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INFRACTIONS AGAINST THE TRAFFIC SAFETY ON THE RAILWAYS ACCORDING TO THE REGULATIONS OF THE NEW PENAL CODE

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Abstract

According to the new Penal code, the infractions against the safety on the railways are regulated in art. 329-332.The new regulation brought certain changes to the existing legal provisions among which we point out two. The first common change with regard to the un-carrying out of the work duties or their defective carrying out, leaving of the post and the presence at work under the influence of alcohol or other substances, destruction or false signaling was the removal of the aggravation element consisting in the causing of a railway catastrophe. Considering this change, it is to be applied the rules of the concurrence of infractions among these deeds being also those against the person or the property, if appropriate. Another common change consists in the transformation of the immediate consequence to the infractions stipulated by art. 329-332 into a „result" consequence; the syntagms „jeopardizing" and „ jeopardy is created".

Keywords: *new Penal code, traffic safety on the railways, work duties, railway accident, jeopardy.*

I. Introduction

In terms of art. 329 of Penal code, by comparing the new incriminating text to the corresponding one in the previous Penal code, we notice that there are some content changes[1]. The first change refers to the removal of the aggravation element consisting in the causing of a railway catastrophe, which means that the rules of the concurrence of infractions are to be applied, between the infraction stipulated by art. 329 of Penal code and the ones against the person or the property, depending on the case[2].

Another change consists in the transformation of the immediate consequence of the infraction stipulated by art. 329 par. (1) into a „result" consequence, being provided the syntagm „jeopardizing" unlike the previous one according to which the deed „*could jeopardize the traffic safety of the means of transportation*".

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[1] For the analysis of the infractions against the traffic safety of the railways according to the provisions of the previous Penal code, see Tudorel Toader, Drept penal. Partea specială, Hamangiu Publishing House, Bucharest, 2008, p. 319 and the following one. For the analysis of this infraction, according to the provisions of the new Penal code, see Tiberiu Medeanu, in the collective paper (of authors Petre Dungan, Tiberiu Medeanu, Viorel Paşca) Manual de drept penal. Partea specială, Vol. II, Universul Juridic Publishing House, Bucharest, 2011, p. 331 and the following one.

There are changes also with regard to the circumstance of the active subject of the infraction. In the previous Penal code, the active subject could be only a railway employee while, according to the new Penal code, any employee "that managed the railway infrastructure or of the transport, intervention or maneuver operators" could have the quality of active subject.

The material object of the infraction, that including also the means of intervention or maneuver by rail was extended.

The law giver removed from the marginal denomination of the infraction the expression "knowingly", since it is no longer necessary to the new regulation of the guilt.

There is a change also under procedural aspect, namely in the case of the type variant for the setting into motion of the penal action, it is not necessary to formulate a complaint from the competent organs of the railway.

Regarding the content of art. 330, by comparing the incriminating text in the new Penal code to the one corresponding in the previous Penal code, we notice that there are some content changes. Considering the fact that, except for the subjective side and the punishment, the content of the incriminating text is the same to the one within art. 329 of Penal code in terms of the undergone changes within the legal content of the infraction, we make reference to those above-shown.

There are significant changes also with regard to art. 331 of the new Penal code. A first amendment brought to the Penal code regarding the simple version consists in the broadening of the person domain that can have the capacity of active subject from the "employees providing the direct traffic safety of the means of railway transportation" as it was under the old regulations to "employees with duties regarding the traffic safety of the means of transportation, intervention or maneuver on the railways."

As well as with the other two infractions against traffic safety on the railways and with regard to this infraction, in order to achieve its contents, the deed is necessary to jeopardy "the traffic safety" on the railway.

The content of the assimilated version was also changed, besides the change regarding the extension of the category of the active subjects, as the requirement regarding the drunkenness was removed and it was replaced by another one, more precise, namely, the existence of an alcoholic saturation of more than 0.80 g/ l of pure alcohol in the blood. In addition, it was added also the hypothesis consisting in the committing of the deed under the influence of some psychoactive substances. The change of the content of the assimilated variant determined also the renaming of the infraction.

The content of the aggravated variant was reformulated, in the sense of providing a single immediate consequence – causing of a railway accident.

There is a change also under procedural aspect, namely, in the case of the variants stipulated by art. 331 par. (1) and (2) for the setting into motion of the penal action, the formulation of a complaint from the competent organs of the railways is not necessity.

Finally, regarding the infraction stipulated by art. 332 of Penal code, we also notice that there are some content changes. A first change to the new Penal code in terms of the simple variant consists in the broadening of the material object. In the new drafting, the legal text aims also the destruction, degradation or bringing into a state of disuse of the railways, rolling- stock, railway installations or those of the railway communications, as well as of other assets or equipments afferent to the railway infrastructure, unlike the previous form that considered only the destruction, degradation or bringing in a state of disuse of the railway or railway installations.

Another change of the content of par. (1) occurred through the new Penal code consists in reducing the penalty limits from 3-12 years to 2-7 years.

Compared to the changes brought to the content of par. (1), the content of the text incriminating the false signaling was changed accordingly.

The content of the aggravated variant stipulated by par. (3) was also reformulated in the sense of providing a single immediate consequence – causing of a railway accident - and the limits of the punishment were reduced.

The content of the fourth paragraph was also reformulated in terms of the applicable penal treatment in the case of committing in the third degree one of the deeds incriminated by the texts afferent to the previous paragraphs. The new law established a sole sanctioning regime by halving the special limits stipulated by law for the intentional deeds.

We mention that the fifth paragraph of the previous incriminating text has no counterpart in art. 332 of the new Penal code, so that the sanctioning of the attempt is regulated within art. 332 par. (5). Given the specificity of the subjective side of the infraction stipulated by art. 332 par. (3), namely the rightful oblique intent, the common aggravated infraction variant was excluded from the deeds where the attempt is punishable. Surely, it is possible also the less likely hypothesis that the form of guilt in the case of the aggravated variant should be the intention.

II. Non- carrying out of the work duties or their defective carrying out

1. Incrimination structure

Under the marginal denomination afferent to art. 329 of Penal code, it is regulated a simple infraction variant and an aggravated one.

The type variant [art. 329 par. (1)] consists in the non- carrying out of the work duties or their defective carrying out by the employees that manage the railway infrastructure or by transport, intervention or maneuver operators; it achieves the content of the simple variant, if through this it is jeopardized the traffic safety of the means of transportation, intervention or maneuver on the railway.

The aggravated variant [art. 329 par. (2)] assumes the committing of the deeds described by art. 329 par. (1), if its consequence was a railway accident.

2. Preexisting conditions

A. Infraction object

a) Special juridical object. The special juridical object of the infraction consists in the social relations regarding the traffic safety on the railways[3]. In the case of the aggravated variant, the special juridical object is complex, because along with the social value mainly protected – the traffic safety on the railways, the social relations of property nature are also protected[4].

b) Material object. The infraction usually does not have a material object. This could have also a material object in the case of the aggravated variant and could consist of means of transportation, rolling- stock or railway installations.

B. Infraction subjects

a) Active subject. The domain of the persons that can commit the examined infraction enter only the employees that manage the railway infrastructure or those of the transport, intervention or

[3] In order to present wide opinions expressed in doctrine with regard to the object of the infraction, see Ion Rusu, Infracțiuni specifice circulației transporturilor feroviare, Prouniversitaria Publishing House, Bucharest, 2009, quoted work, p. 157.

[4] Tiberiu Medeanu, quoted work, p. 332.

maneuver operators. It is noticed that the subject of such an infraction is qualified so that the penal participation is possible in any of its forms, except for the co- doer, when the condition of the special quality is necessary. Nevertheless, irrespective of the quality of the persons, the co- doing is not possible if the material element takes the shape of omission[5].

The person that intentionally carries out performance deeds, but that does not meet the requirements to be a direct active subject will be responsible as concomitant accomplice[6].

The persons that do not manage the railway infrastructure and other persons that are not employees of the transport, intervention or maneuver operators can not be held responsible as direct active subject. These persons will be held responsible if the requirements stipulated by law for the committing of other infractions (abuse of office, dereliction of duty, falsification of a public document, use of forgery, etc.)[7].

The active subject can not be a legal person, even if the general requirements regarding the engaging of the penal liability of the legal persons are met, because it deals with an infraction with qualified active subject[8].

b) Passive subject. The main passive subject is the state represented by the National Railway Company „C.F.R." S.A. or other companies that carry on railway activities. The person whose activity was affected by the deed of the active subject is the secondary passive subject[9].

3. Constitutive content

A. Objective side

a) Material element. The material element of the infraction consists either in an action or inaction. The infraction is omissive when the material element is manifested through the **„non-carrying out of the work duties"**, that is, through the total or partial non- carrying out of an activity that the active subject has to carry on according to the work attributions. For instance, the non- observing of the obligatory stops, non- introduction of the speed restrictions or non- closing of the tracks in the cases set by the applicable regulations, non- closing of the barriers under the conditions of the applicable procedures, un- repairing of the defections, etc[10].

The „defective carrying out" of a work duty is the inadequate carrying out of such an attribution and can regard any aspect of the duty (content, form, moment of the carrying out, etc.)[11]. For instance, sending of a train without a free track or the operator's order, exceeding of the maximum speed limits, surpassing of the fixed and mobile signs that mean the stop or that prohibit the maneuver, etc[12].

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[5] Idem, p. 332.

[6] See: Vasile Papadopol, quoted work, Vol. II, p. 167; Constantin Duvac, in Gheorghe Diaconescu, Constantin Duvac, Tratat de drept penal. Partea specială, C.H. Beck Publishing House, p. 629;

[7] In the juridical practice, it was retained that the person employed as receiver- distributor will be held responsible for the infraction of falsification of a public document, use of forgery and fraudulent management. In this case, it was retained that the doer had drawn up fictive accounting documents in order to subtract certain goods from the stocks (see Ion Rusu, quoted work, p. 162).

[8] For the opinion that also the legal persons can be held penal reliable for this infraction, see Tiberiu Medeanu, quoted work, p. 332.

[9] For the opinion according to which the main passive subject is the state and the persons whose legal interests were injured, it is considered that they have the capacity of secondary passive subjects, see also Tiberiu Medeanu, quoted work, p. 332.

[10] See Ion Rusu, quoted work, p. 164.

[11] Siegfried Kahane, quoted work, Vol. IV, page 301; Ilie Pascu, Mirela Gorunescu, Drept penal. Partea specială, Hamangiu Publishing House, Bucharest, 2008, p. 467.

[12] I. Rusu, quoted work, p. 164.

The work duties are stipulated in normative deeds, rules, procedures, instructions or other documents that set rules in the traffic domain of the railways.

Irrespective that it deals with the non- carrying out of the work duties or their defective carrying out, for the carrying out of the material element of the infraction, it is enough a single deed of breaking the applicable rules for the carrying out of the activity of the active subject, even if the law uses the plural form[13].

b) Immediate consequence. In case of committing the infraction stipulated by art. 329 par. (1) of Penal code, the traffic safety of the means of transportation on the railways is jeopardized.

The aggravated variant [art. 329 par. (2)] assumes a railway accident. The railway accident consists in the destruction or degradation of the means of transportation, rolling- stock or railway installation during the traffic or maneuver of the means of transport, maneuver, maintenance or intervention on the railways.

In practice, the existence of a railway accident is retained if the traffic superintendent sent wrong data regarding the circuit of a freight train by violating its work duties, deed which determined its collision to another freight train that had stopped in the railway station. As a result of the impact between the two trains, 7 wagons overturned and 5 wagons and a locomotive went off the rails; the total prejudice is amounting RON 157.953 lei[14].

In exchange, in practice, it was considered that the requirement of a traffic accident can not be retained if the damage is less than (RON 6510[15]) or lacks relevance[16].

As for us, we consider that, *a fortiori,* a railway disaster can be assimilated to the railway accident.

c) Casualty report. The casualty report does not result *ex re*, but it has to be set, because the law pretends *in terminis* the finding of the jeopardy for the safety of the means of transportations on the railways and in the case of the aggravated variant, the causing of the railway accident is necessary.

B. Subjective side. From the subjective point of view, the infraction is committed with intention that is direct or indirect.

The form of the guilt with which the deed is committed in the case of the aggravated variant is the oblique intent. Considering that the infraction in the aggravated variant is committed with this form for guilt, it means that the destruction in the third degree is absorbed by the content of the examined infraction. But, if the doer wanted the causing of the railway accident, there will be a concurrence of infractions between the one stipulated by art. 329 par. (1) and the one of destruction.

The mobile of the analyzed deed has no relevance for the existence of the infraction, but, along with the purpose, it can be a mark for the juridical individualization of the punishment that is to be applied.

4. Forms. Punishment

A. Forms. This infraction is susceptible of all the forms of the intentional infraction, but the attempt and the preparation deeds are not incriminated.

The infraction consumption takes place when the jeopardy for the traffic safety of the means of transportation on the railways occurs.

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[13] See Supreme Court penal sentence, decision no. 2760/1975, quoted by I. Rusu, quoted work, p. 165.

[14] Supreme Court penal sentence, decision no. 466/1982, in Culegere de decizii ale Tribunalului Suprem pe anul 1982, Ştiinţifică şi Enciclopedică Publishing House, Bucharest, 1983, p. 283.

[15] Supreme Court penal sentence, decision no. 3296/1972, C.D. 1972, p. 371.

[16] Supreme Court penal sentence, decision no. 61/1973, C.D. 1973, p. 295.

B. Punishment. According to the provisions of art. 329 par. (1) of Penal code, the deed stipulated by this text is punished with imprisonment from one to 5 years. If the deed had as consequence a railway accident, the punishment is imprisonment from 3 to 10 years.

III. Non- carrying out of the work duties or their defective carrying out in the third degree

1. Incrimination structure

The infraction regarding the non- carrying out of the work duties or their defective carrying out in the third degree is regulated in a simple infraction variant and in an aggravated one.

The type variant [art. 330 par. (1)] consists in the non- carrying out of the work duties or their defective carrying out in the third degree by the employees that manage the railway infrastructure or by transport, intervention or maneuver operators; it achieves the content of the simple variant, if through this it is jeopardized the traffic safety of the means of transportation, intervention or maneuver on the railway.

The aggravated variant [art. 330 par. (2)] assumes the committing of the deed described by art. 330 par. (1), if its consequence was a railway accident[17].

2. Preexisting conditions

A. Infraction object

a) Special juridical object. The special juridical object of the infraction consists in the social relations regarding the traffic safety on the railways[18]. In the case of the aggravated variant, the special juridical object is complex, because along with the social value mainly protected – the traffic safety on the railways, the social relations of property nature are also protected[19].

b) Material object. The infraction usually does not have a material object, except for the aggravated variant, when the object is made out of means of transportation, rolling- stock or railway installations.

B. Infraction subjects

a) Active subject. The domain of the persons that can commit the examined infraction enter only the employees that manage the railway infrastructure or those of the transport, intervention or maneuver operators. It is noticed that the subject of such an infraction is qualified so that the penal participation is possible in any of its forms, except for the co- doer, when the condition of the special quality is necessary. Nevertheless, irrespective of the quality of the persons, the co- doing is not possible if the material element takes the shape of omission[20].

The persons that do not manage the railway infrastructure and other persons that are not employees of the transport, intervention or maneuver operators can not be held responsible as direct active subject. These persons will be held responsible if the requirements stipulated by law

[17] Pentru un caz din practica judiciară în care s-a discutat problema urmărilor faptei de neîndeplinire a îndatorilorilor de serviciu sau îndeplinirea lor defectuoasă din culpă, see C.A. Timişoara, dec. pen. nr. 114/A/1994, R.D.P. nr. 1/1996, p. 126.

[18] In order to present wide opinions expressed in doctrine with regard to the object of the infraction, see Ion Rusu, Infracțiuni specifice circulației transporturilor feroviare, Prouniversitaria Publishing House, Bucharest, 2009, quoted work, p. 332.

[19] Tiberiu Medeanu, quoted work, p. 334.

[20] Idem, p. 334.

for the committing of other infractions (abuse of office, dereliction of duty, falsification of a public document, use of forgery, etc.).

The active subject can not be a legal person, even if the general requirements regarding the engaging of the penal liability of the legal persons are met, because it deals with an infraction with qualified active subject[21].

b) Passive subject. The main passive subject is the state represented by the National Railway Company „C.F.R." S.A. or other companies that carry on railway activities.

The person whose activity was affected by the deed of the active subject is the secondary passive subject[22].

3. Constitutive content

A. Objective side

a) Material element. The material element of the infraction consists either in an action or inaction. The infraction is omissive when the material element is manifested through the non-carrying out of the work duties, that is, through the total or partial non- carrying out of an activity that the active subject has to carry on according to the work attributions. The defective carrying out of a work duty is the inadequate carrying out of such an attribution and can regard any aspect of the duty (content, form, moment of the carrying out, etc.). For more explanations regarding the content of the material element of the infraction, we make reference to the comment afferent to art. 329 of Penal code.

b) Immediate consequence. In case of committing the infraction stipulated by art. 330 of Penal code, through its committing it is jeopardized the traffic safety of the means of transportations on the railways.

c) Casualty report. The casualty report does not result *ex re*, but it has to be set, because the law pretends *in terminis* the finding of the jeopardy for the safety of the means of transportations on the railways.

B. Subjective side. From the subjective point of view, the infraction is committed in the third degree, that can be simple or with provision.

4. Forms. Punishment

A. Forms. This infraction, considering the specific of the subjective side, does not allow the attempt nor the preparation deeds.

The infraction consumption in the type variant takes place when the jeopardy for the traffic safety of the means of transportation on the railways occurs or when the accident on the railways occurs.

B. Punishment. According to the provisions of art. 330 par. (1) of Penal code, the deed stipulated by this text is punished with imprisonment from 3 months to 3 years or fine. If the deed had as consequence a railway accident, the punishment is imprisonment from one to 5 years.

[21] For the opinion according to which also the legal persons can be held penal reliable for this infraction, see: Constantin Duvac, quoted work, page 629; I. Rusu, quoted work, p. 199.

[22] For the opinion according to which the main passive subject is the state and the persons whose legal interests were injured, it is considered that they have the capacity of secondary passive subjects, see also Tiberiu Medeanu, quoted work, p. 332.

IV. Leaving of the post and the presence at work under the influence of alcohol or other substances

1. Incrimination structure

The infraction is regulated in a simple infraction variant (leaving of the post), in an assimilated variant (presence at work the influence of alcohol or other substances) and in a common aggravated variant.

The assimilated variant [art. 331 par. (2)] stipulates the carrying out of the work duties by an employee with attributions regarding the traffic safety of the means of transport, intervention or maneuver on the railways that has an alcoholic saturation of more than 0.80 g/ l of pure alcohol in the blood or is under the influence of some psychoactive substances.

We mention that the assimilated variant is a distinct deed that can be assimilated to the typical variant if the existence conditions stipulated by art. 331 par. (1) and (2) of Penal code[23] are met. In this sense, it is also the juridical practice. Thus, in a case, in the charge of the defendant – needle controller in a CFR station – it was retained that he left his post without the consent of the station chief on 08.03.1995 and consumed alcoholic drinks, after which he was found drunk at work.

Thus set the deeds, it was indicated that it met the elements of two distinct infractions – one stipulated by art. 275 par. (1) of Penal code and the other by art. 275 par. (2) of Penal code – in concurrence and it could not be considered as the first court thought that the content of the latter would have been absorbed in the content of the former[24].

In fact, the infractions regulated by art. 331 of Penal code are nothing but special forms (specie variants[25]) of the infraction of abuse in office. The differentiation element is the special quality of the active subject[26].

In art. 331 par. (3), it is regulated an **aggravated infraction variant** consisting in the committing of the deeds described by art. 331 par. (1) and (2), if its consequence was a railway accident.

There is a change also under the procedural aspect, namely in the case of the type variant and of the assimilated one for the setting into motion of the penal action, it is not necessary to formulate a complaint from the competent organs of the railway.

2. Preexisting conditions

A. Infraction object

a) Special juridical object. The special juridical object of the infraction consists in the social relations regarding the traffic safety on the railways [27].

In the case of the aggravated variant, the special juridical object is complex, because along with the social value mainly protected – the traffic safety on the railways, the social relations of property nature are also protected.

b) Material object. The infractions stipulated by art. 331 par. (1) and (2) lack the material object. In the case of the aggravated variant, there is a material object which consists of the means of transportation, rolling- stock or railway installations.

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[23] Ilie Pascu, Mirela Gorunescu, quoted work, p. 470.

[24] Bucharest Court of Appeal, 1st penal section, decision no. 380/1996, no. 1/1997, p. 122.

[25] Valentin Mirişan, in the collective paper (of authors Matei Basarab, Viorel Paşca, Gheorghiţă Mateuţ, Tiberiu Medeanu, Constantin Butiuc, Mircea Bădilă, Radu Bodea, Petre Dungan, Valentin Mirişan, Ramiro Mancaş, Cristian Miheş), Codul penal comentat. Partea specială, Vol II, Hamngiu Publishing House, Bucharest, 2008, p. 750.

[26] Tiberiu Medeanu, quoted work, p. 338.

[27] In order to present wide opinions expressed in doctrine with regard to the object of the infraction, see Ion Rusu, quoted work, p. 208.

B. Infraction subjects

a) Active subject. The domain of the persons that can commit the examined infraction enter only the employees with attributions regarding the traffic safety of the means of transport, intervention or maneuver on the railways [in the case of the infraction stipulated by par. (1)] or the employees with attributions regarding the traffic safety of the means of transport, intervention or maneuver on the railways [in the case of the infraction stipulated by par. (2)].

It is noticed that the active subject of the infraction stipulated by art. 331 par. (1) is qualified so that the penal participation is possible in any of its forms, except for the co- doer, when the condition of the special quality is necessary. The carrying out of some performance deeds by a person that does not have the quality stipulated by law in order to be the direct active subject it achieves the content of the participation under the form of the concomitant complicity[28].

The active subject can not be a legal person, even if the general requirements regarding the engaging of the penal liability of the legal persons are met, because it deals with an infraction with qualified active subject[29].

In the case of the infraction stipulated by art. 331 par. (2), which is an infraction with sole doer as nature (*in persona propria*), the doer is excluded *de plano*[30].

b) Passive subject. The main passive subject is the state represented by the National Railway Company „C.F.R." S.A. or other companies that carry on railway activities. The person whose activity was affected by the deed of the active subject is the secondary passive subject [31].

3. Constitutive content

A. Objective side

a) Material element. The material element of the infraction stipulated by art. 331 par. (1) of Penal code consists in the leaving of the post by the active subject in any way and under any form. The leaving of the post can be committed both through an action (for instance, leaving from the post during the working hours) or an inaction (for instance, the not- coming back to the post after the allowed leaving).

The material element of the infraction stipulated by art. (2) provides the carrying out of the work duties by an employee with attributions regarding the traffic safety of the means of transport, intervention or maneuver on the railways that has an alcoholic saturation of more than 0.80 g/ l of pure alcohol in the blood or is under the influence of some psychoactive substances. The simple presence of an employee with attributions regarding the traffic safety of the means of transport, intervention or maneuver on the railways that has an alcoholic saturation of more than 0.80 g/ l of pure alcohol in the blood or is under the influence of some psychoactive substances.

There is no relevance whether the intoxication with alcohol or psychoactive substances is voluntary or involuntary as long as the doer realized the significance of its actions or inactions and that he could control them.

If a person carries out infraction activities that enter both the incriminating texts – the provisions of art. 331 par. (1) and the ones in art. 331 par. (2) – it will be retained concurrence of infractions[32].

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[28] Siegfried Kahane, quoted work, p. 310.

[29] For the opinion according to which also the legal persons can be held penal reliable for this infraction, see: Tiberiu Medeanu, quoted work, p. 338; Constantin Duvac, quoted work, p. 638.

[30] See: Vasile Papadopol, quoted work, page 171; Constantin Duvac, quoted work, p. 638.

[31] For the opinion according to which the main passive subject is the state and the natural and legal persons affected by the infraction activity stipulated by the aggravated form, see also Tiberiu Medeanu, quoted work, p. 338.

[32] Siegfried Kahane, quoted work, p. 312.

b) Immediate consequence. In case of committing the infraction stipulated by art. 331 par. (1) of Penal code, the immediate consequence consists in the jeopardizing of the traffic safety of the means of transportation on the railways. In case of committing the infraction stipulated by art. 331 par. (2) of Penal code, the immediate consequence takes the form for a jeopardy for the social values that form the object of the protection.

c) Casualty report. With regard to the typical variant, the casualty report does not result *ex re*, but it has to be set, because the law pretends *in terminis* the finding of the jeopardy for the safety of the means of transportations on the railways.

B. Subjective side. From the subjective point of view, the infraction is committed with intention that can be direct or indirect.

The guilt form of the aggravated variant is oblique intent.

4. Forms. Punishment

A. Forms. This infraction is susceptible of all the forms of the intentional infraction, but the attempt and the preparation deeds are not incriminated.

The infraction consumption in the type variant takes place when the jeopardy for the traffic safety of the means of transportation on the railways occurs.

B. Punishment. According to the provisions of art. 331 par. (1) and 2 of Penal code, the deeds stipulated by these texts are punished with imprisonment from 2 to 7 years. When the consequence of the deeds stipulated by par. (1) and par. (2) was a railway accident, the punishment is imprisonment from 3 to 10 years and the interdiction of some rights.

V. Destruction or false signaling

1. Incrimination structure

The infraction is regulated in a simple infraction variant (destruction), in an assimilated variant (false signaling), in a common aggravated variant and in a common attenuated variant.

The assimilated infraction variant [art. 332 par. (1)] that is an autonomic infraction, consists in the committing of deeds of false signaling or the committing of any deeds that can deceive the personnel that assures the traffic safety of the means of transport, maneuver or intervention on the railways during the working hours, if a jeopardy of accident on the railways is created through these deeds.

The aggravated variant [art. 332 par. (3)] assumes the committing of the deeds of the deeds described by art. 332 par. (1) and (2), if its consequence was a railway accident.

The attenuated variant [art. 332 par. (4)] consists in the committing in the third degree of the deeds stipulated by par. (1), (2) and (3).

We mention that the assimilated variant is a distinct deed that can enter in concurrence with the typical variant, if the conditions set by art. 332 par. (1) and (2) of Penal code are met.

2. Preexisting conditions

A. Infraction object

a) Special juridical object. The special juridical object of the infractions stipulated by art. 332 of Penal code is complex and is made out of the social relations regarding the traffic safety on the railways (main object) and the ones resulting from the protection of the assets on the material element of the infraction aims (secondary object).

b) Material object. The infractions have as material object the railway tracks, rolling- stock, railway installations or railway communications and any other assets or equipments afferent to the railway infrastructure.

B. Infraction subjects

a) Active subject. The domain of the persons that can commit the examined infraction enter any natural or legal person if it achieves the objective and subjective content of the deeds stipulated by art. 332 of Penal code and meets the general conditions for the engaging of the penal liability[33]. We also consider along with other authors that the legal persons can be held penal responsible for the infractions stipulated by art. 332 of Penal code [34].

b) Passive subject. The main passive subject is the state in its capacity of guarantor of the railway traffic safety. The person whose activity was affected through the deed of the active subject is the secondary passive subject.

3. Constitutive content

A. Objective side

a) Material element. The material element of the infraction stipulated by par. (1) consists in the destruction, degradation or bringing into a state of disuse of the railways, rolling- stock, railway installations or those of the railway communications, as well as of other assets or equipments afferent to the railway infrastructure or the placement of obstacles on the railway. For the content of the three alternative modalities of the material element, we make reference to the explanations given when analyzing the infraction of destruction.

The material element of the infraction stipulated by par. (2) consist in the committing of deeds of false signaling or the committing of any deeds that can deceive the personnel that assures the traffic safety of the means of transport, maneuver or intervention on the railways during the working hours. Through the „committing of any deeds that can deceive the personnel that assures the traffic safety of the means of transport, maneuver or intervention on the railways during the working hours", we will understand both the activities that deceive the personnel to which the text makes reference, as well as the activities that would deceive this personnel.

If a person carries out activities belonging to both the incriminating texts – both to the provisions of art. 332 par. (1) and the ones of art. 332 par. (2) – it will be retained a concurrence of infractions.

The infraction of destruction stipulated by art. 332 par. (1) of Penal code under certain conditions can be in concurrence with the infraction of qualified theft. So, in the juridical practice, it was stated that the deed of the defendants of cutting down cupper wires from the communication network of CFR, while being caught by the police officers after these had been rolled over in order to be transported, meets both the constitutive elements of the infraction of destruction stipulated by art. 276 par. (1) of Penal code and the ones of the infraction of qualified theft in the consummated form[35]. In fact, the court retained that, on 14.10.2004, after having reached a CFR halt, defendant C.D. that had on him a lantern and tongs, together with defendant D.R., waited to get dark and moved to a 500 m distance from the halt along the railway, where defendant C.D. climbed a post and cut down with the tongs 10 cupper wires from the communication network of CFR. Later on, he cut down also the other endings of the wires from the ground, obtaining 20 wires that together with defendants R.A. and D.R. rolled over; while they were rolling over the cables, they got caught by the police officers.

[33] Constantin Duvac, quoted work, p. 644.
[34] See, for instance, Ion Rusu, quoted work, p. 238.
[35] I.C.C.J., Penal sentence, decision no. 4431/2005, www.scj.ro.

b) Immediate consequence. In case of committing the infraction stipulated by art. 332 par. (1) of Penal code, the immediate consequence consists in jeopardizing the traffic safety of the means of transportation of the railways. In the judicial practice, it was retained that the destruction, degradation or bringing into a state of disuse of the telecommunication circuits between the CFR stations met the constitutive elements of the infraction against the traffic safety on the railways, because through the destruction, degradation or bringing into a state of disuse of the telecommunication support between the C.F.R. stations, the safety of the means of transportation on the railways was jeopardized[36]. In this case, as a result of taking out the conductors, the communication between the RC operator and the traffic superintendent in the CFR station was stopped, deed through which it was jeopardized the railway traffic safety during that sector.

In case of committing the infraction stipulated by art. 332 par. (2) of Penal code, the immediate consequence takes the shape of a jeopardy for the social values that form the object of the protection consisting in the existence of the risk of causing a railway accident.

The immediate consequence specific to the aggravated infraction variant consists in the causing of a railway accident.

c) Casualty report. With regard to the typical variant, the casualty report does not results *ex re,* but it has to be set, because the law pretends *in terminis* the finding of the jeopardy for the safety of the means of transportations on the railways.

B. Subjective side. From the subjective point of view, the infraction in the typical variant is committed with intention that can be direct or indirect.

The form of the guilt in the case of the aggravated infraction variant is both the intention and the oblique intent.

The form of the guilt with regard to the attenuate variant is the degree of the guilt.

4. Forms. Punishment

A. Forms. This infraction is susceptible of all the forms of the intentional infraction, but out of the two imperfect forms, only the attempt is incriminated in the case of the deeds described by art. 332 par. (1) and (2).

The infraction consumption in the type variant takes place when the jeopardy for the traffic safety of the means of transportation on the railways occurs or when the accident on the railways occurs, if appropriate.

B. Punishment. According to the provisions of art. 332 par. (1) and (2) of Penal code, the deeds stipulated by these texts are punished with imprisonment from 2 to 7 years. When the consequence of the deeds stipulated by par. (1) and par. (2) was a railway accident, the punishment is imprisonment from 3 to 10 years and the interdiction of some rights. The deeds stipulated by par. (1)-(3) committed in the third degree are punished by reducing the limits of the punishment to half.

Conclusions

According to the new Penal code, the infractions against the safety on the railways are regulated in art. 329-332.

In terms of art. 329 of Penal code, by comparing the new incriminating text to the corresponding one in the previous Penal code, we notice that there are some content changes . The

[36] I.C.C.J., Penal sentence, decision no. 169/2007, www.scj.ro.

first change refers to the removal of the aggravation element consisting in the causing of a railway catastrophe, which means that the rules of the concurrence of infractions are to be applied, between the infraction stipulated by art. 329 of Penal code and the ones against the person or the property, depending on the case .

Another change consists in the transformation of the immediate consequence of the infraction stipulated by art. 329 par. (1) into a „result“ consequence, being provided the syntagm „jeopardizing” unlike the previous one according to which the deed „could jeopardize the traffic safety of the means of transportation”.

Regarding the content of art. 330, by comparing the incriminating text in the new Penal code to the one corresponding in the previous Penal code, we notice that there are some content changes. Considering the fact that, except for the subjective side and the punishment, the content of the incriminating text is the same to the one within art. 329 of Penal code in terms of the undergone changes within the legal content of the infraction, we make reference to those above- shown.

There are significant changes also with regard to art. 331 of the new Penal code. A first amendment brought to the Penal code regarding the simple version consists in the broadening of the person domain that can have the capacity of active subject from the "employees providing the direct traffic safety of the means of railway transportation" as it was under the old regulations to "employees with duties regarding the traffic safety of the means of transportation, intervention or maneuver on the railways."

As well as with the other two infractions against traffic safety on the railways and with regard to this infraction, in order to achieve its contents, the deed is necessary to jeopardy "the traffic safety" on the railway.

The content of the assimilated version was also changed, besides the change regarding the extension of the category of the active subjects, as the requirement regarding the drunkenness was removed and it was replaced by another one, more precise, namely, the existence of an alcoholic saturation of more than 0.80 g/ l of pure alcohol in the blood. In addition, it was added also the hypothesis consisting in the committing of the deed under the influence of some psychoactive substances. The change of the content of the assimilated variant determined also the renaming of the infraction.

The content of the aggravated variant was reformulated, in the sense of providing a single immediate consequence – causing of a railway accident.

There is a change also under procedural aspect, namely, in the case of the variants stipulated by art. 331 par. (1) and (2) for the setting into motion of the penal action, the formulation of a complaint from the competent organs of the railways is not necessity.

Finally, regarding the infraction stipulated by art. 332 of Penal code, we also notice that there are some content changes.

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THE JURIDICAL NATURE OF THE RIGHT TO A FAIR TRIAL

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Abstract

The present study is a theoretical approach to the legal principle regarding the right to a fair trial, particularly to the juridical nature of this right. The importance of guaranteeing the fairness of the procedures – in which the litigants are involved – has considerably increased especially after the European Convention on Human Rights was adopted in 1994. At the same time, the jurisprudence of the European Court of Human Rights played a significant role in observing the fairness of trials, especially in those causes that implied the breach of Article 6 of the European Convention on Human Rights. Under these circumstances and in conformity with the modifications brought to legislation the fair trial started to be perceived as a constitutional principle and it has become an essential rule for justice, hence the necessity to define the juridical nature and character of the right to a fair trial.

Keywords: *right to a fair trial, human rights.*

Introduction

The right to a fair trial, even if it has only recently been perceived as an essential right, in contrast to most of the fundamental human rights and freedoms, can certainly be included in the latter category. Thus, by guaranteeing the fair pursuance of a judicial procedure, the conditions for exercising fundamental human rights and freedoms have been met. At the same time, the right to a fair trial is a fundamental institution for the good organization and functioning of justice. Special literature frequently makes reference to the fair trial as an essential premise for the state governed by the rule of law, particularly in the jurisprudence of the European Court of Human Rights.

Under these circumstances, we are going to analyse the right to a fair trial from a triple perspective: as a fundamental human right, as a principle of organization and functioning of justice and as a premise for the existence of the state governed by the rule of law.

1. Fundamental human rights

The concept of "human rights" appeared in ancient Greece and Rome where it was especially referred to by the phrase "natural rights". From this perspective, it was supposed that there existed natural, universal and immutable rights, as well as divinely inspired or man created rights and that these rights were meant to ensure the free exercise by the humans of the rights which they were granted thanks to their natural free statute.

The concept of "fundamental human rights" was created for replacing the phrase "human inborn rights", as well as the phrase "individual fundamental freedoms". No matter what phrases

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we may use, thanks to the importance that these terms have acquired so far, they underline the fact that in relation to the body of general rights which individuals enjoy in society, there is a category of rights which are considered fundamental for the human material and cultural existence.[1] Thus, laws exist for confirming and protecting the rights which a human being is naturally granted[2] and for applying sanctions if these rights are aggrieved.

The theory on fundamental rights derives from the doctrinarian source of the natural right theory, according to which human rights lie at the centre of the legal phenomenon. Human rights are inherent to the human being, they are beyond and above positive law; human rights have a transcendental nature, they are universal and have been the same from the beginning and will remain unchanged for good.[3]

According to natural law, human rights have been defined as fundamental, inalienable and essential for life, dignity, happiness, as well as for the free development and safety of every person.[4]

Considering the existing possibilities for consolidating and accomplishing the final goal of the regulations regarding the present topic, fundamental rights have been considered as a body of rights and freedoms which are granted to natural and legal persons (both public and private law legal persons) by the Constitution and international legislation and which are protected both against the executive and the legislative by the constitutional or international judge.[5]

In French special literature[6], "fundamental rights", understood as human rights (mainly studied by constitutional law) are distinguished from "public freedoms", understood as citizen rights (studied by the similarly named discipline - "Les libértes publiques"). Thus, human rights, in conformity with the theory of natural law, which was briefly presented above, are inherent to the human being; they are universal, immutable, imprescriptible and inalienable. By contrast, public freedoms are provided by the law, they represent guaranteed prerogatives and belong to positive law. Public freedoms ensure the individual's security and they are duties which individuals must assume in their relation to the state. They imply that the state recognizes the exercise of an established number of activities by the individuals, who are protected from any external threat. Thus, freedoms correspond to actual legal realities and are different from human rights which imply, rather from a philosophical point of view, the existence of rights that are inherent to human nature.

The statement regarding the distinction existing between the concept of "fundamental rights" and the concept of "public liberties", though difficult to support[7], has been critically revised in the doctrine of Romanian constitutional law.[8] Today this differentiation, which was more or less

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[1] Tudor Drăganu, *Declaraţiile de drepturi ale omului şi repercursiunile lor în dreptul internaţional public* (Bucureşti: Lumina Lex, 1998), 21.

[2] M. Freeden, *Drepturile* (Bucureşti: Du Style, 1998), 23.

[3] Ion Deleanu, *Instituţii şi proceduri constituţionale în dreptul comparat şi în dreptul român. Tratat* (Arad: Servo-Sat, 2003), 138.

[4] Corneliu Liviu Popescu, *Solutions modernes de consécration et de garantie des droits de l'homme par les normes du droit international public et de leur réception dans l'ordre juridique interne des états*, Revista Analele Universităţii din Bucureşti (1995), 59.

[5] The Colloqium at Aix, January, 1981, in L. Favoreau, *L'elargissement de la saisine du Conseil Constitutionnel*, Revue française de Droit constitutionnel, 1990, p. 588.

[6] Jean Rivero, *Les libértes publiques*, 6e edition (Paris: Presses Universitaires de France, 1991), 16-18; also see Jean Morange, *Libertés publiques* (Paris: Presses Universitaires de France, 1986), 10; Jean Morange, *Libertăţile publice* (Bucureşti: Rosetti, 2002), 6; G. Lebreton, *Libertés publiques&droits de l'homme*, 4e edition (Paris: Armand Colin, 1999), 2.

[7] Fr. Terré*, Sur la notion des droits et libértes fondamentaux*, în R. Cabrillac, M.A. Frison-Roche, Th. Revet (sous la direction), *Libértes et droits fondamentaux*, 8eme edition (Paris: Dalloz, 2002), 7.

[8] Deleanu, *op. cit.,* 138 and the next pages; also see G. Vrabie, *Organizarea politico-etatică a României* (Iaşi: Virginia), 420-421.

covered in practice until the legal guarantees for observing human rights were created, can no longer be invoked. The main international legal documents on human rights – The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, The European Convention on Fundamental Human Rights and Freedoms – are legally supported by international bodies and considered as being legally relevant by domestic regulations. Thus, the most accurate phrase used by domestic and international law is "fundamental rights and freedoms", which corresponds to the national and international frame that was created with a view to protecting and guaranteeing these rights and freedoms.

Moreover, terminology used in the contents of the Romanian Constitution, Title II, "fundamental rights and freedoms", reveals the opinion shared by the founder of the fundamental law as to the inexistence of any difference between the two concepts. Thus, "the right is freedom, and freedom is a right."[9]

For defining the concept of fundamental human rights it is compulsory to point out the distinct features of this concept in relation to the other subjective rights. Fundamental rights occupy a well defined place within the category of subjective rights even if differences are not made as to their legal nature or object.

Thus, first of all, fundamental rights do not have to be understood as a category of rights which are different through their nature from other subjective rights.[10] Fundamental rights are considered as powers which are guaranteed by the law for the will of the active subject implied in the juridical relation and thanks to which the subject can, in one's own direct interest, adopt an established behaviour or oblige the passive subject to adopt a certain behaviour, which, if necessary, may be imposed to the latter, through the sanctioning power of the state. According to this point of view, fundamental rights are not different from subjective rights, in general. The theory is in contrast with the principles adopted by the school of natural law, which proclaims fundamental rights as being inborn and having a special nature since they are acquired through the simple quality of a human being and not by a legal regulation. So, fundamental rights have not existed ever since immemorial times and they are not supposed to exist for ever, no matter how advanced a society is, because regulations adopted in the field of human rights cannot be contested and they also imply specific differences from one country to another and from one historical period to another one. The concept of "fundamental rights" continuously develops as a consequence of the fact that democratic ideas are more and more numerous; this is different from the first human societies which disregarded or ignored these rights.

Secondly, the difference is not relevant as to the object of fundamental rights in relation to the object of subjective rights. From this point of view, under the influence of the existing specific social relations, certain fundamental rights have the same object as subjective rights which are determined by the labour law relations (the right to work, the right to strike) and are found in criminal processual relations (the right to defence, the inviolability of the domicile, any person's right to freedom) and in civil juridical relations (the right to a private property) etc.

Hence it results that fundamental rights do not have a different nature or object considering the category of subjective rights. Yet, fundamental rights, the nucleus around which all the other subjective[11] rights gravitate, justifies its statute of a distinct category in relation to the other subjective rights, thanks to their economic, social and political importance. Like some real planets around which all the other subjective[12] rights gravitate as satellites, fundamental rights represent

[9] Ioan Muraru, Simina Tănăsescu, *Drept constituţional şi instituţii politice, vol. I,* Editura a XI-a (Bucureşti: All Beck, 2003), 140.

[10] Tudor Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar, vol. I* (Bucureşti: Lumina Lex, 1998), 151.

[11] Vrabie, *op. cit*, 423.

[12] Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar, vol. I, op. cit.,* 152.

the legal foundation of the citizens' rights, the main support for the constitutional law of any state.[13] Fundamental rights are provided by the states Constitutions and are invested with special juridical guarantees. At the same time, fundamental rights – which are regarded as human rights – are provided by the most important international instruments in the domain.

For these reasons, we consider that fundamental human rights are subjective rights and that they are essential for the life, freedom and dignity of human beings; they are also indispensible for the free development of human personality and they are provided and guaranteed by domestic and international legislation.[14]

In the next lines, taking into consideration the various classifications suggested by constitutional law doctrine, we are going to notice the fact that the right to a fair trial is, from this point of view, approached differently, either as a fundamental first generation right or as a fundamental social and economic right.

2. The right to a fair trial and the category of fundamental human rights

According to special literature on constitutional law and political institutions, fundamental rights were classified in relation to several criteria, such as the historical period in which their importance, content and object was recognized etc. However, authors have also recognized the relativity of this attempt which is determined by the fact that the borders drawn between the existing different categories of law are so imprecise that it is impossible to accurately lay them off. The importance of making these classifications consists in the fact that the right to a fair trial has been dealt with either as a right which belongs to the category of social fundamental rights or as a right which belongs to the category of civil and political fundamental rights. In the next lines we are going to revise all the tendencies that exist in the attempt to conceptualize the right to a fair trial in relation to fundamental rights and freedoms.

Taking into consideration their object[15], fundamental rights have been classified as ***individual freedoms*** (rights which have as an object the protection of the human being and his/her private life from any illegal outer interference[16]), ***social-economic rights[17], political rights*** (rights whose object is to ensure participation in ruling the state)***[18]***, ***social-political rights*** (rights which ensure material and cultural development, as well as participation in ruling the state)[19].

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[13] Ion Deleanu, *Drept constituţional şi instituţii politice* (Iaşi: Fundaţia "Chemarea", 1993), 81.

[14] According to the public international law norms, human rights are subjective individual rights, they are essential for the existence, dignity, freedom, equality, happiness and free development of the human being and they are also recognized internationally, as pointed out by Corneliu Liviu Popescu, *Protecţia internaţională a drepturilor omului. Surse, instituţii, proceduri* (Bucureşti: All Beck, 2000), 5.

[15] T. Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar, vol. I, op. cit.,* 171.

[16] The right to life, the right to physical and psychical integrity, the right to live abroad, as well as the right to freely move on the territory of our state and aborad, to right to the safety and inviolability of the domicile, residence the secret of correspondence, as well as of other means of communication, the freedom of consciousness and religion, the right to information etc.

[17] The right to work, healthcare protection, the right to strike, the right to private property, the right to inheritance, the right to study, the right of the person aggrieved by a public authority or by an administrative act or by not settling a claim in a reasonable term etc.

[18] The right to elect representantives in the National Parliament, the right to elect representantives in the European Parliament, the right to elect the President of the Republic, the right to vote in a referendum, the right to initiate, under the conditions of the supreme law, the passing, altering or repealing of an ordinary or organic law, the right to initiate, under the conditions of the supreme law, the revision of the Constitution, the right to elect representatives in local and county councils, the right to elect mayors in communes and towns etc.

[19] Freedom of speech and opinion, as well as of belief, no matter if it is expressed verbally or in writing, through images, sounds or other communication means, freedom of religion, freedom of assembly, freedom of association, the right to petition, etc.

According to this classification, the right to a fair trial belongs to the category of fundamental social-economic rights and it is a faculty of will which is guaranteed by the constitutional law. In this respect, the state is under the obligation to ensure the fair implementation of the judicial procedures and equal treatment for the parties brought before an independent and impartial court that was set up by the law. This obligation is permanent because, otherwise, the right to a fair trial is aggrieved by national jurisdictions[20].

In time human rights have evolved from the statute of essential concerns, such as the right to life, to secondary concerns, such as economic or cultural rights. In approaching this historical evolution, fundamental rights have been classified as follows[21]: ***civil and political rights, 1st generation rights*** (rights which are essential for the individual in his/her relation to the state power; these rights protect the individual through specific measures from violence and the arbitrary command of the governors[22]); ***economic, cultural and social rights, 2nd generation rights***, which are granted to individuals not thanks to their quality of human beings, but because they are members of socially determined categories; these rights imply an active intervention on the state part, not only for guaranteeing them but also for ensuring their actual accomplishment, by creating adequate juridical regimes or specialized institutions[23]; ***solidarity rights, 3rd generation rights***, which – due to their content – cannot be acquired by each state separately but only by state cooperation[24].

According to this classification, the right to a fair trial belongs to the category of civil and political rights, the 1st generation rights. In this respect, for exercising this right, the litigant does not need a certain authorization from power representatives.

Taking into consideration the triple dimension of the human being (man is a biological, psychological and social being), fundamental rights and freedoms have been classified as follows: ***rights and freedoms which protect the human being as a biological entity*** (right to life, right to protection of one's intimate, family and private life, etc.), ***rights and freedoms which protect the human being within a social relation***, as a consequence of the fact that the human being belongs to a state (hence the right to social protection, the right to free movement, the right to have access to any information of public interest, the right to citizenship, etc.).

According to this classification, the right to a fair trial guarantees the proper environment for the social relations in which the individual is involved. The fairness of the procedure ensures trust in state institutions and it thus gives substance to the principle of social trust.

From another perspective, fundamental rights have been divided[25] into: ***individual rights*** (the right to physical and psychical integrity, the right to consciousness and action, the rights regarding private life, social, economic and cultural rights and, last but not least, a right that is corollary to all the other ones: equality of rights) and ***collective rights*** (the right to dispose of oneself, the right to development, the right of permanent sovereignty over natural resources, etc.). According to this

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[20] M.P. Garonne, *Allocution d'ouverture*, în *Le droit à un procès équitable* (Strasbourg: Consiliul Europei, 2000), 8.

[21] Antonie Iorgovan, *Drept constituţional şi instituţii politice. Teorie generală,* (Bucureşti: Galeriile J.L. Calderon, 1994), 77; also see Muraru, Tănăsescu, *Drept constituţional şi instituţii politice, vol. I,* ediția a IX-a, 143-146; Stelian Scăunaş, *Dreptul internaţional al drepturilor omului* (Bucureşti: All Beck, 2003), 11.

[22] Equality of rights, individual freedom, freedom of consciousness, freedom of expression, of association, freedom of assembly, etc.

[23] The right to a decent living standard, the right to work, the right to education, the right to strike, the right to property, etc.

[24] The right to peace, the right to a proper environment, etc. The doctrine holds the existence of fundamental rights that are specific for the fourth generation, such as the right to intimacy, the right to be left on one's own, the right to nostalgy, access to culture, economic freedom.

[25] Ion Cloşcă, Ion Suceavă*, Tratat de drepturile omului* (Bucureşti: V.I.S. Print, 2003), 46-47.

classification, the right to a fair trial (which is subordinated to the right to bring cases before the court) is inherent to the human being and it is, thus, an individual right.

Accordingly, the right to a fair trial is a fundamental subjective right. From a juridical point of view, the right to a fair trial is a public subjective right, which means that the citizens are entitled to fair judicial procedures that the state must ensure. Thus, judicial authorities are obliged to take into consideration all the particular aspects of a fair trial, while complying with a set of safeguards that are going to be analysed in this study.

3. The right to a fair trial and the state governed by the rule of law

The right to a fair trial is a structurally essential characteristic of the state governed by the rule of law due to the obligation of the authorities to apply the principle of law pre-eminence. From this point of view, the concept of *state governed by the rule of law* inevitably implies a discussion about the necessity to observe fundamental rights and, implicitly, the fairness of the judicial procedures.

The state governed by the rule of law, as a set of means that guarantee individual rights and freedoms[26], is organized according to the principle of separation of powers and it attempts, through the adopted legislation, to promote rights and freedoms that are inherent to human nature ensuring the observance of these regulations by the bodies which were set up for this purpose[27].

Similarly, one has appreciated that the state governed by the rule of law is a political and legal concept which defines a form of government that is specific for the democratic regime, thanks to the relations which exist between the state and the law, power and the law, and to the fact that the rule of law, as well as the fundamental human rights and freedoms, are ensured in the exercise of power[28].

There are three fundamental aspects as regards the state governed by the rule of law: a) effective legitimization and guarantee of human rights; b) strict subordination of state authorities to the national and international legal rules (if the treaties which provide them are ratified) and c) separation of powers in the state and the existence of a mutual control exercised by the existing powers[29].

Under these conditions, the right to a fair trial, as a fundamental right of the human being, has to be legitimized, protected and effectively promoted in the state governed by the rule of law, a premise for the pre-eminence of law.

The state governed by the rule of law is a phrase which associates two terms, *state* and *law*; this association helps us identify a complex unity and an indissoluble link between the two components: the law depends upon the state, which creates its norms and facilitates the setting up of the juridical system, in order to accomplish the final goal and efficiency of the juridical norms. If these norms are not observed, penalties are applied; b) the state depends upon the law for expressing power and for making it effective by imposing a general and compulsory behaviour.

4. The right to a fair trial principle and the organization and functioning of justice

Introductory approaches to the principle of "justice". Justice, as an intangible legal ideal, as well as the last and utmost expression of law[30], was created out of the necessity to separate

[26] Jean Chevallier, *L' etat de droit* (Paris: Montchrestien, 1992), 11.

[27] Drăganu, *Drept constituțional și instituții politice. Tratat elementar, vol. I, op. cit.,* 290; also see Tudor Drăganu, *Introducere în teoria și practica statului de drept* (Cluj-Napoca: Dacia, 1992), 5-12.

[28] Ioan Ceterchi, Ion Craiovan, *Introducere în teoria generală a dreptului* (București: All, 1993), 152.

[29] Genoveva Vrabie, *L' etat de droit, principe d' amenagement et de fonctionnement des autorités publiques de Roumanie*, in Etudes de droit constitutionnel (Iași: Institutul European, 2003), 178-179.

[30] Eugen Herovanu, *Principiile procedurei judiciare* (Bucureşti: Institutul de Arte Grafice „Lupta", 1932), 303-304.

equity from inequity, to differentiate the legal from the illegal, the good from the evil. That is why ever since antique times, the concept of *justice* has been associated with the idea of *fairness*, with the prevention of abuses and the possibility to grant citizens free access to the correct distribution of justice.

The antique world approached the concept of *justice* differently. The Romans defined *Justitia* as the sharing of goods in accordance with each person's merits, a philosophy which inevitably led to different accumulations of goods. The ancient Greeks defined *Dike* as the necessity to equally share goods for all the members of the polis, no matter the contribution they brought to it[31].

Socrates considered that there exists a superior form of justice which should not be exclusively expressed in writing and/or sanctioned by a positive confinement[32].

Aristotle[33] differentiates distributive justice from corrective or restorative justice. The role of distributive justice is to ensure a proportional distribution of goods. Thus, persons, who are not equal, cannot have equal merits; if an equal distribution was applied to unequal merits, the equality principle would be aggrieved[34]. Restorative or compensatory justice attempts to establish an accurate correspondence between the offence and the penalty. Thus, according to this definition, the meaning of this type of justice refers to the compensation of the incurred loss.

Differently from the Romans' legal approach and the Greeks' philosophical approach, Christian society defines justice through a deeply prophetic perspective. Laws are divine and God is seen as the supreme embodiment of justice. At present, the concept of justice is vertically defined: from the supreme Divinity to the ruler of society, which, in its turn, exercises its authority through a divine right. That is why those who do justice are considered to be responsible before God[35]. St. Augustine considers that justice is love of the supreme good or of God.

The emergence of democratic regimes has legitimized the principle according to which justice is administered in the name of the people. This different way of perception does not however lead to the modification or loss of the sacred character as long as justice is linked to the infallibility of the popular will[36]. To Montesquieu justice is a fight; thus, unless injustice existed, the very name of justice would be ignored. In the spirit of corrective justice, Kant considers that the juridical sanction is a reward for the committed evil, i.e. the already committed evil. Stammler notices that, finally, the idea of justice means the exclusion of those contradictions which exist between the general and individual goals of the human society.

According to contemporary special literature the concept of *justice* has more meanings as a consequence of the fact that doctrinarian attempts to define this concept are relatively uniform.

First of all, *justice* is an ethical value[37]. According to this perspective, which is very loose, justice is perceived as a virtue and as equity; this is basically a biased approach. Thus, as a moral value, justice is interpreted in a free and subjective way by each person[38]. Justice is meant to

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[31] P.C. Solberg, Guy-Ch. Cros*, Le droit et la doctrine de la justice* (Paris: Alcon, 1936), 83.

[32] I. Rosetti Bălănescu*, Curs de enciclopedia dreptului* (Bucureşti: 1947-1948), 71.

[33] Aristotel*, Politica* (Bucureşti: Editura Ştiinţifică şi Enciclopedică, 1974), 76.

[34] G. Del Vecchio*, Justiţia* (Bucureşti: Cartea Românească, 1936), 55-56.

[35] P. Chaïm*, Ethique et Droit,* (Bruxelles: Editions de l'Universite de Bruxelles, 1990), 184-185.

[36] Ion Alexandru*, Politică, administraţie, justiţie* (Bucureşti: All Beck, 2004), 105-106.

[37] Vrabie*, Organizarea politico-etatică..., op. cit.,* 369; also see G.I. Chiuzbaian, *Sistemul puterii judecătoreşti; organizare şi funcţionare* (Bucureşti, Continent XXI, 2003), 11-13. Justice-virtue relationship has been theoretically approached ever since immemorial times. Plato, in *Republica*, states that justice is a virtue which coordinates and harmonizes both the activity performed by the individual and also by the masses. Aristotel, in a similar way, considers that justice is a perfect virtue, which comprises and encompasses all virtues.

[38] R. Perrot*, Institutions judiciaires* (Paris: Montchrestien, 2000), 21. Justice, as an ethical value, is differently perceived by every person and it is suggestively illustrated by the following statement: „rares sont les plaideurs qui n'ont pas le sentiment d'avoir la justice pour eux".

produce the necessary balance for inter-human relations, as its old symbol, *the balance scales*[39], suggests. If this attribute is lost, the phenomenon known as "the balance crisis of justice" [40] will emerge.

Secondly, from a technical point of view, *justice* represents a state function, by which competent authorities are asked to utter the just/fair (*juris dictio*, *a dire de droit*). This judicial function is accomplished by the state and it implies the solution of civil, criminal, administrative, commercial, etc. trials, of applying sanctions, as well as of re-establishing legitimate rights and interests. According to this point of view, the concept of *justice* overlaps the concept of jurisdiction. Thus, jurisdiction consists in the power of the state to decide insofar as the incurred conflicts are concerned, conflicts that emerged between different legal subjects, natural or legal persons, by enforcing the law[41].

Thirdly, in a limited sense, *justice* denotes a system of public institutions whereby the judicial function is exercised[42]. In this respect, *justice* represents a public service, a state monopoly. The function of justice accomplishment is entrusted to an authority (power) which is distinct and invested with state prerogatives which make it efficient. This is provided by Article 124 in the Constitution, according to which *justice is accomplished in the name of the law* by judges who are *independent and subject only to the law.* In a wider approach of the term, one can appreciate that *justice* denotes the courts of law themselves or a larger category of bodies, which includes, besides courts of law, the bodies by which justice is accomplished (The Public Ministry, The Superior Council of Magistracy) [43].

According to another approach, justice is the act by which a magistrate, who was notified about an existing litigation in which the parties involved have contrary interests, delivers judgements according to the legal procedure. By the act of justice, the magistrate re-establishes the aggrieved rights and sanctions the guilty one in accordance with the law[44].

The definition may be subject to criticism. Thus, when defining the concept of *justice*, it is advisable to use the term *judge* instead of *magistrate*. At the same time, the terms *just* respectively *unjust* particularly indicate a moral and ethical behaviour. This does not mean that the concept of *justice* does not imply these concepts, because justice is accomplished in the name of the law and judges are independent and subject only to the law; judges establish only what it is *legal* and *illegal*. Only when the Constitution or other normative acts make reference to morality or good manners, etc., the judge is entitled to assess *the fair* or *unfair* character of certain behaviour. Even

[39] *The balance scale*, the most common symbol for justice, is also accompanied by the *sword* which, held by the hand of justice is not only a symbol for power but also for accuracy; the sword is rather meant to cut and not to strike the object of litigations into two equal parts. Justice is also depicted as a *maid*, a symbol for incorruptibility, adopting a severe attitude: it pays equal consideration to the two litigating parties, in the absence of any passion or bias (G. Del Vecchio, *op. cit.,* 99).

[40] V. Cioclei*, Despre nevoia de echilibru în justiţia penală,* in Analele ştiinţifice ale Universităţii din Bucureşti, Series Drept (2001), 15.

[41] M. Costin, I. Leş, M.Şt. Minea, D. Radu*, Dicţionar de drept procesual civil* (Bucureşti: Editura Ştiinţifică şi Enciclopedică, 1983), p. 287. In special literature, one has noticed the fact that adding similar meanings to the concepts of "jurisdiction", respectively "competence" represent an error. Thus, the following arguments are brought to support this: 1) the cause falls within the competence of a certain body; 2) the cause is within the jurisdiction of a certain body. The use of the concept of "jurisdiction", with the meaning of "competence" is not scientifically accurate. In reality,"competence" is a component of "jurisdiction". Any judge is invested with a jurisdiction, but his/her competence is limited to those causes provided by the law (Ioan Leş, *Sisteme judiciare comparate* (Bucureşti: All Beck, 2002), 3.

[42] Leş, *op. cit.*, 3.

[43] Vrabie, *Organizarea politico-etatică..., op.cit.*, 369. According to the same interpretation, justice is defined as the totality of bodies whereby the state administers justice (Leş, *op.cit.,* 3).

[44] Cristian Ionescu, *Drept constituţional şi instituţii politice, vol. al II-lea* (Bucureşti: Lumina Lex, 2001), 344.

under these conditions, judges take into consideration legal provisions and not their convictions or beliefs[45].

The right to a fair trial principle and the organization and functioning of justice. Justice, as a safeguard for the effective exercise of the citizens' rights and freedoms, has to prove its efficiency. From this point of view, it is essential for justice to identify the fundamental rules upon which jurisdiction is organized and it functions.

The general principles for the organization and functioning of justice comprise a set of essential rules, which are provided by the Constitution and several organic laws and which constitute the basis for the organization of justice, with a view to ensuring the role played by justice, i.e. to settle litigations arisen between legal subjects or to solve the claims submitted by the legal subjects under the provisions of the law – for protecting persons from any abuses that might be committed by public authorities and to defend, by specific means, legal order[46].

The implementation and observance of these rules ensures the crystallization and foundation of the jurisdictional activity which, in accordance with its role and final goal, must lead to *juris dictio*.

On the basis of these considerations, the right to a fair trial has been considered as a ***fundamental principle whereby justice is accomplished***, besides other principles such as: legality, good administration of justice, free access to justice, the public character of the trial, the impartiality of the judge and proportionality in applying sanctions[47].

Justice, on the other hand, can be approached from two perspectives: as regards its organization and as regards its functioning. Thus, the organization of justice implies the setting up of principles such as: deciding cases by the votes of the judges in courts, the temporary reduction of the workload performed by the courts during holidays, the continuous activity pursued by courts, the specialized jurisdictions and the independence of judges.

The functioning of justice implies free access to justice, the public character of the judgement, contradiction and the two-level jurisdiction[48].

From this perspective, the fair trial can be defined as an application principle both insofar as the organization of justice is concerned (particularly as regards the judges' independence) and also as to the functioning of justice (by ensuring free access, the public character of the proceedings, the principle of contradiction and the two-level jurisdiction)[49].

Conclusions

The right to a fair trial, regarded as a fundamental right of the human being or as a principle of organization and functioning for justice or as a premise for the existence of the state governed by the rule of law, represents a processual institution whose importance has increased and has been recognized not only at national level but more and more within international jurisdictional procedures.

The increasing importance of the analysed institution has determined the Romanian law maker to set up a legal frame by which the right to a fair trial has been regulated within the system of fundamental principles of the judicial procedures. Thus, after the Romanian Constitution started

[45] I. Vida, în M. Constantinescu, I. Muraru, I. Deleanu, F. Vasilescu, A. Iorgovan, I. Vida, *Constituţia României, comentată şi adnotată* (Bucureşti: Monitorul Oficial, 1992), 277-278.
[46] Deleanu, *Tratat de procedură civilă, vol. I,* 60.
[47] Muraru, Tănăsescu, *Drept constituţional şi instituţii politice, ediţia a IX-a ..., op. cit.*, 588.
[48] M. L. Rassat, *La justice en France* (Paris: Presses Universitaires de France, 1987), 23-25.
[49] I. Leş, *Organizarea sistemului judiciar românesc. Noile reglementări* (Bucureşti: All Beck, 2004), 58.

to be revised, the fairness of the used procedures has been regulated in the laws on the organization of the judiciary as well, i.e. in the criminal and civil processual norms. At the same time, the right to a fair trial is more and more frequently present in the defenders' pleadings or in the reasoning of the judges' decisions and the role that this principle has played in the organization and functioning of justice is more and more significant.

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THE "NE BIS IN IDEM" PRINCIPLE IN THE CASE-LAW OF THE EUROPEAN COURT OF JUSTICE (I). THE 'IDEM' ISSUE

Norel NEAGU[*]

Abstract

Two major events occurred in the recent years have triggered a series of cases in the field of criminal law, having transnational dimension and requiring an identical interpretation of the European law in the Member States. The first one is the "communautarisation" of the Schengen Aquis. The second one is the extension of the jurisdiction of the European Court of Justice over the (former) third pillar (Police and Judicial Cooperation in Criminal Matters). As a result, several cases were referred to the European Court of Justice for the interpretation, inter alia, of the dispositions of the Schengen Convention dealing with criminal matters. This article gives a general overview of the case-law of the European Court of Justice in the field of "ne bis in idem" principle, shortly presenting the legal framework, the facts, the questions addressed to the Court by the national jurisdictions, the findings of the Court, as well as some conclusions on the interpretation of the principle. In the first study we will deal with the notion of 'idem'.

Keywords*: case-law, European Court of Justice, 'idem' issue.*

1. Introduction

1.1. The Schengen Aquis

In the context of the European integration process, "Schengen" stands for the realisation of the concept of free movement of persons and the creation of a citizens' Europe. In 1985, five European countries – Belgium, France, Germany, Luxembourg, and the Netherlands – signed an agreement "on the gradual abolition of checks at their common borders" in Schengen – a small village in Luxembourg at the geographical nexus of these countries.

The agreement aims at establishing a common travel area without internal borders and with common external borders. This became known as the "Schengen area". Schengen countries normally do not require citizens to show their passports when crossing borders between one Schengen country and another. A common "Schengen visa" allows tourist or visitor access to the area as a whole. In 1990, the countries signed in Schengen the Convention Implementing the Schengen Agreement of 1985 (in short: the Schengen Implementing Convention, CISA). The Convention lays down detailed rules and measures necessary for the lifting of checks at internal borders (i.e. land, sea, and air borders) between the Schengen states and sets out measures which should compensate the perceived loss of security after the removal of such barriers.

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It should be mentioned that the Schengen Agreement and the Schengen Convention were concluded outside the structure of the European Union/European Communities. Although linked closely with the policy of the European Union, they originally represent conventional multilateral treaties concluded under the rules of international public law. Later however, in 1999, the Schengen rules were incorporated into the EU framework.[1]

Today, the Schengen Agreement, the Schengen Convention, and the subsequent decisions and measures thereupon are implemented by 29 European countries, leading to the abolition of systematic border controls between these participating countries. Among these countries are also countries which are not members of the European Union.[2]

Of interest for criminal law is that the CISA also contains detailed rules on enhanced *police and judicial cooperation*. It foresees, for instance, that the police may cooperate through central bodies or, in case of urgency, also directly with each other. Likewise, a direct exchange of rogatory letters between the judicial authorities is possible, thus avoiding the use of diplomatic channels. Articles 54-58 contain the renowned conditions which prohibit citizens from being sentenced twice in the Schengen area. These rules can be regarded as the birth of a ***European-wide ne bis in idem principle***.

1.2. ECJ's Jurisdiction

On the other hand, the Treaty of Amsterdam has extended the jurisdiction of the Court of Justice to give preliminary rulings to the (former) third pillar (justice and home affairs) and opened the way for the Court, at the request of the national courts, to give rulings on the validity and

[1] The *Schengen acquis* comprises all the acts which were adopted in the framework of the Schengen cooperation till the incorporation of the rules governing the Schengen cooperation into the EU framework by the Treaty of Amsterdam. Accordingly, it is composed of: (1) the Schengen Agreement, signed on 14 June 1985, between Belgium, France, Germany, Luxembourg, and the Netherlands on the gradual abolition of checks at their common borders; (2) the Schengen Convention, signed on 19 June 1990, between Belgium, France, Germany, Luxembourg, and the Netherlands, implementing the 1985 Agreement (CISA) with related Final Acts and declarations; (3) the Accession Protocols and Agreements to the 1985 Agreement and the 1990 implementing Convention with Italy (signed in Paris on 27 November 1990), Spain and Portugal (signed in Bonn on 25 June 1991), Greece (signed in Madrid on 6 November 1992), Austria (signed in Brussels on 28 April 1995) as well as Denmark, Finland and Sweden (signed in Luxembourg on 19 December 1996), with related Final Acts and declarations; (4) decisions and declarations of the Schengen Executive Committee which was the administrative body of the Schengen cooperation and generally mandated by the CISA "to ensure that this Convention [CISA] is implemented correctly"; (5) further implementing acts and decisions taken by subgroups to which respective powers were conferred by the Executive Committee. The latter two Paragraphs regarding the Schengen acquis refer to further decisions and declarations, which were made in order to implement the 1990 Implementing Convention itself. The Schengen acquis was published in the Official Journal L 239 of 22 September 2000. In order to reconcile the overlap between the Schengen cooperation and Justice and Home Affairs cooperation as introduced by the 1992 Maastricht Treaty, the Member States decided to integrate the Schengen acquis into the legal framework of the European Union. This was achieved in 1997 by means of a Protocol attached to the Treaty of Amsterdam. The Council allocated each provision or measure taken to date under the Schengen cooperation to the corresponding legal basis in the EC Treaty and EU Treaty as amended by the Treaty of Amsterdam (COUNCIL DECISION of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis, 1999/436/EC, L 176/17, 10.7.1999). As a further result of the incorporation, the Schengen acquis is binding on and applicable in the new Member States from the date of accession onwards (Article 3 Act of Accession, OJ L 236 of 23 September 2003, p. 33).

[2] **Thomas Wahl & Sarah Schultz***, The Enlargement of the Schengen Area*, Eucrim 3-4/2007, 66-67.

interpretation of framework decisions and decisions, on the interpretation of conventions adopted for police and judicial cooperation in criminal matters and on the validity and interpretation of the measures implementing them.[3]

Under the Protocol and Council Decisions 1999/435 and 1999/436, Article 54 of the CISA may be interpreted in a preliminary ruling given by the Court of Justice, whose jurisdiction on this point is contingent since, in order to be effective, it must be accepted by the Member States in accordance with the provisions of Article 35(2) TEU.

A Member State which accepts that new jurisdiction of the Court of Justice may choose between granting the power to refer questions for a preliminary ruling either to any of its courts or tribunals or only to those courts or tribunals which give a final decision against which there is no further 'judicial remedy'.[4]

1.3. The "ne bis in idem" principle

In the struggle against the forms of criminality, which affect the whole of European society, it is for the States to keep them in check by means of national legislation. Each is responsible for internal law and order, but also, within the Union, for European law and order. Thus situations may arise which may be inconsistent with the *ne bis in idem* principle[5] and in which the same criminal act is prosecuted by the criminal authorities which have territorial jurisdiction and by those of another Member State, which punish it on the basis of other criteria for conferring jurisdiction.[6]

Article 54 of the Convention is a legislative provision in a dynamic process of European integration through the development of a common area of freedom and justice. The gradual abolition of common border controls is a necessary step on the path to achieving that objective. However, the removal of administrative obstacles lifts the barriers for everybody, including those who take advantage of the reduction in security in order to expand their unlawful activities.

For that reason, the abolition of controls must be matched by increased cooperation between the States, particularly with regard to policing and security. Articles 54 to 58 of the Convention, which govern the application of the *ne bis in idem* principle in the sphere of the Schengen *acquis*, are situated within that framework, which seeks greater efficiency in judicial and policing responses without compromising the safeguards afforded to citizens in a society which, by law, is democratic.

Article 54 is the expression of that safeguard for persons who are subject to the exercise of the *ius puniendi*. A person whose trial has been finally disposed of in one State which is party to the Convention may not be prosecuted again, on the same facts, by another contracting Party, irrespective of whether he has been acquitted or convicted, provided that, in the latter case, the

[3] Article 35(1) TEU (before Lisbon Treaty). After Lisbon Treaty, the Court of Justice of the European Union has jurisdiction over the area of freedom, security and justice, with a five years transitional period where Member States may still ask to be subject to former jurisdiction.

[4] [Article 35(3)] TEU (before amendments by the Lisbon Treaty).

[5] According to Article 54 CISA, "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."

[6] For an in depth analysis of the *ne bis in idem* principle, see **Anne Weyembergh**, *Le principe "neb is in idem": Pierre d'achoppement de l'espace penal europeen?*, Cahiers de droit europeen 2004, v.40, n.3-4, 337-375.

penalty has been enforced, is in the process of being enforced or cannot be enforced under the laws of the sentencing State.

The aforementioned provision is a genuine expression of the safeguard in question, which operates not only within the same legal system but also takes effect when the prosecution is repeated in different legal systems.

Currently, the Member States and the European Union itself are bound by the *ne bis in idem* principle, which is a fundamental safeguard for Citizens.[7]

I will further present the main points of the Court's decisions in cases referred to the Court in past years. I will adopt a structure similar to that of the Court's ruling, establishing, where necessary, the legislative framework, a short presentation of the facts of the case, the questions raised by the national judge, the findings and the conclusions of the Court.

2. The Notion of "Idem" in Judgement from 9 March 2006 in Case C-436/04 Leopold Henri Van Esbroeck

The reference for a preliminary ruling was raised in the context of criminal proceedings initiated in Belgium against Mr Van Esbroeck for the trafficking of narcotic drugs.[8]

2.1. Legal Framework

According to Article 54 CISA, "*A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.*"[9]

The United Nations Conventions on Narcotic Drugs and Psychotropic Substances

Under Article 36 of the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol ('the Single Convention'):

'Penal provisions

1. (a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be

[7] See Article 4 of Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 5 of the Charter of fundamental rights of the European Union (OJ 2000 C 364, p. 1). **R. Koering-Joulin** has pointed out that the *ne bis in idem* principle is so fundamental a safeguard for the person that Article 4(3) of the abovementioned Protocol does not authorise any derogation, even in the case of war or other public danger which threatens the life of the nation; it is an absolute right (*La Convention européenne des droits de l'homme. Commentaire article par article,* Popular edition, 2nd edition, p. 1094).

[8] For an analysis of this case and its influence in the national law, see **Christine Guillain**, *L'application du principe "non bis in idem" au traffic de drogues: analyse de l'arret de la Cour de Justice des Communautes europeenes du 9 mars 2006*, 126(6257) Journal des tribunaux 2007, 144-149.

[9] Article 54 CISA constitutes the principal legal basis for all cases analysed below. For operative reasons, I will not repeat this article further in the study.

contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

(b) …

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

(a)(i) Each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence.'

2.2. Facts

Mr Van Esbroeck, a Belgian national, was sentenced, by judgment of 2 October 2000 of the Court of First Instance of Bergen (Norway), to five years' imprisonment for illegally importing, on 1 June 1999, narcotic drugs (amphetamines, cannabis, MDMA and diazepam) into Norway. After having served part of his sentence, Mr Van Esbroeck was released conditionally on 8 February 2002 and escorted back to Belgium.

On 27 November 2002, a prosecution was brought against Mr Van Esbroeck in Belgium, as a result of which he was sentenced, by judgment of 19 March 2003 of the Correctionele Rechtbank te Antwerpen (Antwerp Criminal Court, Belgium), to one year's imprisonment, in particular for illegally exporting the above listed products from Belgium on 31 May 1999. That judgment was upheld by judgment of 9 January 2004 of the Hof van Beroep te Antwerpen (Antwerp Court of Appeal). Both of those courts applied Article 36(2)(a) of the Single Convention, according to which each of the offences enumerated in that article, which include the import and export of narcotic drugs, are to be regarded as a distinct offence if committed in different countries.

The defendant lodged an appeal on a point of law against that judgment and pleaded infringement of the *ne bis in idem* principle, enshrined in Article 54 of the CISA.[10]

2.3. Questions

In those circumstances, the Hof van Cassatie (Court of Cassation) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

1. Article 54 of the CISA can be applied even if it was not implemented and enforced in Norway at the date the defendant was tried and sentenced by a Norwegian court, but was implemented and enforced afterwards by both Belgium and Norway at the date of Belgian Court ruling?

If the reply to Question 1 is in the affirmative:

2. The facts punishable by detention for export and the import on the same narcotic drugs and psychotropic substances of any kind, cannabis included, and which continued in various states must be regarded as the "same facts" within the meaning of Article 54 CISA?

2.4. Findings

On the first question, the Court concluded that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, must be applied to criminal proceedings brought in a Contracting State for acts for which a person has already been convicted in another Contracting State even though the

[10] Case C-436/04 *Leopold Henri Van Esbroeck* [2006] ECR I-2333, paragraphs 14-16 (hereforth, *Van Esbroeck*).

CISA was not yet in force in the latter State at the time at which that person was convicted, in so far as the CISA was in force in the Contracting States in question at the time of the assessment, by the court before which the second proceedings were brought, of the conditions of applicability of the *ne bis in idem* principle.

By the second question the national court is effectively asking what the relevant criterion is for the purposes of the application of the concept of 'the same acts' within the meaning of Article 54 of the CISA and, more precisely, whether the unlawful acts of exporting from one Contracting State and importing into another the same narcotic drugs as those which gave rise to the criminal proceedings in the two States concerned are covered by that concept.

The wording of Article 54 of the CISA, 'the same acts', shows that that provision refers only to the nature of the acts in dispute and not to their legal classification. The terms used in that article differ from those used in other international treaties, which enshrine the ne bis in idem principle. Unlike Article 54 of the CISA, Article 14(7) of the International Covenant on Civil and Political Rights and Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms use the term 'offence', which implies that the criterion of the legal classification of the acts is relevant as a prerequisite for the applicability of the *ne bis in idem* principle which is enshrined in those treaties.

Using the same argumentation as in Gozutok and Bruge (the absence of obligation of harmonisation and the mutual trust in the criminal justice system of another Member State), [11] the Court concluded that the possibility of divergent legal classifications of the same acts in two different Contracting States is no obstacle to the application of Article 54 of the CISA.

For the same reasons, the criterion of the identity of the protected legal interest cannot be applicable since that criterion is likely to vary from one Contracting State to another. These conclusions are further reinforced by the objective of Article 54 of the CISA, which is to ensure that no one is prosecuted for the same acts in several Contracting States on account of his having exercised his right to freedom of movement.[12]

The right to freedom of movement is effectively guaranteed only if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, he may travel within the Schengen territory without fear of prosecution in another Member State on the basis that the legal system of that Member State treats the act concerned as a separate offence. [13]

Because there is no harmonisation of national criminal laws, a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States.

In those circumstances, the only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood in the sense of the existence of a set of concrete circumstances, which are inextricably linked together.

The Court concluded that the facts in the main proceedings may, in principle, constitute a set of facts which, by their very nature, are inextricably linked, underlying that the definitive

[11] As the Court found in Joined Cases C-187/01 and C-385/01 *Hüseyn Gözütok and Klaus Brügge,* [2003] ECR I-1345, paragraph 32-33.

[12] *Gözütok and Brügge*, paragraph 38, and Case C-469/03 *Filomeno Mario Miraglia,* [2005] ECR I-2009, paragraph 32.

[13] As pointed out by the Advocate General in point 45 of his Opinion delivered on 20 October 2005 in *Van Esbroeck*.

assessment in that regard belongs to the competent national courts which are charged with the task of determining whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter.

Stating that the *ne bis in idem* principle is recognised in the case-law as a fundamental principle of Community law[14], the Court concluded that:

– the relevant criterion for the purposes of the application of that article of the CISA is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

– punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different Contracting States to the CISA are, in principle, to be regarded as 'the same acts' for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts.[15]

3. Same Acts in Judgement from 28 September 2006 in Case C-150/06 Jean Leon Van Straaten

The reference was made in proceedings between, first, Mr Van Straaten and, second, the Staat der Nederlanden (the Netherlands State) and the Republiek Italië (the Italian Republic) relating to the alert concerning Mr Van Straaten's conviction in Italy for drug trafficking which the Italian authorities had entered in the Schengen Information System ('the SIS') for the purpose of his extradition.[16]

3.1. Legal Framework

Article 95(1) and (3) of the CISA are worded as follows:

'1. Data on persons wanted for arrest for extradition purposes shall be entered at the request of the judicial authority of the requesting Contracting Party.

3. A requested Contracting Party may add to the alert in the data file of its national section of the Schengen Information System a flag prohibiting arrest on the basis of the alert until the flag is deleted. The flag must be deleted no later than 24 hours after the alert has been entered, unless the Contracting Party refuses to make the requested arrest on legal grounds or for special reasons of expediency. In particularly exceptional cases where this is justified by the complex nature of the facts behind the alert, the above time-limit may be extended to one week. Without prejudice to a flag or a decision to refuse the arrest, the other Contracting Parties may make the arrest requested in the alert.'

Article 106(1) of the CISA states:

'Only the Contracting Party issuing the alert shall be authorised to modify, add to, correct or delete data which it has entered.'

[14] See, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 59.

[15] *Van Esbroeck*, paragraphs 24-42.

[16] For an analysis of the Court's rulings in ne bis in idem cases see **Ariane Wiedmann**, *The principle of "ne bis in idem" according to Article 54 of the Convention implementing the Schengen Agreement: the beginning of a "corpus juris criminalis"?*, The European legal forum: Forum iuris communis Europae 2007, v.7, n.5, 230-252.

Article 111 of the CISA provides:

'1. Any person may, in the territory of each Contracting Party, bring before the courts or the authority competent under national law an action to correct, delete or obtain information or to obtain compensation in connection with an alert involving them.'

3.2. Facts

On or about 27 March 1983 Mr Van Straaten was in possession of a consignment of approximately 5 kilograms of heroin in Italy, which was transported from Italy to the Netherlands. Mr Van Straaten also had a quantity of 1 000 grams of that consignment of heroin at his disposal during the period from 27 to 30 March 1983.

Mr Van Straaten was prosecuted in the Netherlands for importing a quantity of approximately 5 500 grams of heroin from Italy into the Netherlands on or about 26 March 1983, together with A. Yilmaz, for having a quantity of approximately 1 000 grams of heroin at his disposal in the Netherlands during or around the period from 27 to 30 March 1983 and for possessing firearms and ammunition in the Netherlands in March 1983. By judgment of 23 June 1983, the Rechtbank 's-Hertogenbosch ('s-Hertogenbosch District Court, Netherlands) acquitted Mr Van Straaten on the charge of importing heroin, finding it not to have been legally and satisfactorily proved, and convicted him on the other two charges, sentencing him to a term of imprisonment of 20 months.

In Italy, Mr Van Straaten was prosecuted along with other persons, for possessing on or about 27 March 1983, and exporting to the Netherlands on several occasions together with Mr Karakus Coskun, a significant quantity of heroin, totalling approximately 5 kilograms. By judgment delivered *inabsentia* on 22 November 1999 by the Tribunale ordinario di Milano (District Court, Milan, Italy), Mr Van Straaten and two other persons were, upon conviction on the charges, sentenced to a term of imprisonment of 10 years, fined ITL 50 000 000 and ordered to pay the costs.

The main proceedings are between, first, Mr Van Straaten and, second, the Netherlands State and the Italian Republic. The national court refers to an alert regarding Mr Van Straaten the legality of which is at issue in those proceedings, and which the national court examines in the light of the CISA. By order made on 16 July 2004, the Italian Republic was summoned to appear in the proceedings.

Before the national court, the Italian Republic rejected Mr Van Straaten's claims that, by virtue of Article 54 of the CISA, he should not have been prosecuted by or on behalf of the Italian State and that all acts connected with that prosecution were unlawful. According to the Italian Republic, no decision was given on Mr Van Straaten's guilt by the judgment of 23 June 1983, in so far as it concerns the charge of importing heroin, since he was acquitted on that charge. Mr Van Straaten's trial had not been disposed of, within the meaning of Article 54 of the CISA, as regards that charge. The Italian Republic further submitted that, as a result of the declaration as referred to in Article 55(1)(a) of the CISA which it had made, it was not bound by Article 54 of the CISA, a plea which was rejected by the national court.

No further information on the nature of the proceedings is given in the order for reference.

According to the Netherlands Government, the judgment of the Rechtbank 's-Hertogenbosch of 23 June 1983 was upheld by a judgment of the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) of 3 January 1984, which amended the terms of the second charge against Mr Van Straaten. The Gerechtshof te 's-Hertogenbosch described the act as 'voluntary possession of a quantity of approximately 1 000 grams of heroin in the Netherlands

during or around the period from 27 to 30 March 1983'. The appeal on a point of law brought by Mr Van Straaten against that judgment was dismissed by judgment of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) of 26 February 1985. That judgment became final. Mr Van Straaten served the sentence imposed upon him.

The Netherlands Government then states that in 2002, at the request of the Italian judicial authorities, an alert was entered in the SIS for the arrest of Mr Van Straaten with a view to his extradition, on the basis of an arrest warrant of the Milan Public Prosecutor's Office of 11 September 2001. The Kingdom of the Netherlands added to that alert a flag as referred to in Article 95(3) of the CISA, so that he could not be arrested in the Netherlands.

After Mr Van Straaten had been informed in 2003 of that alert and, therefore, of his conviction in Italy, he requested, in vain, from the Italian judicial authorities the deletion of the data in the SIS concerning him. The Korps Landelijke Politiediensten (Netherlands National Police Services; 'the KLPD') stated to him by letter of 16 April 2004 that, since the KLPD was not the authority that issued the alert, under Article 106 of the CISA it was not authorised to delete it from the SIS.

The Netherlands Government further states that Mr Van Straaten then applied to the Rechtbank 's-Hertogenbosch for an order requiring the minister concerned and/or the KLPD to delete his personal data from the police register. The national court found in an order of 16 July 2004 that, by virtue of Article 106(1) of the CISA, only the Italian Republic was authorised to delete the data as requested by Mr Van Straaten. In light of that fact, the court treated the application as an application for an order requiring the Italian Republic to delete the data. The Italian Republic was consequently joined as a party to the main proceedings.

According to the Netherlands Government, the national court then found that, under Article 111(1) of the CISA, Mr Van Straaten had the right to bring an action before the competent court under national law challenging the entry by the Italian Republic in the SIS of data concerning him. Pursuant to Article 111(2), the Italian Republic would be required to enforce a final decision of the Netherlands court on such an action.[17]

3.3. Questions

It was in those circumstances that the Rechtbank 's-Hertogenbosch decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1. What is to be understood by "the same acts" within the meaning of Article 54 of the [CISA]?

2. Is a person's trial disposed of, for the purposes of Article 54 of the CISA, if the charge brought against that person has been declared not to have been legally and satisfactorily proved and that person has been acquitted on that charge by way of a judgment?

3.4. Findings

The Court stated that in the case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical. Therefore, it is possible that a situation in which such identity is lacking involves a set of facts which, by their very nature, are inextricably linked.

[17] Case C-150/05 *Van Straaten* [2006] ECR I-9327, paragraphs 19-29 (hereforth, *Van Straaten*).

It is settled case-law that Article 54 of the CISA has the objective of ensuring that no one is prosecuted for the same acts in several Contracting States on account of the fact that he exercises his right to freedom of movement.[18] Not to apply that article to a final decision acquitting the accused for lack of evidence would have the effect of jeopardising exercise of the right to freedom of movement.[19]

The Court ruled that:

– the relevant criterion for the purposes of the application of article 54 CISA is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

– in the case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical;

– punishable acts consisting of exporting and of importing the same narcotic drugs and which are prosecuted in different Contracting States party to that Convention are, in principle, to be regarded as 'the same acts' for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts.

Also, the *ne bis in idem* principle, enshrined in Article 54 of that Convention, falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence.

4. Same Acts and Enforced Penalty in Judgement from July 18, 2007 in Case C-288/05 Jurgen Kretzinger

The reference was made in the context of criminal proceedings brought in Germany, in which Mr Kretzinger was charged with receiving goods on a commercial basis on which duty had not been paid.

4.1. Legal Framework

Article 56 CISA states that "If a further prosecution is brought in a Contracting Party against a person whose trial, in respect of the same acts, has been finally disposed of in another Contracting Party, any period of deprivation of liberty served in the latter Contracting Party arising from those acts shall be deducted from any penalty imposed. To the extent permitted by national law, penalties not involving deprivation of liberty shall also be taken into account."

The Framework Decision[20]

Article 3 sets out grounds on which the judicial authority of the Member State of execution must refuse to execute the European arrest warrant, including cases in which it 'is informed that the requested person has been finally judged by a Member State in respect of the same acts

[18] See *Gözütok and Brügge*, paragraph 38.

[19] See, to this effect, *Van Esbroeck*, paragraph 34.

[20] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190, p. 1.

provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State'.

Article 4 sets out grounds on which the executing judicial authority may refuse to execute a European arrest warrant. A refusal to execute is permitted, inter alia, in the following cases:

– where the person who is the subject of the European arrest warrant is being prosecuted in the Member State of execution for the same act as that on which the European arrest warrant is based (Article 4(2));

– where the judicial authorities of the Member State of execution have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings (Article 4(3));

– if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country (Article 4(5)).

4.2. Facts

On two occasions, in May 1999 and April 2000, Mr Kretzinger transported cigarettes from countries that were not members of the European Union, which had previously been smuggled into Greece by third parties, by lorry through Italy and Germany, bound for the United Kingdom. They were not presented for customs clearance at any point.

The lorry containing the first consignment, consisting of 34 500 cartons of cigarettes, was seized by officers of the Italian Guardia di Finanza on 3 May 1999. Mr Kretzinger was released after questioning on 4 May 1999.

By judgment of 22 February 2001 the Corte d'appello di Venezia (Court of Appeal, Venice (Italy), allowing the appeal brought by the Public Prosecutor against the decision of acquittal at first instance, imposed on Mr Kretzinger *in absentia* a suspended custodial sentence of one year and eight months. It found him guilty of an offence of importing into Italy and being in possession of 6 900 kilograms of contraband foreign tobacco and an offence of failing to pay the customs duty relating to that tobacco. That judgment has become final under Italian law. The sentence was entered in the defendant's criminal record.

The lorry transporting a second consignment was carrying 14 927 cartons of contraband cigarettes when Mr Kretzinger was again stopped by the Italian Guardia di Finanza on 12 April 2000. He was held briefly in Italian police custody and/or on remand pending trial, following which he returned to Germany.

By judgment of 25 January 2001 the Tribunale di Ancona (Italy) imposed, again *in absentia* and applying the same provisions of Italian law, a custodial sentence of two years which was not suspended. That judgment has also become final. The custodial sentence, which has not been executed, was also entered in the defendant's criminal record.

The referring court notes that, despite several attempts to obtain clarification of those judgments, it has been unable to establish with certainty precisely which import duties they applied to, and in particular whether at least one of them encompassed any charges relating to, or sentence imposed for, customs fraud.

Aware of those judgments by the Italian courts, the Landgericht Augsburg sentenced Mr Kretzinger to one year and ten months' imprisonment in respect of the first consignment and one

year's imprisonment in respect of the second. In so doing, the Landgericht Augsburg found Mr Kretzinger guilty of evasion of the customs duties which had arisen on the importation of the smuggled goods into Greece, an offence under Paragraph 374 of the German Tax Code.

Whilst indicating that the two final sentences imposed in Italy had not yet been enforced, the Landgericht Augsburg rejected the notion that there was any procedural impediment under Article 54 of the CISA. According to that court, although the same two smuggled consignments of cigarettes formed the factual basis of the two convictions in Italy and of its own decisions, that article was not applicable.

Mr Kretzinger lodged an appeal before the Bundesgerichtshof, which expressed doubts as to whether the reasoning adopted by the Landgericht Augsburg was compatible with Article 54 of the CISA.

First, the Bundesgerichtshof has doubts as to how it should interpret the notion of 'same acts' within the meaning of Article 54 of the CISA.

Next, as regards the notion of 'enforcement', the Bundesgerichtshof, which, in principle, is of the view that a custodial sentence such as that relating to the first consignment, the enforcement of which was suspended, is covered by Article 54 of the CISA, wishes to ascertain whether a brief period of remand pending trial is sufficient to bar further prosecutions.

Finally, as regards the existence of a procedural impediment under Article 54 of the CISA, the Bundesgerichtshof, whilst observing that the Italian authorities took no steps under the Framework Decision to enforce Mr Kretzinger's sentence in respect of the second consignment, wonders whether and to what extent the interpretation of that article is affected by the provisions of the Framework Decision.[21]

4.3. Questions

The referring court therefore asked the Court to give a preliminary ruling on the following questions:

1. Is it a criminal prosecution of "the same acts" within the meaning of Article 54 of the CISA if a defendant has been convicted by an Italian court of importing contraband foreign tobacco into Italy and of being in possession of it there, as well as of failing to pay duty at the border on importing the tobacco, and is subsequently convicted by a German court – in connection with his earlier receipt of the same goods in Greece – of being party to evasion in relation to the (technically) Greek import duty that arose when the goods were previously imported by third parties, in so far as the defendant had intended from the outset to transport the goods to the United Kingdom via Italy, after taking delivery of them in Greece?

2. Has a penalty "been enforced" or is it "actually in the process of being enforced" within the meaning of Article 54 of the CISA

a) if the defendant was given a custodial sentence, the enforcement of which was suspended in accordance with the law of the State in which judgment was given;

b) if the defendant was for a short time taken into police custody and/or held on remand pending trial, and that detention would count towards any subsequent enforcement of the penalty of imprisonment under the law of the State in which judgment was given?

3. Is the interpretation of the notion of enforcement for the purposes of Article 54 of the CISA affected by

[21] Case C-288/05 *Kretzinger* [2007] ECR I-06441, paragraphs 14-25 (hereforth, *Kretzinger*).

a) the fact that, having transposed the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1) into national law, the (first) State in which judgment was given is in a position at any time to enforce its judgment which, under national law, is final and binding;

b) the fact that a request for judicial assistance by the State in which judgment was given, with a view to extraditing the convicted person or enforcing judgment within that State, might not automatically be complied with because judgment was given *in absentia*?'

4.4. Findings

By the first question, the Bundesgerichtshof essentially wishes to ascertain the relevant criterion for the purposes of the application of the notion of 'same acts' within the meaning of Article 54 of the CISA and, more specifically, whether the unlawful acts of receiving contraband foreign tobacco in one Contracting State and of importing that tobacco into another Contracting State and being in possession of it there are covered by that notion, in so far as the defendant, who has been prosecuted in two Contracting States, had intended from the outset to transport the tobacco, after first taking possession of it, to a final destination, passing through several Contracting States in the process.

The Court recalled its previous arguments relating to the relevant criterion for the purposes of the application of Article 54 of the CISA (identity of the material acts, understood as the existence of a set of facts which are inextricably linked together)[22], applying irrespective of the legal classification given to those acts or the legal interest protected[23], and the lack of harmonisation of criminal law obligation.[24]

Consequently, the Court confirmed that the competent national courts which are called upon to determine whether there is identity of the material acts must confine themselves to examining whether those acts constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter,[25] and considerations based on the legal interest protected are not to be deemed relevant.

Also the Court has already held that punishable acts consisting of exporting and importing the same illegal goods and which are prosecuted in different CISA Contracting States constitute conduct which may be covered by the notion of 'same acts' within the meaning of Article 54 of the CISA.[26]

The Court concluded that the answer to the first question must be that Article 54 of the CISA must be interpreted as meaning that:

– the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

– acts consisting in receiving contraband foreign tobacco in one Contracting State and of importing that tobacco into another Contracting State and being in possession of it there, characterised by the fact that the defendant, who was prosecuted in two Contracting States, had

[22] *Van Esbroeck*, paragraph 36.

[23] See also *Van Straaten*, paragraphs 48 and 53.

[24] See *Van Esbroeck*, paragraph 35.

[25] See, to that effect, *Van Esbroeck*, paragraph 38.

[26] See, to that effect, *Van Esbroeck*, paragraph 42, *Van Straaten*, paragraph 51, and Case C-467/04 *Gasparini and Others* [2006] ECR I-9199, paragraph 57.

intended from the outset to transport the tobacco, after first taking possession of it, to a final destination, passing through several Contracting States in the process, constitute conduct which may be covered by the notion of 'same acts' within the meaning of Article 54. It is for the competent national courts to make the final assessment in that respect.[27]

By the second question, the referring court essentially asks whether, for the purposes of Article 54 of the CISA, it is necessary to consider that a penalty imposed by a court of a Contracting State 'has been enforced' or is 'actually in the process of being enforced' if a defendant has been given a suspended custodial sentence in accordance with the law of that Contracting State.

In accordance with Article 54 of the CISA, the prohibition on criminal prosecutions for the same acts applies, in the case of a penalty such as that at issue in the main proceedings, only if 'it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party' ('the enforcement condition').

In so far as a suspended custodial sentence penalises the unlawful conduct of a convicted person, it constitutes a penalty within the meaning of Article 54 of the CISA. That penalty must be regarded as 'actually in the process of being enforced' as soon as the sentence has become enforceable and during the probation period. Subsequently, once the probation period has come to an end, the penalty must be regarded as 'having been enforced' within the meaning of that provision.

It would be inconsistent, on the one hand, to regard any deprivation of liberty actually suffered as enforcement for the purposes of Article 54 of the CISA and, on the other hand, to rule out the possibility of suspended sentences, which are normally passed for less serious offences, satisfying the enforcement condition in that article, thus allowing further prosecutions.

The Court concluded that the answer to question 2(a) must be that, for the purposes of Article 54 of the CISA, it is necessary to consider that a penalty imposed by a court of a Contracting State 'has been enforced' or 'is actually in the process of being enforced' if the defendant has been given a suspended custodial sentence in accordance with the law of that Contracting State.

By question 2(b), the referring court essentially asks whether, for the purposes of Article 54 of the CISA, a penalty imposed by a court of a Contracting State must be regarded as 'having been enforced' or 'actually in the process of being enforced' where the defendant was for a short time taken into police custody and/or held on remand pending trial and that detention would count towards any subsequent enforcement of the penalty of imprisonment under the law of the State in which judgment was given.

In that respect, it is necessary to examine whether, if the other conditions imposed by Article 54 of the CISA were fulfilled, a brief period of deprivation of liberty, such as police custody and/or detention on remand pending trial, before the conviction in a first Contracting State had become final, the length of that period counting towards that of the sentence finally passed, could have the effect of satisfying the enforcement condition in advance and therefore preclude further prosecutions in a second Contracting State.

The Court concluded that Article 54 of the CISA cannot apply to such periods of deprivation of liberty, even if they are, by virtue of national law, to be taken into account in the subsequent enforcement of any custodial sentence. The purpose of detention on remand pending trial is very different from that underlying the enforcement condition laid down in Article 54 of the CISA.

[27] *Kretzinger*, paragraph 37.

Although the purpose of the first is of a preventative nature, that of the second is to avoid a situation in which a person whose trial has been finally disposed of in the first State can no longer be prosecuted for the same acts and therefore ultimately remains unpunished if the State in which sentence was first passed did not enforce the sentence imposed.

Consequently, the answer to question 2(b) must be that, for the purposes of Article 54 of the CISA, a penalty imposed by a court of a Contracting State is not to be regarded as 'having been enforced' or 'actually in the process of being enforced' where the defendant was for a short time taken into police custody and/or held on remand pending trial and that detention would count towards any subsequent enforcement of the custodial sentence under the law of the State in which judgment was given.[28]

By its third question, the referring court essentially asks whether, and to what extent, the provisions of the Framework Decision have an effect on the interpretation of the notion of 'enforcement' within the meaning of Article 54 of the CISA.

The interpretation of Article 54 of the CISA, apart from the existence of a final and binding conviction in respect of the same acts, expressly requires the enforcement condition to be satisfied. That enforcement condition could not, by definition, be satisfied where, in a case such as that in the main proceedings, a European arrest warrant were to be issued after trial and conviction in a first Member State precisely in order to ensure the execution of a custodial sentence which had not yet been enforced within the meaning of Article 54 of the CISA.[29]

The interpretation of Article 54 of the CISA cannot depend on the provisions of the Framework Decision without giving rise to legal uncertainty that would result, first, from the fact that the Member States bound by the Framework Decision are not all bound by the CISA which, moreover, applies to certain non-Member States and, second, from the fact that the scope of the European arrest warrant is limited, which is not case in respect of Article 54 of the CISA, which applies to all offences punished by the States which have acceded to that agreement.

The Court concluded that the fact that a Member State in which a person has been sentenced by a final and binding judgment under its national law may issue a European arrest warrant for the arrest of that person in order to enforce the sentence under the Framework Decision cannot affect the interpretation of the notion of 'enforcement' within the meaning of Article 54 of the CISA.

By its question 3(b), the referring court essentially asks whether, under the set of rules put in place by Article 5(1) of the Framework Decision, the fact that the executing Member State is not automatically required to execute a European arrest warrant issued in order to enforce a judgment given *in absentia* has an effect on the interpretation of the notion of 'enforcement' within the meaning of Article 54 of the CISA.

The Court answered that the option open to a Member State to issue a European arrest warrant has no effect on the interpretation of the notion of 'enforcement' within the meaning of Article 54 of the CISA. The fact that the judgment relied on in support of a European arrest warrant was given *in absentia* does not undermine that finding.

[28] *Kretzinger*, paragraphs 50-52.

[29] That is confirmed by the Framework Decision itself which, in Article 3(2), requires the Member State addressed to refuse to execute a European arrest warrant if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts and that, where there has been sentence, the enforcement condition has been satisfied.

5. Same Acts in Judgement from July 18, 2007 in Case C-367/05 Norma Kraaijenbrink

5.1. Legal Framework

National law

Article 65 of the Belgian Criminal Code provides:

'Where several offences are founded on the same conduct, or where several offences simultaneously before the same court demonstrate successive and continuous criminal intention, sentence shall be passed only in respect of the most serious offence.

When a court finds that offences considered in an earlier final judgment and other conduct – assuming it is factually proven – which is currently before it both predates that judgment and, together with those offences, demonstrates successive and continuous criminal intention, the sentence already imposed shall be taken into account in determining the sentence to be imposed. If the sentence already imposed seems adequate as a penalty for the whole course of criminal conduct, the court shall make a finding of guilt and shall refer in its judgment to the sentence already imposed. The total sentence imposed under this article may not exceed the maximum sentence for the most serious offence.'

5.2. Facts

Ms Kraaijenbrink, a Dutch national, was sentenced by judgment of 11 December 1998 of the Arrondissementsrechtbank te Middelburg (Middelburg District Court, Netherlands) to a suspended six month term of imprisonment for several offences under Article 416 of the Wetboek van Strafrecht (Netherlands Penal Code) of receiving and handling the proceeds of drug trafficking between October 1994 and May 1995 in the Netherlands.

By judgment of 20 April 2001, the rechtbank van eerste aanleg te Gent (Court of First Instance, Ghent, Belgium) sentenced Ms Kraaijenbrink to two years' imprisonment for committing several offences under Article 505 of the Belgian Criminal Code by exchanging in Belgium between November 1994 and February 1996 the proceeds of drug trafficking operations in the Netherlands. That judgment was confirmed by a judgment of 15 March 2005 of the hof van beroep te Gent, correctionele Kamer (Appeal Court of Ghent, Criminal Chamber).

Referring to Article 71 of the CISA and Article 36(2)(a)(i) and (ii) of the Single Convention, both those courts considered that Ms Kraaijenbrink could not rely on Article 54 of the CISA. They considered that the offences of receiving and handling the proceeds of drug trafficking committed in the Netherlands and the money laundering offences in Belgium resulting from that trafficking must be regarded in that State as separate offences. That was so notwithstanding the common intention underlying the offences of receiving and handling in the Netherlands and those of money laundering in Belgium.

Ms Kraaijenbrink then appealed on a point of law and pleaded, in particular, infringement of the *ne bis in idem* principle in Article 54 of the CISA.

The Hof van Cassatie observes first of all that, contrary to Ms Kraaijenbrink's contention, the finding that there was a 'common intention' underlying the unlawful conduct in the Netherlands and the money laundering offence committed in Belgium does not necessarily entail a finding that the sums of money involved in the money laundering operations in Belgium were the proceeds of the trafficking of drugs in respect of the receipt and handling of which Ms Kraaijenbrink had already been sentenced in the Netherlands.

On the other hand, it follows from the judgment of the hof van beroep te Gent of 15 March 2005, against which the appeal on the point of law was lodged, that different acts are involved in the two Contracting States which none the less constitute the successive and continuous implementation of the same criminal intention with the result that, if they had all been carried out in Belgium, they would be regarded as a single legal act which would have been dealt with under Article 65 of the Belgian Criminal Code.

Accordingly, the Hof van Cassatie considered that the question arose as to whether the notion of 'same acts' within the meaning of Article 54 of the CISA must be interpreted as covering different acts consisting, first, in holding in one Contracting State the proceeds of drug trafficking and, second, in the exchanging at exchange bureaux in another Contracting State of sums of money having the same origin.[30]

5.3. Questions

It was in those circumstances that the Hof van Cassatie decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

1. Must Article 54 of the [CISA], read with Article 71 of that agreement be construed as meaning that the criminal offences of acquiring or having available in the Netherlands or transferring from there sums of money in foreign currencies originating from the trade in narcotics (offences which were prosecuted and in respect of which a conviction was obtained in the Netherlands for receiving and handling in breach of Article 416 of the Criminal Code), which differ from the criminal offences consisting in the exchanging at exchange bureaux in Belgium of the relevant sums of money from the trade in narcotics received in the Netherlands (prosecuted in Belgium as the offence of receiving and handling and performing other acts in regard to goods resulting from crime, in breach of Article 505 of the Criminal Code), are to be regarded as the "same acts" for the purposes of Article 54 aforesaid where the courts establish that they share a common intention and thus legally constitute a single act?

2. If Question 1 is answered affirmatively:

Must the expression "may not be prosecuted … for the same acts" in Article 54 of the [CISA] be interpreted as meaning that the 'same acts' may also be constituted by different acts sharing the same intention, and thus constituting a single act, which would mean that a defendant can no longer be prosecuted for the offence of money-laundering in Belgium once he has been duly convicted in the Netherlands of other offences committed with the same intention, regardless of any other offences committed during the same period but which became known or in respect of which prosecutions were brought in Belgium only after the date of the definitive foreign judgment or, in such a case, must that expression be interpreted as meaning that the court determining the merits may enter a conviction in respect of these other acts on a subsidiary basis, taking into account the sentences already imposed, unless it considers that those other sentences in its view constitute sufficient punishment of all the offences, and ensuring that the totality of the penalties imposed may not exceed the maximum of the severest penalty?

[30] Case C-367/05 *Kraaijenbrink* [2007] ECR I-06619, paragraphs 13-19 (hereforth, *Kraaijenbrink*).

5.4. Findings

Recalling the criterion for the application of Article 54 of the CISA[31], the starting point for assessing the notion of 'same acts' within the meaning of Article 54 of the CISA is to consider the specific unlawful conduct which gave rise to the criminal proceedings before the courts of the two Contracting States as a whole. Thus, Article 54 of the CISA can become applicable only where the court dealing with the second criminal prosecution finds that the material acts, by being linked in time, in space and by their subject-matter, make up an inseparable whole.

If the material acts do not make up such an inseparable whole, the mere fact that the court before which the second prosecution is brought finds that the alleged perpetrator of those acts acted with the same criminal intention does not suffice to indicate that there is a set of concrete circumstances which are inextricably linked together covered by the notion of 'same acts' within the meaning of Article 54 of the CISA.

A subjective link between acts which gave rise to criminal proceedings in two different Contracting States does not necessarily mean that there is an objective link between the material acts in question which, consequently, could be distinguished in time and space and by their nature.[32]

In the case at hand, the Court concluded that it has not been clearly established to what extent it is the same financial gains derived from the drug trafficking that underlie, in whole or in part, the unlawful conduct in the two Contracting States concerned. Consequently, in principle, such a situation can be covered by the notion of 'same acts' within the meaning of Article 54 of the CISA only if an objective link can be established between the sums of money in the two sets of proceedings.

The Court answered to the first question that:

– the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

– different acts consisting, in particular, first, in holding in one Contracting State the proceeds of drug trafficking and, second, in the exchanging at exchange bureaux in another Contracting State of sums of money also originating from such trafficking should not be regarded as 'the same acts' within the meaning of Article 54 of the CISA merely because the competent national court finds that those acts are linked together by the same criminal intention;

– it is for that national court to assess whether the degree of identity and connection between all the facts to be compared is such that it is possible, in the light of the said relevant criterion, to find that they are 'the same acts' within the meaning of Article 54 of the CISA.

The second question was referred only if the response to the first question confirmed that a common criminal intention is a sufficient condition in itself, which if satisfied, enables different acts to be regarded as 'the same acts' within the meaning of Article 54 of the CISA, that has not been confirmed by the Court in its reply to the first question.

[31] See *Van Esbroeck*, paragraph 36; *Gasparini*, paragraph 54, and *Van Straaten*, paragraph 48.

[32] *Kraaijenbrink*, paragraph 30.

6. Conclusions

The *ne bis in idem* principle raises a lot of questions. Do we consider the legal definition of the offences or the set of facts (*idem factum*) as the basis for the definition of the same/*idem*? Does it depend on the scope of and the legal values to be protected by the legal provisions? What does an enforced final judgement mean? Does it also concern final settlements by prosecuting or other judicial authorities out of court? Does the respect for the *ne bis in idem* principle require a bar on further prosecution or punishment (*Elrledigungsprinzip*), or can the authority imposing the second punishment take into account the first punishment (*Anrechnungsprinzip*)?[33]

I will try to answer some of these questions by giving a synthesis of the Court's rulings as regards principle *ne bis in idem* enshrined in Article 54 of the CISA, focusing on the main point that need clarification: which are the interests protected and the general rules guiding the application of Article 54 CISA and the notion of 'the same acts'?

6.1. Arguments used

In dealing with the cases before it, the Court tried to emphasize the legal interests protected by the *ne bis in idem* principle, trying to balance the conflicting aspects of the objective of free movement of persons on the one hand and of repression of crime on the other and thus creating a true area of freedom, security and justice.

In *Van Esbroeck* the Court appears to have chosen a broad interpretation of Article 54 of the CISA, giving priority to free movement of persons objectives over those relating to the repression of crime and the protection of public safety. In *Miraglia,* however, the Court applied a narrower interpretation; and gave priority to preventing and combating crime over free movement of persons.[34]

The Court relied on the 'pro-free movement' and 'mutual trust' reasoning. It recalled that none of the relevant provisions subjected the application of the principle in Article 54 of the CISA to prior harmonisation or, at least, the approximation of national criminal laws. Rather, the *ne bis in idem* principle necessarily implies the existence of mutual trust between the Contracting Parties in each others' criminal justice systems. For that reason, the fact that different legal classifications may be applied to the same facts in two different Contracting Parties should not be an obstacle to the application of Article 54 of the CISA.

The Court, referred to the aim of Article 54 of the CISA, stating that the right of free movement would be fully guaranteed only if the perpetrator of an act knew that, once he had been found guilty and served his sentence, or had been acquitted by a final judgment in a Member State, he could freely move within the Schengen area without fearing new criminal proceedings merely because the act in question was classified differently in the legal order of another Member State.

The Court concluded that, owing to the absence of harmonisation of national criminal laws, applying a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement in the Schengen territory as there are penal systems in the Contracting States.

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[33] **John A.E. Vervaele**, *Joined cases C-187/01 and C-385/01, "Criminal proceedings against Hüseyin Gözütok and Klaus Brügge", Judgement of the Court of Justice of 11 February 2003, Full Court [2003] ECR 1-5689,* Common Market Law Review 2004, v.41, n.3, 795-812.

[34] Advocate General's Opinion in Case C-467/04, delivered on 15 June 2006, paragraphs 61-63.

6.2. 'The same acts'

One of the crucial points in the Court's rulings as regards the ne bis in idem principle is the notion of 'the same acts'.

In *Van Esbroeck*, the Court was requested to clarify, inter alia, the scope of the notion of 'the same acts' in Article 54 of the CISA. The preliminary question was whether 'the same acts' required merely identity of material facts; or whether it required, in addition, that the facts should be categorised as the same crime in both national criminal systems. Put another way, did there need to be a 'unity of the legal interest protected' as the Court had required in respect of Community sanctions for breaches of EC competition law?[35]

The Court chose to interpret *ne bis in idem* more broadly than it had previously done in that area of EC law, and held that 'unity of the legal interest protected' is not required for the application of Article 54 of the CISA. According to the Court in *Van Esbroeck*, the 'only relevant criterion' for the purposes of Article 54 of the CISA is that there should be an 'identity of the material facts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together'.[36]

There seems to be an inconsistency *between* the case-law on Article 54 of the CISA, which does not require 'unity of the legal interest protected' but is content to apply *ne bis in idem* provided that there is 'identity of the material facts'[37] and that the defendants are the same before both courts; and the case-law on *ne bis in idem* as a 'fundamental principle of EC law', which requires a 'threefold condition' of 'identity of the facts, unity of offender and unity of the legal interest protected' before that principle is applicable.[38]

The Court did not address this inconsistency, raised by the Advocate General Sharpston in her Conclusions, merely confirming its previous rulings, that the only relevant criterion for applying the concept of 'the same acts' is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together in time, in the space, as well as their subject.

The Court also stated that the relevant national authorities, which have to determine whether there is identity of material facts, must confine themselves to examining whether they constitute a set of facts inextricably linked.

I will further point out the main findings of the Court as being 'the same acts' for the purpose of application of Article 54 CISA. The Court concluded that it is not necessary for the quantities of drugs involved in the two-state contractors or people who allegedly participated in the events in the two states are identical.[39] Also export and import of the same drugs and continued in different contracting states in the convention are, in principle, to be regarded as "the same facts",[40] same as the marketing of goods in another Member State, after its importation into the Member State

[35] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123 *(*hereforth, *Cement)*. In *Cement*, the Court held that the 'unity of the legal interest protected' is one of the threefold conditions that must be satisfied for the principle of *ne bis in idem* to apply in EC competition law.

[36] At paragraph 36. It is perhaps unfortunate that the neither the Court nor the Advocate General appear to have considered *Cement* in their examination of *Van Esbroeck*.

[37] *Van Esbroeck*, paragraph 42.

[38] *Cement,* paragraph 338.

[39] *Van Straaten*, paragraph 53.

[40] *Van Straaten*, paragraph 53.

which pronounced the acquittal;[41] taking possession of contraband tobacco abroad in a Contracting State and the importation and possession of the same tobacco in another Contracting State, which is characterised by the fact that the accused who has been prosecuted in both Contracting States had from the outset intended to carry tobacco, after first taking possession, to a final destination across several Contracting States, constitute conduct that may fall within the concept of "same facts"[42].

On the contrary, the Court held that different facts, including, first, to held in a Contracting State money from a drug trafficking and, secondly, to sell in exchange bureaus located in another State Contractor money also coming from such trafficking must not be seen as the "same facts" because of the mere fact that the competent national authority finds that the facts are linked by the same criminal intent.[43]

As it can be seen, the Court answered a lot of the questions raised at the beginning of these conclusions. Whether right or wrong, these rulings have the merit of harmonising the interpretation of the *ne bis in idem* principle further that any international convention or ruling of an international court has ever done it before.

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[41] *Gasparini*, paragraph 57.
[42] *Kretzinger*, paragraph 40.
[43] *Kraaijenbrink*, paragraph 36.

NE BIS IN IDEM AND CONFLICTS OF JURISDICTION IN THE EUROPEAN AREA OF LIBERTY, SECURITY AND JUSTICE

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Abstract

The paper offers a survey on European Court of Justice preliminary ruling decisions on art. 54 of the Convention Implementing the Schengen Agreement, which introduces the non bis in idem principle in the European Union area. After discussing which is the rationale of the non bis in idem principle, the study will focus on the meaning of idem factum and final decision, in order to understand which national decisions forbid a second trial in another Member State on the same fact towards the same person. The essay will then present the 2005 Commission Green Paper on ne bis in idem and conflicts of jurisdiction and the 2009/948/JHA Framework Decision on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, that Member States are expected to implement before 15th June 2012.

Keywords: *ne bis in idem principle; idem factum; final decision; conflicts of jurisdiction; allocating cases to a specific Member State.*

Introduction

– *Ne bis in idem* principle and rules on conflicts of jurisdiction express a single aim: as a matter of fact, prevent the risk of two ore more parallel proceedings on the same fact towards the same person displays a way to protect person's freedom.

In other words, limit multiple prosecutions and prevent repetition of a trial arrived at its final decision responds to legal order consistency requirements as well as to persons' liberty rights.

The need to protect liberty rights and their stability has been expressed long time ago in rules allocating jurisdiction among judicial bodies and solving both positive and negative conflicts of jurisdiction. However, while *ne bis in idem* is a well known principle both in civil and in common law Countries, for long time European Institutions didn't pay much attention to the transnational application of *ne bis in idem* nor to the arrangement of shared rules on mutual recognition of foreign decisions and on the allocation of jurisdiction among Member States.

Ne bis in idem principle, together with rules preventing conflicts of jurisdiction, have to comply with the mandatory prosecution principle, which is an expression of the Sovereignty that States hardly give up.

Free movement rights together with disappearance of borders in the European Area have a direct impact in the implementation of the activity of international criminal organizations. Several States in which crimes, or part of them, are committed are potentially interested in prosecuting criminal acts that affect their national security: however, multiple prosecutions and multiple trials exhaust Member States' resources and hamper victims' and defendants' rights as well as eyewitnesses' participation to the related trial.

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Prohibition of a second judgment on the same fact towards the same person appeared first in the 1987 Convention between European Community Member States on double jeopardy: those provisions entered then in Title III, Chapter III of the European Convention on the Implementation of the Schengen Agreement (CISA), which is entirely dedicated to the application of *ne bis in idem* principle. The introduction of these rules in a Convention whose first aim was to pull down borders shows the tight link between *ne bis in idem* and freedom of movement within the European area. As a matter of fact, the European Court of Justice, in its preliminary ruling decisions, ruled that art. 54 of the European Convention on the Application of the Schengen Agreement, providing the European *ne bis in idem* principle, introduces a corollary to the freedom of movement in a "negative" meaning: the right to move from one State to another shouldn't have negative consequences, i.e. multiple prosecutions towards the same person for the same act.

According to art. 82, § 1, lett. *b* of the Treaty on the functioning of the European Union, the Union is competent in preventing and solving conflicts of jurisdiction among Member States. However, few and no widely applied rules excepted, rules on prevention and resolution of conflicts of jurisdiction were lacking: a first step was taken with the 2005 «Green Paper on Conflicts of jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings» published by the European Commission. Due to the Green Paper, art. 54 CISA is not a sufficient warrant: for example, recognizing a *non bis in idem* effect to the final decision first ruled in one Member State leads to the practice "first come, first served", on which basis the State that first passes a final decision stops any further proceeding elsewhere, even when a second State appears to be, for instance, closer to the fact and its evidences. Moreover, a forum shopping technique could be used by National judicial authorities: for example, when coordinating investigations, the State *mieux placée* to prosecute crimes is chosen during coordination meetings in a case by case way, affecting any previous certainty about the competent judge. Eventually, there are still some exceptions to *ne bis in idem* in art. 54 CISA that should be changed or reduced.

The outcome of the consultations opened with the Green Paper is the 2009/948/JHA «Framework Decision on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings», that Member States are expected to implement before 15th June 2012. The Framework Decision introduces a consultation procedure in order to choose, among Member States equally entitled, which is the best national judicial Authority to prosecute crimes. Indeed, the wording of art. 54 CISA hasn't been changed and is therefore still in force. However, the forthcoming implementation of the Framework Decision raises several problems of consistency with national principles (i.e. mandatory prosecution principle) and with defense rights, because nor the defendant nor his lawyer are involved in the procedure at the end of which the jurisdiction is allocated.

1. Rationale of *ne bis in idem* principle at national, international and European level - The *bis de eadem re ne sit actio* rule comes from Roman Law and passed into present national systems: prohibition of multiple prosecutions on the same fact towards the same person is often codified in legislation and acknowledged as a general principle of law at Courts[1].

[1] In Roman law, see M.T. CICERO, *Laelius, de amicitia*, Chapter 22, § 5: «praeposteris enim utimur consiliis et acta agimus, quod vetamur vetere proverbio», that recalls the Latin saying «acta agere»; M.F. QUINTILIANUS, *Institutio oratoria*, Liber VII, Chapter 6, § 4: «Solet et illud quaeri, quo referatur quod scriptum est: "bis de eadem re ne sit actio": id est, hoc "bis" ad actorem an actionem. Haec ex iure obscure»; E.D. ULPIANUS, *Digestum*, Liber 48, Titulum 2, (*de accusationibus*), Lex 7, § 2: «Iisdem criminibus quibus quis liberatus est, non debet praeses pati eundem accusari»; Emperors Diocletianus and Massimilianus' Constitution to the Codex Iustinianus, Liber 9, Titulum 2, lex 9: «Qui de crimine publico in accusationem deductus est, ab alio super eodem crimine deferri non potest». For a historical view of the *ne bis in idem* rule, see V. ANDRIOLI, *Il principio del* ne bis in idem *e la dottrina*

At least three rationales support the principle in a national framework.

The first is linked to the certainty principle, intended both in subjective and objective way. The first perspective emphasizes the aim to protect the individual: in particular, this is a well known principle in common law criminal justice systems, where the double jeopardy rule admits the use of the "power to stay the proceedings", which occurs when the prosecution is interrupted according to fair trial rules. As a matter of fact, multiple prosecutions on the same fact which has been subject to a previous final decision is a significant example of abuse of process[2]. However, the fact that the *non bis in idem* rule is applied both in case of conviction and acquittal decisions proves that there is a broader concept of certainty as well as a pragmatic approach: the main aim is to avoid the possibility to start multiple criminal trials by means of a certain chronological expiry, which is represented by the final judicial decision.

The second rationale is based on the fact that a "criminal claim" can be used only once by the State and that power is then extinguished[3].

The third rationale embodies the respect for judicial decisions given in the past. Once the fact has been finally ascertained, the outcome of the decision should be respected by other magistrates in order to avoid conflicts among judgments on the same fact and against the same person: respect for trials and its proceedings as well as for the judiciary would be undermined if the fact could be questioned by multiple proceedings.

Both the first and the third rationale seem to be valid also from an international perspective, while the second is less convincing, as the refusal to take criminal proceedings after another State has already prosecuted the fact corresponds to a renounce of part of national sovereignty, especially in cases that affect several national public interests (i.e. security).

In general, however, an international *non bis in idem* rule is not binding as a general principle of international law. Even art. 14 § 7 of the International Covenant on Civil and Political Rights and art. 4 § 1 of the 7th Protocol to the European Convention on Human Rights acknowledges the principle only from a domestic perspective.

This means that, unless the rule is foreseen in an international convention, the prohibition to prosecute a person already acquitted or convicted for the same fact in a previous trial is binding only for judges who are part of the same national system: without a specific rule, judicial authorities are not generally bound by decisions taken in another State on the same fact committed by the same person.

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[2] See E.M. CATALANO, *L'abuso del processo*, Giuffrè, Milan, 2004, p. 124 ss.; A.L.-T. CHOO, *Abuse of process and judicial stays in criminal proceedings*, Clarendon Press, Oxford, 1993, p. 16 ss.; D. CORKER-D. YOUNG-M. SUMMERS, *Abuse of Process in Criminal Proceedings*, Butterworths, London, 2003, p. 183 ss.; C. WELLS, *Abuse of process, a practical approach*, LAG, London, 2006, p. 204 ss.

[3] See J.L. DE LA CUESTA-A. ESER, *Concurrent National and International Criminal Jurisdiction and The Principle "Ne Bis In Idem"*, in *Rev. int. de droit pénal*, 2001, p. 756 ss.

When analyzing in which cases a foreign final decision is relevant in another State, one could see that, first of all, the large amount of European Union Member States doesn't recognize a *ne bis in idem* effect to decisions passed in another State. The only exception is given by The Netherlands, that attaches to foreign judgments a weight that is equivalent to the effects that spread out from a domestic final decision: art. 68 of the Dutch Penal Code contains a general *non bis in idem* provision, regardless the Country where the crime was committed[4].

Secondly, the *res iudicata* effect is generally respected when it comes to exercise extraterritorial jurisdiction, which means that a State is, by its own national laws, allowed to prosecute a fact committed in another State. This happens when the prosecution of a crime is based on principles different from territoriality, such as the nationality principle (in respect of the indicted person's or the victim's nationality), the defense principle (which responds to the interest in granting public State security) or the universality principle (which entitles to apply domestic law to all persons, regardless their nationality and the place where the crime was committed, and generally responding to a solidarity need to prosecute serious crimes, i.e. genocide)[5].

Thirdly, foreign decisions could be considered also in judicial cooperation procedures: in this case, *non bis in idem* is invoked as a ground to refuse cooperation[6]. In some bilateral or multilateral international conventions, the refusal of cooperation appears as mandatory or optional. Moreover, even if conventions are silent on the point, some States made a declaration stating that they are entitled to refuse cooperation in case it would result in a breach of the *non bis in idem* rule[7]. The rationale of these provisions lies in the fact that a concrete mutual trust between States is required for a real cooperation and, by the time those conventions were approved, the abovementioned mutual trust was still lacking: this is proved by the fact that these conventions has never been implemented by the Parties who signed it.

Since most European Countries legislation doesn't always grant a *res iudicata* effect to foreign decisions, European Institutions' main aim was to approve a multilateral treaty with the purpose to avoid the risk that a person could be hampered by double jeopardy after having already served a sentence for the same fact in another State.

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[4] In some States final decision can produce the following effects: when jurisdiction is related to a fact committed in a Foreign Country in which the accused person has already been punished, the possibility to prosecute for a second time the accused depends on the authorization given by a representative of the Government (i.e. a Ministry) or the Head of the State (in some cases, the King): art. 11, par. 2, of the Italian criminal code; chap. 1, par. 3, sentence 1 of the Swedish criminal code. In other Countries, the public prosecutor is entitled to stop its activity (art. 153, lett. *b* German criminal code; art. 34 Austrian criminal code); other States forbid the prosecution in case of acquittal, execution of the sentence, invalidation of the crime by prescription, pardon granted by the State (art. 13, par. 1, 17th April 1878 Belgian Law; art. 113-9, French criminal code) or in case of a final aquittal decision (art. 10, par 3, Danish criminal code).

[5] See C. AMALFITANO, *Conflitti di giurisdizione e riconoscimento delle decisioni penali nell'Unione Europea*, Giuffrè, Milan, 2006, p. 1 ss.; P. GAETA, *L'esercizio della potestà punitiva degli Stati Membri dell'U.E. tra universalità e territorialità della giurisdizione*, Conference on "Il principio del "ne bis in idem" in ambito europeo: prevenzione e composizione dei conflitti di giurisdizione" (Rome, 19-21 settembre 2005), in *www.csm.it*., p. 1 ss.

[6] See O. DEN HOLLANDER, *Caught Between National and Supranational Values: Limitations to Judicial Cooperation in Criminal Matters as Part or the Area of Freedom, Security and Justice within the European Union*, in *International Community Law Review*, 2008, p. 51 ss.; C. VAN DEN WYNGAERT-G. STESSENS, *The international* non bis in idem *principle: resolving some of the unanswered questions*, in *Int. and Comp. Law Quarterly*, 1999, p. 779 ss.

[7] Examples of mandatory refusal could be found in art. 9 of the 1957 European Convention on Extradition, art. 53 of the 1970 Convention on the International Validity of Criminal Judgements and art. 35 of the 1972 European Convention on the Transfer of Proceedings in Criminal Matters. An example of non mandatory refusal to cooperate is art. 18 of the 1990 European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds for Crime.

The first step is the 16th March 1984 European Parliament Resolution, in which it has been stated that national laws which entitle judicial authorities to prosecute a person already judged in another State «in light of the EEC Treaty and the freedoms it enshrines, and particularly the freedom of movement of persons, […] clearly present serious problems».

Following the Resolution purposes, the European Convention among Member States on double jeopardy was signed in Bruxelles on 25th May 1987. To a large extent, this Convention copied the 1970 European Convention on the International Validity of Criminal Judgments and the 1972 European Convention on the Transfer of Proceedings in Criminal Matters provisions on *ne bis in idem*: the only difference is that *ne bis in idem* effect is binding *erga omnes* and not only *inter partes*. Preamble of the Convention mentions the need to improve cooperation, on the basis of mutual trust between Member States, which is the main requirement to the acknowledgement of *ne bis in idem* effect to other Member States' judicial decisions. Mutual trust, which is the cornerstone in judicial cooperation since 2000 Tampere Council, has been in fact mentioned for the first time in this Convention: regardless any harmonization in criminal laws among Member States, prohibit multiple prosecutions towards the same person for the same facts proves the existence of broad mutual trust in the respective national criminal procedure systems[8].

The further step towards the introduction of a European *ne bis in idem* principle has been the 1990 European Convention Implementing the Schengen Agreement (CISA): artt. 54 to 58 of the 1990 CISA are similar to 1987 Convention provisions, but, as a plus, they are binding for all Member States. Referring to these articles, both United Kingdom and Ireland used the opt-in clause. As for the Member States which joined the European Union in 2004 and 2007, implementation of artt. 54 to 58 CISA was a condition to join the European Union[9].

As a result, a person finally judged in one Contracting Party may not be prosecuted in another Contracting Party for the same fact, provided that, if the person has been sentenced, the penalty has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

The following articles introduce other provision: a) some exceptions to the principle (art. 55 CISA); b) the deduction principle, in light of which any period served for the same facts shall be deducted from any sentence in the former Contracting party in case *ne bis in idem* cannot be applied (art. 56 CISA); c) the duty to exchange information between States on the existence of a previous final judgment (art. 57 CISA); d) the application of more favourable national provisions is never hampered.

The last step is embodied by art. 50 of the 2000 Nice Charter on Fundamental Rights of the European Union, which provides the right not to be tried or punished twice in criminal proceedings for the same criminal offence, stating that «No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law».

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[8] N. GALANTINI, *L'evoluzione del principio* ne bis in idem *europeo tra norme convenzionali e norme interne di attuazione*, Conference on "Il principio del "ne bis in idem" in ambito europeo: prevenzione e composizione dei conflitti di giurisdizione" (Rome, 19-21 sept. 2005), in *www.csm.it*.; EAD., *Evoluzione del principio* ne bis in idem *europeo tra norme convenzionali e norme interne di attuazione*, in *Dir. pen. proc.*, 2005, p. 1567 ss.; A. MANGIARACINA, *Verso l'affermazione del* ne bis in idem *nello "spazio giudiziario europeo"*, in *Leg. pen.*, 2006, p. 631 ss.; M. PAGLIA, *Il* ne bis in idem *in ambito internazionale e comunitario*, in *ForoEuropa*, 2003(3), p. 1 ss.; J.A.E. VERVAELE, *The transnational* ne bis in idem *principle in the EU. Mutual recognition and equivalent protection of human rights*, in *Utrecht Law Review*, 2005, p. 100 ss.; M. WASMEIER-N. THWAITES, *The development of* ne bis in idem *into a transnational fundamental right in EU law: comments on recent developments*, in *Eur. Law Rev.*, 2006, 565 ss.; A. WEYEMBERGH, *Le principe* ne bis in idem*: pierre d'achoppement de l'espace pénal européen?*, in *Cahiers droit eur.*, 2004, p. 343 ss.

[9] As for States that joined the EU in 2004, see *O.J.*, L 236, 23rd March 2003, p. 33 ss. As for Romania and Bulgaria, see *O.J.*, L 157, 21st June 2005, p. 203 ss. As for Iceland and Norway, see Council Decison 1999/439/EC, 17th May 1999, in *O.J.*, L 176, 10th July 1999, p. 35. As Swiss, see *O.J.*, L 53, 27th February 2008, p. 1 ss.

Having no regard to the State or jurisdiction that passed the first decision, art. 50 of the Nice Charter realizes the main way to protect individual's right not to be tried twice in the European Area: insofar, *ne bis in idem* is a general principle acknowledged in the European Area and its rationale is the aim to prevent double prosecution as an attempt to individual liberty[10].

2. *Ne bis in idem* principle in light of European Court of Justice jurisprudence: *idem factum*. - For long time the European Court of Justice (ECJ) denied its competence in the interpretation of artt. 54-58 CISA: only the 1997 Amsterdam EU Treaty stated that, as far as concerns *ne bis in idem*, artt. 54-58 CISA find their legal basis in art. 35 of the EU Treaty[11]. So far, there are eleven preliminary rulings passed by the ECJ. Decisions focused both on the meaning of *idem factum* and on the definition of final decision, that is a decision which has the effect to stay any other following proceedings on the same fact towards the same person.

Before defining the concept of *idem factum*, the interpreter should consider that Spanish, German, French, English, Italian and Dutch CISA version are similar and lead to a material definition of the concept[12].

As a matter of fact, when interpreting the meaning of *idem factum*, one can choose among three possibilities: a) consider the legal definition; b) consider the protected interest; c) consider material acts. In Van Esbroeck case, the Court rejected two of these perspectives: as there is no harmonization of national criminal laws among Member States, criteria based on the legal definition of the charge or on the protected legal interest might hamper freedom of movement within the Schengen territory as there could be as many legal definitions and legal interests as the different penal system in force in each Member State[13]. In fact, this would result in a direct conflict with the main objective of the CISA, which is the freedom of movement: leaving the possibility of further imprisonments would result in a sword of

[10] See jurisprudence opinions in First Intance Tribunal decision, 3rd May 2002, T-177/01, Jégo-Quéré, in *Reccueil*, 2002, p. II-2365 ss., §§ 42 and 47; ECJ decision, 27th June 2006, C-540/03, European Parliament v. Council, in *Reccueil*, 2006, p. I-5769 ss.; ECJ decision, 13th March 2007, C-432/05, Unibet, in *Reccueil*, 2007, p. I-2271; ECJ decision, 3rd May 2007, C-303/05, Advocaten voor de Wereld, in *Reccueil*, p. I- 3633 ss.; ECJ decision, 11th December 2007, C-438/05, Viking, in *Reccueil*, p. I-1079 ss.; ECJ decision, 18th December 2007, C-341/05, Laval, in *Reccueil*, p. I-11767 ss.; ECJ decision, 14th February 2008, C-244/06, Dynamic Medien, in *Reccueil*, 2008, p. I-505 ss.; Advocat general conclusion's, in case C-173/99, *BETCU*, in *Reccueil*, 2001, p. I-4881 ss. See also, ECHR decision, 11th July 2002, n. 28957/95, Christine Goodwin v. United Kingdom, in http://www.giurcost.org/casi_scelti/CEDU/CEDU11-07-02.htm.

[11] See A. ADINOLFI, *Commento all'art. 68 del Trattato sull'Unione europea*, in F. Pocar (dir.), *Commentario breve ai Trattati della Comunità e dell'Unione europea*, Cedam, Padova, 2001, p. 317 ss.; C. CURTI GIALDINO, *Schengen e il terzo pilastro: il controllo giurisdizionale secondo il Trattato di Amsterdam*, in *Rivista di Diritto Europeo*, 1998, p. 41 ss.; L. GAROFALO, *Sulla competenza a titolo pregiudiziale della Corte di giustizia secondo l'art. 68 del Trattato CE*, in *Il Diritto dell'Unione europea*, 2000, p. 805 ss.; L. SALAZAR, *Il principio del* ne bis in idem *all'attenzione della Corte di Lussemburgo (I)*, in *Dir. pen. e proc.*, 2003, p. 908 s.; G.L. TOSATO, *Atti giuridici vincolanti e competenze della Corte comunitaria nell'ambito del "Terzo pilastro"*, in *L'Italia e la politica internazionale*, IAI - ISPI, Bologna, 2000, p. 331 ss.

[12] The exact words used are: «por los mismos hechos», «wegen derselben Tat», «pour les mêmes faits», «for the same acts», «per i medesimi fatti» e «wegens dezelfde feiten».

[13] In the case at issue, a Belgian citizen was sentenced in by the Norwegian Court of Bergen to five years imprisonment for illegally importing narcotic drugs to Norway. After serving part of the sentence, he was released and taken to Belgium, where a second prosecution started for illegal export outside Belgium of the same narcotic drug. For an overview of former cases, see S. BRAMMERTZ, *Trafic de stupefiants et valeur internationale des jugements répressifs à la lumière de Schengen*, in *Revue de droit pénal et de criminologie*, 1996, p. 1063 ss.

Damocles pending on the individuals which is not consistent with the protection of individuals' dignity[14].

Seen from the perspective of mutual recognition and freedom of movement, the ECJ offered its autonomous and independent interpretation of *idem factum*: the only relevant aspects are material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together. The definitive assessment in that regard belongs to the competent national court, which is charged to determine whether material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter.

As soon as criteria have been chosen, another question rises: which law should be used to define which are the "same acts"? The Member State which decided first? The Member State which started a second prosecution on the same facts? Or is it possible to determine the existence of "same acts" according to autonomous interpretation, based on the law of the European Union?

The Court stated that the concept of "same acts" shouldn't be different in each member State. In light of the need for uniform application of EU law, since no provision makes reference to the national *idem factum* meaning, an autonomous and uniform interpretation within the European Union should be provided[15].

In following decisions, the Court ruled that a lack of complete identity of the material facts doesn't prevent *ne bis in idem* effect: the place where the crime is committed may be broad, or its execution may stretch over a long period of time. In order to help the national judge, the Court of Justice stated that punishable acts consisting in exporting and importing the same illegal goods are covered by the notion of "same acts" within the meaning of art. 54 CISA.

The material perspective for the definition of *idem factum* appears to be the best in order to pursue the aim of freedom of movement and mutual recognition of foreign decisions. However, several problems are still to be solved: as a matter of fact, at the moment it's not clear what a material fact is, and whether the interpreter should look at the whole offences or at single material acts. The following example explains the problem: having robbed a bank, a person stoles a car to make his way out of the country, even though he has no driving license. Should the case be considered as two separate facts, requiring two prosecutions, or as a set of offences that justify a single prosecution? The set of offences theory offers a way for the development of a European concept of material act, but it possibly leads to some unsatisfactory results. For instance, if, after committing a robbery in State A, the perpetrator fled to State B, where judicial authority sentenced him for driving without license regardless the robbery, even though the robbery was known, then, in light of the set of offences theory, State A judges would arrive to the conclusion that the ruling passed by State B judges forbids a prosecution in State A[16].

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[14] See Advocate general D. Ruiz-Jarabo Colomer's conclusions in ECJ, 9th March 2006, C-436/04, Leopold Henri Van Esbroeck, in *Reccueil*, 2006, p. I-2333ss., §§ 41 ss. See also K. LIGETI, *Rules on the Application of* ne bis in idem *in the EU. Is Further Legislative Action Required?*, in *Eucrim*, 2009 (1-2), p. 39; M. WASMEIER-N. THWAITES, *The development of* ne bis in idem *into a transnational fundamental right in EU law: comments on recent developments*, in *Eur. Law Rev.*, 2006, 572 ss.

[15] See ECJ decision, 16th November 2010, C-261/09, Mantello, in http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0261:IT:HTML.

[16] In a comparative perspective, see U.S. Supreme Court, 4th January1932, 284 U.S., 299, Blockburger v. United States, in *http://caselaw.lp.findlaw.com/scripts/ getcase.pl?navby=CASE&court=US&vol=284&page=299*, stating in particular that «each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not». See also M. EL ZEIDY, *The Doctrine of Double Jeopardy in International*

So far, however, a more precise definition of *idem factum* provided by the European Institutions would be useful: as a matter of fact, even if a shared meaning of material act would overcome the problem of differences among Member States and be more appropriate for specific as well as sensitive cases for practical difficulties such as those encountered in the examples given, still it would leave some unanswered questions, such as: a) if a person is sentenced for a little amount of drug imported, what about a second trial for a bigger amount of drugs import part of the same drugs haul?[17]; b) what about offences connected to a crime whose punishment has been served?; c) how should a material act be defined?

As for the last question, the Greek Draft Framework Decision on conflicts of jurisdiction is useful for the definition of "act": the identity of acts should be referred to the same circumstances or circumstances that are similar in substance. As a matter of fact, "circumstance" is a term with a broader meaning than "act" and prevents running into difficulties outlined above.

Finally, such a broad definition of *idem factum* could also be interpreted as a step towards the creation of a European definition of essential elements of the fact (conduct, event, cause-effect relations), that would be considered as a whole with provisions of several European Union Framework Decisions and Conventions providing mandatory criminal punishments for certain crimes and acknowledging jurisdiction to each Member State in order to prosecute such conducts. There would be a link between art. 54 CISA and these provisions: art. 54 CISA appears as a multi-function instrument to promote mutual recognition (in this case, among definitions of *idem factum*) as well as judicial cooperation among Member States and freedom of movement.

3. *Ne bis in idem* principle in light of European Court of Justice jurisprudence: final decision. - The wording of art. 54 CISA concerning which types of decisions could bar further prosecution is not homogeneous and leads to different interpretations in the different official languages of the EU Member States: while «finally disposed» in English, «rechtskraftig abgeurteilt» in German, «dèfinitivement jugée» in French, «onherroepelijk vonnis» in Dutch doesn't request formally a decision passed by a judge, the Italian wordings «sentenza definitiva» apparently need a decision passed by a judge[18].

Moreover, even within Member States the definition of decisions producing *ne bis in idem* effect triggers academic debate: while acquittals and convictions produce a *res iudicata* effect, several problems raise when it comes to consider if *ne bis in idem* should be considered in a material way, which means that when a decision definitely bars further prosecution at the national level, then the same effect should be acknowledged also in another State[19].

Criminal and Human Rights Law, in *Mediterranean Journal of Human Rights*, 2002, p. 196, where the Author states that «offences are the same if the relevant elements of one are identical to, or included in, the same elements of another. More generally, a greater offence is treated as the same as any logically lesser-included offence with some but not all of the formal elements of the greater offence: *Blockburger* treats two offences as different if and only if each requires an element the other does not». See also B. VAN BOCKEL*, Case Law*, in *Common Market Law Review*, 2008, p. 238 s.

[17] See General Advocate E. Sharpston conclusions in ECJ decision, 17th July 2007, C-367/05, Norma Kraijenbrink, in *Reccueil*, 2007, p. I-6619 ss., § 36.

[18] Cfr. E. SELVAGGI, *La procedura giudiziaria che estingue l'azione penale esclude il nuovo giudizio di un altro Stato europeo*, in Guida *dir.*, 2006 (9), p. 108; J.A.E. VERVAELE, *The transnational* ne bis in idem *principle in the EU. Mutual recognition and equivalent protection of human rights*, cit., p. 112 s.

[19] K. LIGETI, *Rules on the Application of* ne bis in idem *in the EU. Is Further Legislative Action Required?*, cit., p. 39 ss.

The first ruling coming from the European Court of Justice on art. 54 CISA was related to out of court settlements such as plea bargaining and guilty plea: the Court held that art. 54 CISA doesn't require a decision taken by a judge. Therefore, it proposed a very broad interpretation of "final decision", stating that «a decision of an authority required to play a part in the administration of criminal justice in the national legal system concerned» is sufficient to trigger *ne bis in idem* effect if the accused undertakes «to perform certain obligations prescribed by the public prosecutor [which] penalises the unlawful conduct allegedly committed by the accused person herself»[20].

As a matter of fact, any agreement between public prosecutor and defendant is similar to punishments, as they both respond to retributive as well as to prevention aim: the person who is admitted to this procedure could be considered as one serving a sentence.

Moreover, deciding not to acknowledge *res iudicata* effect to these decisions would result into a failure of plea bargaining proceedings. These instruments are meant to lower the number of cases pending at courts and are accepted in each Member State, except for Greece[21]: if these decisions wouldn't produce *ne bis in idem* effect overall the European Union, then they would be less attractive to defendants. Of course, this outcome wouldn't be consistent with the main aim of art. 54 CISA, which is meant to grant freedom of movement within the European Union[22].

So, ECJ accepted a broad interpretation of "finally disposed". However, it also suggested that when the public prosecutor decides not to pursue proceedings because a trial is pending in another Member State towards the same defendant for the same acts, regardless any decision on the merits of the case, a *res iudicata* effect isn't acknowledged.

As a matter of fact, ECJ stated that analysis of the merits of the case is not a requirement for *ne bis in idem* effect: it rather confirmed previous rulings in order to exclude interpretations non consistent with EU Treaty provisions. Freedom of movement within European Union has two sides: from one side it is an expression of individuals' liberty; from the other side it requires that EU Institutions grant security. This means that a broad interpretation of art. 54 CISA shouldn't result in immunity for a person who could take advantage of a decision based on procedural grounds, especially a decision that halts the proceedings in one State because in another State there

[20] See ECJ decision, 11th February 2003, C-187/01, Hüsein Gözütok, and C-385/01, Klaus Brügge, in *Reccueil*, 2003, p. I-1345 ss. For comments on the decision, see. V. BAZZOCCHI, *Ancora sui casi Gözütok e Brügge: la Corte di Giustizia ed il principio del* ne bis in idem, in *Quad. cost.*, 2004, p. 169 ss.; A. CALIGIURI, *L'applicazione del principio* ne bis in idem *in diritto comunitario: a margine della sentenza Gözütok e Brügge*, in *Riv. dir. int. priv. e proc.*, 2003, p. 867 ss.; D. DEL VESCOVO, *Il principio del* ne bis in idem *nella giuriprudenza della Corte di giustizia europea*, in *Dir. pen. e proc.*, 2009, p. 1413 ss. ; M. FLETCHER, *Some Developments to the* ne bis in idem *Principle in the European Union:* Criminal Proceedings Against Hüseyn Gözütok and Klaus Brügge, in *The Modern Law Rev.*, 2003, p. 769 ss.; M. PAGLIA, *Il* ne bis in idem *in ambito internazionale e comunitario*, cit., p. 1 ss.; T. RAFARACI, Ne bis in idem *e conflitti di giurisdizione in materia penale nello spazio di libertà, sicurezza e giustizia dell'Unione europea*, in *Riv. dir. proc.*, 2007, p. 625 ss.; L. SALAZAR, *Il principio del* ne bis in idem *all'attenzione della Corte di Lussemburgo (I)*, cit., p. 906 ss.; ID., *Il principio del* ne bis in idem *all'attenzione della Corte di Lussemburgo (II)*, in *Dir. pen. e proc.*, 2003, p. 1040 ss.; J.A.E. VERVAELE, *Case Law*, in *Common Market Law Review*, 2004, p. 795 ss.; ID., *The transnational* ne bis in idem *principle in the EU. Mutual recognition and equivalent protection of human rights*, cit., p. 100 ss.

[21] See C.M. BRADLEY (ed.), *Criminal Procedure. A Worldwide Study*, Carolina Academic Press, 2007; F. TULKENS (revised by Y. Cartuyvels and I. Wattier), *Negotiated justice*, in M. Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedures*, Cambridge University Press, Cambridge, 2002, p. 641 ss.; B. PAVIŠIĆ (ed.), *Transition of Criminal Procedure Systems*, vol. II, Pravni fakultet Sveučilišta, Rijeka, 2004.

[22] See Advocate General D. Ruiz-Jarabo Colomer conclusions in trials C-187/01, Hüsein Gözütok, e C-385/01, Klaus Brügge, in *Reccueil*, 2003, p. I-1345 ss., §§ 112 ss. and M. WASMEIER-N. THWAITES, *The development of* ne bis in idem *into a transnational fundamental right in EU law: comments on recent developments*, cit., p. 568 ss.

is an on-going trial: in this case, no State would ever arrive at the end of the trial, even if in the second State there were, for instance, grounds (i.e. evidences) to sentence the indicted person.

This ruling was confirmed by two decisions; in the first, ECJ stated that *res iudicata* effect comes also from judicial authorities decisions acquitting the accused person for lack of evidence: to let a judicial authority of another Member State start a new trial would undermine the principle of legal certainty as well as freedom of movement[23]. In the second decision, the Court applied the principle in cases in which the indicted person is finally acquitted because the crime is time-barred: in this case the Advocate General argued that such decisions shouldn't produce *ne bis in idem* effect because there is no decision on merits and because rules on time-barring are different in every Member State. However, the Court confirmed that decision on merits is not a requirement for *ne bis in idem* effect, also because art. 54 CISA doesn't require harmonization of neither procedural nor time-barring rules[24].

Moreover, a decision taken by police authorities cannot produce *ne bis in idem* effect: it should rather be considered the effect produced within the Member State. If the decision bars another prosecution at the national level, then the decision will produce the same effect in other Member States[25].

As far as regards convictions, they produce *ne bis in idem* effect only if the convicted person has served the sentence, is at present serving it or in case the conviction can no longer be enforced: the aim is to avoid that persons who fled from justice moving to another country take advantage of the first final conviction although it has never been served[26]. However, the interpreter has to bear in mind that the ECJ stated that *ne bis in idem* effect comes also from probation measures. Probation decision may be regarded as a conviction that is in force, or is actually in the process of being enforced. The Court confirmed that, since a suspended custodial sentence penalizes the unlawful conduct of a convicted person, it has to be considered as a punishment under art. 54 CISA: it is in fact still possible to enforce it if during the probation period the sentenced person

[23] ECJ decision, 28th September 2006, C-150/05, Jan Leo Van Straaten c. Staat der Nederlanden and Republiek Italië and General Advocate D. Ruiz-Jarabo Colomer's conclusions in *Reccueil*, 2006, p. I-9327 ss., §§ 69 ss. See comments to the decision B. VAN BOCKEL, *Case Law*, cit., p. 228 s.; G. DE AMICIS, *Il principio del* "ne bis in idem" *europeo nell'interpretazione della Corte di giustizia*, in *Cass. pen*., 2009, p. 3172 s.; D. DEL VESCOVO, *Il principio del* ne bis in idem *nella giuriprudenza della Corte di giustizia europea*, cit., p. 1419; K. LIGETI, *Rules on the Application of* ne bis in idem *in the EU. Is Further Legislative Action Required?*, cit., p. 40.

[24] See ECJ decision, 28th September 2006, C-467/04, Giuseppe Francesco Gasparini and others, in *Reccueil*, 2006, p. I-9199 ss.; M. BARGIS, *Costituzione europea e cooperazione giudiziaria in materia penale*, in *Riv. it. dir. e proc. pen.*, 2005, p. 144 ss.; A. GAITO, *Un processo penale verso il modello europeo*, in Id. (ed., in collaboration with F. Giunchedi), *Procedura penale e garanzie europee*, Utet, Turin, 2006, p. 1 ss.; F. GIUNCHEDI, *Linee evolutive del giusto processo europeo*, *ivi*, p. 15 ss.; V. GREVI, *Principi e garanzie del "giusto processo" penale nel quadro europeo*, in L. Lanfranchi (a cura di), *La Costituzione europea tra Stati nazionali e globalizzazione*, Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, Rome, 2004, p. 89 ss.; ID., *Linee di cooperazione giudiziaria in materia penale nella Costituzione europea*, in E. Dolcini-C.E. Paliero (ed.), *Studi in onore di Giorgio Marinucci*, vol. III, Giuffrè, Milan, 2006, p. 2783 ss.; O. MAZZA, *La libertà personale nella Costituzione europea*, in M.G. Coppetta (ed.), *Profili del processo penale nella Costituzione europea*, Giappichelli, Turin, 2005, p. 45 ss.; M. PISANI, *Il «processo penale europeo»: problemi e prospettive*, in *Riv. dir. proc.*, 2004, p. 653 ss.

[25] ECJ decision, 22nd December 2008, C-491/07, Vladimir Turanský, in *Reccueil*, 2008, p. I-11039 ss. See comments on the decision in D. DEL VESCOVO, *Il principio del* ne bis in idem *nella giuriprudenza della Corte di giustizia europea*, cit., p. 1422 s.; K. LIGETI, *Rules on the Application of* ne bis in idem *in the EU. Is Further Legislative Action Required?*, cit., p. 40. For Slovakia criminal procedure rules, see V. MATHERN-V. ĆEĆOT, *Slovacchia*, in B. Pavišić and D. Bertaccini (eds.), *Le altre procedure penali. Transizioni dei sistemi processuali penali*, Giappichelli, Turin, 2002, p. 335 ss.

[26] See ECJ decision, 18th July 2007, C-288/5, Jürgen Kretzinger, in *Reccueil*, 2007, p. I-6441 ss.

doesn't respect or fulfill the requirements and conditions mentioned in the judicial decision approving the probation period. On the other hand, procedural coercive measures, such as police custody, pre-trial measures and detention on remand fall outside the aim of the *ne bis in idem* principle because related to procedural and security issues[27].

Other problems rise in relation to *in absentia* trials: in the "Bourquain case" a man was sentenced to death in France for a murder committed when he was soldier in Algeria with the French troops. He then moved to Germany, where a prosecution by local authorities started for the same fact because the victim was a German soldier. At that time, the French decision couldn't be enforced for three main reasons: a) the French Parliament had approved a general amnesty for crimes committed in the overseas territories; b) the penalty was time-barred; c) sentence to death had been forbidden in the meanwhile. ECJ, involved in the case, held that, in order to produce *ne bis in idem effect*, penalty imposed by the sentencing State should be enforced at least on the date it was imposed: art. 54 CISA refers to criminal proceedings held in a Member State towards an indicted person whose trial for the same acts was finally disposed in another Member State, even though, under the law of the State in which he was first convicted, the sentence could never be directly enforced[28].

Moreover, the Court stated that *res iudicata* effect could be acknowledged to decisions taken *in absentia*. First of all, national rules on *res iudicata* effect are consistent with art. 6 European Convention on Human Rights as long as the person sentenced *in absentia* can obtain a new trial in respect of both law issues. Furthermore, even when there is no possibility of a re-trial, *in absentia* trials may be compatible with art. 6 European Convention on Human Rights, namely when the accused was aware of the summons: States consider the failure of the accused to appear as implicit waiver, and thus carry out a trial *in absentia*[29]. In addition, the interpreter

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[27] See General Advocat E. Sharpston in proceedings C-288/5, Jürgen Kretzinger, cit., §§ 49 ss. See also G. DE AMICIS, *Il principio del* "ne bis in idem" *europeo nell'interpretazione della Corte di giustizia*, cit., p. 3174 s.; D. DEL VESCOVO, *Il principio del* ne bis in idem *nella giuriprudenza della Corte di giustizia europea*, cit., p. 1420. In order to harmonize the special subject of probatory measures, the European Council approved on 27th November 2008 the Framework decision 2008/947/JHA, which is published in *O.J.*, L 337, 12th December 2008, p. 102 ss. on which see first comments by H. KUCZYNSKA, *Mutual Recognition of Judicial Decisions in Criminal Matters with Regard to Probation Measures and Alternative Sanctions*, in *EuCrim*, 2009, p. 43 ss.

[28] See ECJ decision, 11th December 2008, C-297/07, Klaus Bourquain, in *Reccueil*, 2008, p. I-9425 ss. See also S. BRAMMER, *Case law*, in *Common Market Law Review*, 2009, p. 1685 ss.; M. CASTELLANETA, *Interpretazione estensiva nell'area Schengen delle garanzie da osservare nel processo penale*, in *Guida dir.*, 2009 (2), p. 104 ss.; G. DE AMICIS, Ne bis in idem *e sentenza contumaciale. Osservazioni*, in *Cass. pen*., 2009, p. 1296 ss.; ID., *Il principio del* "ne bis in idem" *europeo nell'interpretazione della Corte di giustizia*, *loc. cit.*; A. MANGIARACINA, *Sentenze contumaciali e cooperazione giudiziaria*, in *Dir. pen. e proc.*, 2009, p. 120 ss.; G. NEGRI, *Condanne in un solo Paese. Anche la sanzione non eseguita vale come precedente*, in *Il Sole 24 Ore*, 12 dicembre 2008, p. 39; F. SIRACUSANO, *Reciproco riconoscimento delle decisioni giudiziarie, procedure di consegna e processo* in absentia, in *Riv. it. dir. e proc. pen.*, 2010, p. 115 ss.

[29] See ECHR decision,12th February 1985, Colozza v. Italia; ECHR decision, 18th May 2004, Sejdovic v. Italia; ECHR decision, 10th November 2004, Somogy v. Italia, all published in http://cmiskp.echr.coe.int. For comments by Scholars, see E. APRILE, *La tutela dei diritti fondamentali e le nuove garanzie del processo penale*, in E. APRILE-F. SPIEZIA, *Cooperazione giudiziaria penale nell'Unione europea prima e dopo il Trattato di Lisbona*, Ipsoa, Milan, 2009, p. 157 ss.; S.-J. SUMMERS, *Fair Trials. The European Criminal Procedure Tradition and the European Court of Human Rights,* Hart Publishing, Oxford, 2007, p. 113 ss.; M. DEGANELLO, *Procedimento in absentia: sulla 'tratta' Strasburgo-Roma una 'perenne incompiuta'*, in R. Gambini-M. Salvadori (a cura di), *Convenzione Europea sui diritti dell'uomo: processo penale e garanzie*, ESI, Naples, 2009, p. 79 ss.; B. MILANI, *Il processo contumaciale tra garanzie europee e prospettive di riforma*, in *Cass. pen.,* 2009, p. 2180 ss.; G. UBERTIS, *Corte europea dei diritti dell'uomo e «processo equo»: riflessi sul processo penale italiano*, in *Riv. dir. proc.,* 2009, p. 33 ss.; F. CAPRIOLI, *"Giusto processo" e rito degli irreperibili*, in *Leg. pen.,* 2004, p. 586 ss.; C. DELL'AGLI, *Il fuggevole interesse della Corte costituzionale al principio* ne absens damnetur, in *Dir. pen. e proc.,* 2010, p. 244 ss.; P. PROFITI, *La Corte italiana e il*

should bear in mind art. 5, n. 1 of the Framework decision on the European arrest warrant (2002/586/JHA): when asked to surrender a person sentenced *in absentia*, the refugee State can decide to surrender the person under the condition that the accused has the right to a new trial in the same State if he was not aware of the first trial. So, *ne bis in idem* effect should be acknowledged also to decisions *in absentia*, without prejudice for the possibility of a retrial in the State whose authorities first sentenced the surrender: in fact, this has to be considered not as a second trial, but as a retrial[30].

De iure condito, a more complete definition of "finally disposed" would be useful: first of all, the suggestion is to consider that *ne bis in idem* effect should be acknowledged only to decisions that produce *res iudicata* effect in the Member State whose authorities passed those decisions; secondly, it is also necessary to clarify that the principle applies only to decisions held by the members of the judiciary (both judges or prosecutors, police officers excluded); thirdly, a new description of "enforced punishment" would be useful: as there are several European instruments that assure the enforcement of the decision[31], then the appropriate choice would be to change the requirement of enforcement into an exception for the impossibility of enforcing the sentence. The principle would apply despite non-enforcement of a foreign sentence, except in case the enforcement would be impossible. The first example is given when the first sentence cannot be enforced in the State where the individual fled and, at the same time, also surrender is forbidden. A second example is given in the event of failure to enforce a foreign sentence passed in proceedings that violate defense rights grant by the European Convention on Human Rights: as a matter of fact, in such cases, rather than enforcing the sentence, it should be possible to start a new prosecution[32].

4. From the Green Paper to the 2009 Framework Decision on conflicts of jurisdiction – The overall jurisprudence on art. 54 CISA has set some rules that are independent from the national criminal laws in force in the Member States. However, if at national level *ne bis in idem* principle is an *extrema ratio* in case rules on jurisdiction and competence are not respected, at the European level no rules on the distribution of jurisdiction have been approved. This means that the only guarantee against double prosecution is art. 54 CISA and that it is applied on the basis of the "first come, first served" rule, which means that the first decision bars a second prosecution against the same person on the same facts. However, this is not a satisfactory rule because it is related to mere chance and is also inadequate in certain situations (i.e. if the State deciding first is not the State of the *locus commissi delicti* so that gathering evidences could be difficult)[33].

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processo in contumacia: i riflessi della giurisprudenza di Strasburgo, in *Europeanrights.eu*, http://www.europeanrights.eu/index.php?funzione=S&op=5&id=381.

[30] See G. DE AMICIS, *Il principio del* "ne bis in idem" *europeo nell'interpretazione della Corte di giustizia*, cit., p. 3170.

[31] I.e., Council Framework decision 2002/586/JHA on the European arrest warrant, in *O.J.*, L 190, 18th July 2002, p. 20 ss.; Council Framework decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, in *O.J.*, L 76, 22nd March 2005, p. 16 ss.; Council Framework decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, in *O.J.*, L 327, 5th December 2008, p. 27 ss.

[32] See J. LELIEUR-FISCHER, *La règle ne bis in idem. Du principe de l'autorité de la chose jugée au principe d'unicité d'action répressive. Etude à la lumière des droits français, allemand et européen*, Thesis, Paris I, 2005, p. 544 ss.; EAD., *Comments on the Green Paper on Conflicts of Jurisdiction and the principle of ne bis in idem in criminal proceedings*, p. 28 ss.

[33] See C. AMALFITANO, *Conflitti di giurisdizione e riconoscimento delle decisioni penali nell'Unione europea*, cit., p. 231 ss; N. GALANTINI, *Il principio del "*ne bis in idem*" internazionale nel processo penale*, Giuffrè, Milan, 1984, p. 84 ss.; J.P. PIERINI, *Territorialità europea, conflitti di giurisdizione e* ne bis in idem, in

The first attempt to introduce a complete set of rules is the Freiburg Proposal on Conflicts of Jurisdiction and *ne bis in idem* principle. The proposal comes from Scholars whose draft was first presented at the 2004 AIDP Conference in Beijing[34]; it concentrates on three main issues: a) a set of rules to solve conflicts of jurisdiction by means of coordination among Member States; b) the definition of *ne bis in idem* principle; c) the so-called "consideration" principle, through which, when it is neither possible to allocate jurisdiction nor to recall the *extrema ratio* of art 54 CISA, it is stated that the punishment first served has to be reduced from the original punishment to which the defendant has been sentenced[35].

Coordination among jurisdictions should be organized in two steps: a) exchange of information; b) agreement on concentrating jurisdiction among one Member State, that should take into consideration the place where the crime has been committed (*locus commissi delicti*), the accused's nationality, his residence; victim's nationality; the place where evidences can be gathered; the place where the enforcement of the sentence will be more suitable. This criteria should be considered as a whole: in fact, the Proposal doesn't provide a rank. However, in case criteria are not respected or in case States cannot find an agreement, the proposal suggests to introduce the possibility to involve the European Court of Justice. Moreover, the Proposal provides for a definition of *idem factum* and "finally disposed", almost predicting the European Court of Justice decisions on the interpretation of art. 54 CISA.

Except for the proposal, some positive rules should be mentioned: for instance, the Convention on the protection of European Communities' financial interest and the Framework Decision on combating terrorism and Framework Decision on attacks against information systems. Those Decisions introduced some rules suggesting a coordination among Member States in order to solve conflicts of jurisdiction. However, the only effective example of coordination in order to prevent conflicts of jurisdiction is given by the Eurojust experience. Eurojust was established as a result of a decision taken by the European Council of Tampere, held in October 1999. In order to strengthen the fight against serious organised crime, the European Council agreed that a unit (Eurojust) should be set up and composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to their own legal systems. Since 2000, Eurojust has grown tremendously and so have its operational tasks and involvement in European judicial cooperation. This is why more powers and a revised set of rules became necessary. In July 2008, the French Presidency approved the new Decision on the Strengthening of Eurojust, which was voted in December 2008 and published on 4th June 2009[36].

T. Rafaraci (cur.), *L'area di libertà sicurezza e giustizia: alla ricerca di un equilibrio fra priorità repressive ed esigenze di garanzia*, Giuffrè, Milan, 2007, p. 118 ss T. RAFARACI, Ne bis in idem *e conflitti di giurisdizione in materia penale nello spazio di libertà, sicurezza e giustizia dell'Unione europea*, in *Riv. dir. proc.*, 2007, p. 634 ss.

[34] See *Draft Resolution for Concurrent National and International Criminal Jurisdiction and the Principle "Ne Bis In Idem"*, passed in Berlin, 4th June 2003, in *Rev. int. de droit pénal*, 2002-3, p. 1179 ss.

[35] See A. Biehler-R. Kniebüler-J. Lelieur-Fisher-S. Stein, *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union*, passed in Berlin in October 2003, published in *Rev. int. de droit pén.*, 2002, p. 1195 ss.

[36] Eurojust has been founded by the Council Decision 2002/187/JHA passed on 28th February 2002. Later on, Council Decision 2009/426/JHA passed on 4th June 2009, changed the 2002 Decision implementing Eurojust powers. Referring to Eurojust coordination powers in criminal proceedings, see G. DE AMICIS, Ne bis in idem*, giurisdizioni concorrenti e divieto di azioni multiple nell'U.E.: il ruolo dell'*Eurojust, in *Cass. pen.*, 2006, p. 1176 ss.; M.L. DI BITONTO, *La composizione dei conflitti di giurisdizione in seno ad* Eurojust, in *Cass. pen.*, 2010, p. 2896 ss.; M. PANZAVOLTA, *Il giudice naturale nell'ordinamento europeo: presente e futuro*, in M.G. Coppetta (a cura di), *Profili del processo penale nella Costituzione europea*, Giappichelli, Turin, 2005, p. 107 ss.; ID., Eurojust:

The new Decision's purpose is to enhance the operational capabilities of Eurojust, increase the exchange of information between the interested parties, facilitate and strengthen cooperation between national authorities and Eurojust, as well as strengthen and establish relationships with partners and third States.

As stated in art. 82, § 1, letter c of the EU Treaty, Eurojust is in charge of the implementation of judicial cooperation, including resolution of conflicts of jurisdiction and close cooperation with the European Judicial Network. This is the main reason why, in 2003, Eurojust approved a set of rules with some criteria that should be used to solve conflicts of jurisdiction: this rules, however, have no binding effect and are not mandatory for the States applying for Eurojust's assistance in cases involving several EU Member States. Moreover, there's no hierarchy among this rules and persons interested are not involved: the result is a forum shopping effect that happens within Eurojust at a pre-trial stage. This causes some concern, because Eurojust, due to its composition, is more likely a Prosecution body than an impartial organization: first of all, Eurojust' National Members are usually appointed among Public prosecutors; secondly, the main activity of Eurojust is to assist National authorities mainly during preliminary investigations. This means that the choice of the place where the trial should be based is on the Public prosecutors' representatives, thus breaching the rule that judges shouldn't be chosen by one of the parties involved in the trial and should instead be provided according to rules already in force at the time the crime is committed.

In any case, Eurojust Agency is not ranked in a higher position than its members: thus, it cannot force the national representatives to respect neither the criteria approved in 2003 nor the outcome of the meeting in which the States involved have chosen the best place for prosecution[37].

Moreover, Eurojust activity is subject to the principles ruling the prosecution in each State: the abovementioned scheme, where there is no binding rule for the States, can efficiently work only in Countries where the prosecution of a crime is not mandatory and responds to the opportunity principle.

From the abovementioned experiences, during the Greek Presidency of the European Union Council, Greece submitted a draft Framework Decision proposal on *ne bis in idem principle* and the resolution of conflicts of jurisdiction[38]. The Greek draft was very close to the Freiburg Proposal, however it was not discussed further first of all because the States were not too

il braccio giudiziario dell'Unione, ivi, p. 169 ss. On Eurojust, see G.C. CASELLI – G. DE AMICIS, *La natura giudiziaria di Eurojust e le sua attuazione nell'ordinamento interno*, in *Dirittoegiustizi@* del 5 luglio 2003; G. DE AMICIS, *Riflessioni su Eurojust*, in *Cass. pen*., 2002, p. 3606 ss.; F. DE LEO, *Da Eurojust al pubblico ministero europeo*, in *Cass. pen*., 2003, p. 1432 ss.; ID., *Quale legge per Eurojust?*, in *Quest. giust*., 2003, p. 197 ss.; L. SALAZAR, *Eurojust: una prima realizzazione della decisione del Consiglio europeo di Tampere*, in *Doc. giust.*, 2000, c. 1342 ss.; ID., *Lo statuto ed i poteri giudiziari dei membri nazionali di Eurojust*, Conference on "L'attuazione di Eurojust; forme e modelli di coordinamento delle indagini comuni sulla prospettiva della libera circolazione delle autorità giudiziarie", (Rome, 11-15 ottobre 2004), in *www.csm.it*; T.M. SCHALKEN, *Euro Justice: A Historic Initiative*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 1998, p. 298 ss.

[37] The *guide-lines*, attached to the 2004 Annual Report, are published in http://www.eurojust.europa.eu/press_releases/annual_reports/2004/Annual_Report_2004_EN.pdf.

[38] The Greek Draft proposal is published in *O.J.*, C 100, 26th Aprile 2003, p. 24 ss. For comments, see C. AMALFITANO, *Conflitti di giurisdizione e riconoscimento delle decisioni penali nell'Unione Europea*, cit., p. 231 ss.; EAD., *La risoluzione dei conflitti di giurisdizione in materia penale nell'Unione europea*, in *Dir. pen. e proc.*, 2009, p. 1293 ss.; O. DEN HOLLANDER, *Caught Between National and Supranational Values: Limitations to Judicial Cooperation in Criminal Matters as Part or the Area of Freedom, Security and Justice within the European Union*, in *International Community Law Review*, 2008, p. 51 ss.; A. MANGIARACINA, *Verso l'affermazione del* ne bis in idem *nello "spazio giudiziario europeo"*, cit., p. 631 ss.

enthusiastic about it, and, secondly, because the Commission was working on a broader project that has been published on 23rd December 2005, that is the «Green Paper on Conflicts of jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings». The Green Paper starts from the importance to introduce a system of exchange of information in order to know decisions on jurisdiction within each member State; moreover, each State should provide the possibility to give up the proceedings in favour of the State that is considered the best place for prosecution[39].

The Green Paper provides three stages: a) exchange of information between authorities about pending proceedings; b) briefing among States involved; c) agreement in order to solve the conflict. The Green Paper also suggests the need to involve the indicted person in this procedure in order to grant defence rights as well as the opportunity to acknowledge to the Court of Justice the competence to decide, in case of conflicts among Member States, which is the State whose judge should decide on the case.

The Green Paper offers a list of criteria to suggest the choice among several Member States: it is similar to the one provided by the Greek Proposal and the Freiburg Group, even as far as regards the lack of hierarchy among different criteria. *Ne bis in idem* principle has little space in the last pages of the Green Paper: the main rationale is the fact that while conflicts of jurisdiction is a new subject and deserves long discussions; moreover *ne bis idem* is a well known principle and several suggestions has been given by the ECJ. In the end, *ne bis in idem* is an *extrema ratio* when the rules on jurisdiction exist and are properly applied.

The outcome of the Green Paper is the 30th November 2009 «Council Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings»[40]. Despite the original aims, the official version of the Framework Decisions is shorter and less detailed than the Drafts: this is also because the Institution's commitment was to approve the Framework Decision before the Lisbon Treaty entered into force, in order not to loose all the work done until that moment. However, the result is that what has been deleted from the articles of the Framework Decision in order to avoid long discussions among Member States is now mentioned in the Premises, that, however, are not binding. Moreover, even if the title of the Framework Decision refers to "prevention" of conflicts, there are no rules on prevention: as a

[39] See doc. COM(2005) 696 def., in http://eur-lex.europa.eu/LexUriServ/site/it/com/2005/com2005_0696en01.pdf; Commission Staff Working Document – Annex to the Green Paper On Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, doc. SEC(2005) 1767, in http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2005:1767:FIN:EN:HTML. For comments, see M. FLETCHER, *The problem of multiple criminal prosecutions: building an effective EU response*, in *Yearbook of European Law*, University of Glasgow, 2007, p. 33 ss.; A. PERDUCA, *Parte il monitoraggio della Commissione sull'applicazione del «ne bis in idem»*, in *Dir. Comunitario e Internazionale* (suppl. a *Guida dir.*), 2006 (2), p. 84 s.; T. RAFARACI, Ne bis in idem *e conflitti di giurisdizione in materia penale nello spazio di libertà, sicurezza e giustizia dell'Unione europea*, cit., p. 637 ss.; ID., *Procedural Safeguards and the Principle of Ne Bis In Idem in the European Union*, in M.C. Bassiouni-V. Militello-H. Satzger (eds.), *European Cooperation in Penal Matters: Issues and Perspectives*, Cedam, Padova, 2008, p. 396 ss.; M. WASMEIER-N. THWAITES, *The development of* ne bis in idem *into a transnational fundamental right in EU law: comments on recent developments*, cit., p. 575 ss.

[40] The Framework Decision 2009/948/JHA is published in *O.J.*, L 328, 15th December 2009, p. 42 ss. For first comments, see C. AMALFITANO, *La risoluzione dei conflitti di giurisdizione in materia penale nell'Unione europea*, cit., p. 1294 ss.; E. CALVANESE-G. DE AMICIS, *La decisione quadro del Consiglio dell'U.E. in tema di prevenzione e risoluzione dei conflitti di giurisdizione*, in *Cass. pen.*, 2010, p. 3599 ss.; M. LUCHTMAN, *Choice of forum in an area of freedom, security and justice*, in *Utrecht Law Rev.*, 2011, p. 74 ss.; S. PEERS, *The proposed Framework Decision on conflict of jurisdiction in criminal proceedings: Manipulating the right to a fair trial?*, in http://www.statewatch.org/analyses/no-76-conflict-of-jurisdiction.pdf.; B. PIATTOLI, *Ne bis in idem, alt ai conflitti Ue. Le linee guida targate Bruxelles*, *Dir. e giust.*, 2006 (20), p. 120 ss.

matter of fact, the Framework Decision provides only rules aimed at resolution of conflicts by means of mandatory exchange of information and consultations among Member States potentially competent to prosecute the committed crime.

The Framework Decision provides that when a competent authority in a Member State has reasonable grounds to believe that parallel criminal proceedings are being conducted in another Member State in respect of the same facts involving the same person, which could lead to the final disposal of those proceedings in two or more Member States, it should contact the competent authority of that other Member State. The question whether or not reasonable grounds exist should be examined solely by the contacting authority. Thus, a competent authority which has been contacted by a competent authority of another Member State should have a general obligation to reply to the request submitted. The contacting authority is encouraged to set a deadline within which the contacted authority should respond, if possible. The Framework Decision also provides a set of minimum information that should be provided by the contacted authority.

The main part of the Framework Decision is represented by the consultation proceedings, which is mandatory. In case it has not been possible to reach consensus, the matter shall, where appropriate, be referred to Eurojust by any competent authority of the Member States involved, but only in the fields in which Eurojust is entitled to decide under Article 4, § 1, of the Eurojust Decision. If during consultations consensus has been reached on the concentration of the criminal proceedings in one Member State, the competent authority of that Member State shall inform the respective competent authority (or authorities) of the other Member State (or States) about the outcome of the proceedings.

However, the Framework Decision lacks of several important provisions. The overall impression is that European Institutions were somehow in a hurry when they decided to pass the final draft instead of waiting the Lisbon Treaty to enter into force. The many issues neglected leave the discussion open and transfers to the States the task to deal with delicate aspects.

First of all, there is no definition of "significant link", that is the link between the parallel proceedings conducted in different States, so that is not possible to control whether it is necessary to start consultation proceedings; secondly, there is no time limit to the proceedings. Both these two aspects are on the States' will.

Thirdly, there is no list of criteria to use when choosing the best place for prosecution: the only reference to criteria used by Eurojust (which are not binding and are the outcome of experience by the European Agency) is mentioned only in the Premises. However, there is no hierarchy and the Council itself suggests the case by case approach, even accepting the mix of two or more criteria: moreover, the Framework Decision doesn't require justification of the grounds related to the choice of the best place for prosecution.

Fourthly, the Framework Decision doesn't provide a definition of *idem factum* or final decision, referring directly to art. 54 CISA in the interpretation given by ECJ.

Moreover, the outcome of the consultation proceedings is not mandatory and the Framework Decision provides no intruments to enforce it.

Finally, the main delicate issue is the involvement of the defendant and his lawyer in the proceedings: the Framework Decision doesn't provide any possibility to contest the final decision on jurisdiction and this results in a breach of defence rights.

At a glimpse, Framework Decision effectiveness is based on the States' will and lacks of provisions on several issues: this could also be the rationale of the present delay in the implementation by the Member States, considered that the dead-line is scheduled on 15th June 2012.

The positive aspect is that the Framework Decision 2009/948/JHA represents an important step towards coordination among Member States equally competent in crime prosecution: nevertheless, it leaves all the unsolved issues to the will of the State.

Thus, further steps in order to assure similar solutions among Member States are needed and they should be provided by a new European law on prevention of conflicts of jurisdiction and not only on instruments to be used when the parallel proceedings already exist in different Member States and the individual rights', as explained above, have already been somehow breached by double or multiple prosecution.

IMPUTABILITY AS A SPECIAL FEATURE OF THE OFFENCE, ACCORDING WITH THE NEW PENAL CODE (LAW NO. 286/2009). CONCEPT. CONTROVERSIES

Versavia BRUTARU*

Abstract

The issue of imputation in penal law generated, through out the history, many controversies. The principal aim of this study is to clarify this concept, both in relation with the Romanian and foreign doctrine, and with the new provisions of the new Penal code, enforced by the Law nr. 286/2009. The new Penal code introduces, a new definition of the offence, containing the concept of "imputability". Our study is based both on the opinions of some foreign authors regarding the concept of imputability, imputation and Romanian authors.According to the Initiator (Ministry of Justice) the main justification for introducing this concept into the offence definition was that "a deed, in order to bring upon criminal responsibility, must not only to correspond with the legal description, to be unjustified, but also, the deed, must be able to be imputable to the offender; that means, the deed could be reproached to the offender. In order to discuss this concept of imputation, there are necessary some premises: the offender must have had the representation of his/her actions or inactions and the lack of any duress (the offender should not have been irresponsible, intoxicated or an under aged). In addition, the offender must have known the illicit character of the deed when committing the offence (the lack of error). Also, the study is structured in tree parts, fist beginning with the need for a definition of the offence, second part refers to the concept of offence in Romanian law; third part (the extended one) is dedicated to the essential features of the offence, with a special view on imputation/imputability.

Keywords: *imputability, imputation, incrimination norm, action/inaction, result, illicit character of the deed*

Introduction

The important innovation of this project is renouncing to the material concept of the offence and orientation toward the formal one. It did not renounce only to the social danger element, but also to the definition of the purpose of penal law.

Conceiving, in this way, the essential features of the offence represent a novelty also in relation with the new Penal code adopted in 2004, a Penal code that defined the offence, as "a deed provided by the penal law, that presents a social danger and it is committed with guilt". This new Penal code, although regulated the matter of justified causes (Chapter II, articles 21-25) didn't considered necessary to mention that the lack of these justified causes could represent an essential feature of the offence; error corrected by the second new Penal code, which not only renounces to the social danger as an essential feature of the offence, but introduces, amongst the essential

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features of the offence the "unjustified" character of the deed (meaning the lack of justified causes) and also the *imputable* character of the deed.

According to the Ministry of Justice the main justification for introducing this concept within the offence definition was that "a deed, in order to bring upon criminal responsibility, must not only correspond with the legal description, to be unjustified, but also, the deed, must be able to be imputable to the offender; that means, the deed could be reproached to the offender.

The concept of imputability (or imputation, it is still not clear what term should we use when talking about this essential feature of the offence) is based on some necessary premises: the offender must have had the representation of his/her actions or inactions and the lack of any duress (the offender should not have been irresponsible, intoxicated or an under aged). In addition, the offender must have known the illicit character of the deed when committing the offence (the lack of error).

As arguable as this is, the requirement that the act to be imputable to a person, the criminal doctrine has long ago emphasized the equivocal character of the concept of imputability. It may have the meaning of **causal relation** (a crime act is imputable to X because it is the effect of his/her action) as well as the meaning of **guilt** (a crime act is imputable to X because he/she committed it guiltily). In both cases, the concept of being imputable appears as useless because both the relation of causality and guilt are implicitly emphasized or explained by the other characteristics[1].

A criminal act simultaneously implies an action or an omission, their immediate consequences and implicitly the relationship between the external manifestation and the immediate consequence, thus, **guilt appears explicitly as a distinct concept** within the formulation of the essential characteristics of a crime.

I. The Necessity of an Offence Definition

In the Romanian Penal code in force now the essential features of the offence were influenced by the Italian Penal code of 1930 (Codice Rocco)[2].

Ministry of Justice, namend further as Initiator, in the statement of reasons[3] highlighted the following: „having regard to the tradition established by the Penal code in force now, by introducing an offence definition within the Code, although in the majority of the foreign legislations such a tradition doesn't exist, being considered as falling within the doctrine jurisdiction, decided to maintain this regulatory model and formulate the definition of the ofence in the 15th article". So, this definition took into account both interbelic Romanian criminal law tradition and European regulations that establish a definition, an example being Profesor T. Pop. Since 1923, he defined the offence as "an antijuridical deed, imputable and sanctioned by the penal law". Exactly this definition and a provision of the Greek Penal code (the 14th article) was the justification of the Initiator in choosing these essential features of the offence in the new Penal code, including the "imputability" feature.

The so called tradition of a legislative definition, specific to the soviet legislations, was introduced within the Romanian legislation not by the Penal code adopted in 1968, but by a provision introduced in the Penal code adopted in 1936, through a Decree of the Presidium of the Grand National Asembly of People's Republic of Romania, no. 187/ 30th of april 1949. The article 1,

[1] G.Antoniu, *Critical remarks on the new Penal Code*, Analele Universității "Constantin Brâncuşi", Târgu Jiu, Seria Ştiinţe Juridice, Nr. 2/2010, p. 10-11

[2] Tudor Avrigeanu, *O teorie pură a dreptului penal*? în Studii de Drept Românesc nr. 1-2/2008, p. 87

[3] www.just.ro

which defined the offence, is somehow different as it was provided in the article 17 of the enforced Penal code, but it has some similarities with the definition prposed by the Initiator, without any reference to guilt.

The issue of a legal definition that specifies the content of a concept represents a legal technique method[4]. These legal methods are useful for an authentic interpretation of the law, with a previous setting of the content of a specific concept (notion).[5] On the other hand, it shouldn't be overlooked the fact that a lack of a legal definition, or a too extended definition, that exceeds both in quality and in quantity the necessity and utility of the definition, would be more a dizadvantage to both the practitioners and to the science of penal law. Therefore it is necessary an equilibrium between the law and the interpretation[6].

The majority of the doctrines tried to show the advantajes and disadvantages of the legal definitions. We remark here a comparison between the western law systems and the socialist ones. The socialist doctrine promoted a material concept of the offence (it established in what material conditions the punishment would be applied in case of disobeying the law or violation of protected values). On the other hand, the same socialist doctrine, introduced the forbiddance of using the analogy[7]. Forbidding using the analogy is not regulated *expressis verbis* in the enforced Penal code. The dominant theory starts from the idea that forbidding of using the analogy it is provided by the article 2 of the Penal code: "The law provides which deeds are offences, the punishments applied to the offenders and the possible measures that could be applied in case of committing these offences". But, this was not always so. There was a period during which using the analogy was permitted, 1949-1956. After C. Roxin[8] the material concept is extended beyond any codified penal law system, raisisng the problem of the objective criteria of the criminal behavior.

The specialized doctrine of the western countries has given great importance to the concept of offence; but not all of them adopted a definition, allowing the doctrine to do it.

Both the Romanian Penal code in force now and the new Penal Code (Law no. 286/2009) have chosen in favor of keeping the offence definition, with different arguments: a definition could help in making a differentiation between the domain of penal law and the extrapenal laws, such as: administrative law, contravention law, etc.; a definition of the offence would reflect the specific principles of the penal law (the principle of the social danger, the legality principle, the principle of penal responsibility); another argument was continuing the tradition in our country. A definition could constitute a guaranty for the recipients of the penal law that they could not be held criminally liable unless the concrete deed correspond with the essential features that penal law characterized the offence.

II. The Concept of Offence. Short Considerations

Sanctioning of a concrete deed is not possible unless the legislator incriminates it, meaning, the legislator describes the deed in an incrimination norm, by that proclaiming it as inconvenient for the social group and therefore liable to be punished. From the description of the deed and the

[4] J. Rinceanu, *Analiza trăsăturilor esențiale ale infracțiunii în legea penală română*, R.D.P. nr. 1/2010, p. 56

[5] Hans Lüttger, *Genese und Probleme einer Legaldefinition dargestellt am Beispiel des Schwangerschaftsabbruchs*, în Hamm Festschrift für Werner Sarsdedt zum 70, Berlin/New York, 1981, p. 169; W. Frisch, *Le definizioni legali nel diritto penale tedesco*, citat de Alberto Cadoppi : *Omnis definition in iure periculosa? Il problema delle definizioni legali nel diritto penale*, Padova, 1996, p. 495

[6] Alberto Cadoppi, *Il problema delle definizioni legali nel diritto penale*, Padova, 1996, p. 18

[7] J. Rinceanu, *Analiza trăsăturilor esențiale ale infracțiunii în legea penală română*, R.D.P. nr. 1/2010, p. 58

[8] C. Roxin, *Strafrecht Allgemeiner Teil*, Band I, Grundlagen – Der Aufbrau der Verbrechenenslehre 4, 2006 § 2 A

punishment that could be applied, we deduce the *precept of law*, meaning the command, disposition of the legislator to forbid or to order a certain behavior. The incrimination norm it is also called the *legal model*, the tipical hypothesis in relation with concrete deed, that committed afterwards, should be comparing to. If the concrete features will coincide with those prescribed by the penal norm it means that the precept was violated, as the legislator wish, and the deed will be chatacterized as an offence and susceptible to be punished, as the law prescribes.

In such a vision, the offence appears as being composed from a *concrete action*, inconvenient to the social order, *an incrimination norm* that describes it and to wich it relates, and, finally, by *a concordance* between the features of the concrete deed and those described in the incrimination norm.

When we affirm that the offence is a concrete deed that violated the incrimination norm (penal norm), we only say a half of truth. The features of the concrete deed doesn't contradict the description of the norm, they coincide with the description, but they are in opposition with the precept (as a component part of the norm structure incrimination, precept that is not directly expressed, but deduced from the norm), and they contradict the disposition given by the legislator, disposition that may be an obligation to have a certain conduite or, on contrary, the obligation to refrain from certain acts, conduites.

The same, we don't express a complete truth when we affirm that the offence is the deed to which the juridical order attributes as consequence a punishment, because the punishment applies to a concrete deed and only if the freatures of the concrete deed correspond to the incrimination norm and the punishment is provided by the law only as a consequence of this concordance. So, the offence could not not be conceived only as a concrete deed which features, if they are identical with the ones described by the norm, will entail the punishment provided by the law.

We do not express a complete truth even when we use the concept "abstract offence" instead of "incrimination" because the two concepts do not substitute each other. The abstract offence represents a gereralization of the concrete deeds committed after the incrimination. The incrimination is prior to the concrete deed, and the concrete deed, in order to be considered an offence has to be correlated with the incrimination norm. Neither does the incriminated deed is identical to the offence because the incriminated deed is the deed described by the incrimination norm, which is the legal frame of the offence. The offence is the concrete deed actually committed. „The concrete offence" wrote Prof. Dongoroz, "it is only the fact commited in the conditions provided by the abstract description of the offence".

If we conceive the offence as having the content showed by the incrimination norm, we are poining out only the *formal aspect* of the offence; we underline only the exterior side that characterizes the offence (the contradiction of the concrete deed with the precept provided by the incrimination norm).

In a *formal conception*, the offence exists only between the bounderies within an incriminated deed. In other words, the penal norm "creates" the offence, the description of the deed in an incrimination norm is the basic condition of its existence and it is the main source of the offence (*creatio criminis sub specie juris*). „The offence is a fact incriminated by law" wroted Prof. Dongoroz, "any other addition to the offence definition is useless". The formal definition of the offence reveals only the juridical appearance (the formal side) of the penal deed, and not the natural containt (the substantial side).

The penal law enforced now did not take the stand of the formal conception of the offence, because, by introducing the social danger amongst the essential features of the offence, adopted a substantial conception on the offence.

In a *substantial conception*, decisive in characterizing the concrete deed as an offence is not the legal frame, the incrimination norm, but realities, substantial processes that determined the

legislator to incriminate a deed and to give it a socially dangerous character, meaning, unconvenient in relation with the society's interests.

III. The Essential Features of the Offence. Special view on the "Imputability" as a Special Feature of the Offence

The new Penal code in relation with the enforced law now. The recent Penal code adopted by taking responsibility by the Govern defines in a new way the offence. So, the new definition abandons the idea that the offence is the deed that presents a social danger, meeting the doctrine requirements to renounce to the social danger as an essential feature of the offence. Instead of this essential feature it is mentioned another one, namely, the deed provided by the penal law, granting it the deserved priority. This essential feature was the last one provided by the enforced now penal code. Further, the new definition mentions guilt as the second essential and substantial feature, systemazided, naturally, after the feature regarding the provision in the penal law, fulfilling the requirements of the jurisprudence and doctrine. To these features, the new definition adds another two essential features of the offence: the unjustified and imputable character of the deed.

By "provision in the penal law", we see, based on the german doctrine[9], the objective side (action, immediate consequence, causality, offender, victim) and the subjective side of the incrimination content (forms of guilt: intention, praeterintention and fault).

The unjustified deed is excluded by the existence of a justified cause. The justified causes regulated in the articles 18-22 of the new Penal code (self defence, state of necessity, exercising a right or fulfilling a legal obligation, victim's consent) shows the inspiration from the Italian Penal code in force now[10].

The Initiator, with the reason that this notion has a double acception, excluded initially the guilt, as an essential feature of the offence. The two acceptions are: a) as a secondary element of the subjective side of the offence representing as the intention, praeterintention and fault; b) as general feature of the offence. In the first acception through guilt it was analized the concordance of the committed the concrete deed with the model described by the legislator (tipicity). As for the second acception, it was considered preferable by the Initiator, the aknoledgement of a distinct concept – "imputability" – in order to define the guilt, the main reason being that, according to the normative theory, the guilt, as an essential feature of the offence, is regarded as a reproach, as an imputation made to the offender because he actioned otherwhise that law required, although, he had a clear representation of his deed and a complete liberty in the manifestation of his will. According to the statement of reasons[11], imputability is not confused with the secondary element of the subjective side.

According to the statement of reasons of the draft, this definition was taken from the definition of the offence made by T. Pop even since 1923, but, it must not be overlooked the fact that the Initiator, initially reonounced to define the guilt as an essential feature of the offence, based on the reason that Prof. T. Pop also omitted that. But, T. Pop defines the offence as "antijuridical deed, culpable, with a penal sanction"[12], and imputability and culpability do not have the same semnification – "imputability is the condition for culpability, and the culpability is the

[9] C. Roxin, *Derecho penal, parte general, vol. I*, Ed. Civitas, Madrid 1999, (traducere germană), p. 370

[10] Il Codice penale, art. 50 – Difesa legitima, stato di necessita, consenso dell'avente diritto, esercizio di uno diritto o adempiminento di un dovere.

[11] www.just.ro

[12] T. Pop, *Drept penal comparat*, Cluj, Ardealul, 1923, p. 189

condition of the criminal responsibility"[13]. **So, imputability is not an attribute of the deed, but a condition or capacity of the offende**r[14] (accordingly to N. Buzea[15], imputable is the person capable of a normal conduct, or to be influenced, naturally, by the reasons of his actions).

The Initiator also specified another reason that determined including the imputability amongst the essential features of the offence. The reason was the text that defines the offence in the Greek Penal code: „the offence is an antijuridical deed, commited with guilt, provided by the penal law and punishable by law". Prof. Jean Pradel, in his writing „Droit pénal compare", translates the definition that we find in the Greek penal code in the folowing way: „*l'infraction est une acte injustifié, imputable a son auteur et puni par la loi"*. This definition of Prof. Pradel seems to fit better with the definition of the offence proposed by the Initiator, the imputability is understood as a psichological element of the offence, element that is not confused with guilt.

We observe a desire of the Initiator, in the statement of reasons, to shift the approaching of guilt as an essential feature of the offence from the psychological theory toward the normative theory. According to this theory, guilt, as a general feature of the offence, is being seen as a reproach, as an imputation made to the offender because he actioned otherwhise that law required, although, he had a clear representation of his deed and a complete liberty in the manifestation of his will, as we mentioned before.

In Romanian doctrine prof. Tanoviceanu[16] introduces the concept of "imputability", in the context of responsibility, when discussing the free will. "The laws that govern the society do not annihilate the individual freedom"[17] (in the same way: A. Prins, R. Garraud). Prof. Tanoviceanu does not agree with the free will theory, stating that the will of an individual is a result of three forces: heredity, education and environment. So, if an individual disobeys the laws he must considered mentally ill. In this theory, a partial or diminished responsibility is not admitted[18]. According to this theory, neither the social responsibility is to be admitted[19]. According to E. Ferri, "the deeds of an individual can be imputed to him (are imputable a.n.) and, as a result, he is responsible for those deeds because he lives in society". The same author speaks about a *material imputability*, when a person is the author of the deed, and a *juridical and social imputability* because the person must support the consequences of the deed that he committed. An interesting theory, but with flaws. A mentally disturbed person is not moral responsible but is still socially responsibly because he lives in society? It seems, according to Tanoviceanu, that Ferri is making confusion between one of the essential conditions of the offence and punishment and the actual fundament of the punishment.

So, a perfect healthy person is to be punishable if the conditions are fulfilled. A mentally ill person, with a diminished capacity is to be evaluated by specialists, to determine whether a punishment must be applied, or another form of measure (a medical one, for example).

From the point of view of criminal doctrines, the idea of diminished responsibility is unsound both within the **free will doctrine** and in **determinism doctrine.** The free will doctrine supports itself on the idea that the free will is not determined. It is free. Admitting the diminished

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[13] T. Pop, *Drept penal comparat*, Cluj, Ardealul, 1923, p. 189; J. Pradel, *La reforme du droit penal estonien dans la contexte des reformes penales survenues en Europe etspecialement en Europe de l'Est*, Juridica International VIII/2003, p. 47

[14] G. Levasseur*, L'imputabilite en droit penal*, RSC, Paris, 1983, p. 13 şi urm.

[15] N. Buzea*, Infracţiunea penală şi culpabilitatea*, Alba Iulia, 1944, contrar, Garraud, *Traite Theorique et practique du droit penal francais,* I, Paris, 1913

[16] I. Tanoviceanu, *Curs de drept penal*, vol. I, Bucuresti, Atelierele Grafice Socec & Co., Societate Anonima, 1912, p. 114 si urm.

[17] Quetelet, *Essai sur l'homme et le developpement de ses facultes*, I, Paris, 1835

[18] E. Faguet, *Et l'horreur des responsabilites*, Paris, 1911, p. 83, citat de I. Tanoviceanu

[19] E. Ferri, *La sociologie criminelle*, edtia a II-a, trad. franceza, Paris, 1905, p. 400

responsibility means recognizing implicitly that the will is not perfectly free, but determined by external causes. An illogical situation. A diminished responsibility is also impossible within the determinism doctrine because whatever the determinant causes are, no one could be held responsible (for these causes). So, is either responsible or irresponsible. *Tertium non datur*. Prof. Tanoviceanu[20] proposes a solution, for the ones with diminished responsibility, namely, those with diminished responsibility to be assimilated with the irresponsible ones. The interests of justice are better served in this way.

According to Prof. Dongoroz[21], imputability is a juridical situation. In this case, the person is attributed with a criminal deed and with criminal intent. Therefore, according to prof. Dongoroz, guilt (culpability) appears as a condition of imputability.

The absence of culpability means automatically a legitimacy of the deed in virtue of the constraint exercised by the "laws of nature" that is granting the author with "a right to commit the deed"[22].

According to Prof. Dongoroz : "ascertain the reality of a criminal offence requires a correspondence between deed and the description provided by a statutory provision. The illegal result must have had as cause one or more voluntary acts (*imputatio facti*) and the voluntary act must be accompanied by intention or neglijence (*imputatio iuris*)"[23].

The subject of criminal law is configured by Dongoroz[24] as subject to an obligation to obey the laws, who becomes, through the offence, subject of the subsequent obligation to suffer the punishment provided by the law that was broken, except the situation when he "justifies himself".

Prof. H. Welzel defines the guilt as a personal reproach (not upon the action/inaction but upon forming the will not to refrain from the antijuridical action, although there was the possibility of refraining from the offender). We may say that the reproach is addressed, in fact, to the behavior of an individual, understood as an exteriorization of a subjective will. So, that member of the society who commits a reprobable deed from the ethico-social point of view is "culpable and therefore he shall be reproached, meaning, he is held responsible[25]". At the foundation of the imputation theory is standing in fact the divergence between the actually will of the offender and the will of law of the society. The relation between the action and the produced result will be resolved based on the objective imputation theory of the result[26] (the German, Spanish, Portughese Swiss doctrines). This theory helps to delimitate, at an objective level, the situations when a certain result may be imputed to the offender. In Romanian doctrine,[27] a practical applying of this theory implies two stages: first consists in verifying if the action created a relevant danger for the protected value, from the juridical point of view; the second stage consists in verifying if the produced result is a consequence of the state of danger created by the action. This form of imputation fits the best to the commisive offences of result[28]. In the case of the offences of real danger, the imputation is decided based only on the first stage of the analisys because in these cases it must be demonstrated that the action or inaction of the offender created effectively the state of danger required by the incrimination norm.

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[20] I. Tanoviceanu, *Tratat de drept si procedura penala*, ed. a-II a, Vol. I, Curierul Judiciar, Bucuresti, 1924

[21] V. Dongoroz, *Tratat, Drept penal*, reedit. Editiei 1939, Asociatia Romana de Stiinte Penale, Bucuresti, 2000, p. 334 si urm.

[22] Idem, p. 335

[23] Idem, p. 334

[24] Idem p. 335

[25] T. Pop, *Drept penal comparat*, vol. II, Orăştie, 1926, p. 346

[26] F. Streteanu, *Tratat de drept penal, parta generală*, vol. I, Ed. C.H. Beck, 2008, p. 419

[27] D. Niţu, *Teoria riscului în dreptul penal*, R.D.P. nr. 1/2005, p. 109

[28] G. Fiandaca, *Riflessioni problematiche tra causalita e imputazione oggetiva*, L'indice penale nr. 3/2006, p. 951 şi urm

The behavior of the offender that determined the result, in order to be the basis for imputation the result, must be a dangerous one, meaning, the result was likely to create a probability in causing a damage or endanger the protected value. Usually, the dangerous character of the behavior is decided using the adequate cause theory[29]. The behavior is dangerous when it is adequate in producing the tipical result, in other words, when it leads to the significant growth of the possibility in producing the result. The possibility of producing the result will be decided taking into account all known circumstances by a prudent individual at the moment of the action and also other knowledge that the author had at the moment of commiting the offence.

According to the foreign doctrine,[30] it is suffiecient an aggravation of a preexistent risk. The actions that intensify a state of danger already existent become relevant for the imputation of the result. In the same way, it is imputable the result because of a delay, for the example, delaying the rescue of the victim.

In the case of omissive offences, when the danger is preexistent to the inaction (the danger may even not be a result of a behavior, for example, natural causes) first, it will be verified if the offender diminished the danger, as required by his obligation. According to Prof. Streteanu[31] the omission of diminishing the existent risk would be equivalent with the "the risk is created on the grounds of the objective imputation".

The result cannot be imputed to the offender if that is the result of some authorized activities, the so-called *permitted risk*[32]. It is the case of the offences commited without guilt (for example, the road traffic, when the result is injuring a person that was crossing the street in a forbidden place; in this case, the result couldn't be imputed to the offender, as long as he respected all restrictions imposed by the law: speed limit, granting priority for the pedestrians) because there is no guilt, although the objective deed is tipical (corresponds with the incrimination norm). According to the objective imputation theory, we are not in the presence of a tipical offence because it lacks the condition of imputation the risk at the objective level. In case of *inexistent risk,*[33] the imputation of the result is not possible, after some authors[34], under no circumstances. So, in the case of permitted risk, the imputation will be excluded only in the hypothesis in which the offender actioned respecting all legal norms imposed by the law to that respectively (or particularly) activity.

In case of *diminished risk*, the imputation will be excluded when the offender, by his action, is diminishing a danger already created for the protected social value, imputation having as premises creating or aggravating a risk[35]. For example, if the victim is pushed down in order to avoid a car accident and the victim suffers small scratches, the author will not be held responsible, being even excluded the tipicity of the deed because he acted in state of necessity. But, it is necessary to be a causality link between the initial danger and the result, true, less harmful for the victim.

So, if the tipical result is a consequence of the state of danger created by the action, that result could be imputed to the offender.

The problem of the deviated risk. This risk exists when the author, althotgh he created a danger to the protected value, the result does not appear to be because of materialization of this

[29] F. Streteanu, *Tratat de drept penal, parta generală*, vol. I, Ed. C.H. Beck, 2008, p. 420
[30] F. Hurdado Pozo, *Droit penal, partie generale* II, Ed. Schulthess, Zurich, 1997, p. 50
[31] F. Streteanu, *Tratat de drept penal, parta generală*, vol. I, Ed. C.H. Beck, 2008, p. 420
[32] C. Roxin, *Derecho penal, parte general, vol. I*, Ed. Civitas, Madrid 1999, (traducere germană), p. 372
[33] E. Morselli, *Note critiche sulla teoria dell'imputazione oggetiva*, L'indice penale, nr. 1/2000, p. 24 şi urm.
[34] Idem
[35] H. Jescheck, T. Weigend, *Tratado de derecho penal. Parte general*, Ed. Gromares, Granada, 2002, p. 308

danger, but because of an external fact, a random fact[36]. If, for example, the offender wanted a specific result and acted with the intention for that result to be produced (the death of the victim), but, because of random causes the desired result did produced, but as a consequence of external factors, the result, although wanted by the offender, could not be imputed to him because there is no direct causal link. The result is not materialized in a state of danger created directly by the action of the offender. In the example mentioned above, the offender wil be held responsible only for an attempt. The things are different when the action of the offender is directed to obtain a certain result but this result produces in other modality that the offender wanted. For example, if the victim is stabbed but the death produces because of a hart attack, not because of the stabbing, the result will be imputed to the offender because his unique action created both danger states[37] and the result is the consequence of one of the created danger states.

Regarding to the *culpable risk*, the situation when the subsequent fault of the victim contributed decisively in producing the result, the imputation cannot be applied. The subsequent behavior of the victim, with fault (not guilt) cannot be imputed to the offender. In the same way is the Spanish doctrine[38]. But the French jurisprudence remains faithful to the equivalent conditions theory. According to this theory, any previous action or inaction is a cause without which the result would not be produced (any *sine qua non* condition). Without developing further this theory and its shortcomings, we mention only the fact that it is still used further on by the jurisprudence, including the Romanian jurisprudence. But, there are efforts made in order to determine the structure of the causality relation. Regarding the culpable risk and the culpable action of the victim we must mention the hypothesis when, although the result was produced because of the culpable action of the victim, the result could be imputed to the offender because the victim was forced to use the action that led to the result. The same, the result cannot be imputed to the offender if there is no **direct** causality link between the deed and the neglijent attitude of the victim.

Regarding to the *equal risk*[39], the imputation will be excluded when it is determined that the result would have certainly produced, even in the hypothesis of a correct, licit conduit. In the german doctrine,[40] this solution was nuanced in exemplifying, theoretically, some situations that could appear. So, the imputation is possible even without an action or inaction of the author because there is a possibility or a probability of a consequence as an effect of another person action. Also, the imputation is possible when, in the absence of the author's action, the result would have be produced, but in another form (for example, shooting a person that is very ill is imputed to the offender even if its proved afterwards, based on a forensic medical expertise, that the victim would have died, certainly, at a latter moment). In case of omisive offence, the result is imputable to the offender if the action to which he was legally obligated to do would have led in avoiding the harmful result.

In case of *unprotected risk,*[41] the result will not be imputed to the offender because this result is not a part of the cathegory of results that violated norm protected. For example[42], the result cannot be imputed to the driver of a car who, passing the red light, injuries a pedestrian. The purpose of the norm that impose stopping at the red light has as main goal preventing the collision with another vehicles. Even if the victim was reckless in crossing the street, the result will not be

[36] C. Roxin, *op. cit*., p. 373
[37] F. Streteanu, *op. cit*., p. 424
[38] E. Bacigalupo, *Principios de derecho penal, parte general*, Ed. Akal, Madrid, 1998, p. 197
[39] H. Jescheck, T. Weigend, *op. cit*., p. 309
[40] C. Roxin, *op. cit*., p. 368 şi urm.
[41] F. Streteanu, *op. cit*., p. 427
[42] Idem, p. 427

imputable to the driver, according to the spenish, german doctrine[43]. Although, at the first sight, this theory may be just, in our opinion, it must not be overlooked the causality link, even it is not a **direct** one. Theoretically, the produced result could be imputed to the author. The fact that the produced result is not a part of the cathegory of results protected by the violated norm, it does not automatically lead to an exculpation of the author. The injury of the pedestrian was due to the lack of diligence of the author, who, passing the red light, produced a result. Indeed, not the result protected by the violated norm, but another result occurred (injuring a pedestrian, not a collision with another vehicle). So, in our opinion it shouldn't be excluded, *de plano*, an eventual imputation of the driver. An example is given by the Romanian doctrine[44]. The hypothesis when, near a school it is a speed limitation in order to protect the children. The offender, exceeding the speed limit, injuries a mature person. Although the protected result refers to the protection of the children, the speed limitation has a general application, so that any person located in that area is protected by the general provision.

Other controversies. The function of the legal authorities is not to know and describe law, but to prescribe or permit human behavior, making the law. A rule of law, is, for instance, the statement that, if a man has committed a crime, a punishment ought to be inflicted upon him. But the connection described by the rule of law has a different meaning from that of causality. As professor H. Kelsen[45] says "the criminal delict is not connected with the punishment, and that the civil delict is not connected with the civil execution, as a cause is connected with its effect".

Thus, the connection between cause and effect is independent of the act of an individual. However, the connection between a delict and a legal sanction is established by an act or acts of the individuals.

So, the statement that an individual is "*responsible*" means that a sanction can be inflicted upon him if he commits a crime. The idea of imputation as a specific connection of the crime with the sanction is implied by a juridical judgment that an individual is, or is not legally responsible for his behavior. The cause is responsible for the effect; the effect *is imputed* to the cause, just as the punishment is imputed to the crime.[46]

Nevertheless, there is necessary to make a distinction between *causality* and *imputation*. The difference between causality and imputation is that the relation between the cause and effect is independent of a human act. Another difference may be that each concrete cause must be considered as the effect of another cause, and so on. Causality represents an infinite numbers of links. The line of imputation has not, in comparison with the causality, an infinite number of links. A definite consequence is imputed to a definite condition. Causality has no end point. Imputation does.

The subjective imputation seems to be more as a specified personal imputation. S. Pufendorf (a representative voice of the *natural law* theory) was the first one to introduce into jurisprudence the concept of *imputation* (the deed of the agent is to be imputed if the deed is a free action and if the deed belongs to the agent *ad ipsum proprie partinens).* Only in this case the action becomes *causa moralis* of the result (result) and could determine the criminal liability.

The entire penal system tends to be elaborate upon the subjective imputation, having as premises the free will of the person; the person could held be responsible only for the consequences that are the result of the free will[47].

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[43] F. Hurdado Pozo, op. cit., vol. II, p. 56; H. Jescheck, T. Weigend, op. cit., p. 308

[44] F. Streteanu, *op. cit*., p. 428

[45] Hans Kelsen, *Causality and imputation*, Ethics, University of Chicago Press, vol. 61, 1950, p. 1-11

[46] Idem, p. 9

[47] Hans Henrich Jescheck, *Lehbruch des Strafrechts*, Allgemeiner Teil, vierte Auflasge, Berlin, Duncker und Humblot, 1988, p. 377

According to Wolff[48] "*from the application of a law to a deed it is clearly indicated that the deed is an event of such nature that it can be imputed*". This assertion assumes that there is a difference between the application of the law to an event and imputation of that event. So, applying the law to an event means also the imputing the event as a deed.

On the other side, Kant's definition on imputation states that imputed events are seen as deeds, (as something which is done), deeds that are traced to a person as their author, with the main characteristic of a free cause.

In order to clarify the difference between the subjective imputation and objective imputation, we need to mention a theory traced back to the first half of the twentieth century. The theory refers to the objective imputation and it is divided, mainly, into separate parts: a) not permitted behavior; b) relationship between the non-permitted behavior and the result[49]. Today there is unanimity in penal dogma is that verification of a causal link between action and result is not sufficient to attribute this result to the author of the action.

The penal doctrine makes another important distinction regarding the concept of imputation. According to J. Daries, cited by J. Hrushka[50]: "first level of imputation is the declaration that someone is the author of the deed (*imputation facti*, n.n.); on the other hand, the second level of imputation is the judgment as to the merit of the deed (*imputation iuris, aplicatio legis ad fatum)".*

The first level of imputation states that the event in question, to which the law is to be applied, is a deed (a commission or omission of a human act). After the application of the law (first level of imputation) we can bring into question the second level of the imputation. For example, in certain cases of duress or intoxication, the second level of imputation is not applied. Although a person is certainly the author of a deed (*imputatio facti*), he cannot be held responsible, in case, for example, of intoxication. So, *imputatio facti* is a sum between *imputatio moralis,* that establishes the connection of the natural process into which a person is causally involved with the will of this person regarded as a free rational person, and *imputatio physica* (causality). In conclusion, every application of law must be preceded by the *imputatio facti.* The second level of imputation depends on the application of the law in case of certain results are reached.

Conclusion

According to the Ministry of Justice the main justification for introducing this concept in the offence definition was that "a deed, in order to bring upon criminal responsibility, must not only to correspond with the legal description, to be unjustified, but also, the deed, must be able to be imputable to the offender; that means, the deed could be reproached to the offender.

The concept of imputation, it is still not clear what term should we use when talking about this essential feature of the offence, is based on some necessary premises: the offender must have had the representation of his/her actions or inactions and the lack of any duress (the offender should not have been irresponsible, intoxicated or an under aged). In addition, the offender must have known the illicit character of the deed when committing the offence (the lack of error).

As arguable, as this is the requirement that the crime act be imputable to a person the criminal doctrine has long ago emphasized the equivocal character of the concept of imputability. It may have the meaning of causal relation (a crime act is imputable to X because it is the effect of his/her action) as well as the meaning of guilt (a crime act is imputable to X because he/she committed it

[48] C. Wolff, *Philosophia practica universalis*, Pars prima, Francofurti et Lipsiae, 1738 ; (second edition 1971)
[49] Gunther Jakobs, *La imputation objectiva en el derecho penal*, Editorial Ad Hoc, Argentina, 1996, p. 14-25
[50] Joachim Hrushka*, Imputation*, BYU L. Rev, 1986, p. 679

guiltily). In both cases, the concept of being imputable appears as useless because both the relation of causality and guilt are implicitly emphasized or explained by the other characteristics[51].

A criminal act simultaneously implies an action or an omission, their immediate consequences and implicitly the relationship between the external manifestation and the immediate consequence, and guilt appears explicitly as a distinct concept within the formulation of the essential characteristics of a crime.

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[51] G.Antoniu, *Critical remarks on the new Penal Code*, Analele Universității "Constantin Brâncuşi", Târgu Jiu, Seria Ştiințe Juridice, Nr. 2/2010, p. 10-11

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GENERAL PRINCIPLES GUIDING THE INCRIMINATING ACTIVITY OF THE EUROPEAN LEGISLATURE

Lamya – Diana AL-KAWADRI*

Abstract

As the title itself reveals, the purpose of this study is to identify the general principles guiding the incriminating activity incumbent upon the European legislature. Thus, this study started in the first part to analyze the principle of legality which is found not only at the basis of the law itself – lato sensu – and specific to each member state of the European Union (but not exclusively), and which represents the fundamental principle of the European law also. Also, we shall also present a few important characteristics of other principles such as, subsidiarity and proportionality, ultima ratio principle, principle of guilt. Moreover, in the second part of this study we tried to analyze some procedural aspects regarding the conferral of powers and the jurisdiction in criminal matters and the duty to cooperate in good faith as tools that the European legislature has used and is using in its standardization activity and, if we may say so, even in the development of a common legislation to all member states of the European Union, especially in criminal matters. Furthermore, in its' third part, this study highlights the main changes brought by the Treaty of Lisbon regarding first and foremost the shared competence and also the new instruments used by the main Community actors.

Keywords: *european criminal law, principles, incrimination, sanctions, effects.*

Introduction

Some authors of specialized literature reveal and consider that any *criminal law theory* is made up of a set of ideas based upon which any criminal law can be clearly identified and consequently explained[1]. Thus, it is highlighted that an important role held by the theory of the criminal law is to systematize and clarify the structure, the actual meaning and the ethical sense of the criminal law[2].

As it has been noted by some criminal law scholars from ten European countries in a Manifesto on European Criminal Policy[3], the principles that we intend to present below are the *major contributor to and the motor of European civilization and current integration.*

Each of the principles presented below has it's own important role in EU law and criminal law doctrine respectively, starting with the legality principle as a part of the rule of law, and finishing with the conferral of powers and jurisdiction issues.

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[1] Jerome Hall, General Principles of Criminal Law, second edition, the Bobbs-Merrill Company; Indianapolis, New York, 1960, p.1.

[2] Idem, p.26.

[3] http://www.crimpol.eu.

I. Some aspects regarding the main principles of EU law.

1. Legality principle

In order to discuss the theory of law in general terms and not only the theory of the criminal law – be it national or European -, it is necessary to have some guiding principles able to build the foundation of this theory that shall be further used in the actual enforcement of the (criminal) law. The main principle with a crucial significance is the well-known and widely accepted principle of the lawfulness (known in the criminal law as – nulla poena sine lege, the Latin name bearing no connection with the time when this principle was developed). This principle is rooted in the *Declaration of the Rights of Man and of the Citizen* of 1789 according to the ideologies of the French revolutionaries. Article VIII of it provides that "no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offence". Because of the large number of infringements against this principle, the *Universal Declaration of Human Rights* adopted by the *United Nations General Assembly* on 10 December 1948 deemed necessary to reaffirm this principle. Thus, article III, par. 2 of this Declaration provides that "no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed". Later on, the *International Covenant on Civil and Political Rights* of 16 December 1966 provided in article 15 that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed".

We can state with certainty that, regarded lato sensu, this principle applies in one way or another in all the decisions of the Court if Justice of the European Union as a starting point, if we may call it so. We base our opinion on the fact that the Court of Justice in Luxembourg analyses first of all whether the case presented for judgment refers to a provision regarding mainly the European Union and whether it is the subject of one of the norms of the European law. Moreover, if the case is on trial at a national court, the national proceedings may and sometimes must be suspended in order to give precedence to the European court.

2. Subsidiarity principle

As shown in the Treaty on the European Union, under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[4]

As the specialized literature highlights this principle started from a procedural dimension as the dominant perspective[5]. With the Lisbon Treaty, the national parliaments are more involved in the monitoring process of subisdiarity in imposing an obligation to consult widely before proposing legislative acts[6]. More that that, as art. 4 states *the Commission must send all legislative proposals to the national parliaments at the same time as to the Union institutions and the time limit for doing so has been increased from six to eight weeks.* This principle relates with

[4] Article 5, Treaty on the European Union.

[5] N. W. Barber, The Limited Modesty of Subsidiarity, European Law Journal, Vol. 11, No. 3, May 2005, pp. 308-325.

[6] Ester Herlin□Karnell, *What Principles Drive (or Should Drive) European Criminal Law?*, German Law Journal Vol. 11 No. 10, p.1123.

the subsidiarity from the criminal law area because criminal law has its own principle of subsidiarity embedded in the ultima ratio concept.[7] Article 69 TFEU stipulates that the National Parliaments shall ensure that subsidiarity and proportionality are respected when proposing legislation in the criminal law area. So, it can be said that the Lisbon Treaty appears unclear as regards a minimalism approach to the use of criminal law (as an *ultima ratio)*.[8] Even being considered one of the key constitutional principles that serve to set the character of the EU, this principle has had little obvious effect.[9]

3. Proportionality principle

The general principle of proportionality is provided for in article 5(4) of the Treaty on the European Union. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The proportionality principle is considered a „better tool than the subsidiarity" because it concerns the balancing of interests not only legality of the Union, but also of the member-states.[10] It's implication can be observed not only in situations against private interests, individual rights and fundamental freedoms, but also in areas of indirect discrimination cases[11]. It can be seen that this principle, as a tool as we mentioned before, gives to European Court of Justice the possibility of applying it in concrete cases. As it is noted in the specialized literature, proportionality means that the punishment for an offence ought to be proportionate to the seriousness of the offence, taking into account the harm, wrongdoing and culpability involved. In this way, the principle of proportionality connects with the issue of a fair trial because it insists that the appropriate legal safeguards have been respected[12]. In the art. 49 of the **Charter** of Fundamental Rights states that *the severity of a penalty must not be disproportionate to the criminal offence,* so as it is highlighted[13], the Charter will have a wider impact in the area of EU criminal law as a source of inspiration. According to one opinion[14]the principle is to legitimise the court's decision, it is problematic if the court in its interpretation deviates too much from the understanding of the principle it itself has proposed.

4. Ultima ratio principle

When the fundamental interests of European Union can not be defended and protected by provisions of each Member State and when these interests and values are in danger because of some specific actions, the Union can impose an obligation to that Member State to incriminate such behaviour. This is how criminal law becomes an instrument as *ultima ratio*, instrument that the Union can use as a last possibility in restoring the rule of the European Union law.

The ultima ratio principle is considered as an extinction of the proportionality principle, on

[7] Opinion of AG Mazak in C-440/05, (June 28, 2007)

[8] Ester Herlin-Karnell, op.cit., p.1124.

[9] N. W. Barber op cit, p.324

[10] Ester Herlin Karnell, op.cit., p.1126

[11] Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*) [1979] ECR, 649

[12] Andrew Ashworth, *Criminal Law, Human Rights and Preventive Justice, in* REGULATING DEVIANCE (Alan Norrie, et. al., 2009) – cited in Ester Herlin-Karnell, op.cit., p.1119.

[13] M. Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, COMMON MKT. L. REV. Vol.45, (2008), p. 617.

[14] Tor-Inge Harbo , *The Function of the Proportionality, Principle in EU Law*, European Law Journal, Vol. 16, No. 2, March 2010, pp. 158–185.

one hand. On the other hand, it is shown that criminal law has it's own subsidiarity principle, included in the ultima ratio concept. Specialists[15] apreciate that ultima ratio is more an ethical principle, and less a constitutional one. It is true that the Lisbon Treaty does not explain clearly the need to use the criminal law as a ultima ratio, and more than that the Lisbon Treaty highlights the need of national parliaments to involve in the monitoring process of subsidiarity, as it is stipulated in the Protocol on the Role of the National Parliaments, Annex (2009). Article 69 TFEU stipulates that *National Parliaments shall ensure that subsidiarity and proportionality are respected when proposing legislation in the criminal law area.*

5. Principle of guilt

In respect to **the principle of guilt**, it is important to mention that it regards not only sanctioning that crimes that affect some interests or values of different individuals, but also the crimes that affect especially general and important values for all the Member States, for all accepted and protected. Art. 48 (1) from the European Chart stipulates the need to guarantee the presumption of innocence. Another important mention regarding this principle is that application of a sanction has to be in accordance with proving the guilt for that individual, and more, the sanction to be proportional with the guilt. In the European Criminal Policy Initiative[16] there are some community acts that reffers especially to the principle of guilt, such as the Decision regarding corruption on the privat field[17], where the states apreciate if the sanctioning of legal persons will be by reffering to the criminal law area. Also, the Decision regarding the fight against deception and forgery against non-cash means of payment[18] establishes that the guilt is a priority needed to be proven. It is also important to mention that in this handbill it is highlighted that European Union determined the same sanctioning limits to punish different crimes that put in danger in different ways some values, and this determination from the European Union comes to break the need to have proportional sanctions versus guilt[19].

II. Involvement of the general principles in the incriminating activity of European Union law. Procedural aspects regarding the conferral of powers and jurisdiction. (Decision C - 440/05)

1. Conferral of powers

A specific problem identified in the case-law of the Court of Justice is that of the allocation of the jurisdiction. This gives rise to the following legitimate question: "What is the jurisdiction of the Court of Justice in Luxembourg compared, for example, with that of a court from a Member State of the European Union?" The former has a general jurisdiction regarding the control of the *lawfulness* of the acts of the institutions of the European Union and it also has the task to ensure the correct interpretation for the uniform enforcement of the European Union *law*. Thus, the European Court of Justice has the jurisdiction to settle the disputes between the different institutions of the European Union, between the institutions of the European Union and the

[15] Nils Jareborg, *Criminalization as Last Resort (Ultima Ratio),* OHIO ST. J. CRIM. L. vol.2, (2005), p. 531.
[16] http://www.crimpol.eu.
[17] Decision 2003/568/JAI, JO 2003 Nr. L 192, p. 54.
[18] Decision 2001/413/JAI, JO 2001 Nr. L 149, p. 1.
[19] Decision 2002/475/JAI JO 2002 Nr. L 164, p. 3 (modified by Decision 2008/919/JAI, JO 2008 Nr. L 330, p. 21.)

member states and even between the member states. The Court of Justice has no jurisdiction as regards the appeals (as legal remedy, but of course not only appeals) for the judgments already passed by a national court. Considering the fact that the EU legislation is included in the legislation of every member state, it is possible that a national court be compelled to actually interpret one or more provisions of a European norm. Consequently, the national court must check whether the enforcement of a national norm conflicts with the European law. In this case, the national court is forced to address the Court by means of a "preliminary ruling" so that the latter may interpret a provision of an act issued by one of the institutions of the European Union. Nevertheless, in such cases, the Court of Justice *shall merely offer an interpretation*, and the national court shall be responsible for settling the case. For example, in the case T-116/08 AJ[20] the Court rejected the application as inadmissible and offered the following explanation: "*1 . By way of letters lodged at the Registry of the Court of First Instance on 7 February 2008 and on 7 March 2008, Mr. C.G. A. submitted an application for legal aid in order to bring an action for establishing the illegal nature of the Commission's denial to initiate the infringement procedure against Romania following the complaint filed by the applicant concerning the alleged infringement against the prisoners' rights in Romanian prisons. 2. As shown in the annexes to the application for legal aid, the Commission answered the applicant in the letters from 25 January 2008 and 5 February 2008. In the latter, the Commission stated that it could not interfere with the daily activity of the criminal justice of the member states, as the European Union has no jurisdiction in this field (……) according to article 35 paragraph (5) EU, the Court of Justice of the European Communities shall have no jurisdiction to review the validity or proportionality of the operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order.[21] (……..) Consequently, the application for legal aid must be rejected. "*

2. Jurisdiction

As regards the jurisdiction based upon which the European Union is involved through the Court of Justice in the settlement of the disputes that may arise as a result of the practical situations related to the Community norms applicable in a certain field, it is important to analyse it from the perspective of the jurisdiction of the European Community, on the one hand, and of the Member States, on the other hand, in the criminal law field as well. As shown above, our analysis started with the emergence of the principle of legality that is applied and observed lato sensu by the European Union and the Court of Justice respectively in the settlement of all submitted cases. Nevertheless, it should not be ignored that the Court and the European Union itself through its institutions comes across many situations in its activity that refer to the national criminal law. It is of course a known fact that each Member State has its *own* criminal law, a law that incriminates certain acts as crimes and for which specific sanctions are imposed, but are evaluated individually by each Member State depending on its social environment as individual entity and independent from the way in which other Member States would sanction the same act. However, this should not mean that in developing their own criminal legislation the Member States should not take into account for example the norms of the neighboring countries as this is the reason why we speak so often of the well known *comparative law*, but we do not believe that we can ask three different states to have an identical criminal legislation. Starting from this assumption, we can state that no *European* criminal law should contain binding general provisions applied identically to each Member State of the European Union.

[20] According to http://curia.europa.eu/jurisp/
[21] Article 276 TFEU after the Lisbon Treaty.

On the basis of the considerations set out, there was a case submitted to the analysis of the Court, namely a case between two institutions of the European Union, the Commission of the European Communities v. the Council of the European Union, case C-440/05.

First of all, it would be useful to take a closer look at the *development* of the criminal law inside the European Union.

Thus, the first starting point is the Treaty of Rome from 1958 that established a series of economic objectives, the so-called "common market": free movement of goods, persons, capital and free delivery of services. The Treaty of Rome makes no reference to criminal matters. However, until the Treaty of Maastricht, there were several conventions such as the European Convention on Extradition from 1957, the Mutual Legal Assistance Convention from 1959, the Convention on the Transfer of Sentenced Persons from 1983 which attempted and succeeded in drawing attention on criminal matters. There is a growing concern regarding the activity of the terrorist groups, but no concrete action has been taken. The Schengen Agreement was signed in 1985 by 5 member states and the Implementation Agreement was signed in 1990. The main change was the abolition of internal border controls and the reinforcement of outside border controls. Also, the Schengen information system (SIS) has been introduced, the exchange police information and most important, the *ne bis in idem* principle.

The Maastricht Treaty entered into force on 1 November 1993. The pillar system was thereafter created. Each pillar has it's own role as follows: the 1st pillar – in charge with the EC policies, the 2nd pillar – in charge with CFSP (security policies), and the 3rd pillar – in charge with justice and home affairs, including cooperation in criminal matters. It is obvious that once with the Treaty of Maastricht the issues regarding terrorism, drugs and other similar crimes became "matters of common interest". A big step forward was made once the Treaty of Amsterdam came into force, because now the third pillar gained more effectiveness with the creation of the area of freedom, security and justice (AFSJ), and the integration of ther Schengen acquis partly in the third pillar (police and judicial cooperation in criminal matters). New legislative instruments could be used, such as framework decisions. The most important step made is the Treaty of Lisbon – treaty on European Union (TEU), treaty on the Functioning of the European Union (TFEU) – which came into force on 1.12.2009. It is obvious at this moment that there were changes made, such as the abolition of the pillar system, and also changes in the criminal law area.

3. A *new competence* in criminal matters? (Decision C - 440/05)

Until the Treaty of Lisbon there have been few attempts when the Court found itself in a position to create a new competence in criminal matters, but this was a step the Court was not willing to make[22] , as we will see below.

In this context, the case C-440/05 is emblematic for the approximation of the EU Member States' legislations in criminal matters; this case was brought to the judgment of the Court of Justice by the Commission of the European Communities, which «seeks the annulment of Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution ("the framework decision"), on the grounds that, in infringement of article 47 EU, the measures contained therein providing for an approximation of the Member States' legislation in criminal matters should have been adopted on

[22] Norel Neagu, *Entrapment between Two Pillars: The European Court of Justice Rulings in Criminal Law,* European Law Journal, Vol. 15, No. 4, July 2009, p.549.

the basis of the EC Treaty rather than on the basis of Title VI of the Treaty on European Union»[23]. Thus, this case concerns the distribution of competences between the Community and the EU Member States in the area of criminal law.

By the judgment of 13 September 2005 the Court annulled the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law. The problem that existed and we believe still exists is represented by the way in which the Community has competence to oblige the Member States to provide for criminal penalties and especially to oblige them on the precise extent to which that competence may be exercised [24] by the Community in general, not only in the area of environmental law.

As in any other procedure, the Commission, the European Parliament, the Council of the European Union and the 20 Member States supporting the case expressed their opinions. Thus, the Commission and the Parliament believe that "the approach adopted by the Court exceeds the area of environmental protection and confirm the fact that the *Community legislature is, in principle, competent to adopt any provisions within the first pillar connected to the criminal law of the Member States,* aimed at ensuring the full efficiency of the norms of the Community law." For this purpose, the Commission submitted proposals for directives aimed at obliging the Member States to provide for criminal penalties in their own legislations: Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights [COM(2006) 168 final] and the Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law [COM(2007) 51 final][25]. On the contrary, the Member States supporting the Council in the case (Kingdom of Belgium, Czech Republic, Kingdom of Denmark, Republic of Estonia, Hellenic Republic, French Republic, Ireland, Republic of Latvia, Republic of Lithuania, Republic of Hungary, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Republic of Poland, Portuguese Republic, Slovak Republic, Republic of Finland, Kingdom of Sweden and United Kingdom of Great Britain and Northern Ireland) do not recognize the competence of the Community to "establish the name and the level of criminal penalties" to be applied even in such circumstances.

As the literature unanimously states, the criminal law has an autonomous character, despite its connection to other legal spheres. That is so because the criminal law has its own regulating object and a specific object of the legal protection: the existence and the safety of the value system of the society; these values are protected by developing conduct norms that must be observed or otherwise by enforcing specific penalties. However, the states, and particularly the Member States of the European Union do not define the criminal law in a unitary manner, as each state reserves its right to define it as it best fits it. However, considering the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, more exactly of articles 6 and 7, that provide for certain guarantees especially for criminal matters, the European Court of Human Rights has held, as regards more particularly the purpose of the criminal sanctions that "the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment"[26].

In the explanatory memorandum of the Advocate General in the case mentioned above it is clearly stated that "it can be said without mistaking too much that the criminal law has a dissuasive

[23] The Conclusions of the Advocate General can be read *in extenso* at http://curia.europa.eu/jurisp/

[24] As it results from the Judgment of the Court (Grand Chamber) of 23 October 2007. For further details see www.curia.europa.eu

[25] According to http://curia.europa.eu/jurisp/

[26] European Court of Human Rights, Welch v. the United Kingdom, judgment of 9 February 1993, Series A, no. 307.

or discouraging nature.[27] However, we should bear in mind that the dissuasion is not the sole purpose of the criminal law and that the way in which this *ultimum remedium* of the law is used – some parties have also underlined this aspect – is an indication of the conduct norms on which the society is based and is finally intrinsically connected to the very identity of the society." Moreover, other judgments[28] stated that *neither the criminal law nor the criminal procedure norms fall within the scope of the Community* and that *it must be stressed that the EC Treaty does not make of the criminal law an area reserved for the Member States.*

There was a great deal of debate concerning the relationship between the Community law and the national criminal law of each Member State, and the fact that generated disputes was that in its treaty the Community failed to point out clearly the extent of such competence in criminal matters and allowed this issue to remain ambiguous[29]. The questioned was raised as to how far the Community law can *extend* into the national criminal law, referring actually to the proportionality principle. Thus, in the case Casati, 1981, the Court ruled that:

"In principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible. However, it is clear from a consistent line of cases decided by the Court, that Community law also sets certain limits in that area as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons. The administrative measures or penalties must not go beyond what is strictly necessary, the control procedures must not be concerned in such a way as to restrict the freedom required by the Treaty and they must not be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the exercise of that freedom. (emphasis added)."[30] So, it is obvious that the Court's approach is based on the principle of proportionality.

Moreover, in these judgments[31] it was ruled that it does not fall within the competence of the Community to establish the procedure norms of the criminal legislation to be enforced in a case, however, the Courts states that *when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure (…here for the environment…),* ***the Community legislature*** *can* ***impose*** *the Member States the obligation to apply such* ***penalties*** *in order to ensure that the* ***rules it lays down in this field are fully effective.***[32]

The fact that lead to a certain ambiguity in the correct interpretation of what the Court let to be understood was the fact whether this extension of the competence of the Community legislature in the national criminal law of the Member State(s) in question was given the value of principle or whether the Court only referred to the environmental field. Depending on the interests of those intervening, there were opinions concerning the interpretation in both senses. According to the interpretation stricto sensu, related only to that case, we would have to believe that the European criminal law, actually the instruments specific to the European criminal law could only apply to the environmental field, but in practice there are far more than only environmental issues. At that

[27] Conclusions of the Advocate General Jacobs in the case Germany/Commission (judgment of 27 October1992, C-240/90, Rec., p. I-5383), point 11 and Conclusions of the Advocate General Saggio in the case Molkereigenossenschaft Wiedergeltingen (judgment of 6 July 2000, C-356/97, Rec., p. I-5461), point 50.

[28] Judgment of 11 November 1981, Casati (203/80, Rec., p. 2595) and judgment of 16 June 1998, Lemmens (C-226/97, Rec., p. I-3711)

[29] M Delmas-Marty, 'The European Union and Penal Law', *European Law Journal* vol. 4/1, 1998, 87–115

[30] Case 203/80, [1981] ECR 2595, para 27.

[31] Judgment of 16 June 1998, Lemmens, C-226/97, Rec., p. I-3711, point 19, and Judgment of 13 September 2005, Commission/Council, C-176/03, Rec., p. I-7879

[32] Judgment of 13 September 2005, Commission/Council, C-176/03, Rec., p. I-7879

time, the Commission itself did not adopt such an interpretation, but a broad interpretation in line with our notes above.

It is worth mentioning that we believe that the main issue does not concern the competence and the power of the Community legislature to impose the state to apply penalties, but the extent and the type thereof. It is known that each Member State divides its penalty system differently depending on each committed crime, on the person who committed it and so on. That is why we believe that it is not admissible for this legislature to impose upon a Member State the extent of a penalty, except those offenses expressly listed by the European legislator , and except the situation when *to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish* ***minimum rules*** *with regard to the definition of criminal offences and sanctions in the area concerned*.[33] As it was correctly pointed out, this may lead to *fragmentation and may compromise the coherence of the national criminal systems.* Thus, the government of the United Kingdom pointed out as an example that *a fine applied in a certain amount may contain a different message concerning the severity of the crime depending on the involved Member State.*

Consequently, in his conclusions presented on 28 June 2007, the Advocate General JÁN Mazák pointed out that «*according to the* ***subsidiarity principle****,* ***the Member States*** *are, in general in a* ***better position that the Community*** *to „****transpose****" the terms „****efficient, proportionate and dissuasive criminal penalties****" into their legal systems and* ***their own social contexts***.» Moreover, in his conclusions presented in the case C-176/03 of 13 September 2005 the Advocate General Ruiz-Jarabo Colomer maintained at the time that «*the* ***Community cannot go further that requiring*** *the Member States* ***to provide for certain offences*** *and to make them punishable by „effective, proportionate and dissuasive" criminal penalties*»; moreover, there are also other judgments of the Court supporting the same idea[34].

According to an opinion, the Decision C - 440/05 attempted to prepare a sensitive transition from the competence according to the third pillar to the shared competence, which was finally achieved by the Treaty of Lisbon. Although it can be maintained that at that time the Court failed to determine the very effectiveness of the competence in criminal matters as regards the environmental protection, which was the subject of the respective case, however, the enforcement of the Treaty of Lisbon was successful in creating the legal basis for the Community competence in adopting norms specific to the criminal matters.

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[33] art.83 TFEU : The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament. 2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

[34] Judgment of 21 September 1989, Commission /Greece (68/88, Rec., p. 2965)

III. Conferral of powers and jurisdiction after Lisbon.

The legal basis of what was successfully introduced by the Treaty of Lisbon, namely the shared competence in criminal matters, is represented by article 5 TEU.[35] Moreover, as common law of all other previous treaties, the TFEU provided in article 67 that *the Union shall endeavor* to ensure *a high level of security* for the Member States, which constitutes the basis for the judicial cooperation in criminal matters between the Member States of the EU. Thus, according to article 4 of TFEU, the environment is among the fields where the shared competence applies between the Union and the Member States (in line with the practical situations, but also with the judgments of the Court analysed above), but especially the *area of freedom, security and justice.*

Besides that fact that the TFEU abolished the pillar system, we can point out other aspects concerning the changes that have been made in the criminal law area. Therefore, we can notice by comparison that until the Treaty of Lisbon there was *unanimity in Council*, and after the Treaty of Lisbon there is *QMV (qualified majority) in Council*; also until the Treaty of Lisbon there was *consultation with the EP*, and after the TFEU there is a co-decision system (Council – EP). More than that, another important aspect reffers to special legal instruments in previous provisions (former art. 34 TEU)[36], which became after Lisabona ordinary legal instruments (art. 288 TFEU).[37] Also, Lisbon brings general and horizontal principles of European Union law and full powers for

[35] "The European Parliament, the Council, the Commission, the Court of Justice and the Court of Accounts exercise their duties according to the conditions and for the purposes provided for, on the one hand, by the treaties establishing the European Communities and by the treaties and subsequent acts amending and completing the same and, on the other hand, by the remaining provisions of this treaty."

[36] 1. In the areas referred to in this title, Member States shall inform and consult one another within the Council with a view to coordinating their action. To that end, they shall establish collaboration between the relevant departments of their administrations. 2. The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the

Council may: (a) adopt common positions defining the approach of the Union to a particular matter;

(b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;(c) adopt decisions for any other purpose consistent with the objectives of this title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union; (d) establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the procedures applicable within a time limit to be set by the Council. Unless they provide otherwise, conventions shall, once adopted by at least half of the Member States, enter into force for those Member States. Measures implementing conventions shall be adopted within the Council by a majority of two thirds of the Contracting Parties. 3. Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as laid down in Article 205(2) of the Treaty establishing the European Community, and for their adoption acts of the Council shall require at least 232 votes in favour, cast by at least two thirds of the members. When a decision is to be adopted by the Council by a qualified majority, a member of the Council may request verification that the Member States constituting the qualified majority represent at least 62% of the total population of the Union. If that condition is shown not to have been met, the decision in question shall not be adopted. 4. For procedural questions, the Council shall act by a majority of its members.

[37] "To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force."

the Commission and the ECJ (transitional period) not like before when there were limited powers for the Commission and the ECJ. The treaty brings some changes in respect to the competences of the European Council, compentences focused on criminal law sector, of course. So, art. 15(1)[38]states that the European Council should provide the necessary impetus for development of the Union, define the general political directions and priorities, without a legislative function. More of that, art. 68 TFEU[39] highlightes strategic guidelines for legislative and operational planning in the area of freedom, security and justice (well, multiannual programs). Regarding also the criminal law area we can observe that the Commission has power of initiative, **but shared with the** Member States[40]. We can see that the most of the EU legislation in criminal matters is made of framework decisions and, now, directives.

As already mentioned above, the legal basis of the mutual cooperation on criminal matters are the conferral of powers and the principle of subsidiarity. Regarding the principle of conferral of powers, it is highlighted by specialists, but even by the Treaty that the Union shall act only within the limits of competences conferred upon it by the Member States (the Union does not have a "Kompetenz – Kompetenz"[41]). Regarding the principle of subsidiarity: if a competence is not exclusive, the EU shall act only if and so far as the objectives "cannot be sufficiently achieved by Member States".

As legal basis on criminal law competence on solving issues that impose the involvement of the EU, art. 82(1) TFEU regards the international cooperation in criminal matters, stricto sensu.

The most important measures aim at establishing rules and procedures for mutual recognition, preventing and settling conflicts of jurisdiction, supporting the training of judiciary and judicial staff, facilitate cooperation for proceedings and enforcement of decisions. Art. 83(1) TFEU defines criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting **either** *from the nature or impact of offences* or *from a special need to combat on a common basis.* We can observe that areas of intervention are in a closed list which can be extended by Council *unanimously* with consent of the European Parliament. Important to note that the action is merged only by directives. Art. 83(2) highlights the approximation of criminal laws as *essential instrument of ensuring the effectiveness of a Union policy in an area which is subject to* ***harmonization measures.*** Very important is to observe that *competence* ***was given to establish*** rules on definition of offences and sanctions ***by means of directives***. Well, we have already discussed above that before Lisbon, the question of competence in these areas had been the object of two important decisions of the ECJ[42], so the Treaty of Lisbon settles the question once and for all[43]. Lisbon treaty settles also some issues on the promotion and support of Member States action in the field of crime prevention (art. 84 TFEU), Eurojust (art. 85 TFEU), European Public Prosecutor's Office – in first instance to combat crimes affecting the financial interests of the Union, European Council may extend powers, acting unanimously – art. 86 TFEU.

As we mentioned above regarding the "Unions' situation" before and after Lisbon, the third pillar legal instruments were: common positions, framework decisions, decisions, conventions (art. 34 old TEU). After Lisbon, EU criminal law is regulated through the ordinary types of legal

[38] "In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible."

[39] "The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice."

[40] see note above.

[41] Steven Cras, Making criminal law in the EU: Actors and procedures, ERA Summer School, 2011.

[42] 13 September 2005, Case C-176/03 and 23 October 2007, Case C-440/05, both Commission v. Council.

[43] Steven Cras, Making criminal law in the EU: Actors and procedures, ERA Summer School, 2011.

instruments, common to the entire action of the EU (art. 288 TFEU)[44]. So, we have regulations with general application and being directly applicable and also directives with vertical direct effect[45] - they must be implemented in national law, but the Member States will have the choice of form and methods of implementation. It is known that if directives are not corectly implemented or not implemented in time ”you” can directly rely on the provisions concerned against the State. Another important aspect that is worth mentioning when analyzing what means *european criminal law* from the EU treaties point of view, is the one of QMV (Qualified Majority Voting). So, Lisbon Treaty extends the QMV rule in the Council to the area of criminal law. Well, according to art. 238 TFEU, as of 1 November 2014, QMV will be: 55% of the members of Council / at least 15 member-states / which represent at least 65% of the population, and a *blocking minority* shall be of at least 4 member-states. If a proposal (that regards a criminal issue, because this is the subject of our research) does not come from the Commission, QMV shall be 72% of member-states representing 65% of population (art. 238(2)).

Articles 82(3) and 83(3) TFEU establish mechanisms to ensure a measure of control of member-states over EU legislative activity in the field of criminal law. So, very important to notice that if a Member State concludes that a draft directive ”would affect fundamental aspects of its criminal system”, it can either stop the procedure or reffer the issue to the European Council (within 4 months, after discussion and in case of consensus the procedure can be restarted) – this process took the name of *Emergency brake.* On the other hand, in case of disagreement, at least nine Member States may decide to proceed nevertheless to adopt the instrument, establishing a so called *enhaced cooperation* on criminal matter, a facilitated procedure.

Conclusion

If until Lisbon the crisis in the field of criminal law was very deep[46], after the Treaty of Lisbon important steps have been made, namely the *shared competence in criminal matters* and others was introduced. However, it is important to point out that although the EU has the competence to criminalise conduct, we believe that the situation continues to remain sensitive especially as regards the penalties, because as it was stated in the Decision 440/05 the EU cannot at least yet explicitly impose a certain penalty upon a Member State, especially if the Member State opposes it. In our opinion, this is a legitimate position, so that the European legislature must continue its efforts to identify viable solutions in order to be able to truly unify the European criminal law, and not only for certain categories of offences considered severe offences at the Community level. On the other hand, the paradox is that it is likely that this unifying attempt could become a radical one in the sense that the EU interference in the national law of any Member State could affect the internal law. So, the skillfulness of the European legislature shall have to be demonstrated from now on, since the instruments have already been developed. We have to say that it is important that these instruments are also used and developed in a diplomatic manner for the purpose of creating a powerful community in which the criminal repression, the prevention and the punishment of the offences affecting not only the Community (!), but the Member State itself, must be first of all efficient.

[44] See note 20.

[45] Steven Cras, Making criminal law in the EU: Actors and procedures, ERA Summer School, 2011.

[46] Norel Neagu, *Entrapment between Two Pillars: The European Court of Justice Rulings in Criminal Law,* European Law Journal, Vol. 15, No. 4, July 2009, p.551.

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THE REAL SOCIAL THREAT AND THE CAUSES FOR REDUCING THE PUNISHMENT, ACCORDING TO THE CHANGES BROUGHT BY THE LAW NO. 202/2010, SMALL REFORM IN JUSTICE

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Abstract

The new substantial changes, though minor as concerns the content, if we relate to the intervention caused by the same legislative act in the procedure field, have generated serious difficulties in the interpretation and application in the legal criminal activity. This article aims at analysing and identifying the legal consequences caused at the level of the substantial norm for applying the mentioned legislative act. At the same time, the article offers efficient legal remedies for overcoming the procedure impediments generated by adopting the Law of Small Reform in Justice. The article has three parts, analysing the changes brought by the Criminal Law by the Law No. 202/2010 in different fields: art. 18^1 – the deed that is not a real social threat of a crime, art. 74^1 and art. 184 – accidental wounding.

Keywords: *criminal law, real social threat, parties' reconciliation, grounds for reducing the punishment.*

Introduction

As the Law No. 202/2010 itself, the article has a plural-disciplinary form, discussing aspects connected to adopting the Law of Small Reform in Justice, in the substantial, as well as in the procedure field.

Beyond the critical analysis, the article proposes efficient legal remedies, under the form of concrete, punctual and fundamental solutions, for the negative procedure consequences caused by applying this legislative act.

The work analyses, first of all, the way in which the legislator sets a legal preference for the material or legal criteria that have to be taken into account for determining concretely the degree of social threat of a crime, in the detriment of the personal criteria.

Secondly, one has to take into account the institution stipulated by art. 74^1, that can be characterised with difficulty, as it contains elements that belong to the content of different legal categories, as a form for individualising the punishment with *sui generis* or hybrid character, made up of three distinct causes.

At the same time, there are analysed the changes brought to the way in which the criminal action can be ceased for all forms of the crimes of accidental wounding.

By offering proper procedure remedies, the work has the value of a guide destined first of all to the practitioners, but it can also be a source of inspiration for the legislator, as well, in case of future changes.

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The present form of art. 18^1 Criminal Code seems to be a compromise solution between the old regulation and the ones that propose completely eliminating this institution from the Criminal Code.

The changes brought give the judicial body the possibility to estimate concretely the degree of social threat of a deed stipulated by the criminal law only when considering the material or the real criteria stipulated by art. 18^1 paragraph 2, i.e. of those that concern all facts (conditions and the way for committing the deed, the consequences occurred or that might occur, etc.)

The personal criteria that concern the person and conduct of the offender have a subsidiary character, as they will be taken into account only if the offender is known.

The legislator's intention, by referring to the legislative act where this change was included – for accelerating the solutions of the trials, is obvious.

Thus, the judicial authorities have the possibility to conclude criminal files in the stage of criminal investigation, but with unknown author and for which there exists no other legal possibility, for interrupting the criminal investigation activity, or starting the trial, following the personal character of the criminal responsibility.

At the same time, the judicial authorities are admitted the legal possibility to refuse starting a useless procedure activity (by not starting the criminal investigation), if, although the offender is not known, the criminal activity is not dangerous.

This amendment of the substantial law causes certain procedure linked consequences, partly, by the changes brought by art. 228 and 230 of the Criminal Procedure Code.

At a substantial level, the constructions itself of art. 18^1 paragraph 2 contradicts, at least partly, the possibility of concretely estimating the degree of social threat, without knowing the identity of the offender. Thus, among the material criteria that have to be taken into account compulsorily for determining the real social threat, the legislator also stipulated the one concerning the purpose aimed at for committing the crime.

And the purpose is an element of the subjective side of a crime, a side that comprises all conditions concerning the psychical attitude of the offender towards the deed and its consequences.

The purpose is understood as the aim of committing the deed or the objective proposed and represented by the offender (C.Bulai, B.Bulai *Manual de Drept Penal („Handbook of Criminal Law",* Universul Juridic Publishing House, Bucharest, 2007, page 195).

Therefore, estimating this subjective criterion is always made considering the personal qualities of the offender, since representing the consequences of a concrete voluntary activity differs depending on the capacities of each individual.

Thus, if we take into account the nature of the logical-juridical reasoning that determining concretely the degree of social threat involves, the dimension of this condition, drafted without knowing the offender, is always inexact.

As different from the generic social threat of the crime, evaluated by the legislator *in abtracto*, within the punishment limits for each incriminated deed, the real social threat is evaluated *in concreto* by the judicial authorities, depending on the specific features of each case.

As there are provided at present the procedure consequences, art. 18^1 Criminal Code (regulated in the provisions of art. 228 and 230, Criminal Procedure Code), evaluating the degree of real social threat can be used in two ways.

First of all determining concretely the degree of social threat can be accomplished in a procedure framework, following the analysis of the evidentiary matters, after beginning the criminal investigation. If the judicial authorities estimate in this case that, by minimally affecting the protected value, the fact does not represent a crime, they order the solution of ceasing the criminal investigation (art. 11, item 1, letter b, as related to art. 10, lit. b^1), if the offender is

known, or the solution of the docket solution (art. 11, item 1, letter a, as related to art. 10, lit. b^1), if the offender is not known.

The novelty consists in the possibility of ordering the docket solution (solution conditioned upon the inexistence of the suspect in the case) but also in this situation, as opposed to the old regulation, where the solution was impossible.

In the second way, the real evaluation of the social threat would also be possible in an extra-trial context, when from the content of the act of apprehension or the acts proceeding the case, the fulfilment of the conditions stipulated by art. 18^1 would result.

In this case, the judicial authorities were recognised the possibility to order not starting the criminal investigation under conditions of art. 228, paragraph 3. Evaluating the real social threat in this case is not made by evidence, as the criminal trial has not started yet, but from the perspective of information elements, a fact that gives the estimation a strong random character.

What happens when, after the judicial authorities estimate, in lack of the offender, that the fact does not present the degree of threat of a crime, later, after discovering it, the personal criteria stipulated by art. 18^1 contradict the initial evaluation?

In the absence of an express interdiction, the provisions of art. 273, Criminal Procedure Code, concerning the reopening of the criminal investigation, should apply properly.

Thus, the initial solution for not starting the criminal investigation or for docketing, ordered without knowing the offender, has to be denied, being followed by the order of starting or, as applicable, reopening the criminal investigation.

This hypothesis illustrates the great degree of relativity of the institution in this form.

Moreover, even if the solutions for not starting the criminal investigation or the trial are not final and one cannot speak of the authority of the tried thing, when considering the European jurisprudence, in such a case the principle *non bis in idem* would be infringed, because of the identity of juridical procedures used (CJCE, February 11, 2003, Gozutok and Brugge, C-187/01 and C-385/01).

The important procedure consequences of the change of the substantial norm are found in the provisions of art. 230, Criminal Procedure Code. This article contains special character provisions, applicable if, from the content of the act or apprehension or of the acts performed before, there results the impediment stipulated by art. 10 lit. b^1 (lack of the real social threat).

As I have indicated, as different from the general provisions concerning the existence of the impediments stipulated by art. 10 in this procedure stage, that determine only one solution to be followed, i.e. the begin of the criminal investigation, in the case stipulated by art. 10, lit. b^1 the prosecutor has, according to the law, two possibilities: to order the begin of the criminal investigation or ceasing the criminal investigation.

The regulation is poor because of its incomplete character.

Because the two solutions belong to different juridical categories and have different consequences, the prosecutor's order has a too vast area and a cvasi-arbitrary form; its order should be circumscribed to certain situations stipulated by the law and not implicit, in order to avoid contradictory interpretation.

If we take into account the juridical nature and the general conditions of each of the two measures; the choice should be determined by the following reasons.

Not starting the criminal investigation in the case provided by art. 10 lit. b^1 should be ordered when there is noticed the lack of the degree of real social threat of the deed by reference only to the material or real criteria determined by art. 18^1 paragraph 2 Criminal Code, and the offender is not known.

At the same time, not starting the criminal investigation would be justified even in the situation when the lack of degree of real social threat of the deed, the offender is known, but the prosecutor estimates that the application of an administrative sanction is not proper.

In exchange, ceasing the criminal investigation in the case stipulated by art. 10 lit. b^1 has to be ordered if the lack of social threat is noticed, the offender is known and it is also necessary to apply an administrative sanction.

Knowing the identity of the offender is a *sine qua non* condition for ceasing the criminal investigation in this case, because of the legal nature and of the effects this solution involves (art. 249^1), as well as because of the fact that, although they have an administrative character, the sanctions provided by art. 91, Criminal Code have a personal character.

Although the law does not stipulate expressly, when considering the normal succession of the procedure activities, the solution of ceasing the criminal investigation has to be preceded compulsorily by the measure of criminal investigation, under conditions of art. 228, paragraph 2.

The proposal of the criminal investigation authority addressed to the prosecutor, under conditions of art. 230, by which there is requested the cease of the criminal investigation for the case provided by art. 10 lit. b^1, has to be preceded by the motivated solution for starting the criminal investigation belonging to the same authority.

After receiving the proposal, the prosecutor has to confirm, in max. 48 hours, the resolution for starting the criminal investigation, so that they order the cease of the criminal investigation.

This way to act is due to the fact that the criminal investigation authority is not competent to apply administrative sanctions, as per art. 91, Criminal Code, this right being recognised only to the prosecutor and to the court of law.

As per art. 230, in case of the criminal investigation, as well as in case of the cease of the criminal investigation, the procedure instrument is represented by an ordinance. The order contravenes to the general regulation, as provided by art. 228 that determines that, in all cases, not starting the criminal investigation is ordered by resolution.

The supplementary grounds for not starting the criminal investigation if the prosecutor takes the grounds included in the proposal of the criminal investigation authority if elective, this order is against the regulation stipulated by art. 203, paragraph 2 (*the ordinance has to be grounded).*

If this ordinance is not grounded, the persons interested have to be sent a copy of the ordinance, as well as one of the proposal of the criminal investigation authority, this comprising in reality the grounds that justified the measure.

The ordinance for ceasing the criminal investigation in the case stipulated by art. 10 lit b^1 has to be motivated in all cases, by referring to the general provisions stipulated by art. 203, paragraph 2, as well as by referring to the special provisions stipulated by art. 249-249^1.

Because of the legal qualification that the instrument ordering not starting the criminal investigation, in the case stipulated by art. 10 lit. b^1 , there exists a nonconformity between the provisions of art. 230 and those of art. 278, paragraph 2 and 278^1 paragraph 1 that determine what instruments can form the object of the complaint addressed to the superior prosecutor and later on, to the judge.

If we take into account the express orders of the mentioned articles in the complaints, there results that only the resolutions for not starting the criminal investigation may form the object of this type of judicial control; as long as, in the case stipulated by art. 10, lit. b^1 not starting the criminal investigation is ordered only by ordinance, this instrument cannot be attacked by complaint under the special conditions mentioned.

The solution is excessive, but it is the only one that results from interpreting these non-correlated provisions.

According to the new amendments, art. 18^1 paragraph 3, no longer stipulates the necessity to enforce a punishment with administrative character when the prosecutor or court of law acknowledge the deed does not feature a felony's social threat degree.

The drafting of the text allows for double interpretation.

For a first one, the administrative character punishments do not apply under the situation when the concrete assessment of the social threat degree has been undergone without knowing the identity of the offender. *Per a contrario,* whenever law enforcement agencies determine his / her identity, even if they do not deem the deed to feature a felony's degree of threat, they must apply an administrative punishment following the antisocial behavior.

For the second version, regardless of determining the identity of the offender or not, where article 18^1 is concerned the application of an administrative sanction is left to the supreme evaluation of the magistrate.

I believe that the only tenability for failing to apply an administrative sanction should the social threat be absent would be the fact the offender is unknown.

The fact that these do not represent a form of criminal liability, that they are not recorded in the criminal record and vary from reprehension to a fine in the amount of lei 1.000 are grounds in favor of the necessity to apply an administrative sanction should the offender be known.

Nonetheless, both interpretations are tolerated by law.

Referring to article 74^1 of the Criminal Code, we must first of all emphasize that, by Resolution no. 573 / 2011 of the Constitutional Court (published in the Official Gazette no. 573 / 2011) the high unconstitutional exception has been accepted and these article's provisions were deemed unconstitutional.

Although it is not a legislative body, the Constitutional Court, by its final and generally mandatory decision, thus determines the impossibility to apply the provisions comprised by article 74^1 of the Criminal Code, even if the text was formally ruled out by another legislative intervention.

Nevertheless, analysis of the specified provisions is of interest from the perspective of the legal effects that the existence (between November 25th, 2010 and May 25th, 201) of this substantial norm used to and still generates, if we at least consider the possibility of reviewing final criminal decrees in case of Constitutional Court's decrees, an exceptional possibility provisioned by article 408^2 of the Criminal Code.

The legislator's intervention, although minor in volume, brings forward serious negative consequences concerning its enforcement. The institution contradicts the very finality of the law as instead of simplifying and accelerating the completion of criminal trials, it shall instead generate controversial practice and trial hindering.

The regulation is incomplete both from the form (drafting technique) and contents point of view.

We firstly deal with the absence of a marginal name that seems to suggest the legislator's difficulty to classify his own creation.

What is the legal nature of the institution provisioned by article 74^1?

The classification is rendered difficult by the fact that the institution is composed of elements comprised by distinct legal categories.

Although the article is included in the section regarding general mitigating circumstances, nevertheless the contained clauses are particularly applied to certain types of crimes. At the same time, even if not included in the detailed range of legal mitigating circumstances, the institution is similarly enforced, as it features imperative character, and its enforcement cannot be denied should the premise be met.

The *sui generis* character of the institution provisioned by article 74^1 is pictured in its tripartite content, as it comprises three distinct causes.

Consequently, the institution can be classified as a form of individualizing the *sui generis* or hybrid charge, made up of a cause of punishment reduction (article 74^1 paragraph 1), a cause of replacing the prison charge by a fine (article 74^1 paragraph 2, first hypothesis) and by a cause of

replacing criminal liability with administrative liability (article 74^1 paragraph 2, second hypothesis) .

Another shortcoming considers the hardly identifiable scope of this institution.

If the concrete determination, by listing, of the crimes provisioned by the Special Part of the Code does not raise issues or maybe solely the criteria determining the selection, the generic determination, by indication of the group of crimes, raises serious interpretation issues as the category „economic crimes" does not feature a specific legal cover.

Thus, a crime can be classified as economic either by reporting to the premise, when it implies the preexistence of economic or commercial rapports, or by referring to the material item, when the action or non – action aims an economic activity, even by referring to the subjective element, should the pursued target be economic.

Consequently, the norm fails to meet the predictability requirement, as the semantic area of the term „economic crime" is hard to be concretely defined, due to absence of legal classifications.

The regulation itself is mixed up because, on the one side, there is no equivalence between the expressly specified crimes and the ones determined abstractly, by pointing out the type, the first 6 crimes not being economic by their nature, and on the other side, there is no justification for ruling out from the crime category for which the cause can apply, the ones legally classified as economic, and yet provisioned by the Special Part of the Criminal Code (articles 295 – 302 – crimes to the regime determined for certain economic crimes).

The sole condition these crimes must meet in order to be inscribed in the decrease grounds provisioned by article 74^1 is the one concerning the form.

Thus, crimes, regardless of the fact they are concretely individualized or generically determined, must take the form of done deed crime, and be either material or of outcome; furthermore, the immediate consequence must always result in indubitable damage.

The direct and logical consequence of this condition would be that article 74^1 would not apply to the attempted crimes. Whether we speak of the legislator's intention or omission, the regulation is profoundly inequitable and absurd from the legal point of view as is punishes more seriously this atypical form of crime (always less dangerous) than the done deed crime.

As legal benefits are solely admitted for done deed crime, the regulation equals to encouraging the offender on the crime path all the way through. The prompt intervention of the legislator is required in order to remove this inequity.

Concerning the legal effects of the institution regulated by article 74^1 we would like to point out that it gathers several grounds under the same content, some of charge decrease and others of replacing either the penalty or the criminal liability.

What implies the enforcement of one of these different grounds is the amount of the inflicted and remedied damage.

Should the entire inflicted and remedied damage exceed Euro 100,000, in the equivalent value of the national currency, the limits of the penalty as provisioned by law are cut to half. This provision undoubtedly represents a cause of charge decrease, but as it features specialized character, it should have been regulated within the content of each crime considered by the legislator and not in the general part of the Code.

Should the prejudice be between Euro 50,000 and 100,000 on the other hand, in the equivalent value of national currency, the fine penalty may be applied. The unclear drafting of the text implies the idea that the fine penalty enforcement under these conditions would solely be a possibility, the court being entitled to choose between either decrease of charge limits to half or replacement of prison charge with the fine penalty.

The replacement is possible even if the fine penalty is not alternatively provisioned with prison in the incriminatory text.

Finally, should the inflicted and remedied damage be up to Euro 50,000, in national currency equivalent value, the administrative sanction is applied.

Unlike the prior situation, the application of the administrative sanction is compulsory should the legal condition be met, so that this hypothesis may be classified as a replacement ground for criminal liability.

This criminal liability replacement cause features nevertheless a special character as is supposes meeting of certain different conditions from those of common law provisioned by article 90 of the Criminal Code.

The sole legal solution to substantiate this special form of criminal liability replacement is the cease of the criminal trial pursuant to article 11, paragraph 2, letter 2 reported to article 10 letter i of the Criminal Code.

The cause is comprised by the hindrance stipulated by article 10, letter i, because one cannot identify in its content show replacement of criminal liability came about in compliance with the common law provisions (article 90) or according to the special provisions (art. 74^1 paragraph 2).

Should replacement of criminal liability occur subject to the conditions of article 74^1 paragraph 2, this cause not only ceases the criminal action but also its possible performed civil action, as it involves an entirely inflicted and remedied damage.

Even if the enforcement of an administrative sanction can still happen, on proceeding area, and following ruling of acquittal pursuant to article 11, point 2 letter reported to article 10 letter b^1, by application of article 18^1 of the Criminal Code, I believe that this kind of settlement is not possible for the hypothesis provisioned by article 74^1 paragraph 2 of the Criminal Code.

First of all, if we consider the legal structure of the new institution, it unequivocally results it acts as a hindrance deriving from the lack of object of the criminal action (namely criminal liability), the deed continuing to be deemed as a crime.

On the other hand, the case provisioned by article 18^1 of the Criminal Code no longer deems the deed as a crime due to lack of an essential feature (lack of social threat), so that it acts as hindrance due to lack of criminal action(namely the crime).

Secondly, the absence of real social threat cannot be determined with apriority for any economic crime, regardless of the way it is committed, solely through whole damage reparation.

Last but not least, as we pointed out, the enforcement of administrative punishment is compulsory in the case stipulated by article 74^1 paragraph 2 while the case provisioned by article 18^1 is left to the consideration of the legal authority, thus featuring an optional character.

Although it implies a special character, the grounds for the replacement of criminal liability regulated by article 74^1 paragraph 2 must be enforced, due to its incomplete regulation, by reporting to the general conditions of the institution for criminal liability replacement.

Thus, although not specifically provisioned by law, one may conclude by analogy that replacement of criminal liability can solely be ordered by the court of law and the administrative punishment can solely be part of the ones stipulated by article 19 of the Criminal Code: rebuke, warning rebuke, fine from lei 10 to 1,000.

Although of administrative nature, the charge is recorded in the criminal record, in order to check the incidence of article 74^1 paragraph 3. The text hinders the application of decrease or replacement grounds for the offender who, although having initially benefited from such grounds, commits all over again the same type of crime during a time period of 5 years from having committed the deed.

The term runs between the time of committing of the two crimes and not between the times of rulings by which these grounds are enforced.

At the same time, according to the legislator's express will, the term runs solely for the future, as is addresses special reduction or replacement grounds provisioned by article 74^1.

Consequently, if a person committed tax evasion and benefited from reduction grounds (identical in content) stipulated by article 10 of Law 241 / 2005, even if that person commits a new economic crime in a time period less than 5 years, that person has the right to enjoy the grounds for charge reduction stipulated by article 74^1 paragraphs 1 and 2, as the identity required by law is not met.

In order for the provisions of article 74^1 paragraphs 1 and 2 to come into effect it is required the damage coverage happen *post delictum* obviously but necessarily *ante judicium*, namely until the case settlement in the court of first instance.

In absence of a contrary provision, the reduction or replacement grounds can also apply when the case is submitted to retrial following abolition or invalidation, to the extent to which retrial shall be performed by the court of the first instance.

In all cases, reparation must be whole; in case of partial remedy of the damage, the grounds stipulated by article 74^1 cannot be enforced but the incomplete reparation can be deemed as legal mitigating circumstance.

Another major shortcoming refers to the lack of correlation between the general provisions concerning the extremely serious consequences with the ones of newly introduced provisions. Thus, replacement of criminal liability, subject to conditions of article 74^1 paragraph 2 is involved in case the inflicted and remedied damage goes up to Euro 50,000, in the equivalent value of national currency when already due to exchange fluctuations, crimes come under the form of aggravating circumstances because the inflicted material damage can be larger than lei 200,000.

At the same time there is enormous discrepancy between the general conditions concerning the damage and replacement of criminal liability in the common law conditions, when the amount of the damage should not exceed lei 10 or 50 and the ones provisioned by article 74^1 paragraph 2 where the amount of the prejudice must not exceed Euro 50,000 (approximately lei 210,000).

Last but not least the drafting is short as it does not rule out the possibility of gathering legal benefits that can come about either under the form of additional mitigating circumstances or under the form of punishment reduction grounds with special character (for instance article 320^1 Criminal Code – admitting of guilt)

To conclude, the institution, structured in default brings more controversies than benefits.

Concerning the newly introduced provisions in article 184 of the Criminal Code, the possibility of removing criminal liability through reconciliation of the parties takes shape for two other forms of the crime of the crime of injury, namely the ones provisioned by article 184, paragraphs 2 and 4.

Although the way to remove criminal liability is identical for article 184, paragraphs 5 and 6, the legal structure and proceeding consequences are different.

Thus, for the deeds provisioned by article 184, paragraphs 1 and 3, the criminal trial can solely start following a complaint of the injured party, while for the deeds provisioned by article 184, paragraphs 2 and 4 the trial always starts officially.

At the same time, in the first situation, criminal liability can be removed either by reconciliation of the parties or by withdrawal of the prior complaint, while the newly regulated hypothesis stipulates that liability can solely be removed by reconciliation.

Following the patter of possession disorder (article 220) and seduction (article 199) crimes, the legislator's intervention is welcome because it gives the parties the opportunity to settle the criminal dispute by mutual consent.

Conclusions

In substantial and especially proceeding filed, where the legal norms are promptly applied, any legislative intervention gives rise, through its nature to controversies and disputes.

Nonetheless when the contents of the amending law contradicts the finality itself, the emergence of not unitary practices and proceeding impediments is unavoidable, as the law is at the same time the premise and the condition of the procedure.

The legislator's intervention, reported to the normative instrument this amendment has been included in – of accelerating trial settlement- is obvious.

Nevertheless, sometimes the regulation has flaws both concerning the form (drafting technique) and the contents.

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THE TRAFFICKING OF MOLDOVAN MINORS IN ITALY

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Abstract

The research analyzes the phenomenon of trafficking of moldavan minors for sexual exploitation in Italy and in the European context trying to measure the quantitative and qualitative incidencef the criminal problem. Through a questionnaire submitted to the responsibles of the Italian centers of assistance (according Italian legislation) recovering moldovian minors for the period 2000 – 2008, it has been possible to evaluate all the variables concerning the victims and the traffickers and to reach specific conclusions regarding the adoption of preventive measures in the short and long term. The study suggests the integration of two convergent approaches in a transnational dynamic perspective.

Keywords: *trafficking, sexual esploitation, Italian legal/social system, European context Moldovan minors trafficked, victims, traffickers, prevention measures, human rights-centered approach, transactional network approach, new model of 4 P' approach.*

Introduction

The present study concerns the analysis of the characteristics of Moldovan child trafficking for sexual exploitation, focusing in particular on the conditions of the victims in Italy, a European destination country of phenomenon among others. Consequently, the investigation will examine and try to uncover, as much as possible, behavioral and situational aspects of Moldovan child victims, who have been included in social protection programs in Italy after their identification as victims.

As has been amply highlighted by the major international organizations concerned with the phenomenon[1] that Italy is a destination country for women trafficked primarily of

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[1] US Department of State, *Trafficking in Persons Report*, June 2010, p. 236; US Department of State, *Trafficking in Persons Report*, June 2009, p. 167; US Department of State, *Trafficking in Persons Report*, June 2008, pp. 147 e 182; US Department of State, *Trafficking in Persons Report*, June 2007, pp. 122 e 150; US Department of State, *Trafficking in Persons Report*, June 2006, p. 147; US Department of State, *Trafficking in Persons Report*, June 2005, p. 130.

Nigerian and Eastern European nationalities (Romania, Albania, Hungary, Bulgaria and Moldova), according also to a recent dossier of Save the Children[2] in Italy over the period 2000-2009 from a total of 50,000 victims of trafficking 986 are minors and global victims (84%) are mainly trafficked for sexual purposes[3], in light of the specific project "Additional Measures to Fight Child Trafficking in Moldova" it will be attempted to realize a thorough analysis of the situation of Moldovan minor victims of trafficking in the Italian context only, to highlight the trend of the phenomenon in time and the personality and socio-demographic characteristics of victims and exploiters.

The research will outline the articulated mechanisms of trafficking, the related factors and dynamics and, therefore, the push and pull motivational aspects, the methods of recruitment, the organization of transportation of victims, the criteria for selecting the routes to be used and subjugation and control systems used by the exploiters. Obviously, the investigation requires knowledge of the Italian system of protection and assistance offered to victims of trafficking with the possible interventions that are feasible in practice.

The analysis will be divided into the following points:

1. The Italian anti-trafficking regulatory system
2. The methodology used
3. The phenomenological aspects of child trafficking from Moldova to Italy
    - 3.1. The evolution of the phenomenon
    - 3.2. The main types of exploitation
    - 3.3. The routes used by traffickers
    - 3.4. The methods of recruitment
    - 3.5. The methods and means of transport
    - 3.6. The use of false or forged documents and false personal data
    - 3.7. Victims
    - 3.8. The problem of minor victims quantification
    - 3.9. The problem of minors victims identification
    - 3.10. Sex, age, place of origin, education level of victims
    - 3.11. The living conditions before departure
    - 3.12. Some particularly representative case studies
    - 3.13. Traffickers
    - 3.14. The involvement of organized crime in trafficking from Moldova to Italy
    - 3.15. The methods used for the submission and exploitation of victims
    - 3.16. The prosecution of traffickers
4. The assistance and protection offered to victims of trafficking
    - 4.1. The types of assistance and protection for victims of trafficking
    - 4.2. The level of cooperation of the actors involved

UNODC, *Global Report on Trafficking in Persons*, 2009, p. 260; UNODC, *An Assessment of Referral Practices to Assist and Protect the Rights of Trafficked Persons in Moldova*, February 2007, p. 17.

IOM, *Second Annual Report on Victims of Trafficking in South-Eastern Europe*, 2005 , pp.338, 355, 358.

American Bar Association. Central European and Eurasian Law Initiative, *The Human Trafficking Assessment Tool Report*, June 2005, p. 95.

[2] SAVE THE CHILDREN, *Dossier - Le nuove schiavitù, agosto 2010.*

[3] UNODC, *Trafficking in persons*, 2010.

5. The prevention of human trafficking
6. Shadows and lights raised during the investigation: the voice of the social workers.

1. THE ITALIAN ANTI-TRAFFICKING LEGAL SYSTEM

The Italian system designed to combat human trafficking and protect and assist victims of this crime was one of the first to be implemented with the adoption of the immigration law of 1998, considered to be a cutting-edge system and a model to be adopted by legislators in other countries. With the additions and changes subsequently made it is still considered the most advanced model in the international scene[4].

1.1. THE ITALIAN ANTI-TRAFFICKING LEGISLATION

The Italian legislation on combating trafficking in human beings is constituted mainly by the following legislation:

- Law n. 108 of July 2, 2010 - Ratification and implementation of the Council of Europe Convention on Action against Trafficking in Human Beings, signed in Warsaw May 16, 2005, and adapting internal rules;
- Law n. 146 of March 16, 2006 - Ratification and implementation of the Convention and the Protocols of the United Nations Convention against Transnational Organized Crime, adopted by the General Assembly 15 November 2000 and May 31, 2001;
- Law n. 38 of February 6, 2006 - Provisions on the fight against sexual exploitation of children and child pornography even through the Internet;
- Law n. 228 of August 11, 2003 - Measures to combat trafficking in persons;
- Law n. 46 of March 11, 2002 - Ratification and implementation of the Optional Protocols to the Convention on the Rights of the Child, relating to the sale of children, child prostitution and child pornography and the involvement of children in armed conflict, made in New York on 6 September 2000;
- Law n. 269 of August 3, 1998 - Provisions against the exploitation of prostitution, pornography, sexual tourism involving children, as new forms of slavery;
- Article 12 of Legislative Decree no. No 286 of July 25, 1998 - Consolidated text of provisions governing immigration and the status of foreigners[5];
- Article 3 of Law No. 75 of February 20, 1958 - Abolition of the regulation of prostitution and the fight against the exploitation of prostitution of others.

Two norms are considered as fundamental on combating trafficking in human beings and protection of victims, a criminal and an administrative norm: Law 228 of 2003, "Measures against trafficking in persons", as amended by law 108/2010 for the ratification and implementation of the Warsaw Convention and Article 18 of Legislative Decree 286 of 1998, "Consolidated text of provisions governing immigration and the status of foreigners".

[4] International Centre for Migration Policy Development, *Legislation and the Situation Concerning Trafficking in Human Beings for the Purpose of Sexual Exploitation in EU Member States*, 2009; TRANSCRIME, *Tratta di persone a scopo di sfruttamento e traffico di migranti. Rapporto finale della ricerca*, Ministero della Giustizia, Roma, 2004; Carchedi, F., Orfano, I. (a cura di), *La tratta di persone in Italia. Evoluzione del fenomeno ed ambiti di sfruttamento*, Franco Angeli, 2007.

[5] *Consolidated Act on Immigration* henceforth.

Law 228 of 2003 has as its objective the fight against this phenomenon and considers the prevention of human trafficking as a key feature. This law has amended some articles of the Italian Penal Code, further revised by the recent Law 108/2010 entered into force on July 30, 2010 in pursuance of the Council of Europe Convention on Action against Trafficking in Human Beings, (Warsaw, 16 May 2005), giving the definitions of "reduction and maintenance in slavery or servitude" and "trafficking in persons" and providing penalties.

The new offense of "trafficking in persons" is introduced by the article amending Article 601 of the Penal Code and the new notion for the most part follows the internationally agreed definition and sanctioned by the Additional Protocol to the UN Palermo Convention against Transnational Organized Crime of 2000[6].

In addition, Art. 14 of Law 228/2003 stipulates the measures to be put in place to prevent this type of phenomenon, recognizing a key role in the prevention and to that end attaches to the Ministry of Foreign Affairs the power to define the policies of cooperation with the countries affected by these crimes and to organize in cooperation with the Ministry for Equal Opportunities, international meetings and information campaigns, even within the major countries of origin for the victims of human trafficking. Another important preventive measure is to be put in place by cooperation between the Ministry of Interior, the Ministry for Equal Opportunities, the Ministry of Justice and the Labour and Social Affairs Ministry who will arrange, where necessary, training courses and other useful initiatives[7].

It is also envisaged the establishment of the Anti-trafficking Victims Fund[8] to finance assistance and social integration programs for the victims of these crimes.

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[6] "Art. 600. – *(Placing or holding a person in conditions of slavery or servitude).* – Whoever exerts on any other person powers and rights corresponding to ownership; places or holds any other person in conditions of continuing enslavement, sexually exploiting such person, imposing coerced labour or forcing said person into begging, or exploiting him/her in any other way, shall be punished with imprisonment from eight to twenty years. Placement or maintenance in a position of slavery occur when use is maid of violence, threat, deceit, or abuse of power; or when anyone takes advantage of a situation of physical or mental inferiority and poverty; or when money is promised, payments are made or other kinds of benefits are promised to those who are responsible for the person in question.The aforesaid penalty becomes harsher, increasing by one third to 50%, if the offences referred to in the first paragraph above are perpetrated against minors under eighteen or for sexual exploitation, prostitution or organ removal purposes".

"Art. 601. – *(Trafficking in human beings).* – Whoever carries out trafficking in persons who are in the conditions referred to in article 600, that is, with a view to perpetrating the crimes referred to in the first paragraph of said article; or whoever leads any of the aforesaid persons through deceit or obliges such person by making use of violence, threats, or abuse of power; by taking advantage of a situation of physical or mental inferiority, and poverty; or by promising money or making payments or granting other kinds of benefits to those who are responsible for the person in question, to enter the national territory, stay, leave it or migrate to said territory, shall be punished with imprisonment from eight to twenty years. The aforesaid penalty becomes harsher, increasing by one third to 50%, if the offences referred to in this present article are perpetrated against minors under eighteen or for sexual exploitation, prostitution or organ removal purposes".

"Art. 602. – *(Sale and purchase of slaves).* – Whoever, in cases other than the ones referred to in article 601, purchases or sales or transfers any person who is in any of the conditions referred to in article 600, shall be punished with imprisonment from eight to twenty years. The aforesaid penalty becomes harsher, increasing by one third to 50%, if the offences referred to in this present article are perpetrated against minors under eighteen or for sexual exploitation, prostitution or organ removal purposes".

[7] Law n. 228 of 11 August 2003, art. 14 (1).

[8] Law n. 228 of 11August 2003, art. 13.

The Legislative Decree n. 286 of 1998 (Consolidated Act on Immigration) contains a framework of an administrative nature concerning the entry and stay of migrants and forsees, in article 12, the crimes of aiding and abetting of illegal immigration, namely the profit-making activities designed to allow the entry of irregular foreigners in Italy[9] (Article 12, paragraph 3 Consolidated Act on Immigration). In order to effectively protect victims of such offenses, otherwise destined to be expelled from Italian territory, the Consolidated Act on Immigration introduces a very specific and innovative program of social protection and integration with art. 18, entitled Staying on social protection grounds. Article 18 recognizes, as an exception to the rules on the entry and stay of foreigners in Italy, the possibility for the Police Chief to issue a special residence permit to victims of trafficking, regardless of the irregularities of their entry in Italy. Article 18 offers victims of trafficking the opportunity to escape the violence and the influences of criminal organizations, by participating in assistance and social integration programs.

In the same year, Law No. 269 of 1998 introduced rules for the punishment of the induction, the facilitation and exploitation of child prostitution in a specific and aggravated maner, which is equivalent to the production of pornography and pornographic performances involving minors (the so-called "Law against child pornography"). The young age of the person who is a prostitute is considered an indication of serious exploitation, trafficking or slavery, and consistent with the art. 18 Consolidated Act on Immigration, particular attention is given to the foreign child without assistance in Italy: for them the court must take all necessary urgent measures.

1.2. SOCIAL SECURITY PROGRAMS FOR VICTIMS OF TRAFFICKING

In addition to criminal law in combating human trafficking, the two main institutions that offer protection to victims of trafficking are Article 18 of the Consolidated Act on Immigration and Article 13 of Law N. 228 of 2003. Both provisions intend to protect the victims of all forms of exploitation (including non-sexual exploitation).

Article 18 of the Consolidated Act on Immigration allows foreigners who are victims of violence and serious exploitation to be granted a residence permit for social protection reasons and to be included into a social protection program. The residence permit for social protection reasons can be issued if the conditions mentioned in the first paragraph of Article 18 are met:

- in the presence of crimes related to the exploitation of immigration;
- can only be issued to a foreign national;
- situations of serious violence or exploitation against an alien;
- real danger for the safety of the victim because of his attempts to escape the constraints of the exploiters or of the victim's cooperation with the justice system.The permit of staying is granted by the Police Chief based ona proposal from the prosecutor, in case a criminal trial

[9] Some specific aggravating circumstances have been regulated: for those who facilitate the entry or stay in the State of five or more persons; for those who have acted in a way that the person illegally introduced has been exposed to danger to his life and his safety; if the trafficked person was treated in an inhuman or degrading manner; if the offense is committed by three or more people together, if the acts are committed in order to target the people introduced to prostitution or sexual exploitation or the acts concern children intended for use in illegal exploitation (Article 12 paragraphs 3 and 3 bis and 3 ter).

is ongoing, from the social services of local authorities, or fro associations or other bodies. The key innovation brought by art. 18 is the fact that the residence permit may be obtained by the victims of trafficking regardless of a judicial complaint, in that it provides the so-called "dual track": a process of social integration with a judicial nature and a second one with a social nature. The judicial process is activated in response to a complaint by the injured party or, even if no complaint is made, on the proposal of prosecutor of the case. In the social path the residence permit is issued without a complaint from the victim and the social protection program can be activated at the initiative of a local authority or a private organization registered in the special section of the registry required by the Consolidated Act on Immigration, after the acquisition of the competent prosecutor's opinion. The reasons for an eventual lack of the complaint are different: fear of violence by traffickers, fear of reprisals against the victim's family in the origin country. The specific provision of the social path by the legislator emphasizes the not rewarding characteristics of the residence permit provided by art. 18.

The permit lasts six months and is renewable for another six months or for a longer period if the protection program so requires, and allows access to healthcare services, study, training, enrolling in unemployment lists and actual employment[10]. In fact, this special type of residence permit can be converted into a residence permit for work or study reasons in case of success of the program, with the real possibility of starting a real socio-professional inclusion[11]. When the permit expires, the victim may still opt to return to the country of origin through assisted voluntary return programs.

In the event that the program of assistance and social integration is interrupted, if its beneficiary has a conduct incompatible with its purposes or when the conditions that allow its issue are lacking, the permit is revoked. However, the legislator has not provided the benchmarks against which inconsistency of conduct can be measured: it is therefore left to the discretion of the implementing organizations and law enforcement[12].

In both processes, judicial and social, the foreign victim of trafficking is placed under the care of a local authority or of private social services (enrolled in the special section of the registry required of the Immigration Act), after the host organization sets up a program of assistance and social integration, which will forward a request to the Police Chief to issue the permit for social protection reasons. In the social path, the release will be granted following an inquiry performed by the Police Chief on the information supplied by the non-profit organization or social service.

In light of the foregoing, we conclude that Article 18 of Legislative Decree 286/1998 has as its fundamental aim social inclusion and the fight against exploitation.

Article 13 of Law No. 228/2003 creates a program of social inclusion by establishing a special fund for victims of trafficking. This new program applies not only to foreign victims and provides an integration program specifically linked to crimes under Articles 600 and 601

[10] Art. 18, par. 5 Legislative Decree n. 286/98.

[11] Associazione On the Road, *Articolo 18: tutela delle vittime del traffico di esseri umani e lotta alla criminalità (L'Italia e gli scenari europei) - rapporto di ricerca*, On the Road Edizioni, Martinsicuro (TE), 2002, p. 51.

[12] Associazione On the Road, *Articolo 18: tutela delle vittime del traffico di esseri umani e lotta alla criminalità (L'Italia e gli scenari europei) - rapporto di ricerca*, On the Road Edizioni, Martinsicuro (TE), 2002, p. 52.

of the Criminal Code ("Reduction or holding in slavery or servitude" and "Trafficking in persons"). We are in the presence of a special assistance program which provides, on a transitional basis, adequate housing conditions, food and health care to the victims of the crimes mentioned above[13].

The regulation implementing Article 13 was adopted by a Decree of the President of the Republic of 2005[14]: it introduces the details of the programs of social inclusion provided for by art.13. These programs are achievable through three months projects, renewable for another three months, which can be proposed by regions, local authorities or private persons affiliated with these. Private persons who wish to perform this type of activity must be enroll in the registry required by the Decree of President of the Republic No. 394 of August 31, 1999.

2. THE METHODOLOGY USED IN THE INQUIRY

It is not an easy task managing to get a picture of the status of Moldovan child victims of trafficking in Italy as the most delicate problem is the inadequacy of statistics capable of providing a complete picture of the extent of the phenomenon: the characteristics of human trafficking and its transnational nature makes it extremely difficult to gain knowledge on this type of crime, particularly because of the complexity of all its realization stages, which make it almost invisible. At the international level, the OSCE has attempted to collect the methods used by Member States to identify data on trafficking and on the *modus operandi* of criminals and to monitor all the information in order to harmonize the laws and operations of the various bodies concerned by the phenomenon (Prosecution / Police / NGOs), but these good intentions have not been followed. Therefore for the purposes of our investigation to try to identify victims from Moldova it has been decided to contact the various international, European and Italian institutions (official or otherwise) concerned with the victims' problem, namely: IOM (Geneva, Moldova, Roma), OSCE , UNODC, UNICRI, ECPAT-Italy, On the Road, Italian Department for Equal Opportunities, Save the Children - Italy, Committee for Foreign Children (Italian Ministry of Labour and Social Policy), City of Rome, ANCI (National Association of Italian Municipalities), INTERIOR MINISTRY, MINISTRY OF JUSTICE, NATIONAL ANTI-MAFIA PROSECUTOR, Terre des Hommes International, Victims Support Europe.

As for the Italian data available, our sources were twofold: the National Anti-Mafia Directorate and the Department for Equal Opportunities.

The National Anti-Mafia Directorate for the period 2003/2008 has gathered all available data on criminal cases that permit to identify the number of cases, the origin of suspects and victims and the alleged offenses related to human trafficking under Articles 600, 601, 602 of the Italian Criminal Code[15].

[13] Art. 13 par. 1, Law n. 228/2003.

[14] Presidential Decree No 237 of September 19, 2005. Regulation implementing Article 13 of Law No 228 of August 11, 2003, on measures against trafficking in persons.

[15] SCIACCHITANO G., Tratta di persone, *Direzione Nazionale Antimafia, Relazione Annuale,* dicembre 2008.

CRIMINAL PROCEEDINGS ENTERED DURING THE PERIOD 7.9.2003/30.06.2008 IN RELATION TO THE ARTS. 600, 601, 602 CRIMINAL CODE (MEASURES AGAINST TRAFFICKING IN PERSONS)

INVESTIGATED	ADULT VICTIMS	JUVENILE VICTIMS
3.804	2.194	251

L. 18 agosto 2003, n. 228, Misure contro la tratta di persone- Ripartizione per articolo

Periodo di riferimento: 07/09/2003 - 30/06/2008

DDA	art 600 c.p.					DDA	art 601 c.p.					DDA	art 602 c.p.				
	Nr. Proc		Nr. Indagati	Nr. Vittime			Nr. Proc		Nr. Indagati	Nr. Vittime			Nr. Proc		Nr. Indagati	Nr. Vittime	
	noti	ignoti		di età > 18 anni	di età < 18 anni		noti	ignoti		di età > 18 anni	di età < 18 anni		noti	ignoti		di età > 18 anni	di età < 18 anni
ANCONA	6		71	8	2	ANCONA	1		3	3		ANCONA	0		0		
BARI	17	1	77	20	4	BARI	5		37	6		BARI	2		2	3	
BOLOGNA	53	14	126	145	19	BOLOGNA	27	11	81	101	6	BOLOGNA	0	2	0	4	
BRESCIA	33	3	139	56	9	BRESCIA	12		47	15	3	BRESCIA	1		2		1
CAGLIARI	21	2	100	19	1	CAGLIARI	26	1	93	18	1	CAGLIARI	4		13		
CALTANISSETTA	5		97	111	0	CALTANISSETTA	4		99	106		CALTANISSETTA	1		4	16	
CAMPOBASSO	9		47	54	0	CAMPOBASSO	5		15	39		CAMPOBASSO	0		0		
CATANIA	5		27	5	0	CATANIA	4		25	1		CATANIA	1		2		
CATANZARO	20	1	64	9	3	CATANZARO	5	1	39	10		CATANZARO	1		26		
FIRENZE	18	3	57	38	3	FIRENZE	11		46	14	1	FIRENZE	0		0		
GENOVA	19	1	71	91	8	GENOVA	11	1	44	15	8	GENOVA	3		7		
L'AQUILA	16	4	75	19	2	L'AQUILA	8		42	7		L'AQUILA	1		3	1	
LECCE	15	2	40	14	1	LECCE	5	1	25	25		LECCE	0		0		
MESSINA	0		0	0	0	MESSINA	0		0	0		MESSINA	0		0		
MILANO	48	12	122	200	7	MILANO	9	2	29	22	1	MILANO	2	1	10	4	
NAPOLI	83	10	300	173	22	NAPOLI	27	2	153	72	3	NAPOLI	4	2	50	5	1
PALERMO	5	1	10	11	0	PALERMO	2	1	6	5		PALERMO	1		5		
PERUGIA	6	1	59	43	0	PERUGIA	3	1	22	5		PERUGIA	0		0		
POTENZA	2		45	2	0	POTENZA	0		0	0		POTENZA	0		0		
REGGIO CALAB.	15	1	33	28	1	REGGIO CALAB.	5	1	12	8		REGGIO CALAB.	2		4	2	
ROMA	170	30	441	202	77	ROMA	31	5	123	30		ROMA	20	2	85	26	3
SALERNO	6		69	14	1	SALERNO	1		10	5		SALERNO	1		53		
TORINO	20		155	155	22	TORINO	14		63	69	11	TORINO	0		0		
TRENTO	14	1	41	22	0	TRENTO	4		22	11		TRENTO	0		0		
TRIESTE	22	1	123	58	13	TRIESTE	3		11	1	1	TRIESTE	2		7		
VENEZIA	26	4	67	37	14	VENEZIA	7	2	23	10	2	VENEZIA	1		5	1	
	654	92		1534	209		230	29		598	37		47	7		62	5
TOT	746		2456	1743		TOT	259		1070	635		TOT	54		278	67	

* Nell'ambito di un singolo procedimento può procedersi in ordine ad uno o più dei delitti suindicati

Source: National Anti-Mafia Directorate, Annual Report, December 2008.

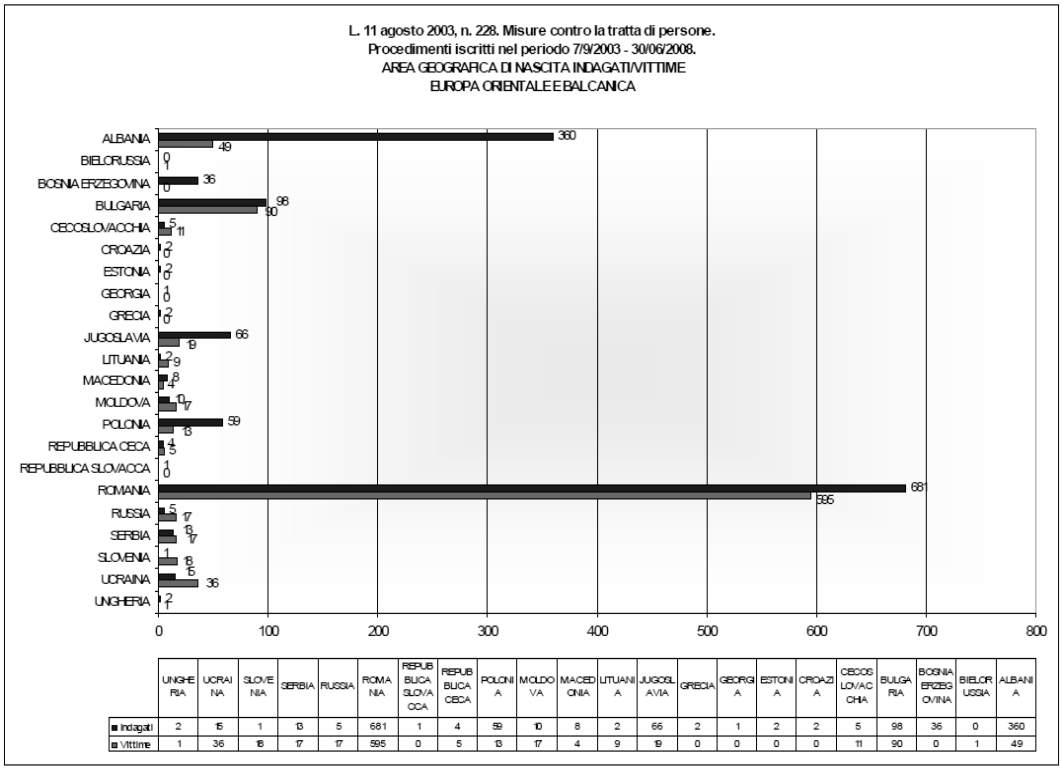
Again with reference to the same crimes, it is clear that when faced with a phenomenon that is becoming more widespread, the proceedings are relatively few with the highest concentration of suspects in the Central and northern Italy; they are completely absent in areas of strong presence of our traditional mafias and this could be explained by the fact that our traditional organized crime does not normally directly handle this trafficking that remains in the hands of foreign organizations. It is still relevant the geographical dislocation of the suspects and victims, which highlights that the countries most affected are:

in Central and Eastern Europe:
Albania
Romania
Bulgaria
Poland

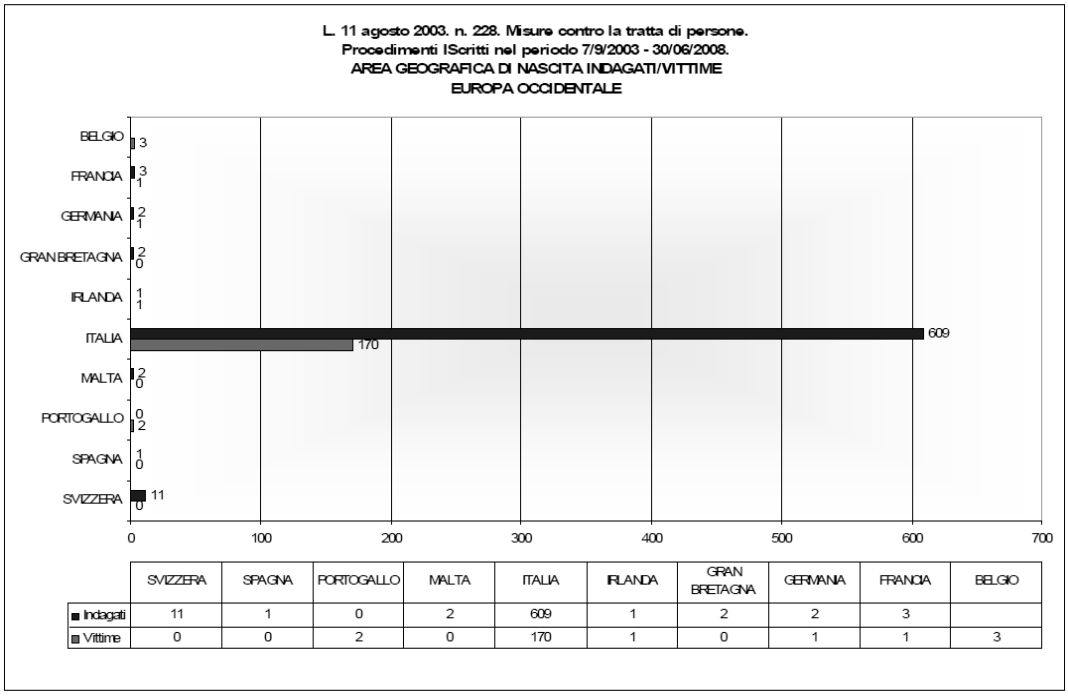
in Western Europe:
Italy

in Africa:
Nigeria

in Asia:
China
Thailand

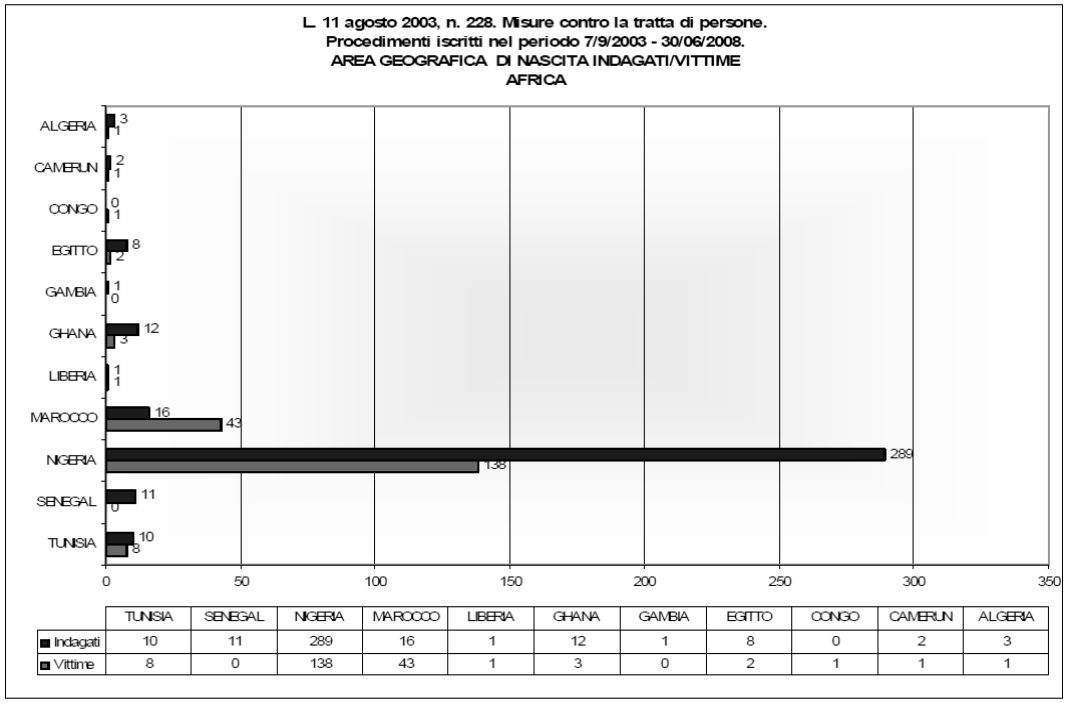


Source: National Anti-Mafia Directorate, Annual Report, December 2008.



	SVIZZERA	SPAGNA	PORTOGALLO	MALTA	ITALIA	IRLANDA	GRAN BRETAGNA	GERMANIA	FRANCIA	BELGIO
Indagati	11	1	0	2	609	1	2	2	3	
Vittime	0	0	2	0	170	1	0	1	1	3

Source: National Anti-Mafia Directorate, Annual Report, December 2008.



	TUNISIA	SENEGAL	NIGERIA	MAROCCO	LIBERIA	GHANA	GAMBIA	EGITTO	CONGO	CAMERUN	ALGERIA
Indagati	10	11	289	16	1	12	1	8	0	2	3
Vittime	8	0	138	43	1	3	0	2	1	1	1

Source: National Anti-Mafia Directorate, Annual Report, December 2008.

The official figures only show that in the period 2003/2008 there are 17 Moldovan victims and 10 Moldovan suspects. The table regarding Central Europe / the Balkans shows 595 Romanian victims against 681 Romanian suspects: are they real Romanian? Cosidering the fact that tens of thousands of Moldovan citizens have obtained dual citizenship and, therefore, the Romanian or Bulgarian passport, it is clear that if apprehended abroad they will omit to declare themselves as Moldovan citizens[16].

The Department for Equal Opportunities was able to provide data on victims officially registered as beneficiaries of social protection projects (under art. 18 D. lgs. 286/1998), which shows that in the period March 2000 - April / May 2007, the number of people contacted and accompanied to various social services, were **54,559**.

Not all these persons were given the opportunity, or have chosen to participate in the programs, but all of them received a first aid consisting mostly in "assisted accompaniments" at medical facilities, or have benefited from legal and / or psychological advice, with their accompaniment at health facilities. Individuals who have joined and participated in projects have been 13,517, of which 938 minors[17], including 17 Moldovan, all young women[18].

contacted victims and accompanied to various social services	**victims included in Social Protection projects**	**juvenile victims included in Social Protection projects**	**juvenile Moldovan victims included in Social Protection projects**
54.559	**13.517**	**938**	**17**

As for the period 2007/2008, the data processed by Transcrime and provided by the Department for Equal Opportunities show that out of the total of 2062 victims, the Moldovan were 230 and out of 139 minors included in the protection programs, 9 were Moldovans.

[16] INTERPOL, personal comunication.

[17] Department of Equal Opportunities (personal communication), 2010.

[18] BARBERI A., *Dati e riflessioni sui progetti di protezione sociale ex art. 18 D.lgs 286/98 ed art. 13 Legge 228/2003 Dal 2000 al 2007,* COMMISSIONE INTERMINISTERIALE PER IL SOSTEGNO ALLE VITTIME DI TRATTA, VIOLENZA E GRAVE SFRUTTAMENTO, 2008: "In order to improve the quality of data it was necessary to find a new monitoring toolthat would make the information not only reliable but also more reliable and more complete. The new monitoring began with the call 8 (2007-2008) and Transcrime was the research organization responsible for carrying out an expertise for the activation of the National Observatory on Trafficking ".

DATA 2007/2008 from institutions / organizations beneficiaries of art 18 (Legislative Decree 286/98) and Art. 13 (L. 228/2003) projects.

Number of subjects included in art.18 and art. 13 social protection programs	**2062**
Numbers of child subjects included in art. 18 and art. 13 protection programs	**139**
Number of Moldovan victims included in art. 18 and art.13 social protection programs	**230**
Number of Moldovan child victims included in art.18 and art. 13 social protection programs	**9**

Source Department for Equal Opportunities, October 2010.

2000/2008 DATA

VICTIMS INCLUDED IN SOCIAL PROTECTION PROGRAMS	CHILD VICTIMS INCLUDED IN SOCIAL PROTECTION PROGRAMS	MOLDAVIAN CHILD VICTIMS INCLUDED IN SOCIAL PROTECTION PROGRAMS
15.579	**1.077**	**26**

The 26 Moldovan child victims were housed in different institutions across the Italian territory to which go our heartfelt thanks and appreciation for the cooperation given to us and for the work undertaken for the victims of trafficking. Obviously, for the protection of the work of such organizations we prefer not to reveal their identity.

A questionnaire designed for this purpose (see the Annex) has been administered to social workers belonging to these organizations. In some cases, retrieval of data on victims relating to an old period was very difficult because of logistical and organizational problems in the victims' shelters. However, these difficulties have been overcome through the very valuable contribution of those interviewed and their experience in the field.

The content of the interviews enabled us to identify the phenomenon of trafficking in Italy at the expense of Moldovan minors at the following times:

- Evolution of the phenomenon in Italy;
- Main types of exploitation;
- Routes used;
- Recruitment methods;
- Ways and means of transport;
- Use of forged or falsified documents.

- Victims
- The problem of underage victims quantification
- The problem of underage victims identification
- Gender, age, place of origin, education level of victims
- Living conditions before departure
- Some particularly representative case studies
- Traffickers
- Involvement of organized crime in trafficking from Moldova to Italy
- Methods used for the subjugation and exploitation of the victims
- Prosecution of traffickers.

3. THE PHENOMENOLOGICAL ASPECTS OF CHILD TRAFFICKING FROM MOLDOVA TO ITALY

3.1. EVOLUTION OF THE PHENOMENON IN ITALY

The evolution of the trafficking phenomenon from Moldova to Italy has been greatly influenced by the vicissitudes of recent European history. The fall of the Berlin Wall in 1989 and the subsequent opening of borders between east and west of the old continent have led to an exponential increase in migration from countries in Central and Eastern Europe towards its western part. In addition to traditional flows of Latin American, Africanand Asian immigrants, immigrants from the ex-communist European region were also added, including the Moldovans.

The evolution of the phenomenon has varied, both at a qualitative and at a quantitative level: there was indeed a change in the characteristics of Moldovan victims which after 2005 had a much lower cultural and social status than before. Sometimes the girls were aware of the type of work to be done abroad and sometimes have had already started to work as prostitutes at home. In this second period, the duration of the migratory project was usually limited to a few months, a period in which prostitution was practiced to achieve higher and "easy" earnings, intending to return home and use them to study, improve their life, open their own business and so on.: although aware of the type of work to be done in Italy, these underage girls did not imagine the conditions in which they were forced to work and abuse that they experienced.

At the quantitative level it was noted that the presence of Moldovan victims reported on the Italian territory, according to those interviewed, registered a peak in the period 1999-2002/2003, which then decreased gradually: in the last years, very few victims from Moldova have been sheltered by the organizations interviewed during the investigation. The last entries of underage Moldovan victims registered with these organizations date back to two cases in 2006 and one in 2009 of an adult woman. However it should be noted that the nine new cases for the period 2007/2008 concerning subjects who benefited of art. 13 and article 18 projects and this could explain the unusually large number (compared to previous years) of victims assisted, and therefore recorded twice.

Number of adult and child Moldovan subjects included in social protection programs - Article 18. D. lgs. 286/1998, 2001 – 2007

Call	Number
Call 2 2001/ 2002	289
Call 3 2002/ 2003	165
Call 4 2003/ 2004	148
Call 5 2004/ 2005	141
Call 2005/ 2006	91
Call 2006/ 2007	77

What might be the causes of this trend of the phenomenon? A first possible explanation might be the shift from street to indoors prostitution, which involves many difficulties. In fact, the exploitation of indoors prostitution, as opposed to street (outdoor) prostitution - still very significant[19] - has features that make the victims almost invisible, more vulnerable to various types of abuse, dramatically preventing their correct identification as victims of trafficking and, consequently, their escape from the circle of exploitation.

Another possible reason is the change of the routes used and the destination countries chosen by the networks of traffickers. The concept of territorial displacement[20] could properly explain this: the organized networks could have chosen to move their traffic to local contexts with a lower risk than Italy, where the 1998 law and the art. 18 of the Consolidated Act on Immigration may have acted as a deterrent to the activities of criminal groups involved in trafficking women from Eastern Europe, pushing them towards other regions, including Russia.

We must also note that in general the flow of unaccompanied Moldovan minors - trafficked or not - to Italy fell sharply until May 2010, as reported by the Italian Committee for Foreign Minors.

[19] CARCHEDI F., *Rapporto finale. La Tratta delle minorenni nigeriane in Italia. I dati, i racconti, i servizi sociali,* UNICRI, February 2010; International Organization for Migration (IOM), *Presidium V. Rapporto sulla situazione dei migranti presenti nella Provincia di Caserta e nell'area di Castelvolturno,* January-April 2010.

[20] In criminology, the term displacement is used to explain the displacement of crime caused by a an anti-crime measure or policy taken in a certain context. The concept is that while there may be a real reduction of one type of crime in an area, it might be that this type of crime has moved in a different space context, or it is transformed into another type of crime, or it will only be committed at a later date. See, for further discussion, Eugene McLaughlin, John Muncie, The Sage Dictionary of Criminology, Sage, London, 2006, p. 116.

Number of unaccompanied Moldovan minors in Italy, 2006 - 2009
Distribution by type of child[21]

Year	Identified	Not Identified	Total
2006	32	232	**264**
2007	31	84	**115**
2008	23	53	**76**
2009	18	38	**56**
2010 (until May)	18	32	**50**
TOTAL	**122**	**439**	**561**

Source: Italian Committee for Foreign Minors.

Number of unaccompanied Moldovan minors in Italy, 2006 - 2009
Distribution by gender of the child[22]

Year	Males	Females	Total
2006	168	96	**264**
2007	66	49	**115**
2008	51	25	**76**
2009	44	12	**56**
2010 (until May)	41	9	**50**
TOTAL	**370**	**191**	**561**

Source: Italian Committee for Foreign Minors.

[21] Italian Committee for Foreign Minors.
[22] Italian Committee for Foreign Minors.

3.2. MAIN TYPES OF EXPLOITATION

From the data provided by the Department for Equal Opportunities it is possible to identify that the type of exploitation of Moldovan children on the Italian territory is sexual exploitation. This is confirmed by the interviews with the social workers. We can certainly say[23] that this form of sexual exploitation of underage girls, through involvement in prostitution, is quite similar to the exploitation of adult women, both in the manner of controlling the victims and for the areas of exploitation. It is obvious that the underage victims were and are more vulnerable and at risk of suffering much deeper trauma than adults.

The place of exploitation of underage Moldovan girls was usually the street, although recently there has been a decrease of this phenomenon, which may be related to a shift towards indoor prostitution. The geographical distribution of sexual exploitation of Moldovan underage girls cuts across the peninsula, so much so that the organizations that have sheltered the victims over time are distributed throughout the Italian territory (Turin, Novara, Cilavegna, Vicenza, Genoa, Bologna , Rome and Bari, Milan, Venice, Bergamo). Social workers reported also that incidents of exploitation also occurred in Taranto, Piacenza, Sirmione, Brescia, Milano, Cuneo, Ancona, Genoa, Teramo, Florence. In relation to the duration of the exploitation of underage Moldovan victims it could vary from a few days to several months (four years in one case only).

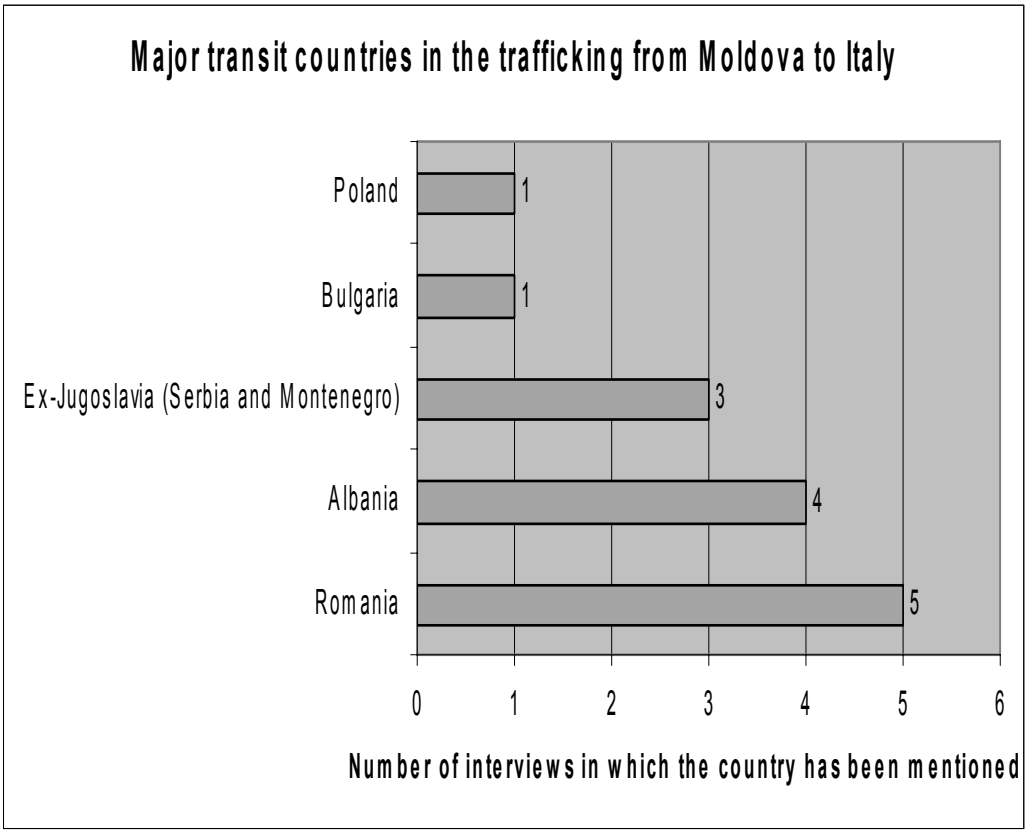
3.3. ROUTES USED

The routes mainly used by traffickers to bring victims in Italy have been obtained from the case studied and from the field experience of the social workers interviewed, having slightly changed over time.

The route most frequently used, especially at the beginning of the reporting period (until 2003), is through Romania, followed by one through the former Yugoslavia (Serbia and Montenegro), with a stop in Albania and the crossing of the Adriatic Sea, often in a rubber dinghy, to reach Italy. Victims have often stop along the way, for days and sometimes for months, mainly in Timisoara, Romania, where the change of the accompanying persons and of the means of transport took place. Other stops that allowed the sale of underage girls took place in Belgrade, Montenegro and Albania. The victims suffered repeated violence during transit and were initiated into prostitution once they entered the areas of Bari in Italy (when coming from Albania), Udine and Trieste, after crossing the Italian border on foot.

This route has been slightly modified over the years by excluding the intermediate stages to directly reach Italy from Romania. So much so that in 2007, with the entry of Romania into the European Union, traffickers were definitely helped and the Moldovan victims have easily reached the Western European countries, and therefore also Italy.

[23] See, in support of this thesis, Carchedi, F., Orphan, I. (ed.), *La tratta di persone in Italia. Evoluzione del fenomeno ed ambiti di sfruttamento*, Franco Angeli, Milano, 2007, p. 216.



3.4. RECRUITMENT METHODS

The recruitment methods of Moldovan victims were numerous. The most widely used were (as always): false promises of work made by acquaintances, friends or even relatives (including women), through the publication of false job offers in newspapers with promises of jobs with good earning as domestic helpers or babysitters. An equally widespread system of recruiting young girls from Moldova is that of the "pseudo boyfriend," usually a person known and trusted by the family, which proposed to future victims a migratory project abroad to improve their conditions of life. Once out of Moldova, the girls were sold to organized networks of prostitution and the "fake boyfriend" recruiter disappeared into thin air.

In some cases there was the extreme situation of an agreement between the trafficker and the victim's family of origin which was fully aware of the consequences of the migration process of the child.

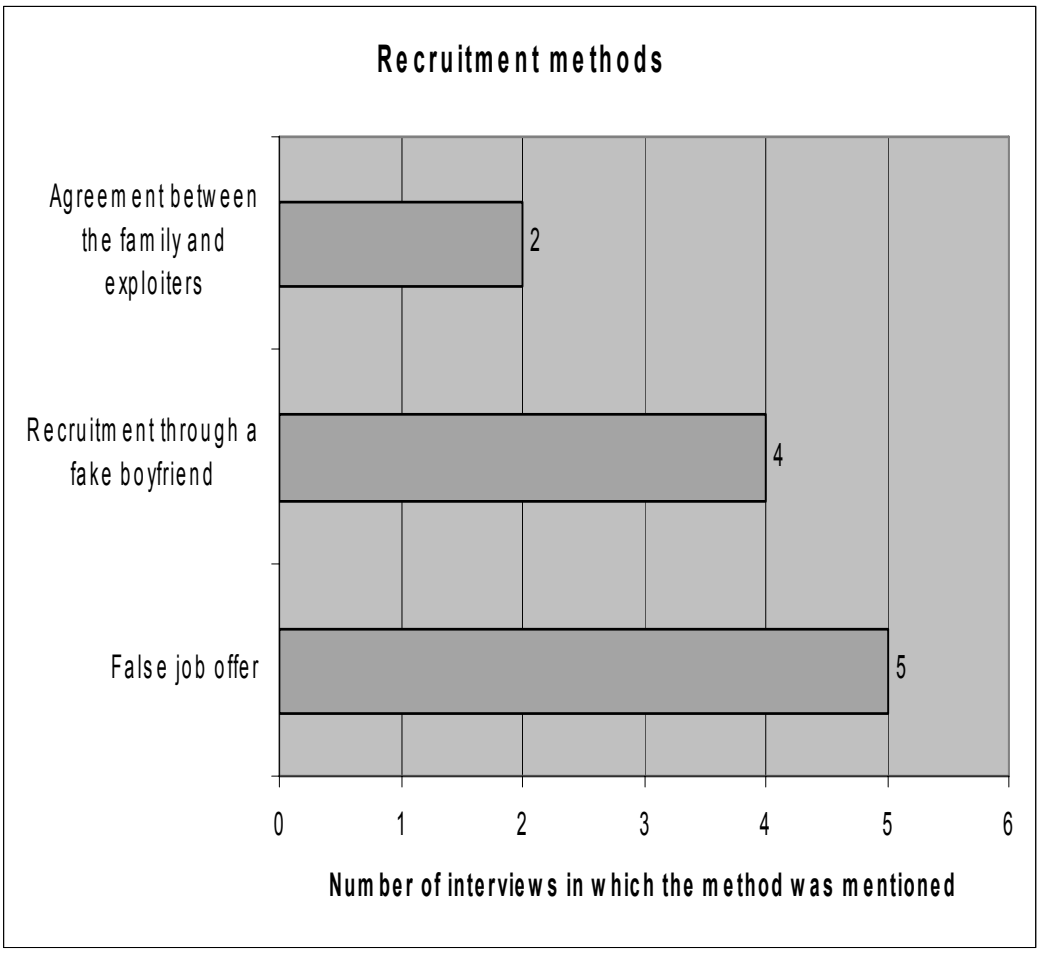
There have been no reported cases of kidnapping and sale occurred in the origin country; the victims were usually lured abroad by deception, fraud, lies, very often by people they

know. In the countries of transit, however, such as Romania, former Yugoslavia and Albania, incidents of kidnapping victims and the organization of real girls sale have been reported.

A change in the methods of recruitment has been reported since 2005: many times the girls were aware of the type of work related to the sex market, but they were not aware of the working conditions, exploitation and the serious physical, psychological and economic violences they would suffer. To this end, a fundamental issue related to the consent of the victims should be made clear. The Additional Protocol to the United Nations Convention against Transnational Organized Crime to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Palermo, 2000, specifically provides for the revocation of consent in the case in which it was obtained with the use or threat of use of force or other forms of coercion, abduction, deception, fraud, abuse of power or of a position of vulnerability, in short, by the means provided in the definition of "trafficking in persons"[24]. In the case of underage victims the Protocol strictly provides the absolute irrelevance of consent: a person under the age of 18 should always be considered a victim of trafficking, even though none of the means listed above was used[25].

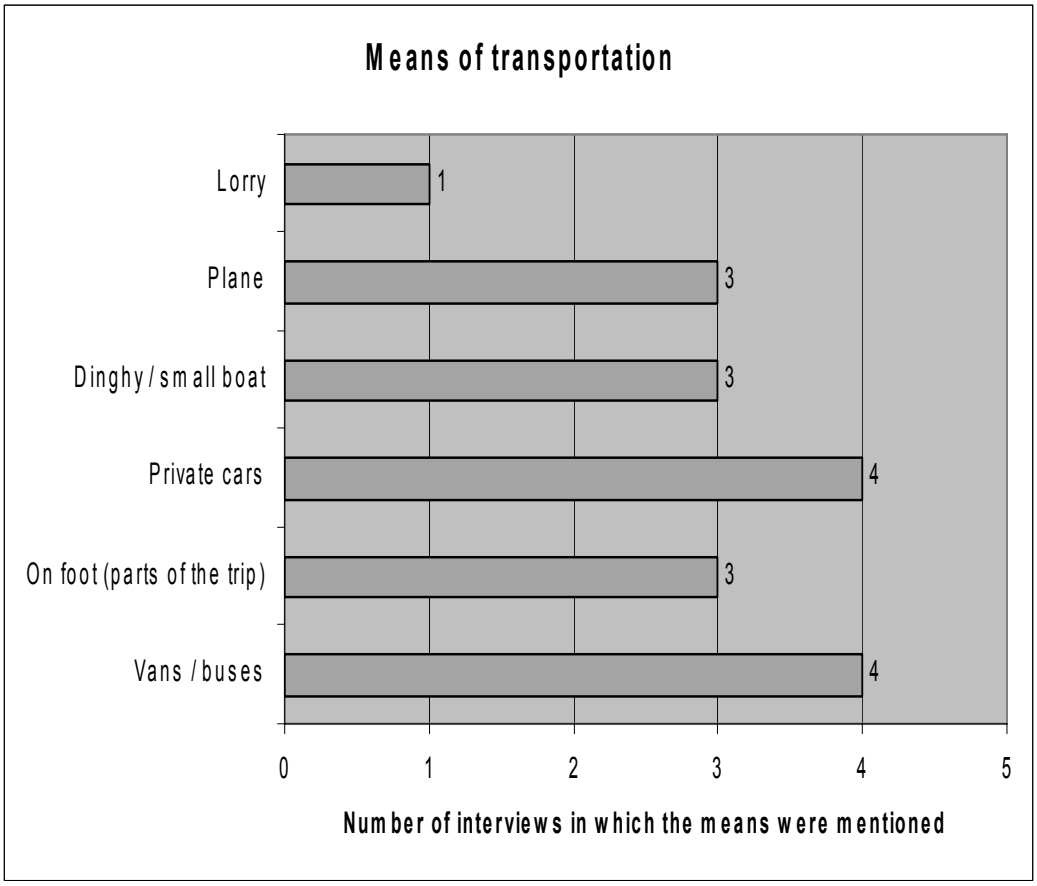
[24] *Additional Protocol to the United Nations Convention against Transnational Organized Crime to Prevent, Suppress and Punish Trafficking in Persons, Especially Women andChildren*, Palermo, 2000, art. 3 (a) and (b).

[25] *Additional Protocol to the United Nations Convention against Transnational Organized Crime to Prevent, Suppress and Punish Trafficking in Persons, Especially Women andChildren*, Palermo, 2000, art. 3 (c) and (d).



3.5. THE METHODS AND MEANS OF TRANSPORT

As for the routes, the methods and means of transport used by the exploiters have evolved over time: in the first period, the means of transportation most frequently used were buses, vans, private cars (for the crossing of Romania and for travelling in the areas of the former Yugoslavia and in Albania), whose drivers were accomplices in or unaware of the traffic, the rubber dinghy for the crossing over from Albania to Italy. Long journeys on foot were not infrequent, especially when crossing borders, often using abandoned houses to hide victims during the journeys.The train and the plane were used occasionally in the past, in one case the plane was used for a trip from Serbia to Montenegro. Subsequently, starting from 2007, the use of false documents and aircrafts have become more frequent and common means and methods of transportation, following Romania's entry into the European Union.



3.6. USE OF FALSE OR FORGED DOCUMENTS OR FALSE PERSONAL DATA

Often the victims were brought into Italy by using forged or falsified documents or providing false personal information as this method ensured to the traffickers avoidance of police detection and ensured to the victims escape from subsequent expulsion.

An issue closely related to this method is the uneven practices in the Italian context (at the law enforcement and the judiciary levels) so that participation in a program of social protection and a potential social inclusion is not always easy.

3.7. THE VICTIMS

3.7.1. THE PROBLEM OF UNDERAGE VICTIMS QUANTIFICATION

As already noted, the experience of social workers and the available data on the number of underage Moldovan victims indicate a downward trend of their presence in Italy. However, this trend is the result of the only available information: the numbers of underage victims

benefiting of social protection projects on the basis of art. 18 of Legislative Decree 286/1998 and the experience of social workers involved in the protection system of the victims.

The key problem when studying phenomena so hidden as trafficking in persons is the almost impossibility of knowing its actual extent. We must be aware that the actual situation of Moldovan underage victims of trafficking in Italy goes well beyond the numbers reported with this investigation and that their dark number could be very high.

Another problem that arises in relation to the identification of victims of trafficking as underage is their registration on the basis of the declared age and not the actual age: sometimes the victims enter the social protection programs and are recorded as adults, although they have been exploited before their coming of age. In any case, the number of adult and underage victims of trafficking from Moldova sheltered over the period 2001 - 2009 at each contacted organization was a maximum of 40 adults (10 - 15 adults per institution) vs. 1 to 4 children. Even in the case of adult women their age rarely exceed 30 years.

3.7.2. THE PROBLEM OF UNDERAGE VICTIMS IDENTIFICATION

In addition to quantifying the number of victims, their identification is equally important. The specific literature on the subject has consistently underlined the importance of their appropriate and timely identification, with particular attention to minors. In that regard specific risk indicators have been developed by various NGOs and organizations, including Save the Children, ILO and UNODC[26] mainly focusing on:

- displacement and isolation of victims
- deprivation of passports
- extreme poverty and need of family
- need of having to repay the amounts for travel expenses
- cultural conditioning
- failure of the migratory project
- fear of retaliation
- lack of freedom of movement
- violence or threat of violence
- young age

[26] UNITED NATIONS OFFICE ON DRUGS AND CRIME, UN.GIFT, *Human Trafficking Indicators*; INTERNATIONAL LABOUR OFFICE, *Operational indicators of trafficking in human beings*, September 2009, SAVE THE CHILDREN, *Dossier – Le nuove schiavitù*, agosto 2010.

• socio-cultural knowledge of the destination country, and level of social and environmental interaction

• trust / distrust in institutions for the purpose of regularization

• involvement in further criminal activity

• degree of language knowledge

• contacts and support from the family of origin

• physical conditions.

The consequences of identification failure can be criminal report and subsequent conviction of the victim for illegal border crossing, illegal residence and possession of forged or falsified documents.

One could also imagine that some of the Moldova victims exploited may have declared a false nationality (Romanian) by using false documents, showing knowledge of the language and socio-cultural similarities in order to overcome the police checks and to avoid deportation. In order to correctly identify the victims, the important role of cultural mediators was emphasized, who from the first approach are able to properly identify the victim's nationality. Several social workers interviewed have suggested that the decrease in the number of victims from Moldova after 2007 could partly be attributed to the fact that many of them have chosen to declare themselves Romanian in the absence of identification documents.

The process of self-identification as victims is extremely problematic[27], since, so that the Moldovan children can accuse their exploiters, it is necessary that they become aware of their serious status of exploitation.

3.7.3. SEX, AGE, PLACE OF ORIGIN, LEVEL OF EDUCATION OF THE UNDERAGE VICTIMS

Underage victims of Moldovan nationality in this enquiry were, as explained above, all female with an age between 15 and 18 years, while their places of origin were quite diverse, ranging from the capital Chisinau, to small towns like Dubasari or other rural areas. A fairly common feature has been the transfer of future victims from small towns or rural areas to the capital, to study or work, where they were subsequently approached, contacted and eventually recruited.

As to the level of education of the children trafficked, one can identify two different phases: the first period (1999-2005) was marked by a high and medium-high level of education, while from the mid 2000s the victims' economic and social status has decreased significantly, together with their level of education.

[27] Organization for Security and Cooperation in Europe, *Ensuring Human Rights Protection in Countries of Destination: Breaking the Cycle of Trafficking*, Conference Report, Helsinki, 23-24 September 2004, p. 85.

3.7.4. THE LIVING CONDITIONS BEFORE DEPARTURE

The living conditions of the children before being recruited have been crucial to understanding the motivational problems that forced them to leave Moldova, the so-called "push factors" of migration. A first factor is the family environment, difficult family contexts in most cases: families that are as inexistent to the children, separated parents neglecting their children, sometimes entrusted to the care of grandparents or state institutions. A particularly acute level of poverty and economic hardship with unemployed parents or employed in casual or temporary work, have been a common feature of the family situation of the future victims, so much so that one of the factors that led to their migration was the children's desire to solve or improve such situation.

A further and quite common problem in the victim's family context has been alcoholism of one or more family members or their different judicial troubles, such as the theft, committed by an alcoholic mother to obtain money for alcohol.

3.7.5. SOME PARTICULARLY REPRESENTATIVE CASE STUDIES

Some life stories of underage women of Moldovan origin, victims of trafficking, collected by the social workers interviewed are now submitted. From their testimony has emerged that the majority of women included in social protection projects on the basis of art. 18 of the Legislative Decree 286/1998, which provide social and work inclusion programs designed specifically for them, have been happily reintegrated into society.

Almost all the victims assisted through art. 18 projects were well integrated, obtaining a regular job in the end.

The stories that follow show how complex is the process that brought these trafficked women from Moldova in Italy, and give an account of the process that led to their integration in society.

Case 1. O.

O. is a Moldovan minor of seventeen years, arrived in Italy in 1999. She was recruited by a man who was the boyfriend, who proposed work in Italy, saying that he had read an ad in the newspaper promising great earnings.

The girl comes in touch with two women who speak Russian. The two women say that they will accompany her in Montenegro, as Italians would hire Moldovan migrants in that country. The girl is given a passport with her personal data.

Thus began the journey of O. and two other girls from Moldova towards Romania. The ride takes place in a private car, in the company of the driver and the two women recruiters.

In Romania, in the city of Timisoara, an exchange takes place: the three girls are assigned to a new accompanying person, a Romanian citizen, and they are moved to a different car. The two recruiters and the driver immediately disappear. The new guide leads the girls to a house on the border between Romania and the former Yugoslavia, where two men that speak both Romanian and a Slavic language arrive in the evening; the girls imagine they are of Romanian origin. The two new guides lead the three Moldavian girls to another house where there are other girls of Russian nationality, and they spend the night there.The

next morning they cross the Danube in a boat and reach Serbia. The trip takes about thirty minutes and there is a car waiting on the other side on board of which are the girls are carried to another house where they spend the night. They are moved further to a bar and to other houses; then they end up in in Belgrade, in a house that looks like a collection center, where they encounter around thirty women of different nationalities, all white: Russian, Romanian and Moldovan. The women had been bought by a Slavic man who intends to sell them to other individuals: the house is meant as the place where the transactions take place. After a month spent in the house in Belgrade, during which the girl is taught how to behave, how to dress and what to do for future customers, O. is bought by two Slavic men, which bring her to Montenegro by plane, by using air tickets with false identities. Upon arrival, she is again taken to a house where the sale of women occurs. Prices are around 2,200 - 2,300 German marks. O. is bought by an Albanian who rapes her at the first opportunity, each cry for help is useless. The girl begins a journey from Montenegro to Albania, by the Albanian buyer's car. During the journey, O. is raped repeatedly and by several people in the places where she is forced to sleep. Once in Albania, she is forced to sleep on the fields, so as not to attract attention of local police. The next step in this long journey is Vlora, where the buyer has contacts with some corrupt policemen.

She enters Italy in November 1999, crossing the Adriatic Sea in a rubber dinghy near Bari; many cars are waiting for the arrival of the boat. From Bari, O. is moved in several Italian cities: Taranto, Teramo, Piacenza, Milan, and finally Turin, where she is transferred to another Albanian pimp, that segregates her in a house with another girl. O. must pay back to her exploited six million of Italian liras plus half of her earnings, that is the amount of the debt incurred for the trip to Italy. She undergos close controls by the exploiter: used condoms and number of customers, phone calls every ten minutes. O. is subject to frequent physical violence and is threated with retaliations against her family in Moldova during the long period of her exploitation.

The profits obtained by her pimp for entire period she spent in Turin, amounted to about one hundred million Italian liras.

Eventually, O. and the other girl who is exploited with her manage to seek help, and they are included in a social protection project.

O. remained to live and work in Italy and claims to have integrated well.

Case 2. T.

T. is a Moldovan underage girl who was sexually exploited by an Albanian criminal group in Italy. Her living conditions before departure from Moldova are characterized by several problems: alcoholism, family misunderstandings, financial problems. The reason that prompted her to leave for foreign countries is to try to help her family to solve their economic problems. T. leaves Moldova at the age of fifteen.

T. is forced into prostitution for four years in various Italian cities: Bari, Ancona, Rome, Florence, in northern Italy and the province of Pavia. The method of submission used by her exploiters is that of the fake boyfriend. T. is in love with the Albanian boy that will after reveal himself as her exploiter, is convinced of his sincerity, so as to present him to his family. The relationship with her boyfriend-exploiter is very strong: the difficulty of breaking the cicle of exploitation is influenced by this as well. With the passage of time, T. realizes

that the fake boyfriend has other women and, feeling betrayed, begins to separate from him, but not knowing how to get out of exploitation circle, because she does not have any identity documents.

She has only Albanian false identity documents and for this reason she has been deported several times from Italy to Albania and repatriated to Italy from Albania. Once back in Italy T. is deprived of the passport, seized in Tirana by the exploiters in exchange of a new Albanian one and from again here the same process goes on.

During the period of exploitation in Italy, T. is stopped for more than thirty times by the police and subjected to different expulsions to Albania: this has subsequently been an obstacle in her obtaining a residence permit under Article. 18 of the Legislative Decree 286/1998.

Eventually, T. decides to denounce her exploiters, thanks also to the work of a police inspector who gets in touch with one of her clients, who had become a reference point for T. The criminal proceedings against T.'s traffickers is still ongoing, being a particularly difficult trial for the criminals' involvement in other crimes such as drug dealing and arms trafficking.

When T. entered the gated community in 2001, she had just come of age. She is kept under high security, being in danger because of her criminal report made against her exploiters.

She is now fully integrated into the Italian society, has a job and is married to the former client who helped her escape exploitation. They have a child.

Case 3, V.

V. is a Moldovan girl. She was sexually exploited in Italy for four months in 2003, when she was only seventeen. V.'s motivation to leave for Italy is the hope of finding a job to help her alcoholic mother. The method of recruitment is the false job promise as a waitress in Italy. The organization that manages the recruitment provides her with a Moldovan forged passport, which states the girl is nineteen years old.

At first she is exploited by a Romanian group, but is subsequently sold to an Albanian criminal group. V. does not accept her exploitation condition: after being put on the street, she tries without success to escape once, asking for help to a fellow countryman, that introduces her to people who take her back to the prostitution circle.

Eventually, V. asks a squad of policemen for help, but since she does not speak Italian but only Romanian and Russian, an interpreter had to be used to communicate with her.

When V. enters into the sheltered community, she manages to integrate and completes her social integration process, despite the problems arising from her relationship with her mother, who in the meantime was arrested for stealing in order to obtain money to purchse alcohol. The girl, who is very attached to the mother, must call in prison to have news on her mother.

A tailor-made project for her was created in the community: V. finished school and later attended a waitering and cooking school according to her wishes. The community shelters and protects her even after reaching the age of majority, until the age of twenty-one years when she requested to return home. After her return she begins to have closer contacts with her mother, trying to help her. Now she lives in her origin country, is married and has a regular job.

Case 4. X.

X. is a Moldavian girl victim of trafficking, sexually exploited in Italy in 2001, when still a minor. She was recruited through a false job promise on a Russian construction site, only to discover that she was sold to some Albanian men who use violence aginst her. After the sale, X. is brought to Albania, through Romania and the former Yugoslavia. From Albania, the girl is accompanied by two Albanian citizens to Italy, in Bari. Once arrived, the girl should had gone to Milan to be exploited. In Bari, however, the two Albanians are stopped by the police and pimps X. makes a regular complaint against them. Following the judicial commplaint, X. is inserted in a social reintegration project under Article. 18 Lgs. D. 286/1998. The girl remains a guest of the shelter in Bari until, for security reasons, it was decided to provide her with a more secure accommodation, following several incidents in which she saw some of the people who have threatened and used violence aginst her. Later, in June 2001, she was transferred to another shelter.

Case 5. V.

V. is a Moldovan victim of trafficking, sexually exploited in Italy when she was still a minor. She is given shelter and she is incuded in a social inclusion program as soon as she turns 18. She is comes from a small town in Moldova. Her idea was going abroad to work in night clubs. Her family context is quite normal, even overprotective: perhaps the girl wants to go abroad for pure spirit of transgression.

The girl denounces her exploiters and she is the beneficiary of a project in base of art. 18 Legislative Decree 286/1998. Obtaining a residence permit was very hard as V. had several expulsions from Italy.

Her social and work reintegration is successful: V. lives and has a regular job in Italy.

3.8. THE TRAFFICKERS

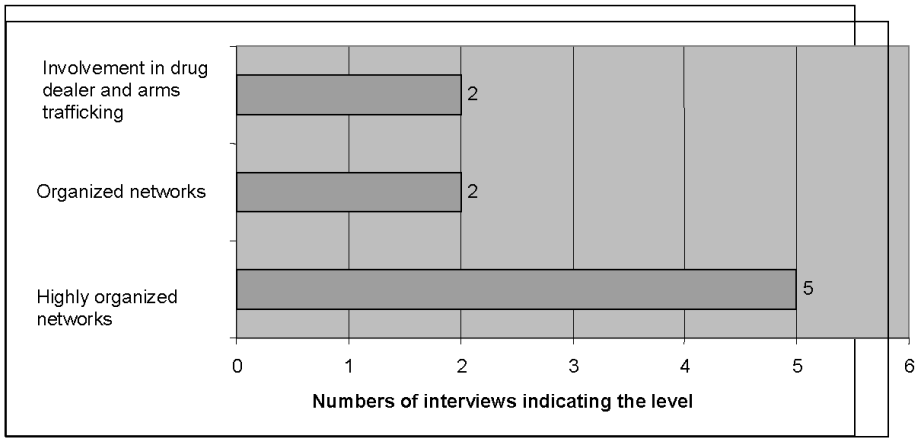
3.8.1. THE INVOLVEMENT OF ORGANIZED CRIME IN TRAFFICKING FROM MOLDOVA TO ITALY

The characteristics of the traffickers involved in this complex "migration process" were also obtained from the interviews realized during the inquiry. The exploitation networks resulted to be well organized, highly specialized in the different stages of the process: the recruitment was handled in the origin country by small groups, sometimes one or two people, relatives, friends or acquaintances of the victims; the recruiters' nationality was always Moldovan while the transport of the victims was subsequently organized by people of Moldovan, Romanian, Serbian or Albanian nationality. The victims could be sold several times during the trip and such sales were handled by Serb, Montenegrin and Albanian criminals. Exploitation in Italy (1999-2001) was managed by highly organized Albanian criminal organizations, involved in other types of illegal activities like drug dealing and trafficking in arms and present throughout the Italian territory. These groups however declined dramatically in recent years: exploitation of Moldovan children was managed most often by Moldovan or Romanian organized groups, according to the experience of social

workers. The Italian organized crime was also included in the management of the exploitation of prostitution, in addition to the Albanian, Romanian and Moldovan.

The various groups that managed the various stages of trafficking could be linked together, as part of a larger, more complex and highly organized network, but in some cases the groups had no ties except for the exchange of the victims. The high level of specialization of the exploitation networks and the few links between criminal groups could provide benefits to the criminal organization, as it minimized the risk of identifying the entire criminal structure involved in trafficking (recruitment, transportation means used, accommodation of the victims and their exploitation).

Level of organization of the exploitation networks



3.8.2. METHODS USED FOR THE SUBMISSION AND EXPLOITATION OF VICTIMS

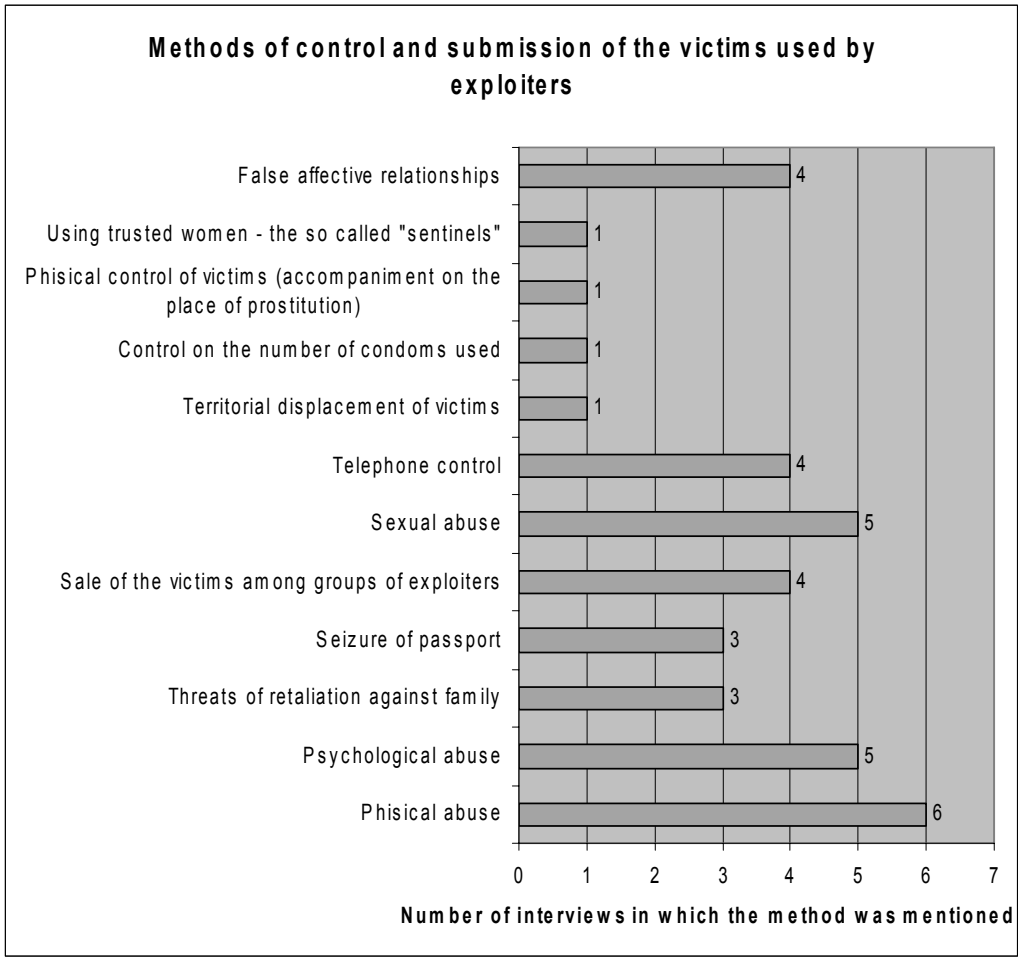
The techniques of submission used by the exploiters of Moldovan victims were very different, ranging from violent to non-violent ones, related to a sentimental or emotional relationship: physical and sexual abuse, psychological abuse, threats of use of force or physical reprisals on family members remained at home, passport seizure, sale of the victims among exploiters, phone control of the victims on the place of prostitution, spatial displacement of the victims to avoid law enforcement controls, monitoring of condom use, on-site accompanying of the victims to the place of prostitution, complicity of older trusted women , the so-called "guardians".

As already noted in connection with the victims, physical, sexual and emotional abuse were already inflicted on the way from Moldova to Italy, during the various stages along the way where the girls were sold and forced to become prostitutes and sometimes forced to have unsafe sexual contacts. In cases of refusal to engage in prostitution, criminal groups did not hesitate to resort to sexual abuse, beatings, threats of retaliation against family members. In transit countries like the former Yugoslavia and Albania, the victims were also seized in private houses: in these countries the sale of children took place, which could be

bought and sold several times, passing from a traffickers' criminal group to another, often of different nationalities.

The clandestine status of the victims increased their subjection to criminal organizations, as such an illegal status was an element of blackmail. Often, the victims were seized identity documents as soon as they arrived at the place of exploitation until the payment of the debt incurred for the trip or they were provided with false or counterfeit documents to seem adults. The status of illegal immigrants, the forged documents, the complete ignorance of the Italian legislation, the lack of trust in institutions, led the children, doubly vulnerable by age and status, to become completely subject to criminal organizations.

Even more complex is the submission mechanism in case of traffickers known to the victims (boyfriends / exploiter-friends) who use deceitful exploitation systems, mainly of sentimental / emotional nature that the children could not perceive in their absolute negativity[28].



[28] Save the Children, *In Italia ancora molti i bambini e gli adolescenti coinvolti nello sfruttamento sessuale, lavorativo o in attività illegali e accattonaggio*, www.savethechildren.it, 2009.

3.8.3. THE PROSECUTION OF TRAFFICKERS

The majority of trafficked underage girls were included in social protection projects through the so-called "judicial" path: the victims made regular criminal complaints against their exploiters. It was not possible to know the outcome of the criminal processes, given the long duration and complexity of the proceedings for trafficking in persons. However, all persons reported by victims were arrested and two cases were concluded with the sentencing of traffickers. According to the report of the National Anti-Mafia Directorate[29] criminal cases registered during the period 7.9.2003 / 30.06.2008 in relation to Articles 600, 601, 602 of the Italian Criminal Code (Measures against trafficking in persons) are as follows.

CRIMINAL PROCEEDINGS
DURING THE PERIOD 7.9.2003/30.06.2008 IN RELATION TO ARTICLES 600, 601, 602 CRIMINAL CODE
(MEASURES AGAINST TRAFFICKING IN PERSONS)

INVESTIGATED PERSONS	ADULT VICTIMS	CHILD VICTIMS
3.804	**2.194**	**251**

4. ASSISTANCE AND PROTECTION TO VICTIMS OF TRAFFICKING

4.1. TYPES OF PROTECTION AND ASSISTANCE FOR VICTIMS OF TRAFFICKING

The forms of assistance and protection offered by organizations working in the field of social protection of victims of trafficking are:

- Street units
- First reception
- Secondary reception
- Third reception (semi-autonomy)
- Safe houses
- Shelters
- Management of the anti-trafficking toll-free number 800 290 290 (which has a central and 14 local centers located throughout the country)

[29] DIREZIONE NAZIONALE ANTIMAFIA, *Relazione annuale*, December 2009.

- Legal advice
- Psychological counseling
- Preventive medicine
- Education courses
- Training courses
- Labour market orientation
- Social and labour inclusion.

In large cities, associations working with trafficked victims are more specialized than those present in small towns, there are only those working on the street, or just first reception of victims or just labour orientation, etc. In medium-sized or small towns the organizations are involved in the whole integration process of the victim, from the first contact on the road to full employment and social integration. The institutions that have participated to our survey have also realized and continue to realize awareness and information campaigns on the risks of exposure to infection of AIDS and other sexually transmitted diseases and their means of prevention.

4.2. THE LEVEL OF COOPERATION BETWEEN THE ACTORS INVOLVED

The fight against human trafficking and victim protection is based on the cooperation of all actors involved: the police, judiciary, local and governmental organizations, social workers and so on. The division of labour on a sectoral basis only would not give successful results, and so, as showed through the interviews, the level of cooperation, communication and trust between the non-profit sector involved in the protection of trafficking victims and other concerned authorities was valid and consolidated over time.

It is obvious that such cooperation should not be limited to local or national actors, but it is particularly effective when it includes the active exchange of information across borders between the different stakeholders in various countries involved. To foster further such cooperation, the organization of seminars, training courses, workshops, study days with the various stakeholders, can play an important role, because the fight against trafficking must be seen in an integrated, interdisciplinary view, according to a short- and long-term preventive approach, repressive and protective of victims and with the ultimate goal for their reintegration in society. To this end it is worth remembering the coordination activities carried out in Italy by the National Anti-Mafia Directorate strongly pursuing the involvement of "all stakeholders to find a multidisciplinary perspective, the necessary synergies between the different skills and activities"[30].

5. PREVENTION OF TRAFFICKING IN HUMAN BEINGS

In the integrated view of combating trafficking in human beings the preventive aspect is particularly important as underlined by the Protocol to Prevent, Suppress and Punish

[30] SCIACCHITANO G., *Tratta di persone*, in DIREZIONE NAZIONALE ANTIMAFIA, Annual Report, December 2008.

Trafficking in Persons, Especially Women and Children, Palermo (2000)[31], which requires Member States the adoption of preventive measures in the short and long term. The first set of measures include information and awareness programs (the so-called awareness raising campaigns) of society and citizens in general, on the characteristics of trafficking as a criminal phenomenon perpetrated by organized crime and the serious risks that poses for the migrants involved in this process. A problematic aspect of awareness campaigns on trafficking for sexual exploitation concerns the role of the "client", which in most cases analyzed has contributed to helping the victims to escape exploitation. In this regard it is worth mentioning the Council of Europe Convention on Action against Trafficking in Human Beings[32] that under Art. 19 provides the possibility to punish clients of victims of trafficking for having received sexual services from them, if there is an awareness that the person is a victim of trafficking in human beings. This prediction is apparently intended for a possible reduction in demand through a broader responsibilization of clients.

The long-term measures are much more complex and are designed to identify the root causes of the phenomenon: the Member States should promote or strengthen (where they already exist) "development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment"[33]. These measures are aimed at "tackling" the root causes of trafficking. The main actors responsible for implementation of these measures are government authorities and intergovernmental bodies, acting through the establishment and strengthening of economic development programs for the most deprived areas, including through closer transnational cooperation.

It is obvious that any information and awareness campaign on the phenomenon is to be implemented in origin countries and their effectiveness must be tested there.

With regard to the prevention strategies implemented in Italy, the role played by the Department for Equal Opportunities should be pointed out and its work (at national, international and transnational levels) through: 1) assistance and protection programs for victims of trafficking (from 2006 to 2009 it has co-financed 72 programs); 2) establishment of the National Anti-Trafficking toll-free number (800290290); 3) monitoring and data collection; 4) establishment in 2007 of a national observatory on trafficking in human beings, managed since 2009 by Transcrime; 5) communication campaign promoted by the Ministry of Interior in collaboration with the Department which realized the video spot "Let's erase trafficking" broadcast by the national networks; 6) meetings with foreign delegations. At transnational level, the Department for Equal Opportunities is the proponent and leader of two projects funded under the Community Programme "Prevention and Fight Against Crime" and leader of the European project "FREED", seeking to create networks of assistance and training among institutions and NGOs and aimed at combating trafficking in persons for the

[31] See art. 14 of the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, Palermo, 2000.

[32] Signed in Warsaw, 16 May 2005.

[33] Art. 15, par. 3 of the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, Palermo, 2000.

purpose of labor exploitation. It should further reported on the action carried out by Save The Children with "AGIRE", "REACT", "Praesidium", "CivicoZero", and "Accoglienza" projects, by the Italian NGO On The Road - and by IOM Italy and by the Italian Ministry of Interior with the "NIRVA" and "AZIONE DI SITEMA" projects.

6. SHADOWS AND LIGHTS RAISED DURING THE SURVEY: THE VOICE OF SOCIAL WORKERS

The findings of this survey have both positive and negative connotations. Significant negative aspects are:

- The scarcity of financial resources for protection and social reintegration initiatives for victims of trafficking;
- The problem of the duration of the social inclusion projects of victims of trafficking under Article 18;
- The heterogeneous application of the double path laid down in Article 18 Legislative Decree 286/198 (in the sense that the so-called social path laid down by art. 18 is infrequently used, even though the law expressly so provides);
- The full integration of victims on the labor market and the need for psychological support even after the conclusion of the project;
- The need for personnel turn over and for training programs for new staff;
- The need for greater disclosure of services for victims;
- Issues related to the legislative restriction on the conversion of the residence permit of unaccompanied foreign minors when they turn 18[34].

Among the positive connotations we can mention:

- the application of Art. 18 of Legislative Decree 286/1998 with the integration of victims into Italian society as a possible model to be replicated in other countries;
- the approach to the victim as a key actor;
- the awareness raising campaigns on the phenomenon of trafficking in human beings aimed at various sectors of society;
- the judicial approach which is not only repressive but oriented to the human rights protection of victims and their defence.

Final remarks

In light of the findings of the survey conducted it is possible to reach some final conclusions, which refer to the traditional areas of work in the field of trafficking in persons and highlight how our protection methods have proved effective, in relation to the priority

[34] Law n. 94 of 15 July 2009, on "Public safety dispositions" (publidhed in the Italian Official Journal of 24 July 2009), entered into force 8 August 2009.

aim of recovery and subsequent integration of the victims, but also as a valuable judicial tool. One should not overlook the small number of underage Moldovan victims object of our study which, considering the almost invisibility of the trafficking phenomenon, could lead to presume a very different and not identified reality. It is therefore appropriate to point out the need for better implementation of specific risk indicators which, while well conceived, were not correctly or not currently used.

In this perspective, one of the best ways to understand the complexities of human trafficking would be to frame it according to two approaches to be converged and integrated: the first approach is centered on the protection of human rights (human rights-centered approach), intended to ensure to all individuals the fundamental right to be free and self-determination. This safeguard should be fully provided in a transnational vision of each stage of the trafficking process: recruitment / deceiting, transit / coarctation-sexual violence, destination / sexual exploitation, methods to exit exploitation / protection and social reintegration. It is clear that if the whole process of trafficking does not positively end for the victim, there may be two further stages represented by a subsequent victimization or even by a potential "retrafficking" or role reversal that would then need a strategy for prediction.

The second approach is to consider the trafficking of human beings as a transactional network whose driving force is characterized by economic pressures for the author (exploitation / financial gain) and for the victim (vulnerability / economic improvement).

These two integrated and convergent approaches must be, always in a transnational dynamic, the conceptual basis of four distinct operational moments which reformulate the 4P's approach[35] in the most strictly criminological sense: Prevention, Protection, Prosecution, Prediction.

The actions relating thereto shall be constructed using interdisciplinary strategies, whose effectiveness should be continuously monitored, evaluated and improved.

With this in mind, 10 years after the Protocol, one could suggest:

1) ensure the development or strengthening of the criminal policies adopted to combat the phenomenon of trafficking and their consistency with all other policies related to social welfare;

2) consequently, the legislation in the field should also provide for the criminalization of all related criminal phenomena and the subsequent proceedings against the traffickers should be a priority as well as the dismantling of criminal networks, ensureing the victims's respect in order to avoid a new victimization and witnesses protection;

[35] The so-called 4P's (Preventiom, Partnership, Prosecution, Protection) principles that the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime* (2000), the *Stockholm Programme* (2009) and the *Action Oriented Paper (AOP) on Strengthening the EU external dimension on Action Against Trafficking in Human Beings* (2010) consider basic, to be pursued in any action, domestic and outside the EU, against the trafficking and that should always guide the implementation of any social/criminal policy.

3) application of sanctions appropriate and proportionate to the seriousness of the crime and to ensuring the confiscation of the proceeds thereof;

4) collect all possible information at national and international level on status of trafficking so that their comparison, according to an intelligence system and disaggregated availability, we can achieve a better understanding of the complex links between trafficking and other forms transnational organized crime;

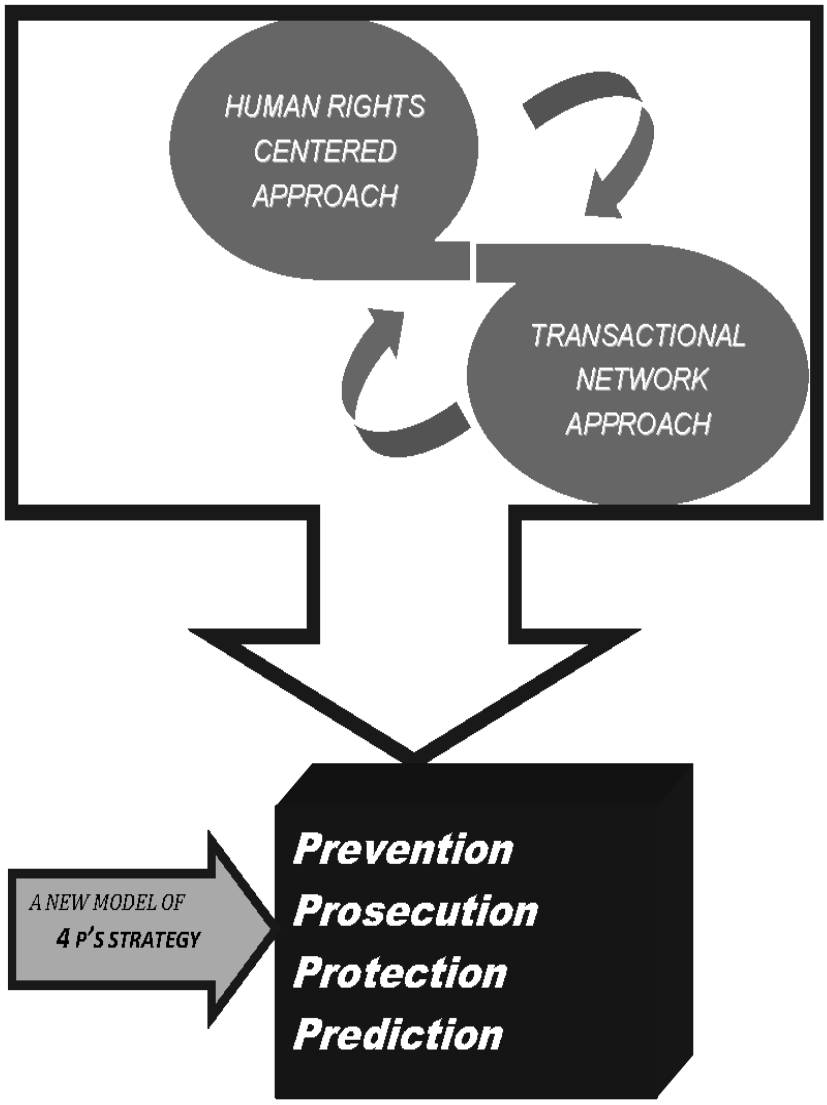
5) strengthen the training of all possible "actors" involved and, in particular, of those working in the fields of law enforcement and justice administration because starting from their cooperation and coordination both nationally and between states (as rightly argued by the Proposal for a Directive on Preventing and Combating Trafficking in Human Beings, and Protecting the victims[36] that the European Commission should adopt at the end of 2010) one could develop comprehensive programs of prevention/fight to reduce the vulnerability of potential victims addressing the roots of the problem, including the demand side which is at the basis of any trafficking dynamic.

This dynamic view of criminal politicies is also in line with recent suggestions of the Secretary General of the United Nations formulated during the Twelfth United Nations Congress on Crime Prevention and Criminal Justice (12-19 April 2010), indicating as the most effective and comprehensive response "the five pillars of intervention: prevention, prosecution, protection, National coordination and cooperation and International cooperation and coordination"[37]. So much so that the UN Secretary General Ban Ki-Moon at the launch of the Global Plan of Action Against Trafficking in Persons (August 31, 2010), effectively emphasizes that "we must improve our knowledge and understanding of this crime if we are to make good policy decisions and targeted interventions"[38].

[36] Malmstrom C., *Speech at the European Anti-Trafficking Day*, Brussels, 18 October 2010.

[37] UNITED NATIONS, *Criminal justice responses to the smuggling of migrants and trafficking in persons:links to transnational organized crime*, working paper prepared by the Secretariat , Twelfth United Nations Congress on Crime Prevention and Criminal Justice, 12-19 April 2010.

[38] BAN KI-MOON, *General Assembly launches global plan of action against trafficking in person*s, sixty-fourth General Assembly Plenary 114th Meeting, 31 august 2010.


HUMAN RIGHTS CENTERED APPROACH
TRANSACTIONAL NETWORK APPROACH
A NEW MODEL OF 4 P'S STRATEGY
Prevention
Prosecution
Protection
Prediction

APPENDIX:
QUESTIONNAIRE ON CHILD TRAFFICKING FROM MOLDOVA
(2001 - 2009)

Please reply to the questions below from the direct experience of your organization. Consider that all the questions concern the situation of trafficking of children form the Republic of Moldova.

I. ORGANIZATION DATA

Name

Type of organization

Address

Interviewed person

II. VICTIMS DATA

1. How many Moldovan child victims of human trafficking has your organization assisted during the past years (starting 2001)?
2. Could you provide information on the age, sex, type of exploitation, type of assistance received by the Moldavian children assisted by your organization during the past years ?
3. From your experience, which are the main types of exploitation experienced by Moldavian children in your country?
4. Could you comment on the pre-conditions for trafficking in minors from Moldova: which was the general situation, categories of children at risk, push and pull factors.
5. How were the children recruited?
6. How did children leave their country of origin? Ways of transporting minors abroad.
7. Which were the routes employed for trafficking children form Moldova to your country?
8. Which is the ratio of Moldavian migrating children to adults – if available form your organization's data? Which is the ratio of Moldavian trafficked children to adults – if available form your organization's data?

III. TRAFFICKERS DATA

1. Which are the principal methods used by traffickers when recruiting Moldovan children? Have they changed in the recent past?

2. From your experience, is organized crime involved in cases of trafficking in Moldovan minors?

3. How law enforcement proceeds in the detection and investigation of child trafficking cases in your country?

4. Could you provide any information on the prosecution of authors in your country?

IV. VICTIM ASSISTANCE AND PROTECTION

1. How is your organization addressing the issue of victims' protection?

2. What is your role in assisting victims or providing services?

3. Do you actively share information with police and prosecutors regarding traffickers, victims and routes?

4. What is the level of cooperation, communication, and trust between your organization and law enforcement?

5. How could methods of victim protection and implementation be improved in your opinion?

6. Do you know of cases where the government punished victims for forgery of documents, illegal crossing of borders, or illegal work?

V. PREVENTION OF CHILD TRAFFICKING

1. Are public awareness campaigns directed at potential victims? Are they directed at reducing demand by changing attitudes of society? If so, how?

2. Has your organization realised/helped to realise such campaigns?

3. Does prevention include protection against criminal incrimination or protection against vulnerabilities that create victims (poverty, domestic violence, unemployment, poor schooling, discrimination against women, children, or minorities, etc.)?

4. Does prevention include specific ethical issues relating to children?

VI. BEST PRACTICES AND RECOMMENDATIONS

1. Could you please share any best practices emerged from your experience?

2. What would you recommend to improve the activity of organizations similar to yours?

3. Which are the major difficulties and needs that your organization is facing?

4. Please comment on any experiences with Moldavian child trafficking not already addressed.

5. Could you also share some specific Moldavian victim stories or significant case studies, as long as names and identities are protected?

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CONVENTIONAL DEVELOPMENT OF ENVIRONMENTAL PREOCCUPATIONS

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Abstract

A great number of the conventions referring to nature, even if they do not refer ton particular species, were limited from the point of view of geography and territories: we may give as example here a convention for the protection of flora, fauna and panoramic beauties of America, the African convention for nature and natural resources… By the Stockholm conferences, from the 5th of June 1972, we entered in a "dynamic of globalization". Article 1 of the Declaration that followed the conference is important for the global awareness: "Human beings have the basic right for freedom, equality and conditions of a satisfying life, in an environment with a quality that allows him to live with dignity and well being. He has the solemn duty to protect and improve the environment for the present and future generations (...)". This article proclaims a right for the environment. A new law seems to have arisen with the apparition of this convention: the right of a healthy human being and of a healthy environment. This law is bipolar because it associates the human beings to nature. Human beings have the right to live in a healthy environment and this is why he has to protect nature. This does not represent a right of the human beings from a strict point of view. This is a right that has a universal value. The right to a healthy environment can not be put in the same category as the right to live or the right to be healthy, because this right contains the latter.

Keywords*: the principle of precaution, globalization, cultural patrimony, natural patrimony, international ecological order.*

Introduction

A brief history of environmental law allows the situation of an idea of universal interest in a conventional context. Only a few decades ago has the human being been aware of the nefarious consequences that could influence the environment. In the beginning, the environmental conventional instruments did not aim but at the salvage of certain animal or vegetal, only a few conventions from the beginning of the 20th century were more global. Environmental international law was at its origin "*a sector discipline"*. Nowadays, it tends to *"adopt a global vision of the biosphere and of its multiple components"*.

• An international ecological order?

The Rio Conference took into consideration the global risks representing climate changes and the disappearing of biodiversity[1].

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[1] BEURIER (J.-P.), Le droit de la biodiversité, RJE 1-2 /1996, p. 5-28.MALJEAN-DUBOIS (S.), Biodiversité, biotechnologie, biosécurité : le droit international désarticulé, JDI 2000 (4), p. 949-996. LONDON (C.), Nouveau millénaire, nouveaux impératifs environnementaux ? , Droit de l'environnement mai 2002, n° 98, p. 129 et s. et

The globalisation of environmental risks results thus in the multiplication of environmental international conventions. We assist at "a globalisation of problems"[2], at a "universal mobilisation"[3]. This conventions are most often, conventions-cadre[4], which are easy adaptable to difficulties. The ozone layer was, first of all, the preoccupation of scientists and international organisations. The Framework convention regarding the protection of ozone layer was signed in Vienna on the 22nd of March 1985[5].

This first text determines the judicial principle of a progressive elimination of substances that damage the ozone layer without any constraining obligation being edited regarding the states. The Montreal Protocol (16 September 1987) establishes a term for this lagoon and shows at what point the earth atmosphere, the air that every species breathes is at the hearth of international preoccupations. The framework convention of the United Nations regarding climate changes (entered into force in March 1994) has aided the adoption of the Kyoto Protocol[6] in December 1997. This Protocol aims at the fight against the earth warming due to the emission of gases with a greenhouse effect.

If it seems difficult to assert the existence of an international ecological order, it wouldn't be too hard to sustain that the establishment of a psychological and sociological connection, that unites people, limits the frame of a construction of an order of the environment. The technological evolution, the scientific discoveries and the economic and social transformations, that affect the life of people, wake the feeling of their interdependence and the urgency of forming a true international ecological order.[7] The formation of an international ecological order is connected to the raising of an ecological conscience. But, the state of tensions that surrounds international relations doesn't agree to the eviction of an awareness of common interests in almost every domain. This general awareness results from the constant degradations of the planet Earth, the only space in the universe where there life is possible, until the contrary happens. The awareness is presented as a live factor of evolution of the international ecological order that is underlined by some basic ideas. This order is built around referential principles and protector norms of the environment[8].

These conventions present all the spaces that represent our planet: water, air and earth. Thus, by desiring to reign over these spaces, that once did not belong to anyone and which weren't assigned any right of property (air doesn't belong to anyone and neither the inaccessible sea

spécialement p. 131-134. HERMITTE (M.-A.), La convention sur la diversité biologique, AFDI 1992, p. 844-870. STONE (D. C.), the Rio Convention from 1992 regarding biologic diversity. http://www.unige.ch/sebes/textes/1996/96_CDS.html

[2] KISS (A. C.), La protection de l'atmosphère : un exemple de la mondialisation des problèmes, AFDI 1988, p. 701 et s.

[3] BOISSON DE CHAZOURNES (L.), *Le fonds pour l'environnement mondial : recherche et conquête de son identité,* AFDI 1995, p. 612 : « La conférence de Stockholm avait sonné le glas en appelant à une mobilisation universelle en faveur de la protection de l'environnement ».

[4] VAN DEN HOVE (S.), *La globalisation des risques environnementaux rend nécessaire un renforcement des régulations internationales,* in *Le nouvel état du monde. Les idées-forces pour comprendre les nouveaux enjeux internationaux*, sous la direction de Serge Cordellier, deuxième édition actualisée, La découverte, Paris, 2002, p. 74-76.

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[6] MOLINIER (M.), *Le principe de précaution dans le dossier climatique,* Droit de l'environnement n°108, mai 2003, p. 90-93.

[7] Abraham Yao GADJI, *Liberalisation du commerce international et protection de l'environnement,* Thèse de doctorat, Limoge University, Faculty of Law and Economic Sciences Crideau, p.117 and the following.

[8] Abraham Yao GADJI, op.cit.

waters); man breaks away from the idea of res nullius[9]. These properties still have a "universal destination" and we also can observe the terms "common goods" and " res communis". Nature in all its diversity will remain a common good for all humans, a common patrimony of humanity[10].

Humans become more and more aware of the existence of global risks and establish, in order to prevent or eliminate, contravention elements that are also global. This globalisation of problems and solutions is the one that represents the seeds of universe interest and thus of the universal action.

This globalisation that aids at the raising of new goods, also helps the writing of a new law adequate for environmental preoccupations newly appeared: the right to a healthy environment[11]. This law seem to be consecrated to different international instruments articles 22, 25 and 27 of the Universal Declaration of Human Rights, articles 1, 6, 7, 11, 12, 13 and 15 of the International Pact regarding the social and cultural rights, articles 11 and 14 of the Convention regarding the elimination of all forms of women discrimination… This law isn't only the object of application, but it has also offered to all state the right to a healthy environment, as for example the Rio Declaration, the Beijing Declaration… France applies this law in its constitutional law starting with the 1st of March 2005 regarding the Environment Charta[12]. In its first article, it proclaimed that "Each person has the right to live in an equilibrated environment and to respect its health". Each framework convention insists on the human's obligations to protect nature, but it also announces a few rights. Thus, it will be easier to approach this problem due to human rights because these are, in reality, tied to the right to a healthy environment et mainly because the right to a healthy environment isn't yet clearly defined. In fact, the deterioration of the environment affects a great number of other rights: the right to health, the right to work, the right to an education and the right to life[13].

In addition, the degradation of the environment, cased by the economic activities often results in the violation of civil and political rights. The human right to a healthy environment possesses a part of humanity nuanced by the idea of the environment or of nature: the nature is "what is spontaneous in the universe, without the intervening of humans". The environment "encompasses the elements that don't have anything natural, mainly in the urban space"[14]. The human right to a healthy environment doesn't just represent the right to live in a preserved nature, but also the right to live in human infrastructures where nature is respected.

This right also exceeds what our biosphere contains in order to incorporate human activities. The human right to a healthy environment is understood as the right to nature that needs to be respected. Thus nature could become the subject of law, as humanity did[15]. Humanity can be the

[9] LAROCHE (J.), *Politique internationale*, 2ème édition, LGDJ, Paris, 2000, p. 510.

[10] BARDONNET (D.), *Le projet de convention de 1912 sur le Spitsberg et le concept de patrimoine commun de l'humanité, in Humanité et droit international*, Mélanges René-Jean Dupuy, Pédone, 1991, p. 13-34.

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[13] Isabelle SOUMY, *L'accès des organisations non gouvernementales aux juridictions internationales,* Thèse de doctorat, UNIVERSITÉ DE LIMOGES FACULTÉ DE DROIT ET DE SCIENCES ÉCONOMIQUES, p.448 et suiv.

[14] UNTERMAIER (J.), *Droit de l'homme à l'environnement et libertés publiques. Droit individuel ou droit collectif. Droit pour l'individu ou obligation pour l'Etat,* RJE 4/1978, p. 337.

[15] CHEMILLIER-GENDREAU (M.), L'humanité peut-elle être un sujet de droit international ? , in Droit et humanité, Les cahiers de l'action juridique, septembre 1989, n°67-68, p. 14-18 et notamment p. 14 : « L'absence de débats autour de la véritable portée juridique de l'humanité masque une difficulté insurmontable. Comment faire la synthèse entre l'unité du genre humain et la diversité des peuples qui a donné naissance aux nations et conduit à leur attribuer une souveraineté ? La souveraineté nationale, expression et protection de la diversité est beaucoup plus construite théoriquement et techniquement que l'humanité, expression de l'universel ».

victim of international penal crimes (crimes against humanity) and it disposes of a patrimony (the common patrimony of humanity)… If this reasoning applied to the nature of NGOs an environmental vocation it would open new perspectives because these could defend the interests of nature. The preservation of an international ecological order is justified by the existence of a common interest that all the other interests and connections between the states and humans with a common destination. The concrete manifestation of an international ecological order, the notion of a common interest isn't one of a general interest in internal law. The first one would be the continuation of the latter at an international level.

The recognition of a human right to a healthy environment doesn't have to be considered the advent to an nth human right. Its more than that: this right represents the symbiosis that exists between humans and the environment that surrounds us and mainly the respect that humans must manifest towards nature. The rights of nature are, probably, the supreme expression of human rights, their universal expression.

• The World Charta of Nature of the United States

International law transcends the context of its formation rapports were mainly politic in order to integrate the new needs of a mutating world and answer at the same time the people's profound and numerous aspirations. The subjective element underlines the will of the state of living in common in spite of division factors. In fact, there is, at a state level, a general identity of moral and ethic s conception, the feeling of justice, a general aspiration to peace and security, an economic interdependence, a protection of the environment and a social ell-being. This subjective element is the connection of an international community. The notion of international community is more developed than the one of international society, because an international community supposes an identity of rights and obligations of people and puts an accent on international solidarity[16].

The World Charta of Nature was adopted and proclaimed by the General Assembly of the United Nations in 26 October 1982. And if nature seems to be its first preoccupation this Charta is in reality more oriented towards the protection of humanity (of humans) than nature. Nature is in reality the mediate. It's true that it addresses to all states, but it also addresses to each in particular in order to remember them their duties in this domain and it advocates their participation in the elaboration of decisions that affect directly their environment. It insists on the necessity of having means of rescue that insure victims of environment degradations of the possibility of obtaining reparation, regardless their nationality or place of residence. This Charta, being transparent, deserves of being studied because it points out what we should avoid (the protection of humanity and not of universality) and what to conserve (the implication of natural and legal persons) in the perspective of establishing an universal action, a convention consecrated more to humanity than universality: the World Charta of Nature doesn't have to be mistaken by the concept of the Earth Charta enounced by M. Alain Renaut.

We have to mention that belonging to the first category, the principle of the Rio Declaration which is the same, besides two words, with the principle 21 of the Stockholm Declaration: it confirms the suzerain power of the States to exploit their own resources and to remember to them their duty of acting in such a manner that their activities are exercised in the limits of their jurisdictions or under their control do not cause any damage to the environment of the other member states or in area that do not show any national jurisdiction. Often presented by the doctrine and by literary texts "soft law", this principle has received the conventional confirmation

[16] Isabelle SOUMY, *L'accès des organisations non gouvernementales aux juridictions internationales,* Thèse de doctorat, UNIVERSITÉ DE LIMOGES FACULTÉ DE DROIT ET DE SCIENCES ÉCONOMIQUES, p.460 and the following.

of an universal plan through article 3 of the Convention on the biologic diversity, but also from the International Court of Justice in its consultative note from the 8 of July 1996 regarding the Legality of the threat or use of nuclear weapons and by the Decision from 25 September 1997 presented in the Project Gabcikovo-Nagymaros case which refers to the precedent note[17].

For Alexandre KISS, the obligations regarding the environment are basically connected to the common interest of humanity and this build and important part of it. No counterpart results, for the contracting states, from obligations prescribed by treaties to not pollute the oceans, to respect the species to be extinct, to protect the ozone layer and to preserve biological resources. This common interest of humanity that leads member states to accept these obligations without any immediate advantage or reward because these obligations are necessary to avoid ecological catastrophes that affect the entire humanity[18].

Maurice Strong[19], general secretary of the Rio de Janeiro Conference says we talk more easily of the Rio declaration that of the Earth Charta. The Rio declaration, in the same manner as the Charta for nature from 1982, doesn't have a compulsory force. The Charta for nature is held 10 years after the Rio declaration. In the first one we only find premises of the precaution concept[20], the second one is almost exclusively destined to durable development.

The World Charta for nature has as its primal weakness its title. The idea of nature seems to exclude all human investment. What is nature isn't touched by human action. Thus, the place of man in this Charta isn't seen as positive.

In addition nature (because this is the title chosen) seems, according to this Charta to be subordinated to man. M. Alain Renaut wrote, explaining the Lévi-Strauss argument that "two phenomena are indissoluble connected: on one side the affirmation the man as supreme value (…) on the other side, the reduction of nature to raw material, lacking of significance and value, a simple instrument offered, as such, to the indefinite process of exploitation realized by men for men"[21]. And it seems that this convention is a little bit too tempted by humanism and no enough by universalism. But, everywhere we see that nature has to be respected and that its processes don't get, at any prise, altered; that nature must be preserved from all sorts of degradations. Thus we believe that nature must be protected for itself and not for the people that live in it. Another phase speaks about the preservation of "species and ecosystems in the interest of present and future generations"[22] and not for themselves. The interest of humans is primal, even dissimulated behind the instauration of universal ecologic norms.

The World Charta for nature is deceiving because it uses nature for the safety of humans, but by recognizing that these two entities are connected and without seeing them as equal: "humanity is a part of nature and life depends on the continuous functioning of natural systems which represent the source of energy and nutritive materials" and "civilisation has its roots in nature, which modelled human culture and influenced all artistic and scientific works (…)". The

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[17] Alexandre-Charles KISS, *Tendances actuelles et développement possible du droit international conventionnel de l'environnement, http://www.cidce.org/pdf/livre% 20rio/rapports%20g%C3%A9n%C3%A9raux /kiss.pdf*

[18] Alexandre KISS*, Introduction au droit international de l'environnement* , in Programme de formation à l'application du droit international de l'environnement, Institut of United Nations for Formation and Research (UNITAR), Genève, 1999. pp. 110-111.

[19] Voir à ce sujet sur le site des Nations-Unies : *Déclaration de Rio sur l'environnement et le développement. Principe de gestion des forêts,* http://www.un.org/french/events/rio92/rio-fp.htm

[20] CHAGNOLLAUD (D.), *Le principe de précaution est-il soluble dans la loi ? A propos de l'article 5 de la Charte de l'environnement*, Dalloz 2004, chroniques, doctrine, p. 1103-1107

[21] RENAUT (A.), *Naturalisme ou humanisme ? Discussion de Lévi-Strauss,* Philosophie politique 1995, no. 6, *La nature*, p. 57.

[22] Preamble of the World Charta of Nature.

protection of nature isn't considered as the end, but as a means of protecting humans. It would be more judicious to use humanity for universality. In fact, the protection of the environment doesn't have to be the means for the protection of human space but the end with the same subject for the survival of humans. Humans and nature must be considered equal and the protection of one should start the same mechanisms for the protection of the other. Universality must be protected and not humanity through the environment.

It seems that the Rio declaration from 1992 approaches this explanation. We see in its preamble the following phrase: "Earth, home of humanity, represent a whole marked by interdependency". A step towards universality is made through the World Charta for nature. The World Charta for nature lacked universality and the approach taken by the Rio declaration seems to be more accurate. The universal action doesn't have to be a print of humanity but of universality in order to allow an efficient protection of nature.

This convention also has a strong point: it encourages member states in offering natural and legal persons a proper place in the fight for the preservation of nature. The taking into account of an efficient role of natural and legal persons in the protection of nature: it's the 3rd Chapter of the Charta titled "implementation" which has to get our attentions. This it's about the use of principles that were presented in the convention, articles 23 and 24 that bring a certain innovation in this domain. These deserve to be present in this convention.

Article 23 says: "Every person will have the possibility, according to the legislation of his/her country, to participate, individually or with other persons, to the elaboration of decisions that regard directly his/her environment and in the case in which this is subject of damages or degradations, he/she will have access to means of rescue in order to obtain reparation". Article 24 mentions that "it offers responsibility to everyone to act according to the dispositions of the present Charta; each person acting on his-her own, in association to other persons or in participating at a political life, trying to ensure the realization of objectives and other dispositions of the present Charta". Besides the Convention on civil responsibility of damages resulting from dangerous activities for the environment (Lugano, 21 June 1993) which has a general application, there are numerous instruments treat specific aspects of the problem (International Convention on the responsibility and the compensation for damages regarding transport on the sea, from toxic substances and potentially dangerous, London, 3 May 1996).

These two articles contain the premises for a real taking into consideration of natural and legal persons in the domain of nature protection. It introduces, besides the member states, simple citizens constituted or not in associations. It is true that these articles are more references to national law than international law. But at the same time, it aids a development of individuals' participation in the national and international judicial process.

Article 23 of the World Charta for nature must attract our attention. The individual is admitted to participate at the elaboration of decisions that regard directly the environment and in the case of damages or degradations; he will be able to demand reparation to national judges. It isn't the national aspect of this affirmation that has to attract us. What is troubling is the quality of acting, or otherwise said, the individual is a victim of damage of the environment. The fact that the environment undergoes degradation doesn't seem to be enough; it has to bring a prejudice to human being[23].

We have to underline that an economic "globalisation" demands a general judicial frame, allowing the prevention of negative consequences that will be exercised on the environment. Thus it is indispensable codify the principle of international law of the environment which are now

[23] Isabelle SOUMY, *L'accès des organisations non gouvernementales aux juridictions internationales,* PhD Thesis, LIMOGES University, Faculty of law and economic sciences, p.454 and the following.

progressively recognised, but are also consecrated under the shape of a compulsory international pact, according to the proposition of IUCN. The primacy of these principles in comparison to other international rules must be affirmed, at the insertion of article 22 of the Convention on biologic diversity[24].

The concept of common patrimony of humanity is at the level of international law. It has appeared at the beginning of the 70's with the occasion of the United Nations Conference on sea law and was later finalized with the adoption of the Montego Bay Convention from the 10th of December 1982 on the sea law[25].

The common patrimony of humanity presents itself at the ensemble of goods belonging to humanity; it doesn't present any state suzerainty of which humanity is the owner of. The definition that allows us to distinguish the two ancient concepts: res nullius and res communis is the following: res nullius signifies a whole that contains wild animals and plants that don't belong to anyone, which can be used freely by everyone and that every person may own. Res communis is a part of international law and refers to the surface of the earth, the surface high from the sea, and the extra-atmospheric space in its ensemble, that no one can own because it belongs to the community of nations. Still, their resources may be used by everybody. In a general manner, certain regions as the bottom of the sea and the subsoil, the Artic, the Moon, the orbit represent particular interests. In particular, the bottom of the sea and oceans situated beyond the limits on national jurisdictions has been considered common patrimony of humanity and is thus excluded from the national appropriation and from a free use at the proposition made by PARDO, the representative of Malta in a speech at the General Assembly of UN in 1967. The massive adhesion of countries to the development of the United State has finalized with the universal consecration of the concept "humanity common patrimony" through the resolution of the UN General Assembly[26]. The Convention from Montego Bay on the sea law, in its Part XI, offers a precise content to the concept of "humanity common patrimony" by applying to sea bottoms and to the subsoil beyond the limits of national jurisdictions that represent the "zone". The instauration of the Zone results from the difference that is established between marine bottoms and their subsoil and the waters that surround them. These domains receive an autonomous judicial regime and distinct limits. The Zone is circumscribed by exterior limits of the state continental platforms, while the high sea starts where the exclusive economic zones end. The respect of liberty of navigation and the freedom to realize scientific in high sea may intersect with the need for exploitation of the Zone. Still, according article 147 of the Convention on sea law, the activities of the Zone must be exercised in a reasonable manner keeping in mind the other activities realized in these areas. The judicial regime applicable to the Zone doesn't concern the economic resources of the marine grounds and subsoil and neither all economic installations of the marine bottoms. The Convention from Montego Bay regarding the sea law, in its article 136, le paragraph 1 of the Declaration specifies that "the Zone and its resources represent humanity common patrimony"

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[24] Alexandre-Charles KISS, *Tendances actuelles et développement possible du droit international conventionnel de l'environnement, http://www.cidce.org/pdf/livre%20rio/ rapports%20g%C3%A9n% C3%A9raux/kiss.pdf*

[25] Alexandre KISS, *La notion de patrimoine commun de l'humanité*, Course of the Academy of International Law from Hague, 1982-II, vol.175,pp. 99-246 ; ONU, The law of the sea – The notion of common patrimony of humanity – history of the ellaboration of articles 113 to 150 and 311 (6) of the United Nations Convention on the law of the sea, New York, 1997.

[26] N'Guyen QUOC DINH, Patrick DAILLIER et Alain PELLET, *Droit international public*, op.cit.pp.1160-1161.

Conclusions

This approach seems questionable and not to far from the idea of universal interest. It seems more obvious to offer, as in the case of humanity, an international legal personality to world environment. Nature, in the same manner as human beings, must be able to obtain reparation once it is damaged. Of course reparation can not have an identical shape. The reparation of the prejudice suffered by the environment may leave room to state rehabilitation, to a developed protection, but not to a pecuniary counterparty. These remarks will be discussed, by the decisions of the EDH Court and its relations with the environment. National associations seem to find their place in nature law. It is possible to imagine that the same place belongs to NGOs in front of international jurisdictions in order to defend the rights of nature. It isn't the case that NGOs do not defend definite interests (individual or collective) nor common interests, but a universal interest, in other words, these ensure a perennial state of the universal individual. We mustn't just sustain that humans and nature are interdependent. We must put the two elements on the same balance by offering a place to individuals in national and international jurisdictions in order to recognize their values in environmental rights for them and for nature. In this view a universal action must be understood.

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NGO - PRIVATE ACTORS AT AN INTERNATIONAL LEVEL

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Abstract

International law, taken by globalization, helps emerge "private actors at an international level" by generating "a removal from territories of problems and solutions". The question of NGO accessing international jurisdictions is situated at this intersection, which is a dangerous one for jurists. The ways of national laws intersect, in fact, with those of international law. More over, private international law, more specifically, the private judicial nature of NGOs that enter into contact with public international law, an intersection that will imprint a plural-disciplinary character that marks this study. Thus, we must follow this rocky road and try a private approach of a question disputed by public law, which is also a part of international law. The risks of maladroitness are numerous, but must be assumed according to their importance and of the rarity of clarification attempts. NGOs, legal persons from private law exercising their activities in international context contain, in fact, elements of foreign origin that result in specific problems of international law. And if "international law can not be the domain of perfect solutions" it can allow however the adoption of others which, that can seem less perfect to some, will possess the aptitude of "creating the laws of a state". Thus, only by allying public international law to private law, the question of NGOs access to international jurisdictions can receive an answer.

Keywords: *NGO, international jurisdictions, arbitration jurisdictions, private actors, motivation, regulation.*

Introduction

The paradox surrounding NGOs hasn't erased them definitively from international justice, these have proven a will already ancient, always more powerful, to access international jurisdictions by trying to bypass their absence as international legal persons. The idea of will doesn't have to be taking as a consented act[1] , but as being relevant to the impulse offered by the NGO. The will of NGO doesn't have to, in any case, limit to hypotheses or to member states by offering access to an international jurisdiction.

• The access of Non Governmental Organismizations to international jurisdictions

NGOs want to be actors of the international life, to become actors of international justice. They desire to be included in "*the cycle of international judicial actors"*[2]. This will to accede an

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[1] COHEN-JONATHAN (G.) and FLAUSS (J.-F.), The European Convention on human rights and member states will, in The role of will in judicial act. Studies in the memory of prof. Alfred Rieg, Bruylant, Bruxelles, 2000, page s 161-186.

[2] RANJEVA (R.), *Les ONG et la mise en oeuvre du droit international*, RCADI 1997, vol. 270, page s 91

international judge may be synonym to the will to accede a jurisdiction[3]. This could be mistake a right to a judge[4], a right to an equitable case, a right to an effective recourse, a right to a jurisdictional recourse[5].

They have been satisfied with the use of mechanism that exists for example in front of the EDH Court or community jurisdictions. NGOs do not dispose of a quality of member in front of the EDH Court[6] (article 34 of the EDH convention), TPICE (article 230 EC for the recourse in annulment, the same article for ECJ) and the ECJ (but in a limited manner in front of the latter jurisdictions). In reality NGOs are not expressly seen as a part of the procedure that in front of the EDH Court are the beneficiaries of the right to recourse.[7]

By multiplying the trials of access and by being inventive, without receiving the quality of subject of international law, NGOs have put into perspective the movement that pushes them towards international judges. And if evolutions are slow in action, the doctrine isn't wrong. There are article that question the access of NGOs to different international jurisdictions and these seem to be multiplying[8]. It seems difficult to ignore for long the phenomenon that pushes NGOs to desire to accede international jurisdictions. This determination affirmed by NGOs to accede and international judge will make possible the apparition of the purpose.

In other occasions[9], they tried to force a way to conducted them towards a judge by deposing memoirs or by demanding meetings. An NGO, the International League of human rights, has demanded to be able to communicate its resentment regarding a problem of a right to asylum that was opposing Columbia to Peru in front of ICJ (20 November 1950). Even if ICJ has rejected this demand it doesn't erase the will of NGO to associate to international contentious procedures.

Should we speak about *locus standi*? The notion of party in a court seems more appropriate or we have to limit to the idea of having the right to express in front of a judge? Is this an access to contentious[10]

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[3] BRUNO (R.), *Access of private parties to international dispute settlement: a comparative analysis,* www.jeanmonnetprogram.org/papers/97/97-13.html : in this article, close to the subject we try to treat, the notion of access isn't well defined as the author states it, in the first part, what he tries to understand by the subject of international law. The question of signification of access to justice is also put in the work of CAPPELLETTI (M.) and GARTH (B.), *Access to justice : the wolrdwide movement to make rights effective. A general report,* work mentioned in RIDC 1979, page s 617-629

[4] SIMON (D.), *"Droit au juge" et contentieux de la légalité en droit communautaire : la clé du prétoire n'est pas un passe-partout,* in Mélanges en hommage au Doyen Gérard Cohen-Jonathan, Libertés, justice, tolérance, Volume 2, Bruylant, Bruxelles, 2004, page 1399-1419. COHEN-JONATHAN (G.), Le droit au juge, in Gouverner, administrer, juger. Liber amicorum Jean Waline, Dalloz, 2002, page s 471-504.

[5] RENOUX (T.), *Le droit au recours juridictionnel,* JCP ed. G 1993, doctrine, I, 3675.

[6] Marian Mihăilă, Claudia Andriţoi, *Drepturile omului şi strategii antidiscriminatorii*, Eftimie Murgu Publishing House, Resita, 2009, page 85.

[7] The beneficiaries to the right to a recourse, in the Procedure of the new European Court for human rights after protocole no. 11, collection law and justice, no. 23, Nemesis-Bruylant, Bruxelles, 1999, page 7-27 ; DE SCHUTTER (O.), The new European Court for Human Rights, CDE 1998, no. 3, 4, page 319-352) article 34 (former article 25) of the EDH Convention (PEUKERT (W.), The right to an individual recourse according to article 25 of the European Convention of human rights, RUDH 1989, page s 41-49 and especially page s 44 et 45 for the association of persons and NGOs; COHEN-JONATHAN (G.), The European Convention for Human Rights, Economica, 1989, page s58-60).

[8] DE SCHUTTER (O.), L'accès des personnes morales à la Cour européenne des droits de l'homme, in Mélanges offered to Silvio Marcus Helmons, Bruylant, Bruxelles, 2003, page s 83-108.

[9] SOUMY Isabelle, L'accès des organismisations non gouvernementales aux juridictions internationales, PhD Thesis, Limoges University, Faculty of Law and Economic Sciences, page 30 and the following.

[10] GHERARI (H.), *L'accès à la justice interétatique,* in L'émergence de la société civile internationale. Vers la privatisation du droit international ? , CEDIN Paris X, Cahiers internationaux no. 18, Pédone, 2003, page s 141-166.

or participation[11] to it, or is this an access to justice [12] or to a judge and access to a right[13]?…
It is the general idea of *locus standi* of NGOs in front of international jurisdictions which must have preference. *Locus standi* means "*the right to be heard directly by judges".* For the other authors, as professor Pierre-Marie Dupuy, *locus standi* would be "*the right to an action in justice". Locus standi* define as a right to action in justice doesn't correspond to the idea that we may access it.

The will of NGOs, legal persons of private law, to implicate in the international world and mainly in the international justice can not offer them an international legal personality and neither the quality if subjects of international law. Still these voluntary approaches must be the point of start for a reflection that desires to facilitate their access to international jurisdictions.

The will to accede an international jurisdiction is not enough. We also need a profound motivation for an NGO to be sustained, motivation amines[14]. Still, the idea of motivation, taken in a common sense, couldn't allow a real judicial reflection. In fact, this approaches the question: why do NGOs desire to enter an international jurisdiction? It seems preferable to offer this journalistic interrogation and a little bit judicial, some rigor. The notion of judicial interest will allow the consolidation of this thinking. It seems difficult to leave aside al social consideration in order to finalize a reflection and to not consider interest but from a judicial point of view, and more often, from a procedural point of view. It doesn't seem acceptable to see this study as over passing all sociologic consideration and even moral one because it will risk erasing an entire part of the problem.

In fact, it limits the access to the possibility if being a part of the process that restrains this subject. NGOs want to be heard by an international and it would be wrong to thin that they do not have the quality of party. Contrary, and they proved this on many occasions, NGOs want to accede the courtroom in order to make themselves heard by a judge and not just to be a party of the case[15].

• Pertinent international jurisdictions

International jurisdictions[16] contain arbitration international jurisdictions and penal international jurisdictions[17]? Are the permanent or *ad hoc*, regional or universal, specialized or not? … These many questions receive in reality a great number of answers. But, the mentioning of the jurisdictions that will be studied, represents a part of the subject delimitation and can not be

[11] CAPPELLETTI (M.) (managed by), *Accès à la justice et Etat providence*, Publication of the universitary institute, collection of legal studies, Economica, 1984.

[12] SHELTON (D.), *The participation of nongovernmental organismizations in international judicial proceedings*, AJIL 1994, vol. 88, no. 4, page s 611-642.

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[14] SOUMY Isabelle, L'accès des organismisations non gouvernementales aux juridictions internationales, PhD Thesis, Limoges University, Faculty of Law and Economic Sciences,, page 33 and the following.

[15] DUPUY (P.-M.), *L'unité de l'ordre juridique international,* RCADI 2002, vol. 297, page 114

[16] KOVAR (R.), La notion de juridiction en droit européen, in Gouverner, administrer, juger. Liber amicorum Jean Waline, Dalloz, 2002, page s 607-628

[17] SANTULLI (C.), Qu'est-ce qu'une juridiction internationale ? Des organismes répressifs internationaux à l'ORD, AFDI 2000 , page 58-81.

left to hazard, especially now that we observe a multiplication of international courts[18]. A few simple definitions may the starting of the reflection and also allows a sorting of jurisdictions that may enter the purpose of those that need to be excluded. Still, these definitions are not of a real interest because the question to be put here isn't of knowing what an international jurisdiction is but what pertinent international jurisdictions[19] are.

In a general manner, works treating international contentious law classify as "*jurisdictional organism"*[20] arbitration organisms and regulations of a permanent jurisdiction[21]. In *Vocabulaire juridique* of M. le Doyen Gérard Cornu[22] an international jurisdiction may be "*a permanent jurisdiction instituted for the settling of international litigations or (and) for the ensuring of an interpretation and the respect of conventions or international treaties, which are composed of members from different states".*

This can also refer to "*a denomination offered to an arbitration state regarding international arbitration".* The idea of incorporating arbitration courts to the notion of international jurisdiction can also be found in other definitions: "*institution invested with the power to judge, that is to decide in litigations between states by compulsory decisions, if an arbitration or judicial organism is involved or another organism disposing of jurisdictional powers".*

TSL is a part of jurisdictions called "internationalized", "hybrids" or "mixed" which are a part of the new approach of international penal justice. This type of court have as particularity being "half-internal half-international" regarding the law the application and their composition[23]. Courts that are strictly international are created by an international instrument, their composition is pluri-national, they apply international law and their decisions apply immediately without any recourse at an internal judicial order. In exchange, mixed courts answer partly only to these criteria and to variable proportions. In the same manner, special courts may be different and each of them represent an original experience. From Cambogia to Liban, passing through Sierra Leone, Kosovo and Timor Oriental, internationalized special jurisdictions recover different realities. TSL, being a part of this category of jurisdictions, can not remain an organisms that is original, regarding its modalities of institution and its internal and international dosage proposed. Moreover, the institution of TSL poses new questions regarding objects and issues of international penal justice. If it is incontestable that the apparition of international courts are witness of "remarkable booms of international penal justice", it is sure that numerous question will appear regarding TSL.[24] What is the degree of internationalism of TSL? How can we distinguish it from other types of non-international crimes? And, is TSL an element of international penal justice or it has to be understood as an international element of administration of national justice? The factual and political context explains the incapacity if Liban judicial order to follow the persons responsible for the directed attacks against Libanese polical personalities (1). Demanded by the Libanese government and desired by the "international community" the institution of an internationalized court, besides the conventional one, will be imposed unilaterally by the Council of Security under the title of Chapter VII of the Charta (2).

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[18] KARAGIANNIS (S.), La multiplication des juridictions internationales : un système anarchique ?, in La juridictionnalisation du droit international, French Society for international law, Lille Colloquy, Pédone, 2003, page s7-161.

[19] SOUMY Isabelle, L'accès des organismisations non gouvernementales aux juridictions internationales, PhD Thesis, Limoges University, Faculty of Law and Economic Sciences, page 27 and the following.

[20] COMBACAU (J.) et SUR (S.), *Droit international public,* Domat droit public, 6ème édition, Montchrestien, 2004, page 572.

[21] CAVARÉ (L.), *La notion de juridiction internationale*, AFDI 1956, page 31

[22] CORNU (G.), *Vocabulaire juridique,* Association Henri Capitant, PUF, 2004.

[23] Youssef BENKIRANE, *Le Tribunal spécial pour le Liban, une juridiction pénale internationale*? Revue Averroès – Variations, September 2009

[24] A. Azar, « Le tribunal spécial pour le Liban : une expérience originale ? », RGDIP, 2007/03, page 645.

The exclusion of arbitration jurisdictions: arbitration jurisdictions don't seem to have their place in this study. So how can we motivate their exclusion from this study? Arbitration is according to the definition offered by the *Vocabulaire juridique* of M. le Doyen Gérard Cornu, "*a manner considered amiable or pacific but always jurisdictional in the regulation of a litigation by an authority (or by arbitrator) which has the power to judge, but a permanent delegation of the State of an international institution, but of a convention of the parties (which can be simple or belonging to a state").* Arbitration depends on the will of the NGO to see a solving from third parties, a dispute that opposes the other party. We must refer to the writings of Motulsky who considered that "*once a pretension is presented to an invested person by the Law with the power to accept of reject this pretension by applying a rule of law, we find ourselves in front of a jurisdiction"*[25]. He continued by stipulating that the arbitrator is a judge, he rejects the jurisdictional theory of arbitration and marks his preference for the thesis that attributes a "mixed" or "complex" of arbitration. Motulsky considered that the arbitration function may also be jurisdictional and private: arbitration is *"a private justice, the origin of which is ussualy conventional".* The exclusion of arbitration jurisdictions doesn't result from its private character, but from a conventional essence. If an NGO can accede by simply agreeing with the other party, this wouldn't represent a real interest. In fact, it's about the forcing classical law ways by going against the generalized will of refusing NGOs the access to an international judge. International arbitration is defined by article 37 of the Hague Convention as having "*as object the regulation of litigations between state by chosen judges and on the basis of respecting law".* This ancient definition doesn't underline the contemporary aspect of arbitration that regulates more and more often litigations regarding privates. Still this evolution can not be deceiving. These litigations of member state with privates regard especially problems of investments and implicate powerful transnational societies far from NGOs[26].

Arbitration through its consented aspect and its commercial connotation must be excluded from this study which puts an accent in institutionalized international jurisdictions.

Conclusions

We have to present a method that allows the motivation of an interest. The reasons of the creation of an NGO may be different and its domains of action are also numerous. It seems delicate to state that there is an unique motivation that sustains the will of NGOs to accede international jurisdictions. Thus we may have to find a common point in the motivation of NGOs to be interested in children's rights, the abolition of torture, the planet warming, the conservation of marine species, the fight against poverty, against world hunger, social development... Motivation doesn't have to be presented from a sector manner, unless there are enough motivations in the sector in which NGOs are invested. Contrary, these must be understood from a global manner and be researched beyond their specificity of actions. The unique motivation of NGOs is to advance the reasons for which these were created and by different means, for different activities which are represent by terrain actions to political actions, or even trials of contribution of the elaboration of international law. But we haven't spoken about these activities: in this study, the NGO desires to realize its social object by acceding international jurisdictions due to procedural actions. In order to advance their demand NGOs must fold to the demands of the international

[25] MOTULSKY (H.), *Etudes et notes sur l'arbitrage*, Dalloz, 1974

[26] Mihăilă Marian, *Tratat de drept internațional public*; Vol. III, BREN-V.I.S.PRINT; Bucharest; 2006, p.405 and the following.

judicial procedures of control. Thus, these must be placed in a procedural point of view. By studying the existing access means existent in front of pertinent international jurisdictions, it would be possible to consider their adaptation to other jurisdictions and even to create new procedural methods that connect international jurisdictions to NGOS.

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- KARAGIANNIS (S.), *La multiplication des juridictions internationales : un système anarchique?*, in La juridictionnalisation du droit international, Société française pour le droit international, Colloque de Lille, Pédone, 2003, page 7-161.
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CONSTITUTIONAL ASPECTS REGARDING THE INSTITUTION OF THE OMBUDSMAN

Marta Claudia CLIZA[1*]

Abstract

The significant increase of the legislative power's tasks and implicitly of the public administration, due to the more emphatic complexity of the economic and social life at the level of world's states, determines that every moment citizens encounter different public authority and administrative structures but with whom they do not always communicate so facile.[2].

Keywords: *Constitutional Court, ombudsman, Government, the Romanian constitutional law, Parliament*

Introduction

This particular institution is Swedish based, also known as **„ombudsman**"[3] and has occurred for the first time in the year 1766**.** It has been created in Sweden through the Constitution from 1809 and has been working permanently ever since in this country, as an additional instrument for controlling the executive by the Parliament.[4].

Under the constitutional compared aspect, one can notice a few characteristics of this institution.

The Ombudsman has a general authority, i.e. that of receiving all complaints from citizens against the excess and abuses of the administration, of investigating and intervening in front of the Government. In some cases it also has a special competent, namely that of controlling certain services and even the army, as is the case of Germany. In some states, it may decide whether to place a public servant under accusation or give a warning, especially in the constitutional systems where it functions as a **parliamentary prosecutor**. Generally it cannot control the activity performed by the Government's members.

Therefore, for instance in Denmark, the **Ombudsman** is chosen by the Folketing in order to control the civil, military and municipal administration, being entitled to proceed in certain investigations that may take place as a consequence of its initiative or an individual complaint.

In Finland, **the Ombudsman** is appointed by Eduskunta, with similar attributions as the Danish one, having in addition the right to control that the courts of law are compliant with the lawfulness.

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[2] Corneliu Manda, Ioan Popescu Slăniceanu, Ovidiu Predescu, Cezar Corneliu Manda,- *„Ombudsmanul-instituție fundamentală a statului de drept",* (Lumina Lex Publishing house, Bucharest, 1997), p.12

[3] Spread in other countries under various names: parliamentary commissioner (England), people's defender (Spain), public mediator (France), parliamentary guarantor of human rights (Hungary), ombudsman (Romania), etc

[4] Corneliu Manda, Ioan Popescu Slăniceanu, Ovidiu Predescu, Cezar Corneliu Manda,- *„Ombudsmanul-instituție fundamentală a statului de drept",* (Lumina Lex publishing house, Bucharest, 1997), p.7

In Sweden, **the Ombudsman,** which is appointed by Rikstag, procures the supervision of all civil servants and magistrates in order to ensure their compliance with the laws and the performance of their tasks.

In Germany, there is a **parliamentary commissioner** for the armed forces that also has rights to assist the Bundestag in controlling the armed forces. The parliamentary commissioner may investigate upon the commission's apprise for defending the Bundestag, the armed force's members as well as upon its sole discretion.

In France, a **mediator** appointed by the Ministries' Council is entitled to investigate with respect to the complaints regarding the administration's functioning and its relations with privet owners, however its cannot be appraised by the parliamentarians.

In the Great Britain there is a **parliamentary commissioner** for the administration, appointed by the Queen, at the first ministry's proposal, who exams the complaints received from the House of Commons, acting in the best interests of the private owners[5].

In all legal systems the institution of **Ombudsman** co-exists with other state means of control, such as hierarchic appeal, administrative courts of law, ordinal courts of law, etc.[6]

1. The legal nature of the institution in the Romanian constitutional law

In all constitutional systems based on the separation and balance between the state's powers, the Parliament undertakes certain attributions more or less large, controlling both the lawfulness as well as the of executive activity's opportunity.

The aforementioned control of the Parliament has a political character *par excellence* under two main aspects.

First, as the Parliament's members must not present a special qualification which would qualify them to verify the lawfulness of the administrative acts, the consideration of the particular body shall be inevitably inspired, more or less profound, by political motivations.

Secondly, as a mainly political body, the Parliament may not sanction the illegality or lack of opportunity of an administrative act, save as also through political means, among which, in the parliamentary and semi-presidential regimes, the most efficient is enacting a censure motion against the Government.[7].

Taking into account all these limitations and inherent barriers to the parliamentary control over the lawfulness of administrative acts, as well as the need to involve the prestige of the representative body at national level in a greater proportion and in optimum conditions, there occurred the need for enacting this institution in the Romania's Constitution.

This institution was created pursuing the model provided by the Scandinavian countries and other states where there is an independent body, with the prerogative to exercise a control over the government acts.

The Romanian's Constitution as of 1991, for the first time in the history of our country, establishes the Ombudsman Institution, created with the purpose of defending the citizen's rights and freedoms in relation with public authorities. It is bound to the issue of ensuring lawfulness in the activity of state body and apparatus, of respecting the citizens' rights against any abuses, arbitrary actions or errors performed by public authorities[8].

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[5] Les parlaments dans le monde, Recueil de donnes comparatives, Presses Universitaires de France, Paris, 1977, p.115-123- note took from Victor Duculescu and collaborators, „*Constituția comentată şi adnotată*", (Lumia Lex publishing house, Bucharest, 1997), p.176

[6] Corneliu Manda, Ioan Popescu Slăniceanu, Ovidiu Predescu, Cezar Corneliu Manda - op. cit., p.9.

[7] Tudor Drăganu, op. cit, vol I, p.345

[8] ibidem, p.54

In the professional literature, until the present moment, there were many opinions expressed with respect to the nature of this new state institution in the Romanian law system. We do not aim for a detailed presentation and analysis of the authors' opinions, however we underline that the Ombudsman has been considered by some authors as a *parliamentary law institution* , through which the parliamentary control is achieved over the activity of some public authority bodies, by other authors as a *state administrative body* and finally, in a third opinion, it has been considered as an ***institution with specific characteristics*** which provides a distinct statute, different from the state's traditional authorities, whether legislative, administrative or judicial. We regard the third opinion as being scientifically justified, fact proved through the fulfilled authority and attributions. It is obvious that this institutions is not part of the state's administrative bodies, since the Constitution does not even include it in this chapter, and, by the nature of its attributions, it mainly supervises whether the local or central public administration bodies comply with the citizens' rights and freedoms.

The professional literature states that the efficiency of this institution mainly depends on the professional and deontological qualities of the person appointed in this high function as well as on the working manner. *The Ombudsman is a mediator between citizens and the public administration bodies* and in the same time a *guarantor* for the compliance with the citizens' fundamental rights and freedoms.

In compliance with the norms of the Romanian constitutional law, the Ombudsman is aimed at defending the citizens' rights and freedoms especially with reference to public authorities and especially with the executive ones. The name of "Ombudsman" was preferred in order not to associate the concept of parliamentary prosecutor with the legal activity.

In the Romanian constitutional law, the relevant provisions are included in art. 58-60 from the revised Constitution (until the revision, the relevant provisions were regulated by the art. 55-57 from the Constitution) and Law no. 35/1997[9], regarding the organization and functioning of the Ombudsman's institution.

The general characteristics of this institutions are as follows:

1. The Ombudsman is a *unipersonal body*, even if the organization law also refers to their own administrative apparatus, necessary for exercising their attributions. It functions near the Parliament, *however it cannot be considered as a parliamentary institution*, but having its own structure, a distinctive national body such as the Constitutional Court.

2. The Ombudsman is a *public authority* aiming to defending the citizens' rights and freedoms within their relations with the public authorities;

3. *It is independent towards any other public authority* and no one can obligate it obey its instructions or provisions (art.2 par 1 from Law no. 35/1997).

4. The Ombudsman may not be subjected to any imperative or representative mandate in compliance with art. 2 par. 3 from Law no. 35/1997.

5. *Its activity is public* and upon request from the injured persons, for grounded reasons, it may decide upon the confidential character of its activity.

[9] Law no. 35/1997 with respect to the organization and functioning of the Ombudsman institution, published in the Romania's Official Gazette no. 48 as of March 20, 1997. Senate's decision no. 17 as of May 20, 1997 for appointing the Ombudsman published in the Official Gazette no. 97 as of May 1997.

6. Undertakes to present annual reports in the common meeting of the two Chambers with respect to the institutions' activity.

2. The organization of the Ombudsman institution and its attributions.

The proposals for the candidates are made by the Senate's and the Chamber of Deputies' Permanent Offices upon recommendation from the parliamentary groups from the two Chambers of the Parliament. The candidates must meet the requirements imposed by the law, which are similar with those imposed for the positions of judge at the Constitutions Court of Romania[10].

It is pursued by the submission of the supporting documents and the hearing of the candidates by the Chambers' legal committees.

The mandate's duration is 5 years and it may be renewed only once, the beginning of the mandates being signalized by the moment of making the oath of allegiance. The mandate may cease before the expiration date in case of resignation, dismissal from function by the Senate, incompatibility, the impossibility to exercise its attributions for more than 90 days or death.

In compliance with the provisions of art. 58 par. 2 from the Constitution, *the quality of Ombudsman is not consistent with any other public or private function.*

In compliance with the provisions of art. 10 from Law no. 35/1997, the Ombudsman is assisted by deputies, specialized on activity fields. The deputies are appointed into function by the Ombudsman with the Senate's legal Commission's approval.

During the mandate's exercising, the Ombudsman and his deputies may not be detained, arrested, searched or sent to trial except when approved by the Senate.

The Ombudsman and his deputies may not be members of a political party.

Except for a special situation, the mandate is valid until a new Ombudsman is placed into function.

Their appointing is published in the Romania's Official Gazette.

The Ombudsman 's attributions are specified in the Romania's Constitution as well as in the Law no. 35/1997 :

- it coordinates the activity of the Ombudsman institution;
- it receives and distributes the requests from injured persons to the specialized personnel within the institution;
- it follows the legal execution of requests sent and requests to the administrative authorities to cease the breaching of citizens' rights and freedoms, the petitioner's reinvestment and mend the damages;
- it represents the Ombudsman institution in front of other public authorities;;
- it is the main credit release authority;
- it is charge with hiring the institution's personnel;
- it is compliant with the provisions of art.57 from the Constitution, the Ombudsman submits annual reports to the two Chambers of Parliament, or whenever they request them. Through such reports the Ombudsman may make recommendations with respect to the legislation's improvement or may propose other types of measures in order to protect the citizens' rights and freedoms.

[10] see art. 143 from Romania's Constitution.

The Ombudsman's attributions concern the public administration authority's activity and its relations with the citizens exclusively; this institution may become an antidote against the bureaucracy that is a largely extended disease[11].

In order to solve the requests received from the injured persons, the Ombudsman is entitled to investigate on its own in compliance with the law. This activity is not judicial in nature and does not have the specifications of the investigations performed by a judicial body. In this regard, the Ombudsman may hear and note statements from the public administrative authorities management, from any employee who performed his activity in a public institution or public services, found under the authority of the state administration. Moreover, it may request the public administration authority any information or documents necessary for the investigation. In compliance with the provisions of art. 59 par. 2 from the Constitution, the public authorities are obligated to provide the Ombudsman all the necessary assistance in exercising his attributions and implicitly to communicate any requested information. He shall be granted access to secret documents providing his compliance with the confidentiality requirement.

In compliance with the provisions of Law no. 35/1997, if breaches of human rights are noticed the Ombudsman shall request in writing to the public authority to reform or revoke the administrative act and to mend the damages occurred and, depending on the case, to reinvest the injured person in the previous situation.

Mainly, this request is not mandatory for the public administration body therefore *not leading to the same effects as the court's decision*. Nevertheless, the public administration authorities may not ignore the Ombudsman's request, especially when it has all the legal cohesion means.

Therefore, in compliance with the provisions of Law no. 35/1997, the public administration bodies are obligated to take all necessary measures and to inform the Ombudsman, in this regard within 30 days as of receiving the request.

In case the administrative authorities do not answer within 30 days, as provided by law, the Ombudsman may notify the superior administrative authority, that is obligated to communicate the measures taken within 45 days.

If the notice is with respect to an administrative act from the prefect, the latter must answer the Ombudsman's request regarding to the observance of the breached citizens' rights and freedoms within 45 days.

The Ombudsman may notify the Government with respect to any illegal administrative act or deed from the central public administration. The Government is obligated to communicate the measures taken within 20 days from the notification. In order for the public administration to respect the citizens' fundamental rights and freedoms, the Ombudsman may also notify the Parliament communicating the observed aspects.

3. The reports between the Ombudsman, the other state institutions and the civil society

In compliance with the provisions of art. 59 par. 1 from the Constitution and art.14 from Law no. 35/1997, the Ombudsman exercises its attributions *ex officio* or upon *request* from injured persons with respect to their rights and freedoms, within the limits established by law.

The request may be addressed by any natural person, regardless of his political affiliation, sex or religion. The requests must be in writing, must indicate the person's identification data, the breached rights and freedoms, as well as the respective administrative authority or public servant. The petitioner undertakes to prove the delay or the refusal of the public administration body in

[11] Ioan Muraru, Simina Tănăsescu, op. cit., p.432

order to solve his request. The anonymous complaints are not take into consideration nor are those against the breaching of human rights that are older than one year, as of the date when the respective person became aware of the deed consisting in the complaint's object.

In compliance with the provisions of art. 15 par. 4 from Law no. 35/1997, the following request are not included in the Ombudsman's activity:

- acts issued by Chambers or the Parliament as a whole;;
- acts and deeds of deputies and senators;
- Acts and deeds of the Romania's president, the Government's, the court's of law authorities, the Constitution Courts' and the presidents' of the Legislative Council;

The requests are exempted from the stamp duty.

In case the above mentioned requirements are not met, the Ombudsman may reasonably reject the complaints addressed to him, as ungrounded.

If the request is deemed to belong to the Public Ministry's authority, or the injury referred to is pending in a court of law or refers to judicial requests, the Ombudsman shall notify, on a case basis, the Attorney General next to the Supreme Court of Justice or Superior Council of Magistracy, bodies that are obligated to communicate their conclusions and measures taken.

Conclusions

Under no circumstance may the Ombudsman address directly to the trial courts for solving the request, having in regard that his controlling activity does not directly refer to the trial court's activity, those representing the judicial power.

In conclusion, the Ombudsman was defined by the professional literature as being an institution recognized by the Constitution or by a law of the legislative body, lead by an independent person who answers for his deeds in front of the Parliament, receives the citizens' complaints and acts on its sole discretion in order to defend the lawfulness of the legal or administrative acts, make recommendations or suggestions and announces annual information[12].

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[12] Carlos Giner de Grado- *„Los Ombudsmen europeos*", (Tibidabo publishing house, Barcelona, 1986), p.14

CONSIDERATIONS ON THE USING OF ALTERNATIVE MECHANISMS DESIGNED FOR SOLVING THE INTERNAL MARKET PROBLEMS

Constanța MĂTUŞESCU *

Abstract

The European Commission has undertaken in recent years into a comprehensive and ambitious approach to improve the application of Union law, in which he proposed better coordination of the various instruments of European governance without resorting to additional regulations. Emphasis was placed on enhancing the partnership with Member States, of preventative measures, the more effective use of infringement proceedings, on enhancing dialogue and transparency between European institutions and improving the way public information is shared and, not least, on the introduction of new tools to facilitate informal solving of problems. Most of these new devices controls are informal instruments, with non-legislative nature, but which aims to increase the degree of law respecting with obligatory nature.Their implementation involves, primarily, increased cooperation and coordination between Member States administrations. Based on informal analysis of some of these tools, we propose in this paper to evoke how the contributions they can domestic law enforcement market, but also the impact that these mechanisms have on the national administrative system, serving at the targeting policies of the Member States and representing vectors of a normative action.

Keywords: *The European Union, European law, European governance, internal market, informal mechanisms*

Introduction

Over the last decades we have witnessed across the European Union an evolution of the European political system, meaning a bigger flexibility: a smoother coordination process, the emergence of several control mechanisms with alternative and informal character, the multiplication of new types of public tools, less constraining for the member states than the classic tools describing the community method (statutes, directives). A greater importance is attached to deliberating and taking counsel, the institutional system is getting more complex, thus creating multiple independent structures, the horizontal logistics is constantly developing, the definition of common objectives is the heart of the matter and the focus is rather on how the public action is being taken than its content.

But the use of this type of instruments does not exclusively belong to the European Union. Similar mechanisms have been developed both at national level, across most of the western states (even for fields which are not directly submitted to European integration), and international law

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level as well. Flexibility is more popular than the traditional „dirigistic" approach, thus creating a „new public management"[1], featured, among other things, by stronger bonds between the public and private sectors, openness towards the civil society, and the pursuit of technical rather than political resolutions to contemporary problems.

The European Union is nowadays a laboratory designed to generate new legal instruments and new government techniques, as a result of traties merging. The inovations mainly cover the instruments chosen to solve the public issues, they don't aim at the nature of these issues. The role played by these instruments designed for public actions is to improve the way the European political system works.

Considering the analysis on some of these new developed instruments within the European Commission, designed to facilitate the informal settlement of the problems in order to improve the application of EU law, this paper aims to highlight how the use of several alternative mechanisms for solving the emerged problems and disputes on the Internal Markets displays a cluster of benefits in terms of participation, transparency and efficacy of the system. However, we do consider that multiplying the informal instruments instead of the formal ones in order to achieve the objectives of the European Union takes up the topic of a leading European Union principle: the law community, so an equitable balance between these two types of instruments is compulsory in order not to prejudice the legitimacy over the efficacy.

A special care[2] has been lately attached to this topic when talking about the technical foreign literature, but the continuous improvement of the alternative mechanisms and the emergence of new ones entitles new analysis and structural approaches.

• The Internal Market – an unfinished project

Being a central element of the European project and its charter members and a capital objective of the European Union[3], the set up of the Internal Market[4] is the most important European project[5], which has brought a lot of benefits for its European citizens, consumers and economic agents[6], being one of the main growth engines in Europe at the same time. Its

[1] L. Boussaguet, S. Jacquot, *Les nouveaux modes de gouvernance: quelle nouveauté pour quelle gouvernance ?*, in „Les politiques européennes", de R. Dehousse, (coordinator), Presses de Sciences-po, Paris, 2009, p. 410.

[2] See, in particular: T. Christiansen, S. Piattoni, (eds.), *Informal Governance of the European Union*, Cheltham: Edward Elgar, 2003; L. Salamon, *The Tools of Government: a Guide to the New Governance*, Oxford, Oxford University Press, 2002; W. Walters, J.H. Haahr, *Governing Europe*, London: Routledge, 2005; I. Bruno, S. Jacquot, L. Mandin, *Europeanization through its Instrumentation*, Journal of European Public Policy 13(4)/2006, pp. 519-36; O. Borraz, *Governing Standards: The Rise of Standardization Processes in France and in the EU,* în „Governance", nr. 20(1)/ 2007, pp.57-84;

[3] Art. 3 indent. (3) of the Treaty on European Union (TEU), the consolidated version – Official Journal of the European Union C 83/52 RO from 30.3.2010.

[4] Its name changed from *Common Market* to *Single Market*, then to *Internal Market*, thus highlighting a double process of getting a deep and enriched meaning. By developing around the four liberties, that is freedom of *movement of goods*, persons, services and capital, the major European market has been completed and upgraded especially by means of enhancing the economic integration, by creating a single currency and by means of developing the cohesion policy.

[5] According to professor Mario Monti, „The single market is the original idea and the unfinished project of Europe" (The report *A new strategy for the single market. At the service of Europe's economy and society,* presented to the president of the Commission on 09.05.2010. For further information: http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_ro.pdf.

[6] According to the European Commission appraisal, the intra-European Union trade rate is nowadays 17% and 28%, respectively, from the ratio of trade in goods and services. The drop by 70% of mobile phone calls costs or by 40% of plane tickets costs are actual illustrative examples – Communication from the Commission, *Towards a Single Market Act. For a highly competitive social market economy. 50 proposals for improving our work, business and exchanges with one another,* COM(2010) 608, 27.10.2010

implementation means cooperation between the member states of the European Union, thus triggering the emergence of the so-called „actual solidarity", which the charter members had in mind.

The complexity involved around this project, the fact that the Internal Market is governed by a normative frame, made of over 1500 directives and near 1000 statutes, in connection with several policy domains of the exclusive market, normative texts which are often quite complex and look like a „machinery" really hard to understand for the common citizen, made it difficult for the Internal Market to come up. Especially given the present context, marked by the the fiancial and economical crisis which left its mark on each and every European economy and sectors, touching both the enterprisers and the employees as well, and squeezing the purchasing power of millions of European consumers.

The national governments have to deal at the same time with a range of problems while adopting and implementing the measures concerning the Internal Market, according to several assessments carried out by the European Commission[7]. The actual implementation of the Internal Market norms is still facing major challenges, such as considerable delays related to transposing directives or an increased number of complaints came from the citizens or enterprises concerning the violation of their rights granted by EU law[8].

In the light of the treaties, the EU institutions – especially the Commission and the Court of Justice, are in control and make sure that all the member states observe the European norms, as the European justice is compulsory for the member states (Art. 258 and 259 of the Treaty on European Union) and exclusive (Art. 344 of the Treaty on European Union).

The European Commission is the one that oversees the member states to correctly apply the Union's law. This responsibility as a „guradian of the treaties" is stipulated under the Art. 17 of the Treaty on European Union („… The Commission shall oversee the aplication of the Union law under the control of the Court of Justice of the European Union") and it has been ammended through the agency of the Court jurisprudence, which included within the Commission competence the existence of a „general surveillance mission", which enables it to monitor if the states observe their engagements in the light of the treaties and the decisions made during their application[9].

While carrying out this mission and due to slow law procedures[10], The Commission continuously developed new ways to enhance the implementation of EU law. Their purpose is not to replace the jurisdictional procedures, they are instead complementary *alternative mechanisms,* strictly related to specific problems, such as the inadequate implementation of EU law or predictable EU norms infringements. Their purpose is to enable the European citizens to fully benefit from the advantages provided by Internal Market and to offer a quick remedy for those who have been touched by the inadequate implementation of European norms, without any proceedings.

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[7] The most complex ones are the annual reports on monitoring the application of EU law, which can be checked at the following address http://ec.europa.eu/eu_law/docs/docs_infringements/annual_report

[8] Internal Market Scoreboard no. 22 (IP/11/329), made public on 21st of March 2011. For further information: http://ec.europa.eu/internal_market/score/index_en.htm

[9] The Court of Justice of the European Communities, Judgment of 5/5/1981, *Commission vs. the Netherlands*, Case 804/79, in „Recueil de la Jurisprudence de la Cour de Justice", 1981, p. 1045.

[10] Basically, the procedure concerning the acknowledgement of a state member which doesn't observe its commitments, or the *infringement* procedure, governed by Art. 258 of the Treaty on European Union, whose average lifetime is 2 years (for this purpose, report to The 27th Annual Report on Monitoring the Application of EU Law (2009) - COM(2010) 538 final, made public on 01/10/2010 and the 21st Internal Market Scoreboard - 21IP/10/1166, made public on 23/09/2010)

The main alternative mechanisms for solving the problems at the level of the single market are the SOLVIT[11] network, the European Consumer Centres networks, the mechanism governed by Regulation 2679/98/CE regarding the free movement of goods[12] within EU and the „EU Pilot" project[13].

Most of these control mechanisms are informal non-legislative instruments, but they are used to increase the observance of compulsory legislation degree. The implementation flaws are caused by lack of knowledge, lack of coordination and slow bureaucracy[14].

Providing a less intrusive way to follow the observance of EU legislation, these „soft"[15] and flexible instruments have a practical influence which transcends their informal character, having a strong impact on the national administrative system, serving as orientation advisor for the policies of member states, and acting as the vectors of a normative action.

The application of these new control mechanisms implies a higher cooperation and coordination degree between the Member States governances, a series of measures being taken for this purpose, which include monitoring practices (such as *scoreboards* regarding the performance within several domains), national agency networks for regulation and office servants training programs.

• New ways of administrative cooperation and coordination for a better governance of the single market

There has been traditionally drawn out a razor edge between the activity of EU administration and the administrations of the Member States, considering that, if the first one is responsible of

[11] Ad hoc network for solving the problems, in which the EU member states work together for solving the problems caused by public authorities' inadequate application of the law concerning the Internal Market, without using the judicial procedures.

[12] Published within the „Official Journal of the European Union" L 337/8 from 12/12.1998. By the agency of this journal, in order to prevent from habitual and punctual inobservance of technical legislation,there has been developed a rapid alert mechanism between the member states, just in case one of the member states is facing an immediate obstacle which might block the free movement of goods.

[13] The idea for the EU Pilot project was launched in the Commission Communication in 2007 on „A Europe of Results" [COM (2007) 502]. he Communication states that EU Pilot is designed to deal with enquiries and complaints from citizens and business raising a question of the correct application of EU law. EU Pilot is used when clarification is required from Member States of the factual or legal position. Explanations or solutions are to be provided by Member States within a short timeframe, including remedial action to correct infringements of EU law. The Commission services review all Member State responses and further action may be taken to enforce EU law if required. EU Pilot has been operating since April 2008. Fifteen volunteer Member States are participating: Austria, Czech Republic, Denmark, Germany, Finland, Hungary, Ireland, Italy, Lithuania, the Netherlands, Portugal, Slovenia, Sweden, Spain and the United Kingdom. By February 2010, the EU Pilot was dealing 723 files, after 22 months of operation. A further evaluation of EU Pilot is planned for 2011. For further information: http://ec.europa.eu/eu_law/infringements/application_monitoring_ro.htm

[14] O. Borraz, *Governing Standards: The Rise of Standardization Processes in France and in the EU,* in „Governance", no. 20(1)/ 2007, pp.57-84.

[15] A set of atypical legal instruments with a doubtful status, such as testimonials, opinions, communications, guiding lines, notes, framing-tools etc., issued by the European Commission, which in spite of not having mandatory legal force shall not be deprived of any consequence, they constitute the so-called „*soft law*" according to technical literature, in order to distinguish them from the compelling law instruments (treaties, testimonials, directives) which constitute the so-called *„hard law"* – F. Snyder, *Soft Law and Institutional Practice in the European Community*, in „The Construction of Europe", by S. Martin (coordinator), Kluwer Academic Publishers, Dordrecht, 1994, p. 198; E. Bernard, *La specificite du standard juridique en droit communautaire*, Edition Bruylant, Bruxelles, 2010, p. 490; E. Ferran, *Can Soft Law Bodies be Effective? The Special Case of the European Systemic Risk Board*, in „European Law Review", Volume 35, Number 6, December 2010, pp. 751-776; L. Senden, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?*, in „Electronic Journal of Comparative Law", vol 9.1- January 2005 (http://www.ejcl.org/91/art91-3.html).

initiating and adopting the legislative instruments, then the last ones are supposed to apply the European law[16].

The cooperation between the Member States while applying the Union law may consist of a normative, judicial or administrative action[17]. It may come as a set of actions at legislative level in order to add up the dispositions of the EU law, to ensure the observance of the European norms, even by constraint, through the agency of the judicial system, but most of the national actions are included within the executive role of the Union, meaning the European decisions shall be carried out by the national administrative apparatus. This kind of administration can be called *indirect administration*, which comes in to play in the absence of a deconcentrated European administration, the Member States thus being in charge with providing the administrative implementation of EU law by means of adopting individual decisions and carring on material acts. The doctrine evokes even the existence of an *indirect administration principle*, officially proclaimed (even though without obligatory force) within *Declaration 43 annexed to the Treaty of Amsterdam*, according to „It is therefore incumbent on all Member States to apply the Community law at administrative level". In addition, given the distinction between direct and indirect administration, a reflection on how the competences can be divided at the EU level, and given the enhanced practical collaboration between national and European authorities while implementing the European policies, there are some voices who speak about the existence of a „*co-administration*", a *composite administration*[18] or a *„split execution"*[19], some authors considering this a new model[20].

The Treaty of Lisbon introduces a new title dedicated to administrative cooperation (Title XXIV of the Treaty on the Functioning of the European Union), which stipulates that effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.. For this purpose, The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States (art. 197 of the Treaty on the Functioning of the European Union).

Art. 6 of the Treaty on the Functioning of the European Union states that the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States in the area of administrative cooperation (alongside other areas, such as industry, culture, tourism, education etc.).

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[16] D. Ritleng, L*'identification de la function executive dans l'Union,* in „L'execution du droit de l'Union, entre mecanismes communautaires et droits nationaux", by J. D. de la Rochere (coordinator), Edition Bruylant, Bruxelles 2009, p. 40.

[17] For detailed information, please check: C. Mătuşescu, C. Gilia, *Aspects regarding the EU Member States competence in the enforcement of the Europeen legislation,* in „Challenges of the Knowledge Society - eBook", Ed. Pro Universitaria, Bucureşti, 2011, pp. 538-548.

[18] E. Schmidt-Assmann, *Le modele de l'administration composee et le rol du droit administratif europeenne*, in „Revue francaise de droit administratif", no. 6/2006, p. 1246.

[19] J. Ziller, *Execution centralisee et execution partagee*, in „L'execution du droit de l'Union, entre mecanismes communautaires et droits nationaux", by J. D. de la Rochere (coordinator), Edition Bruylant, Bruxelles, 2009, p. 114.

[20] J. Ziller, *Les concepts d'administration directe, d'administration indirecte et de co-administration et les fondements du droit administratif europeenne,* în „Droit administratif europeen", de J.- B. Auby, J. D. de la Roche (coordinators), Edition Bruylant, Bruxelles, 2007, p. 235.

Independently from the formal commitment of administrative cooperation at European level, the Union and the national administrations have developed new forms of administrative interaction, that can't be described anymore through the agency of the classic distinction between drawing up and implementing the measures, or between direct implementation by European institutions and and indirect implementation by national authorities. It's about a new type of cooperation between the Union and the national administrations, which involves innovative and extremely varied methods, takes the shape of an „administrative union" (*Verwaltungsverbund*)[21], and boosted exchanges at all levels between administrations under the influence of information and communication technologies. A clarifying example to this end is given by the multiplication of European *angencies*, whose role is to promote the interaction between the European and the national administrative services inside their activity field[22], or to set the basis of the *European Union Public Administration Network* (EUPAN), an informal network, whose civil servants from all over the European Union cooperate and establish exchange of information inside the public administration area[23].

As for the Internal Market, here operates one of the most effective instruments for administrative cooperation: the *Internal Market Advisory Committee* (IMAC)[24] and the *Internal Market Information System* (IMI) [25].

Having regard the Internal Market, at this level operate two of the most effective instruments in terms of administrative cooperation: the *Internal Market Advisory Committee* (IMAC) and the *Internal Market Information System* (IMI).

Being formed out of two representatives of each Member State and chaired by a representative of the Commission, *IMAC* may be consulted by the European Commission on any practical problem concerning the functioning of the Internal Market, other than those which are covered by action taken in compliance with arrangements to notify to the Commission and/or exchange information between the Member States and the Commission, laid down in any other applicable Community measure or established within an existing framework for practical cooperation between the Commission and the Member States[26].

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[21] Ch. Demmke, D. Bossaert, *L'européanisation par la coopération informelle: l'exemple du réseau EPAN*, in „EIPASCOPE", Numéro spécial 25ème anniversaire, 2006, p. 57.

[22] Most of the European angencies play a supporting role, they don't govern anything. They have been established to take over some of the Commision duties and to support the Member States in various fields. For detailed opinion on the enhanced role of EU agencies, please T. Zwart, *La poursuite du pere Meroni ou pourquoi les agences pourraient jouer un role plus en vue dans L'Union Europeenne*, in „L'execution du droit de l'Union, entre mecanismes communautaires et droits nationaux", by J. D. de la Rochere (coordinator), Edition Bruylant, Bruxelles, 2009, pp. 159-174.

[23] This cooperation is set up on three levels: *political* (ministers and the commissionary for public administration), *management* (general managers or representatives from the administration) and *tehnical* (human resources groups, innovative public services, e-governing; experts meetings for better regulation; meetings with the principals of institutes and public administration schools) -http://ec.europa.eu/civil_service/ audience/nat_admin/epan_ro.htm.

[24] Issued by the European Commission Decision on the establishment of the Consultative Committee for the coordination of the Internal Market, no. 93/72/CEE, published in the „Official Journal of the European Union", L26/18 of 23/12/1992.

[25]IMI was launched in February 2008 to support the revised Directive on the Recognition of Professional Qualifications (2005/36/EC) and since December 2009, Member States are legally obliged to use IMI to fulfil the information exchange obligations of the Services Directive (2006/123/EC) and Commission decision 2009/739/EC of 2 October 2009 setting out the practical arrangements for the exchange of information by electronic means between Member States under Chapter VI of the Services Directive. IMI currently has more than 5 700 registered competent authorities and 11 000 registered users.

[26] For detailed information, you can check http://www.dae.gov.ro/182/comitetul-consultativ-pentru-pia-a-intern-imac

As for the *Internal Market Advisory Committee*, it is an electronic tool, whose purpose is to facilitate administrative cooperation and mutual assistance between Member States of the European Union (including the states of the European Economic Area) in order to ensure a proper functioning of the Internal Market and the free movement of goods and services[27]. The information system of the Internal Market has been designed as a flexible tool to sustain the administrative cooperation that supports sectoral legislative instruments. It is currently used for the Directive on *professional qualifications* and the *services* Directive.

IMI is a secure, reusable, multilingual, online electronic application developed by the Commission in partnership with the Member States. IMI allows national, regional and local authorities throughout the 30 EEA Member States to communicate quickly and easily with their counterparts across borders. IMI helps its users to find the right authority to contact in another country, communicate with them using pretranslated sets of standard questions and answers and follow the progress of the information request through a tracking mechanism. The idea behind IMI is to replace the very high number of bilateral relationships, linking EU Member States with a single interface, the IMI network. One of the key advantages of IMI is to successfully overcome the main obstacles to cooperation, such as uncertainty about whom to contact, language barriers, different administrative and working cultures and a lack of established procedures for cooperation[28].

In the context of debates over the relaunch of the Internal Market in order to cope with the curent challenges and to make available for its citizens and enterprises its full potential[29], the simplification and acceleration of the cross-border administrative cooperation between the national administrations, which would eventually give the citizens the possibility to easily benefit from their rights within the Single Market, it's a major objective aimed at because the relaunch of the Single Market requires the active support of all European institutions, Member States and interested parties. One of the tools which may trigger the achievement of this objective is the *expansion of the Single Market Information System*, which turned out to be a mechanism that successfully ensured the contacts between national administrations, and also within other political domains, including the electronic commerce and public acquisitions. One considers that a higher interaction between the Member States authorities, qulified in terms of Single Market issues, doesn't only promote the resolution of immediate problems emerged while applying the directives, but it also promotes the development of a mutual trust between the Member States authorities and a more viable Single Market on the long run (the European dimension of public administration across the Member States)[30].

• Improving the implementation of Internal Market law. The role of the alternative mechanisms

As we previously mentioned, the Internal Market, the most ambitious European project, is still facing difficulties during the processes of implementation. „The single market is a construct

[27] Romania's participation both within the Internal Market Consultative Committee and Internal Market Information System is basically carried out through the agency of the Department of European Affairs, under the Romanian Government's command, playing the role of a national coordinator.

[28] Communication from the Commission *Better governance of the Single Market through greater administrative cooperation: A strategy for expanding and developing the Internal Market Information System - „IMI"*), COM(2011) 75 final, Bruxelles, 21.2.2011.

[29] For more information, refer to Communication from the Commission *Towards a Single Market act. For a highly competitive social market economy. 50 proposals for improving our work, business and exchanges with one another,* COM(2010) 608, Bruxelles, 27.10.2010

[30] The European Parliament report on *Governance and Partnership in the Single Market* [2010/2289(INI)] – Rapporteur: Sandra Kalniete.

based on law. Thus, it is crucial that Member States take seriously their obligation to timely transpose and correctly apply the rules they agreed to"[31].

Through the agency of the Internal Market Scoreboard – an informal tool designed to support the implementation of the Internal Market, the European Commission monitors the way in which Member States apply and observe the Internal Market norms. After studying the 22 Scoreboards that have been issued on a regular basis[32], the general conclusion mirrors a positive evolution regarding the implementation and enforcement of the Internal Market norms. Despite this positive evolution, the Single Market is still divided and doesn't work in its full capacity. There are multiple and complex causes: a large number of regulations and the frequence of their adoption, the supremacy of directives during the enactment process (about 80% of the whole number of norms), having the advantage to allow the consideration of local specificities, but also implying significant downshifts between the moment of their adoption at the Union's level and their implementation at national level, thus affecting the effectiveness of regulation and the system consistency) and heavy risks in terms of wrong implementation, a slow procedure in dealing with the infrigement cases etc. The hard truth is that „…the decentralised system in which Member States are responsible for the implementation of EU law and the Commission monitors their action presents many advantages but cannot ensure total and homogeneous compliance"[33].

Over the last years, the European Commission committed itself to a complex and ambitious project, designed to improve the implementation of EU law[34], aiming at a *better coordination of European governance instruments without using extra regulations*. The stress was on boosting the preventive measures, in partnership with Member States, on an effective usage of the infrigement procedure, on boosting the dialogue and transparency between the European institutions, on improving the ways to inform the general public, and last but not least on *introducing new instruments designed to facilitate the informal problem-solving* by means of some extremely effective instruments, such as the SOLVIT network and the EU-pilot project.

Despite all the measures that have been adopted, and although there can be seen a slight improvement when talking about the application of Internal Market law, the results don't meet the expectations. Thus, according to the latest *Internal Market Scoreboard*, made public in March 2011[35], the average transposition deficit regarding the Internal Market, whose deadline expired, is 0,9%, Member States are still in line, but only just, with the 1% target set by Heads of State and Governments in 2007[36], and the average timespan for delayed implementation of directives after the agreed period also decreased by 9 to 5,8 months. Regarding the compliance deficit, although the infringement cases have decreased by 11% compared to the last semester (the average number of open infringement proceedings decreased to 40 cases per each Member State), it still remains persistent and alarming. If the infringement number remained a constant over the years, it is a different story when talking about the resolution period of these cases. Member States still take considerable time – on average more than 18 months – to comply with rulings of the EU Court of Justice[37], even though they are required to take immediate action. One case out of five takes more than 3 years to be solved or to be presented to the Court.

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[31] The Monti Report, *ibidem*, p. 101.

[32] They are issued on semestral basis, the first one being presented in November 1997. A full list can be accessed via the following link: http://ec.europa.eu/internal_market/score/index_fr.htm.

[33] The Monti Report, ..., p. 103.

[34] To be seen, in this matter, The Communication from the Commission „Towards a Europe of Results – Applying Community Law" (COM(2007)0502).

[35] The Internal Market Scoreboard No. 22, *ibidem*.

[36] The total number of Member States achieving the 1% transposition deficit target increased from 18 to 20 Member States comparing to last semester.

[37] Ireland accounts for the longest delay, taking on average approximately 25 months to comply with rulings.

Given the measures that have been adopted to improve the application of EU law, *the alternative mechanisms for solving the problems and dealing with the complaints had a tremendous effect over the progress that has been made*. The techniques and procedures that have been used for the running of these informal mechanisms (mainly those of the SOLVIT network, which operates in all the 27 Member States) were able to hold pressure on the Member States authorities in order to carry out a better observance of the Internal Market regulations. They have been appointed by the Commission to basically interfere, ex post, in order to solve the lack or the inappropiate norm application, which represent types of law infringement that are harder to detect by the Commission compared to delayed application cases. For instance, through the agency of SOLVIT, there are frequently *identifyed general structural problems at the Single Market level*. Using annual reports, the network basically offers precious information, in addition to that delivered otherwise (including the formal way), regarding the difficulties each Member State has to deal with while applying the Internal Market norms. Its activity also plays an important preventive role, especially throuh the agency of SOLVIT +[38] cases, submitted to be solved on a frequent basis. The resolution of these cases requires structural changes of the administrative practices or even the legislation. If the above mentioned changes are successfully brought into effect, they prevent the emergence of new cases of incompliance with the European regulations.

But most of the time, the alternative mechanisms for solving the problems and dealing with the complaints imply cooperation between the structures of the national, regional and even local public administrations, fostering common undertanding over some issues related to the application of the Internal Market norms, common definitions of the problems and common working practices. These types of cooperation thus bring a contribution in shaping the procedures undertaken by the national administrations, improving some flawed administrative practices public administrations of Member States, the public administrations of Member States thus going through a professionalization process. The national authorities came to endorse the way of thinking[39] and the course of these informal structures, which led to an „informalization" of the national administration working practices[40]. At the same time, by linking the national administrations which cooperate in order to solve the issues related to the application of the Internal Market law, they facilitate the exchange of good practices between these administrations, triggering a more uniform law interpretation and application.

Conclusions

Despite being recently developed, the new EU judicial instruments and governance techniques have already contributed to a better functioning of the Single Market, mainly due to a more direct involvement of all interested parties (European institutions, Member States, citizens, companies, socio-professional organizations, civil society etc.). They have many *advantages* which account for their development. First of all, these instruments facilitate the accomplishment and functioning of the Single Market, using the attunement of national administrative norms and practices and developing mutual trust, thus contributing to *simplification of Single Market rules*. Secondly, and maybe the most important benefit is they have generated a *co-responsabilization* of

[38] For such cases, in order to solve the problem which is subject to intimation, it is required certain structural changes regarding the public authorities demeanor, some cases demanding a formal plea designed to amend the legislation, the orientation or other official transposition directives, at national level.

[39] Mainly it's about the way in which the Internal Market law is interpreted and transposed.

[40] For a complex analysis regarding the Informalization of Governance in the EU, check T. Christiansen, S. Piattoni, (coord.), *Informal Governance of the European Union*, Cheltham: Edward Elgar, 2003.

all the parties involved in creating the Internal Market, using these judicial instruments and alternative mechanisms for solving the problems. Bringing them closer to the European decision, there are increased chances to accept the agreed rules and to adequately apply them. These mechanisms contribute to a more educated sense of community, to social dialogue, to a better acknowledgement of the rights arising from the European citizenship and they determine the organized civil society to become more responsible. Thirdly, the informal mechanisms generally allow *a better versatility and dispatch in action* comparing to legislative process or jurisdictional proceedings. They enable the disengagement of the European legislative process and the federal courts, thus contributing both to public funds savings and lesser working tasks, which are frequently in excess inside the legislative or judicial apparatus. As a result, they will be able to focus on the core problems related to the functioning of the European political system. The role of these instruments is not to elude the formal proceedings, they are instead complementary *alternative mechanisms*, strictly related to specific problems, such as the inappropriate application of EU law or predictable EU norms infringements. Their purpose is to enable the European citizens to fully benefit from the advantages provided by the Internal Market and to offer a quick remedy for those who have been touched by the inappropriate implementation of EU norms, in order to early rectify, whenever possible, the EU law infringement situations, without being necessary to fall back on any proceedings related to EU law infringement. But the EU decisional institutions have the chance to interfere whenever they consider these mechanisms don't achieve the expected results or they harm the legislative or jurisdictional rulings.

Providing a less intrusive way to follow the observance of EU legislation, these „soft" and flexible instruments have a practical influence which transcends their informal character, having a strong impact on the national administrative systems. Fostering common undertanding over some issues related to EU norms application, common definitions of the problems and common working practices, these types of cooperation thus contribute to shaping the actions undertook by the national administrations, they amend some flawed administrative practices and play a role in the Europeanization process of public administrations.

Despite having lots of advantages, the new instruments and alternative mechanisms for solving the Internal Market problems do not stand as universal solutions and cannot identify answers for all the emerged problems. Their effectiveness mostly depends on the existance of an appropriate judicial framework, with clear and transparent proceedings, on the responsibility they are transposed and coordinated with, and also on the available financial resources[41].

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[41] The lack of clarity in legislation and the insufficient resources have been considered responsible for the limited performances of some of the existing mechanisms, especially the Solvit network - The Monti Report, *ibidem*, p. 104.

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CLOSE RELATIONS ON THE FINANCIAL MARKETS AND IRREDUCIBLE UNSTABLE ECONOMIC PERFORMANCES

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Abstract

The evolution of the market development of any kind registered an overlapping and conditioning of financial markets and economic performances, reinforcing, after the 80's, the connections between the financial system and industrial economy in relation to the age of conglomerates. Although the financial system uses its assumed functions of not being responsible for the cyclic instability of the economies, which has a negative influence over the average rate of economic growth over long periods, macroeconomic analyses reflect the financial origins of cyclic instability.

Keywords: *Neoclassical financial market, neoclassical general equilibrium model, basic Walrasian model, strong-form and semi-strong financial market efficiency, capital markets general equilibrium model, marginal efficiency of capital.*

Introduction

The functioning of the markets is mainly based on two models, the "Neoclassical general equilibrium model" and the "Basic Walrasian model".

The neoclassical general equilibrium model comprises the general equilibrium properties of commodities markets and capital goods and of financial markets. Within these we find the same form: the atomicity of supply and demand, homogeneity of products, transparency of exchanges, and mobility of financial resources. In a perfect competition, the free allocation of capital allows continuously raising their economic performances at an optimal level.

The basic Walrasian model has multiple characteristics: economic and financial decisions are made by rational individuals who are perfectly informed regarding market conditions at any given moment; the markets have monopoly over the aggregation and alignment of supply and demand; the so-called pure and perfect "competition" excludes all forms of power over prices; the equilibrium prices are a result of anonymous forces.

The model brings a response to one of the problems that continue to be asked for over a century. It incites to an approach based on the specificity of the nature of the relations between the financial market and economic performances, taken as a whole.

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Literature Review

• I. Relations still limited by mediators

The neoclassical financial market organises the meeting between the agents holding financial capacities and the agents needing financing. Manufacturers, sellers of commodities, are not in the position to self-finance 100% of their equipment expenses. They can manage the placement of their available capitals in addition to supply. In this model, the supply of capital meets the corresponding demand without financial mediators. The equilibrium of all the economies supplied by the capital and investments market, with no losses, is reached with nil mediation costs. The market may differentiate what equilibriums are possible.

Keynes' general theory marked a rupture with the unifying visions summarised by the markets' general equilibrium. Therefore, two sides of the market are very different. Businesses and individuals are not in the symmetrical relation adopted by Walras for the representation of the supply and demand addressed to markets of commodities and factors.

The capital market works in accordance with all modalities that make this difference as imaginable neoclassical models. Wicksell highlighted, against the orthodoxy of his age, the role of banks within the credit market: distinguishing between the natural rate of interest and the monetary rate required by the banks, which prefigures the Keynesian developments of the marginal effectiveness of capital and the use, which is of interest to this day, of the rate of return on equities.

The capital's rate of interest includes the variable risks premiums in accordance with the debtors' quality. The aversion to risk incites to prudence and abstention; under the form of distrusting the volume of exchanges, and the judgment used in obtaining credits and the miracle of capital operations make the economy to be one of under-investment, if the neoclassical model is taken as a reference standard.

The imperfections of the market information open with the Malthusian practices, which keep in check the increases and degradations that are of no use.[1]

The global role of banks and, at a broader level, of the financial mediations ensemble, is a positive one in regards to adjusting the capital supply and demand.[2] Regarding the term of "financial system", it also includes the capital market.

A system in which specialised organisations, banks and other mediators facilitate the movement and distribution of capitals links these two activities. Generally, the management of primary economies consists of entrusting their liquidities to an ensemble of financial institutions that act as institutional investors: pension funds, mutual funds and SICAV, speculative funds, insurers, private equity funds, real estate participants' guarantors, etc.

Banks remain the main source of external funds for enterprises. **Or, banks act in a double risk universe**. On one hand, as all enterprises, the bank is subject to the constraints of financial equilibrium; they are concerned with winning parts of the profitable markets; they compete and cooperate with the syndicates on competitive markets; they consider shareholders: they fully participate in mergers, acquisitions and other restructurings.[3] As such, they diversify their activities (credits, deposits, enterprises reconciliations, financial arrangements, wealth management, etc.), and differentiate their products and services for a better capitalisation of their distinctive advantages. The monetary market introduces new financial instruments; alternative

[1] Akerlof, Spence, Stiglitz
[2] Gurley & Shark
[3] Bienayme, 1998

financing procedures allow large enterprises to depend less on credit institutions for their cash needs. For the large clients' services segment, banks exploit their compared advantages. The specific advantage of a bank in relation to other financial mediators is providing two services instead of one: underwriting and procuring payments instruments which, in excellence, are the currency, and that which offers credits, guarantees and other derivatives. These activities generate together synergies that reduce the estimation costs of credit risk, since the history of a deposit account informs a banker about the financial position of the depositing client. The bank is also a coalition of creditors that diversifies the credit risks. Depending of their market share, enterprises accept debt after the banks have an inferior rate of interest to the market price because the bank sees the confidential information it holds, signalling their high quality market; this confidential signal allows the entity to supplement its financing sources by addressing the market. On the other hand, banks encourage specific types of risks, such as the credit risk and the liquidity risk.

The relation of the bank with its client evolves constantly depending on the business climate and its solvability.

The activities with banks should be accompanied by a high service quality bringing returns for the banks, but not through suspicious loans: the deposits' liquidity should be guaranteed; the increase of credit risks and operational risks should be competently overseen; clients should have the capacity to measure to an extent the loyalty for supporting the bank in case of difficulties. In case of bankruptcy, a banker strongly affects his clients. Maintaining a reduced competition on the credit market functions soundly only when the probability of debtors' weakness remains within tolerable limits.

Foreign currencies, loans and reimbursements on the capital market are a collective commodity: they are not accepted solely for the simple fact of being liberated, to answer to the wording Keynes used to summarize the neoclassical model.[4] The value of the currency dominates the relations between creditors and debtors. The Central Bank arbitrates in this manner between its role as a lender of last resort and its mission as "master of inflation"; this implies that, in the position of "master", it would increase the monetary mass and oversee the quality of the credits granted in the economy.[5]

To summarize, banking and financial mediations have multiple particularities. There are various activities that allow, at a global level, the reduction of the uncertainty of deponents, of those who make primary economies and of investors of all kinds.

The multiplication of financial products and of securitisation possibilities for a resale on the financial markets ultimately allows the adjustment of market supply and demand. Financial mediations aggregate the multiple small economies, and diversify and mutualise risks. At the same time, they have functions which, if used competently and honestly, favour economic efficiency, at a general level, stimulate growth and the use of workforce.

Certain financial mediation activities generate operation costs. They are a consequence of the fact that primary economies are not wholly transformed into productive investments through lenders. They cannot generate a loss that would result in a lack of earnings for the national economy in relation to the neoclassical optimal level, since financial mediations are not attributed with a lack of earnings in real cases related to uncertainties, information asymmetries and countless moral hazard manifestations in business relations.

[4] Skidelssky
[5] Allen & Santomero

The financial market is congenitally opaque because of the simple fact that changeable assets are carriers of eminently random future return promises. Financial mediators, holders of primary economies bring a higher security and the trust they inspire in attracting capital without which there may be no contribution to production development.

There are countries where the financial services activity (necessary and of national magnitude) occupies a significant part in relation to GDP generating activities.

Financial mediators raise problems within the national economies because the neoclassical model does not have the necessary vocation to deal with them. This pure economy model sets aside space: it explores the economic logic of work within a world without borders. The insertion of national economies within the world dynamics highlights these problems. Our world, fragmented between over 200 nations of unequal powers, recirculates half a dozen key statements in order to facilitate the international transactions ensemble. Combinations between flexible foreign exchange rates and the free movement of information made the financial system strongly interconnected at a global level, being integrated starting form the end of the 19th century. National economies conserve financing circuits that are not indirectly integrated within the global system. Within the EU, which is more familiar to a system adopted in the 19th century, assumed finances decisively participate to the market economy.

After the end of the 1970's, institutional investors entered the capital markets and gathered the power of the arbitrages recently held by the financial directors of conglomerates.[6] Industrial enterprises were borrowed in order to achieve their mission of producing goods and services, of invoking procedures and products and of ensuring their positions as leaders on their markets. M. Pineau Valencienne counted in 1980 approximately 450 segments of globalised markets (type bluejean, rover). They reached over 10,000 today, and will reach 20,000 in the near future.

The capital market tends to assume its quotations in financial matters and proposes instruments adapted to the infinite varieties of partner needs: derivative products, asset swaps, financial volumes, etc. At the same time, the financial market has included industrial enterprises that wish to change their management criteria, without forgetting the theory regarding the election of activity portfolios from stock exchanges (that reveals an insurance diversification behaviour) in order to re-centre the activities in which the enterprises are more competitive (core businesses) in a manner that allows the capital market to run its activity, judge more investments and allow industrial enterprises to fathom their penetration on international markets.

This separation of activities is present through international investors as a guarantee of a higher transparency over a real profitability of productive investments from the so-called real area.

Finances are also attractive through the rate of return of equity funds (ROE: Return on Equity) which remunerates the enterprise's risk and its shareholders. ROE perspectives direct equity funds towards productive investments developed and operated by the enterprises judged as being the most effective.

Economic games are iterative, the investors carefully observing the results achieved by the enterprises. They develop the assumptions of a long series of successes, given with more talent rather than hazard; they assume that in relation to the market signals, enterprises have a certain chance to be encouraged in their projects to make other more efficient judgements.[7]

[6] Fligstein, Betbeze
[7] J.P. Betbeze

This evolution, begun in the 1980's, reinforced the links between the financial system and industrial economy in relation to the age of conglomerates. Macroeconomic analysis highlighted the financial origins of cyclic instability. It emphasizes the attraction relations between profits, investor anticipations, and equipment and credit expenses.[8] The increase of stock exchange rates creates a euphoric climate, facilitating loans. However, enterprises indebtedness increases risk. Investments multiply in a reasonable manner, also as a result of the credits offered by a good market, and banks share the investors' optimism. Or, just as in Ricardo's rationale regarding the most fertile lands cultivated, enterprises start choosing more investment projects.

In the expansion contraction phase, the phenomena reverse the game. However, decreasing the percentage of used workforce and decelerating salary quotas limits the fall of benefits. And, once the concerns regarding the revival of inflation are calmed, banks may be delighted to play a part against cyclicality.

Recent activities show a diversification of the mediums through which the "financial and monetary sector" influences the evolution and maintenance of the return to cyclicality.[9] The strictly monetary perspective acts as an advisor for the Central Bank for the width of the directing rate of interest, the volume of the mandatory reserves and the allotment of retirement effects. But, if an interest rate decrease encourages credit demand and increases the monetary mass, it will shrink on the longer term, to the extent in which the reimbursements volume exceeds that of new loans, which may delay a renewal of credits in the initial volume.

Contemporary theory emphasises the respective roles of direct finances (public directly paid in shares and bonds issues) and intermediate funding: bank credits, infusions from other financial institutions, funds management.[10] Exigent remuneration includes a premium increased for reasons directly related to risk. The rate of indebtedness of capital requesters is an indicator signalling risk.[11]

Mediation allows financing more complex industrial operations, brings tolerance for information asymmetries that influence the long financial information control chain.[12]

II. Economic performances are partially disconnected from the financial market

The facts resulted from the last unfolded period call for four sets of reflections regarding: the respective stimulation devices of business leaders, the financial market efficiency, the weaknesses of financial information control bodies, and business valuation. They lead to a prediction of a maximum of efforts directed to improving operations transparency, but the limits of these efforts are not emphasised.

a) The relation between the agent uniting leaders and external shareholders is as relaxed as the participation of the first capitals in the enterprise, which is limited proportionately with the equity funds as their personal wealth. Or, the leaders hold privileged information that grants an advantage over the shareholders and administrators it represents. This situation is favourable to conflicts of interest with the shareholders, who are, at the same time, those who save up, concerned with receiving their dividends and, as much as the owners, ultimately bear the residual receivable risk. Through the stock exchange, shareholders offer a way out through the liquidity of their securities.

[8] Zarnorvitz
[9] Barjou
[10] Boutilier & others
[11] F. Barjou 2000
[12] J.P. Pollin et Euronex, 2002

The idea stimulated leaders, who mostly take into account the shareholders interests, to use the share options method, which appears to have logical substance. Also, when options are correlated with the high advantageous prices of the last year, they contribute to certain increases of the number of shares and to a decrease of benefits to the disadvantage of external shareholders.

At the same time, a partial consideration of the problems raised by the share options distribution, entry price, and conservation expenses results in the alignment of the leaders' interest research over shareholders not being automatically correlated with the enterprises' conduct over the long term. The continuous research of the enterprise's maximum value for its shareholders may prejudice the adoption of projects more favourable towards competition over the medium and long terms.

(b) Second, an economy that complies with the canons of the neoclassical model reaches efficiency. A more realistic and dynamic approach to economic performances and financial market transparency leads to distinguishing multiple efficiency decreases over the last period. In adopting the point of view of securities buyers and sellers, the financial market is efficient if it allows balancing their portfolios, even the more as this is in their own interest.[13]

E. Fama (1961, 1970, 1991) analysed three decreases of efficiency, in accordance with the available type of information. He distinguishes a weaker variety, in which the information historically reduces the stock exchange rate, a semi-strong where the information cover all of the published data susceptible to influence the enterprise's value (balance sheet, accounts, PER, circumstances, etc,), and a strong form that includes privileged information only accessible to initiates.[14]

In accordance with the strong efficiency hypothesis, agents operate on the financial market while holding perfect information; this public information, in its entirety, comprises the price of the shares synthesised by current and present stages. Agents can also measure each security's expected profitability and risk. No one can estimate the sustainability of a superior market performance. Optimist economies affect their time crossing resources and provide the enterprises with the funds they need to invest. Strong efficiency defines the market's condition when all the possibilities to make mutually advantageous transactions are exhausted. At the limit, transactions stop and the market becomes inactive in the moment it becomes absolutely efficient. The volume of the transactions observed on this type of efficient financial market is limited to the quasi-instantaneous observation of new opportunities for advantageous investments.

This school case homogeneously deals with both capital and goods markets. Fama considers the financial market efficiency a necessary condition for the optimum in economy, the so-called "competition". This market achieves an optimal allocation of capitals and equal securities transactions without delays of profit rates in different activity sectors. The rationale of the description of properties in a pure market economy makes transactions insure by themselves the coordination of economic activities. If such an economy exists, the price mechanism is sufficient to guide the entrepreneurs' saving decisions.

Or, an economy of this type ignores the enterprises, their particular solidity, their singularities and their market capacities. Enterprises with interdiction shall generate by their presence the compliance with the efficiency conditions of the financial market. Convergence between the market efficiency and the economic optimum disappears when perfect competitive conditions are

[13] Fama E (1961, 1970, 1991)
[14] Jacquillat et Solnik

missing. This is the case of reasons concerning the capital demand, issued by large listed companies.

The notion of available information is ambiguous. In our world, leaders inevitably hold private information and tacit knowledge which procure perspicacity to the market. They decide according to detailed technical, commercial information and financial reasons. The enterprise which sells its shares on the market, for example, in order to increase its capital, does not act as a simple securities seller.

Strong efficiency does not recognize the continuity solution which separates enterprises with results marked by incertitude and by those who save a lot and can distribute their risks by diversifying their portfolios and proceed to instantaneous arbitrations.

All companies exposed to competition are inclined to notice a minimum of discretion on these trumps, preferences or strategic choices not in order to surprise their competitors or to gain a contract or important orders. An enterprise remains somehow opaque in order to defend itself against competition. And it is contraindicated "to say everything, everything in time".[15] They often make enterprises cross a major crisis in order to reveal these real difficulties.[16] A premature disclosure of these difficulties risks aggravating choices in closing ways to eventual remedies. These discordances limit the contribution by which financial markets ca bring their contribution directly to the economic growth of countries that cross the expansion of their enterprises.

The financial market efficiency favors the instantaneous allocation of resources within a static analysis. This is a reason of the concentration on the elimination of improvidence by the liberty of procedures for profitable transactions.

The extension of the general equilibrium model of the capital market paradoxically attributes value to listed enterprises when this model does not grant any consistency to the price difference of any goods on a perfectly competitive market, and the stock value does not explain the real price of the enterprise. It is obvious that a profound, liquid and transparent financial market is likely to favor capital allocations and more information concerning the value of every day resulted loans and projects of enterprises with an open market.[17] The share price acquires a distinct statute as concerns the strong efficiency form: it does not synthetically reflect all information concerning the enterprise value, but is an indicator which does not react alone to the variety of information concerning enterprises and, at the same time, to overall market data.[18]

The financial market corresponds to these descriptions efficiently placed in attenuated forms, by the conditions that justify the existence of game rules as concerns information and authorized by the exchange market which require their compliance. The half-strong efficiency is convenient for a profoundly heterogeneous economy or for industrial and financial groups that replace and complete the markets.

Within this type of organized economy, the capital markets assume the advisor part with several and contradictory operator objectives; liquidity is procured from the exterior in order to resume Hirschman's terminology (Voit, Voice and Loyalty) with yields which suppose a minimum loyalty among participants. This organized market is found among operators that do not

[15] Boissieu, Societal, 2002

[16] Vezi exemplul raportului Hannezo, director financiar la Vivendi Universal remis COB privind evoluția grupului în perioada 1997; Le Monde, 14.12.2002

[17] Ross, 1987, Guerrien, 2000

[18] Keynes

have the same aversion against risk, the same implicit discount rate, or the same preference between dividends and added value.

In order that a financial market can provide reliable information, it is necessary for the market authorities to insure transparency, liquidity and profoundness. These conditions favor the economic growth and use of workforce. It leads to a larger distribution of high quality financial information, which can reduce the distrust of small holders in stock transactions with their origin functions – in other words, they associate more openly the financial market with the economic performances of enterprises.

However, the improvement of financial information is never radical as wished for. Nevertheless, it is enough for the volume of the assets acquired or desired by financial investments to be forced to correlate to the quality of their information so that games are made before small holders could react in time.

(c) In the third place, authorities tutor the intervention on control modalities as concerns financial information in order to remedy the market imperfections. In a world where the moral hazard is widespread, their vigilance is indispensable. It defines the game rules and the classification of the activity of several intermediaries which operate on the financial markets where they influence decisions. Their control is exercised, first of all, in a direct manner the regulation and publication of information, regulating authorities for the financial markets - AMF, SEC) and then in an indirect manner (deontology, self-discipline).

Or, the financial market is animated by an influence of intermediaries. Their activity is apparently improved by the market transparency and reduction of information asymmetries. They provide services and products adjusted to the needs generated by the two market quotas: that of expert accountants, audit institutions, strategy advisors, financial analysts investment banks, pension funds trustees, mutual funds, speculative funds, departments of patrimony management advisors within banks and insurance companies.

d) In the fourth and last place, one cannot return to values and enterprise evaluation without underlining three characteristics given by the current crisis, which show the relative importance of novelties.

• Several enterprises present the "new economy" and MTT (medium and telecommunication technologies) looking for external financing in order to profit as soon as possible of the "profit equations"[19];

• Intangible assets (patents, logistics, trademarks, personnel skills, contracts, etc.) obtain a more and more particular importance during the technological revolution period;

• Enterprise relationships cover a large variety of possibilities to overpass the width of the competition field, of an expected competition in the sense of frontal rivalry.[20]

Conclusions

In conclusion, if it is indispensable to ensure transparency of financial markets, hope can be placed where they meet the limits they operate within. Transparency depends on the achievement of two conditions: the publication of the accounts in a sincere and objective manner; the insurance

[19] Procter, Cohen
[20] Bienayme, 2003

that everything is legally available at any moment to the same information on results and perspectives of enterprise evolution. It prevents the deformed propagation of information and keeps a good watch on enterprises, so that they cannot hide data they should give to the market. Or, the accounting and financial information did not particularly revealed the trumps and handicaps of companies and market evolution factors. These dissatisfactions are based on two reasons. On one hand, the logic of an enterprise which acts in different periods from those of the financial market that animates actors at different and unstable horizons. An enterprise cannot raise again the question of data updating according to which it based its strategically important decisions; investors are freer to move in this area. On the other hand, the notion of transparency, if taken on paper, allows obtaining simple prices (COB). Transparency of financial analyses is opposite to the synthesis needs of the market actors. In this respect, the activity course ceases to provide a synthetic indication, sufficient in different interpretation and comment reasons, with events and acts mark the enterprise life.

Therefore, transparence is not light. To the extent in which transparency is an efficiency condition of the financial market, the latest remains inaccessible, as a strong form.

In other words, like Roland Barthes who affirmed about Racine's heroes: "Transparency of an ambiguous value: it is given and nothing says and can say."

Generally speaking, the objectives of accounts and publicity of market operations provide indisputable advantages to establish a favorable climate of economic efficiency in the development of capital markets. It is more comprehensible that the enterprise is judged according to the quality of its products by its clients; at the same time, it can admit as legitimate the fact that investors appreciate regulate quality intervals of enterprise management to which they entrust their funds. In this respect, the measurement of regulations imposed by the United States (the Sarbanes-Oxley Law- July, 2002) and Europe (the Law on financial security in France) is generated by reinforcement reasons of information objectives and transparency of financial operations.

However, for their justification they concern the immediate interests of investors, and do not end by a time discordance which belongs to the own nature of the capitalist system.

The progress achieved in the stock telecommunication and computerization accelerates the market transactions, without disturbing laws that govern the strategic balance of firms, maintained and improved by their competitive skills.

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INTEGRATION OF EUROPEAN FINANCIAL MARKETS AT THE BEGINNING OF THE 21ST CENTURY

Mădălina Antoaneta RĂDOI*

Abstract

The latest four decades have marked by their width, speed and radicality a true "revolution" on the financial market, a transformation and restructuring of financial services, of financial instruments which were used, of transaction systems, but also of competitive processes. The importance that should be given to such transformations of financial systems is given, as well, by their impact, both at the micro- and at the macro- levels, on the economy as a whole.The evolution of the European financial market at the beginning of the 21st century has followed the general trend of global markets. As a main tendency of financial market restructuring at the European level we should keep in mind the fact that there was an opening towards private financing according to the American model, due to the necessity to attract international capital resources, a process which is still ongoing.The integration of the European financial markets at the beginning of the 21st century follows the general process of financial globalization which develops rapidly on several structures of financial systems.

Keywords: *financial globalization, ideal financial market, futures market and options market, portfolio management, risk management, institutional investors, compensation facilities, trade and communication systems.*

Introduction

The integration of the European financial markets is a process preceded by restrictions of the financial systems at the global level, including the European level. These restructurings are connected to a larger opening of financial markets for the diversification of financial resources, radical transformations of financial instruments – receivable and patrimonial – the revolution of transmission systems, restructuring of trade systems, and essential changes in competitive processes, etc. these changes contribute to the extension of competitiveness advantages.

For example, deregulation, as an element of financial globalization, is one of the key processes of transition from the paradigm of management at demand, to the paradigm of supply economy, representing the opening to competition in the arbitration between regulation and competitiveness.

Starting from an ideal financial market, this paper deals with a multinational European financial market, by integrating European capital markets and banking systems the supply and demand on the European financial markets, as well as tendencies manifested on these markets.

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Literature review

THE IDEAL EUROPEAN FINANCIAL MARKET

Many Europeans would like the establishment of a multinational financial market, with a transaction volume comparable to that of the US or Japan. This would mean the integration of European capital markets and banking systems in order to allow an investor of any European country to execute its order on the best market through the best beneficiary, having access to the most efficient banking services, as well. Such a market would gather a large number of institutional investors, including an important volume of orders from all countries, and carrying along a large variety of companies (public and private). It would provide sophisticated and modern financial instruments, able to satisfy the requirements of investors, portfolio managers, transnational companies and traders.

1. The Ideal Financial Market Concept

The ideal financial market supposes a complex framework of regulations, alternative markets and adequate financial instruments, namely:

- A mutual regulation framework, able to insure the investors' protection and loyal competitiveness, without useless obstacles;
- An efficient compensation and settlement facilities, mutual for all European Union countries;
- Trade and communication systems able to insure a transparent and efficient distribution of information. Technology should have an essential part in the automatic trading, order transmission and communication of securities quotas;
- Futures and options contracts all over Europe;
- Harmonization of fees and commissions on exchange transactions and banking operations;
- A competitive framework to trigger an efficient development of financial activities.

The ideal European financial market supposes, at the same time, a professional and specialized personnel, competitive prices, a flexible management system able to combine long-term plans with the capacity to rapidly answer modifications and the effective use of technology, with an essential part in the management process and in the delivery mechanism. Emphasis should be placed on risk control, operation supervision and profitability.

2. Financial Market Restructuring – A Worldwide Integration Stage

The European financial market restructuring is a condition of their integration in the global system of financial systems.

During the latest decade and most of all during the latest 5 years, the convergent evolution of financial markets in Europe with the American one was accentuated. These convergent movements have as drivers the transition to the unique currency – Euro and the globalization of financial markets.

A large opening of the European financial markets towards private markets was registered, due to the necessity to attract international capital financial resources. This is why private financial flows become the core of the international financial system. This is an element of the financial globalization process which rapidly develops on several structures of financial systems.

Also as a part of the European financial market integration we can find radical transformations in the area of Europeanization/internationalization of securities markets. The investment horizon of investors' funds gradually becomes more European. The weight of national financial securities within the portfolios of investment funds is decreasing. The volume of cross-border transactions is increasing. However, the operations of issuing financial securities, of cross-border trading and settlement are still affected by several legal, regulation and technical obstacles.

Certain entrance barriers are highlighted; and a series of legal restrictions which affect European providers of financial services on third markets (United States).

Another part of integration is formed by the revolution of the transmission systems which took place amid the strong growth of institutional investors during the latest decade, namely: mutual funds, pension funds, insurance funds, which imposed as a stringent necessity an indirect access of the public, through information and communication systems, to the financial investments on the capital, banking, foreign exchange and insurance markets.

We cannot overlook the restructuring of trade systems on the European financial markets, namely the clearing, settlement and storage systems.

The strong development of telematics and information systems for financial banking operations, also as a result of the dematerialization of monetary instruments and securities has allowed a simultaneous interconnection of monetary, foreign currency and capital markets for the performance of distance transactions, rapid fund transfers in real time.

Their effects are most benefic, namely financial markets gain efficiency, profoundness widening and liquidity.

At the same time, transaction expenses are reduced and capital markets develop a competitive advantage as compared to banks as regards the capital cost.

The integration of financial markets is connected as well to essential changes in the competitive processes, changes that contribute to the extension of competitiveness advantages, together with the deregulation of financial processes, as an element of financial globalization.

In order to facilitate the international circulation of capital, regulations concerning the free movement of capital, free movement of financial services, namely the renouncement to restrictive measures in connection with interest rates, foreign exchange regime, taxation of obligations assumed by non-residents, etc., were adopted.

The strong development of capital markets, in different forms – markets regulated in time, share markets, option markets, futures markets, forward markets, etc. – is the result of these revolutions and, at the same time, one of the most important components of the "financial revolution" facilitating integration.

The corollary of this evolution is the increasing disintermediation of financial processes on the capital markets and the decrease of the banks' part in attracting economies and company financing.

The European financial market faces not only competitiveness, but also the necessity of cooperation between the stock exchanges and the transaction systems.

Over twenty alternative transaction systems function in Europe, but we should notice the fact that as long as new transaction agreements are publicly accessible to a number of investors, they can generate some regulation problems compatible with those on share markets.

The strong recoil of the latest period on the US stock exchange markets, where the capitalization volume decreased by over several trillions dollars, has affected and shall continuously affect the European financial markets, by generating reconsiderations and temporizations of these markets' dynamics. However, we should appreciate that the integration tendency should not and cannot be reversed.

The real evolution has prevailed in the dispute among those who affirmed that the new economy changes all the problem data and determine the separation of cyclical financial crises. The crisis cyclicality is far from disappearing, it reaffirms its perenniality. More than that, the end of a bull-market, which has lasted two decades, highlights the excesses and deficiencies of financial markets.

Associated to technological innovations, these markets tend to work up and generate "speculative balloons", which sometimes leads to painful corrections.

3. Demand on the Financial Market. Participants

Many years the European financial markets registered a relatively stable demand from investors. But at present profound changes take place, which determine participants and their markets to react with new or improved strategies concerning investments, quotation, compensation and settlement of financial product delivery services.

Some specialists[1] identify certain tendencies in the demand of the European financial market.

The marginal inclination towards economies of individual investors shall increase, most of these funds being placed more in financial products than in banking deposits, as they are aware of the importance of choosing the best investment alternative. The knowledge and achievement of clients' requirements shall be the key of success.

Thus, clients shall become much more sophisticated and demanding.

Institutional investors shall give proof of high professionalism, by leveraging important investment flows to pension funds, mutual funds and insurance institutions. Like large corporations, they became familiar to risk management techniques.

The characteristics of the market demand are determined by the types of participants on the financial markets:

(i) Individual investors

Although the inclination towards economies and investments shall increase in case of individual investors, they shall probably manifest certain timidity as concerns the direct participation on the market, by preferring to invest indirectly, by specialized companies, in pension funds or insurance companies.

Direct individual investments in securities shall register a moderate growth, while indirect investments on the capital market shall spectacularly increase. A growth by about 20% was foreseen for investments in pension funds, mutual funds and investment companies. The portfolio management shall have new clients. The number of institutions in this area is considered to increase, contrary to the general trend of concentration and reduction of the intermediaries' number. A survey on portfolio management services for individual investors on financial markets revealed that the most important criteria in choosing the intermediary on the market shall be the security conferred to the client, the personnel image and qualification, as well as the ability to provide specialized services; commissions and other fees shall have a reduced influence in choosing the institution of securities investment management. The survey results are given in Fig. 1.

[1] R.W. Anderson, Donald Westfall Developments in International Capital Markets

CLIENT CRITERIA (in order of importance)	COMPARATIVE ADVANTAGES (%)			
	Banks	Securities companies	Mutual funds	Insurance companies
Security, stability	66	1	11	20
Image	67	5	8	15
Personnel qualification	44	27	8	9
Long-term performances	25	15	37	16
Previous relationships	78	10	3	5
Accessibility	91	2	2	3
Product diversification	76	5	7	7
New or innovatory products	32	28	14	16
Short-term performances	28	24	26	10
Commissions, price	29	31	17	14

Fig. 1 Portfolio management services for individual investors

Although individual economies invested in banking deposits shall decrease comparatively to investments in other financial institutions, it is estimated that banks shall have certain competitive advantages as compared to other institutions concerning portfolio management services. This is mainly due to banks security and image, to the accessibility and diversity of their products.

(ii) Instituțional investors

Their authority shall significantly grow, as they shall receive funds from individual investors, corporations of pension and treasury funds; previsions reflect the fact that the most rapid development shall be that of pension funds and insurance companies.

The efficiency criteria for institutional investors shall be the precise execution of orders, a high qualification of personnel and an efficient compensation and settlement system. With two exceptions: the institutional investors in Great Britain shall emphasize the market expertise, due to their relatively complex market environment; those from Denmark shall minimize the importance of executing orders and the compensation and settlement criterion, after the introduction of the automatic transaction and compensation systems. Surprisingly, commissions and fees shall not have a peculiar importance, especially because of competition which shall determine the decrease of tariffs and their uniformity; they shall have the part of a minimum differentiation among intermediaries.

The increase of the investors' demand shall create new opportunities for the market participants. Although some of them could profit from the structure of their branch of activity or from the relationships previously created on the market, they shall however cope with serious

investments in technology and informatics in order to cope with the growth of transaction volume and control costs associated to services which were provided.

The new market participants that shall not be able to build a distribution network shall have to use the information technology in order to supply a physical office. However, important investments are necessary in services of financial product deliver, which cannot be performed without a clear business strategy and without understanding the system of computerized information.

(iii) Corporations

Corporations are among the most sophisticated investors on the financial market, although most of their activities on this market represent only a part of all their developed operations. Specialists consider that during recent years, corporations approach a professional orientation, by giving more importance to some efficient and innovatory solutions than rates charged by intermediaries.

By their shares issued on the market for the increase of their capital, corporations pursue, in the first place, the added value of services in choosing institutions to intermediate the issue.

It is unanimously accepted the fact that the demand on the financial market as a whole, and especially on the capital market, shall experience changes as concerns the clients' segment, the execution of orders, compensation and settlement, personnel strategies, marketing. However, intermediaries shall not always completely understand the performance criteria of their clients. Therefore, market surveys are very important, as they allow rapid adjustments to modifications in the clients' demand.

Providing efficient services supposes investments in technology, but also changes in trade organization and procedures. The quality and accessibility of the banking personnel, of securities companies and of other institutions on the financial market shall be real strengths. This is why an increased importance shall be given to personnel strategies, by attracting and maintaining the most competent people, by educational programs, artificial intelligence, etc.

The direct marketing and communication methods shall be useful as well, not only to promote new products and services, but also to highlight differences concerning the financial power and the "firm" image.

4. Market Tendencies. Instruments and Transactions

Tendencies of the European financial market as concerns integration reveal a series of particularly important aspects, which should be taken into account by the participants on this market:

- **Competition**

Competition among intermediaries in the first place and slightly the clients' demand and market regulations shall be the main determinants of market changes. Competition shall be tighter on the wholesale market, serving large corporations and institutional clients, and certainly it will come from foreign intermediaries, by bringing new instruments, experience and a new style of the portfolio management and from banks which shall pursue compensation of losses in traditional deposits of their clients.

- **Strategic Positioning**

The current rural environment provides unique opportunities to those who are able to implement and develop specific strategies for each business. Small-sized intermediaries shall specialize in certain market sectors, financial instruments or products, probably searching for mergers or alliances.

The innovation rhythm on the developed financial markets shall slow with their maturity. The life cycle of the new products shall be lower and lower, and the belated shall loose profit opportunities.

- **Concentration**

Competition and requirements of the financial market shall lead to an accentuation of concentration. The largest corporations in each country shall increase their market quota in all their activity sectors, except the portfolio management. Concentration shall be achieved rather by mergers and acquisitions than by an internal growth of the activity. Banks shall be the main actors of the ongoing or future merger and acquisition processes, and their purpose shall be to determine the increase of market quotas; the maintenance of market quotas can be in some cases expensive and unprofitable. Small financial securities companies and brokerage firms are the main targets of these acquisitions. Therefore, they shall try to defend themselves by alliances and mergers.

- **Management**

Successful management strategies should take into account risks and be profitability medium and long-term oriented. If personnel costs shall constitute the main aspect of companies on the financial markets, the quality and loyalty of personnel are essential. The planning of financial resources is very important for the development of some remuneration systems to insure the personnel costs flexibility.

- **Risks in a Changing Environment**

The increasing competition shall require from financial securities companies and banks the necessity to assume more risks, by trying to minimize their effects and searching for higher gains. The ability to accept and manage risk is decisive in the market fight. The complexity of financial products shall add new valences to risks on the European financial market. The rigorous personnel training and an efficient organization are key elements of the risk control. Investments in the new technologies shall allow a certain risk control, but shall never substitute competence and a permanent management of risks.

- **Strategic Importance of Technology**

Investments in technology shall differentiate the market participants, by defending large corporations against attacks on their market position. The main investments shall be in the information system, at the managers' level, the control system, the transaction and back-office systems. Important investments in technology shall certainly increase fixed costs, by changing the whole cost structure on a company on the financial market. The simple management of the communication system shall be an important competitive advantage.

I. For the Capital Market

The bond market was traditionally divided into two segments: the national bond market and the Eurobond market. At the same time with the introduction of Euro, national markets shall be integrated, by forming a unique market of European bonds, and the Eurobond market shall disappear in time from the European architecture, but shall receive an important part at the international level. Thus, a more profound and liquid bond market is expected to become more attractive for investors, as the share of securities issued in Euro shall increase within portfolios. The share market – after the current financial crisis – shall probably develop each year, knowing a capitalization growth and of the turnover of about 10-15% a year. The largest 200 European

companies are expected to form a group whose shares negotiated among countries shall increase the integration of national markets and liquidity as a whole.

The derivative market shall remain the most important innovation sector, as very volatile markets and institutional investors' interests determine the demand growth for hedging instruments. The Monetary European Union (EMU) shall have a direct impact on contract structure, by the elimination of derivatives based on currencies among participant countries. As a result, the transaction volume on the intra-European specialized market shall diminish, but without affecting transactions in dollars, yens and European currencies.

Conclusions

II. For the Monetary – Foreign Exchange Market

The introduction of the unique Euro currency as a result of the implementation of a mutual monetary policy, directed by the European Central Bank at the EMU space level, shall determine the diminution of transactions on the European Monetary – Foreign Exchange Market. The foreign exchange risk shall disappear, as well as costs assigned to transaction on this market.

III. For the Credit Market

The banking sector shall gain from expanding and deepening of the European financial market, which shall become really comparable and competitive as compared to that of the American dollar which is still dominating, but which shall be confronted as well with high costs.

The credit market shall be strongly competed by the capital market, as a result of the extension of Euro securities, to the detriment of bank loans.

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AN OVERVIEW OF REGULATIONS THAT PROTECT REAL ESTATE STOCKS, REITS AND DERIVATIVE INVESTORS IN HONG KONG

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Abstract

All investors seek to make money. The repeated financial crises in recent years not only caused many people to lose their money; it also reminds us of the importance of financial regulations to reduce investors' losses due to improper business activities in a company or stock market. Together with London and New York, Hong Kong is one of the best known financial markets in the world. Real estate investment does not rest on direct investments in hotels, residential units, or the stock market. In this decade, Real Estate Investment Trusts (REITs) and derivatives provide a new source of investment. Yet, the huge volume of transactions coupled with increasingly complicated investment tools also implies that the rules of the legal system affect many people. While many European countries and China follow civil law systems, Hong Kong follows a common law system. Judge-made law forms one of the major sources of law and lays down the important rules on indirect real estate investment. The code of practice and legislation also provide a framework for investors and entrepreneurs.

Keywords: *Real Estate Derivatives, Real Estate Stock, REITs, Hong Kong*

1. Introduction

An increasing number of new financial tools are being developed to enable investors to make money. Gone are the days when the stock market was the only source of indirect real estate investment. Options, swaps, accumulators and Real Estate Investment Trusts (REITs) provide alternative ways to hedge losses in the stock market or act as alternative investment tools. Due to the smaller transaction costs, the existence of a public market place in the securitized market, higher liquidity, greater number of market participants, the indirect real estate market is generally more efficient than the direct one (Oikarinen *et al.* 2011). The quality of financial infrastructure relies on an effective legal framework (Herring and Chatusripitak 2000), Hong Kong's success as one of the highest rank financial centers also relies on this (MacNeil and Lau 2001). History also shows that appropriate legal regulations plays an important role in financial market, for example, overregulation and unfavourable tax treatment once resulted in a sluggish start of REITs in the U.S (Ulrich Schacht and Jens Wimschulte 2008). While previous pool of literature sheds light on causes of subprime financial crisis, few or no research paper has studied the regulations which protect indirect real estate investors. This study reviews Hong Kong's indirect real estate market statistics during financial crisis. It was found that Hong Kong REITs market's drop in prices was lowest among Australia, Japan, United Kingdom, United States, Singapore and

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France. The stock market ranked number two in the World during financial crisis. The paper then proposes the reasons behind her success through the lens of well-established rules and regulations. The research results provide useful insights to legal drafters when they attempt to draft relevant rules and regulations.

2. Indirect real estate investment tools

The merits of including real estate in a mixed-asset portfolio have been well documented. These include liability matching characteristics and risk diversification. Nevertheless, investment in the direct real estate market, which includes retail, residential, hotel and office properties suffers from obsolescence, lumpiness information asymmetries and co-ownership problems (i.e., unclear property rights) (Hoesli and Lekander 2008). In view of these drawbacks, many investors choose to invest in the indirect real estate market, such as property stocks, derivatives and REITs.

2.1 Real Estate Stocks

Stock owners can be viewed as owners of the company. Although stock ownership is often raised as one of the typical examples of the principal agent problem (when the owners and managerial staff are not the same person, managers may primarily pursue selfish interests, such as power, instead of running a profitable business), it brings many benefit to both firm owners and individual investors. From entrepreneurs' perspectives, a listing in the stock market is a good source of financing. Whereas borrowing money from a bank may involve huge expenses in the form of interest, money captured in the stock market does not require an expenditure on interest. On the other hand, the investors also view that it is a golden opportunity to invest in the real estate market with a small amount of money. Moreover, unlike direct real estate investment, which requires a lengthy transaction process, stocks can be bought or sold at any time.

Many of the Hong Kong listed firms are predominantly property businesses in nature, focusing on land, buildings, and estates. Many firms also conglomerate with other sectors, including trading, industrial and utility businesses, but have significant property interests on their balance sheets (Wallace and Naser 1995). Many real estate companies were listed as early as the 1970s, such as Cheung Kong Holdings, Sun Hung Kai Properties, and Sino Land. As China's economy grew quickly in the early 1990s, many China-based companies became listed in Hong Kong, such as China Overseas and China Resources.

During financial crisis, the listed property securities had not shrunk much in Hong Kong. In terms of market capitalization, Hong Kong property securities market ranked number 2 in the World (Newell and Razali 2009).

Country	Number of property securities	Market capitalization (US$ billion)	% of Asia market	% of global market	World ranking (by US$)
Hong Kong	126	175	41.4	18.5	2
Japan	163	107	25.3	11.3	3
Singapore	62	39	9.2	4.1	7
China	78	56	13.2	5.9	4
India	38	16	3.8	1.7	10
Taiwan	47	6	1.4	0.6	26

Table 1 Listed property securities markets in Asia in December 2008 (Newell and Razali 2009)

2.2 Real Estate Investment Trusts (REITs)

An REIT is a business trust, corporation or association which combines capital of investors to own and operate income producing real estate or to engage in real estate finance activities. REITs are analogous to mutual funds as they pool investors' funds (Daly 2008). The performance of REITs and that of the housing market are not directly comparable as the date which controls their prices come from different sources. A REIT's performance is measured in a way similar to those publicly traded stock (Monroe 2009).

In 1960, REITs were introduced in the USA to offer retail investors a possibility to invest in diversified property portfolios. A couple of countries have followed since then: Netherland (1969), Luxemburg (1988), Spain (1994), Italy (1994), Belgium (1995), France (2003) and lately the UK (2007) (Ulrich Schacht and Jens Wimschulte 2008). There are four different types of REITS currently (Rong and Trück 2010):

1. Mortgage trusts: the assets are invested in claims where interest is the major source of income.
2. Specialized trusts: investment in development and construction which involved in sale and lease-back arrangements.
3. Hybrid trusts: the assets invest in equity and mortgages, offering an advantage which offsets the interest income against depreciation of the property.
4. Equity trusts: the assets are invested in ownerships claims to different types of properties, e.g. commercial, industrial or residential property.

The first Hong Kong REIT, known as the Link, was launched by the Hong Kong Housing Authority in 2005 (Ooi *et al.* 2006). Since then, 7 REITs have become listed in the Hong Kong Stock Market (Table 2). To further understand the correlation between 7 REITs' prices in Hong Kong, daily REITs prices data from 6 November 2007 to 17 June 2011 was collected from Yahoo! Finance. The Pearson correlation results from SPSS 11 show that all the 7 REITs show a significant correlation with one another, i.e. most of the REITs fluctuate together (Table 3). That is collapse of one REIT may affect the other REITs in market badly.

Name of REIT	Hong Kong stock code	Description
The Link	823	The Link Real Estate Investment Trust was Hong Kong's first REIT. It includes a portfolio of 180 car park and retail facilities.
Regal Real Estate Investment Trust	1881	Regal REIT includes a portfolio of hotel properties in Hong Kong (Regal Real Estate Investment Trusts 2010).
Sunlight REIT	435	Sunlight REIT includes a diversified portfolio of 8 retail and 12 office properties in Hong Kong. The retail properties are located in regional transportation hubs, new towns and other urban areas with high population density, and the office properties are located in both core and decentralised business areas (Sunlight REIT 2010).
PREEF China Commercial Trusts	625	It includes Gateway Plaza, a Premium Grade A office complex located in Beijing (RREEF China Commercial Trust 2010).
Champion REIT	2778	Champion REIT owns 95.7% of Citibank Plaza, a modern steel and glass office complex that comprises Citibank Tower, a 47-storey building, and ICBC Tower, a parking garage for 555 vehicles and a retail podium (Champion REIT 2010).
Prosperity REIT	808	The portfolio includes properties with direct mass transportation network access in Hong Kong. These properties include Prosperity Place, The Metropolis Tower, Prosperity Centre, Prosperity Millennia Plaza, Harbourfront Landmark, Trendy Centre and New Treasure Centre (Prosperity REIT 2010).
GZI REITs	405	Champion REIT was spun off from Great Eagle Holdings, Its principal asset includes a stake in Citibank Plaza (GZI REIT Assessment Management Limited 2010).

Table 2 Real Estate Investment Trusts in Hong Kong

		LINK	REGAL	GZI	Prosperity	CHAMPION	SUNLIGHT	PREEF
LINK	Pearson Correlation	1	.870(**)	.952(**)	.868(**)	.817(**)	.801(**)	.847(**)
	Sig. (2-tailed)	.	.000	.000	.000	.000	.000	.000
	N	893	892	893	893	893	893	891
REGAL	Pearson Correlation	.870(**)	1	.924(**)	.944(**)	.953(**)	.955(**)	.889(**)
	Sig. (2-tailed)	.000	.	.000	.000	.000	.000	.000
	N	892	892	892	892	892	892	891
GZI	Pearson Correlation	.952(**)	.924(**)	1	.907(**)	.891(**)	.868(**)	.903(**)
	Sig. (2-tailed)	.000	.000	.	.000	.000	.000	.000
	N	893	892	893	893	893	893	891
Prosperity	Pearson Correlation	.868(**)	.944(**)	.907(**)	1	.969(**)	.953(**)	.854(**)
	Sig. (2-tailed)	.000	.000	.000	.	.000	.000	.000
	N	893	892	893	893	893	893	891
CHAMPION	Pearson Correlation	.817(**)	.953(**)	.891(**)	.969(**)	1	.962(**)	.863(**)
	Sig. (2-tailed)	.000	.000	.000	.000	.	.000	.000
	N	893	892	893	893	893	893	891
SUNLIGHT	Pearson Correlation	.801(**)	.955(**)	.868(**)	.953(**)	.962(**)	1	.821(**)
	Sig. (2-tailed)	.000	.000	.000	.000	.000	.	.000
	N	893	892	893	893	893	893	891
PREEF	Pearson Correlation	.847(**)	.889(**)	.903(**)	.854(**)	.863(**)	.821(**)	1
	Sig. (2-tailed)	.000	.000	.000	.000	.000	.000	.
	N	891	891	891	891	891	891	891

** *Correlation is significant at the 0.01 level (2-tailed).*

Table 2 Stock price correlations between 7 REITS in Hong Kong (Author's SPSS results)Fortunately, all the REITs in Hong Kong perform quite well during financial crisis. She dropped less than many other countries' REITs which include France, Japan, the U.S., Singapore, the U.K. and Australia.

Countries	Impact of financial crisis on REITs market	Rank of change (least =1, most=7)
Hong Kong	-28.50%	1
France	-36.80%	2
Japan	-37.10%	3
US	-38.30%	4
Singapore	-56.10%	5
UK	-59.10%	6
Australia	-64.80%	7
Global	-45.00%	

Table 3 Impact of financial crisis on REITs market (Newell and Razali 2009)

2.3 Real Estate Derivative

A "derivative" refers to an investment tool whose value is determined by, or derived from, a bundle of assets or the value of another asset. Financial derivatives can appear in a variety of forms, including futures and swaps, call and put options and more exotic complex instruments (Clayton 2007). Derivatives include swaps, options and so on. Many people nowadays associate derivatives with infamous financial events (e.g., the subprime financial crisis in 2007-2009) and scandals resulting from speculative use of derivative and hugely leveraged financial instruments. Joseph Stieglitz, a Nobel economics prize-winner, suggests that their use should be outlawed. Nevertheless, they are in no doubt an excellent, indispensable tool of risk management. Myron Scholes, another Nobel laureate, says a complete ban would be a luddite response which takes financial markets back decades (Suetin 2011).

The underlying assets in real estate derivative are those property related indicies, mortgage etc. Real Estate derivatives have many uses, e.g. hedging, portfolio diversification or get exposure to foreign countries' real estate without buying physical property (Fabozzi *et al.* 2010). Real estate derivatives witness tremendously growth in the UK and Europe recently. They were introduced since the early 1980s with the establishment of the Investment Property Databank (IPD) index in the U.K (Ong and Ng 2009). Two main types of property derivatives available in the UK now are total return swaps based on IPD indices and property index certificates (Patel and Pereira 2008). In the U.S., Credit Suisse First Boston LLC teamed up with NCREIF in an attempt to create the first US real estate investment derivatives market in mid 2005 (Ong and Ng 2009).

In Asia, Hong Kong is the first city which offers real estate indexes for derivative trading. Developed jointly by GFI Colliers HK and the University of Hong Kong in November 2006, the monthly indexes cover the residential markets in Hong Kong Island, New Territorries and Kowloon in Hong Kong (Ong and Ng 2009).

3. Laws and regulations that govern real estate stocks, derivatives and REITs

In Hong Kong, financial investors are protected by legislative rules and judge-made law (common law). Because Hong Kong was once a colony of the United Kingdom, many of these rules are rooted in UK law. Apart from that, the Basic Law also provides useful insights on financial regulations.

3.1 Common Law in Hong Kong: jurisprudence and legal reasoning

The common law is 'common' in the sense that it is generally adopted in English terrain. Unlike the civil law system, the common law system is less influenced by Roman law. The common law system gives a great precedential weight to common law (case law), in which judges make judgments according to the doctrine of precedent of courts together with the statute statements. Hence, there is a wide range of variety of sources of law. Under the common law system, there are three major primary sources: statutes (laws enacted by the legislature, which is given authorisation of the government, also known as legislation), case law (judge-made law), and customary law. Alternatively, common law can be classified into two types, public and private. The former includes criminal law, administrative law and constitutional law, concerning the public bodies or officials to *'protect public decision makers from risk …or challenges made by those who use judicial process as a means of political point'* (Mcleod 2009). Private laws involve the dealings of private parties. Examples are contract and company law, which are common in indirect real estate transactions. Finally, some customs are also defined as law, i.e., customary law. Other secondary sources of law, such as directories and journals, are not treated as real law but as an interpretation.

The common law is different from the civil law system in the sense that it is '*part of the law which is contained in the decision of courts rather than having been enacted by the parliament'*(Mcleod 2009). In other words, judges have to analyse the statutes (enacted by legislation), understand the overall picture of the case, then apply the various principles, with less sensible ones rendered void while more sensible ones are adopted in the judgment. If necessary, precedential judgment is also considered. The ultimate court decision will become a case law that is binding to future cases, a principle known as 'stare decisis'. One should note that 'equity' has been incorporated into common law to provide non-monetary remedies, e.g., injunctions.

In the common law regime, jurisprudence is '*the theoretical analysis of legal issues at the highest level of abstraction*'. Therefore, jurisprudence should be understood before the discussion of common law (Martin 2009). One of its important emphases is American (Legal) Realism, with O.W. Holmes (d. 1935) as its founder. This stream of academics focuses on 'law in action' rather than 'law in book'. In other words, the law should be determined by practices in the real world. '*Behind any explicit formulation of judicial reasoning there lies an implicit attitude on the part of the judge*' (Mcleod 2009, p.4). A judge's personal interpretations of a case, previous case laws and statutes together affect his decision.

Because judges' decisions influence the functioning of the law by augmenting case law, some criticisms arise. Common law is undemocratic in the sense that judges, who can alter the law, are not elected by the public. Additionally, unfairness may result because judges may be biased in particular conditions. These situations can be regarded as the drawbacks of common law (Wesley-Smith 1998). Because the jurisdiction can be influenced by the precedential judgment, legal reasoning, which is syllogistic, is involved. By comparing the statement of law (major premise)

and statement of fact (minor premise), legal outcomes can be reasoned. There are three legal reasoning methods: analogy, inductive reasoning, and deductive reasoning. Analogy means that, if A has numerous similarities with B, then A and B should be similar to each other in some way. In law, similar cases should be judged in a similar way so that a similar result is obtained and thus fairness is maintained. This is also known as 'stare decisis' as mentioned before. The rationale for inductive reasoning is that the court observes different cases and then works out a principle for general application of the law. Deductive reasoning means evaluating a proposition with reasoning by applying the established principles of logic. Its rationale flows from general to specific conditions (Mcleod 2009).

3.2. Regulation of Hong Kong real estate derivatives, REITs and stocks

Many people argue that the failure of large complex financial institutions in 2007-2009 was the results of unprepared legal and regulatory systems (Arner and Norton 2009). There is no doubt that maturity and transparency in many Asian real estate markets have improved considerably since the Asian Financial Crisis in 1997 (Ooi *et al.* 2006). During the global financial tsunami, Hong Kong's real estate stock and REITs perform better than many other overseas markets during financial crisis. How do Hong Kong legal rules and regulations protect investors?

3.2.1 Regulation of real estate stocks

As share price equals the discounted value of expected cash flows (Nwaeze 2000; Ambrose and Bian 2010), regulations which affect the future cash flows of stock owners also play an important role in investment decisions. In Hong Kong, there are legislations which govern the property stocks trading.

Insider dealing occurs when a corporation or an individual that is directly or indirectly connected to a listed corporation uses information about that corporation to buy or sell securities with the aim to earn more than they would have without knowing this information. To ensure a level playing field for all participants in the market, the Securities (Insider Dealing) Ordinance (SIDO), and the Securities (Disclosure of Interests) Ordinance (SDIO) were implemented on September 1, 1991. Insider dealing, therefore, is a criminal offence in Hong Kong. The Insider Dealing Tribunal is empowered to impose orders to penalise insider dealers and inquire into insider dealing cases. A person who had been identified as an insider dealer may be required to pay the loss avoided by the insider dealing or an amount not exceeding the profit he/she made to the government. He/she may also be prohibited from assuming a position as a liquidator, director, manager or receiver of a company for a period of up to five years and/or penalised for an amount of up to three times the profit made. Any persons who contravene the orders or the investigation made by the Tribunal may be liable for a term of imprisonment of one year and a fine of up to $200,000. The SDIO requires the disclosure of interests for substantial directors and shareholders as well as chief executives of corporations. Regardless of where the companies are incorporated, the Ordinance is applicable to all companies listed on the Stock Exchange of Hong Kong (SEHK). A substantial shareholder is defined as anyone holding at least 5% of the share capital of a corporation listed on the SEHK. Moreover, chief executives and directors of a listed company are obligated to declare any interest in debentures or shares in the listed company or any associated corporation and their disposal or acquisition. Any shares or debentures owned by any children under the age of 18 or spouses of directors must also be disclosed. Both substantial shareholders and directors are required to report any alterations in their interests to the SEHK within five working days. If a listed company fails to comply with the Ordinance, the officer concerned would be liable for a fine of $2000. A further $200 fine per day must be paid in the case of continuing

offences. An individual who makes a notification that is false in material particulars or who fails to make a timely notification is subject to a term of imprisonment of up to two years and a fine of up to $100,000 (Cheuk *et al.* 2006).

Unlike the stock market in Japan and the US where securities law prohibits foreign securities being offered locally unless they are registered and registration is a process akin to listing on the local exchange, there is no such restriction in Hong Kong. Furthermore, Hong Kong's market is quite transparent as the authorities do not intervene in stock and bond markets via 'price-keeping operations (the Japanese broking houses may do so) or market participants try to manipulate the market for commercial or political gain (De Brouwer 2003).

3.2.2 Regulation of Real Estate Investment Trusts (REITs)

Currently, all REITs in Hong Kong are formed under section 104 of the SFO (Chapter 571 of the Laws of Hong Kong). Some regulations control the parties that can invest in REITs. Under section 8(2)(c) of Schedule 1, Mandatory Provident Fund Schemes (General) Regulation, a constituent fund (CF) may invest no more than one tenth of its NAV into REITs as approved by the SFC under the REIT Code. The Occupational Retirement Scheme Ordinance (ORSO) states that there is no explicit prohibition of SFC-authorised REIT acquisition subject to the Code on Pooled Retirement Funds (Department of Justice 2011).

On 30th July 2003, Hong Kong's final Code on Real Estate Investment Trusts was released. It permits Hong Kong REITs to be managed either externally by an external third party or internal party, i.e. parties of REIT sponsor. The manager must employ property management staff with at least 5 years experience in managing real estate and at least 2 officers with at least 5 years experience in managing collective investment schemes (Lockhart and Turl 2003).

The following Table compares REITs in Hong Kong and other places. As gearing is critical for REITs to have flexibility in borrowing, a conservative approach adopted during financial crisis plays an important role in hedging against risks. Unlike the other places such as North America, Singapre and Australia where there are no limit on gearing, Hong Kong is quite conservative in setting a borrowing limit of 35% (Wang *et al.* 2009).

	Hong Kong	Other places
Gearing	There is borrowing limit at 35%	There is no limit in North American, Singapore, Australia, Japan and France. In Netherland, there is no more than 60%
Management company	At least 5 years' experience in managing property funds or employment of persons with at least 5 years	Singapore has similar requirement.
Investment restrictions	There is no restriction on overseas investment.	The same principle applies in Singapore, the U.S., Canada, the Netherlands and France.

Table 4 Financial regulations of REITs in Hong Kong and other places (Wang et al. 2009)

3.2.3 Regulation of Hong Kong's Derivatives

As one of the major financial centres in the world, the emergence of derivative products has led to the question of whether Hong Kong's regulators should take the initiative in legislation

reform. Partly for historical reasons, there is no single unified regulatory framework that applies to all derivative products. Hong Kong derivatives are regulated in three principal ways. The first type of regulation refers to laws that have been designed specifically for particular types of derivatives. For instance, under the Securities and Futures Ordinance (SFO), the trading of futures contracts is a regulated activity. Second, when derivatives are embedded in another investment instrument, their trading may be regulated by the regulations that are applicable to that particular instrument. For instance, a derivative may be embedded in a bond or note, such as an equity-linked note. Because an equity-linked note is regarded as a security, engaging in such derivatives trading constitute a regulated activity of securities dealing. Third, a derivative may contain certain characteristics and features similar to certain pre-existing products that have already been covered by the regulations applicable to these products; e.g., parties who are entering into longevity derivatives, credit derivatives or weather derivatives have to consider whether products as such constitute insurance. An insurance business must be regulated by the Insurance Companies Ordinance. Apart from the above-mentioned legal rules and regulations, similar to the US Commodity Exchange Act, the margin requirements and short sales restrictions of the Securities Exchange Act of 1934 which ruled out illegal speculation activities (Stout 1999), the Gambling Ordinance in Hong Kong requires the consideration of whether the derivatives issued are illegal gambling contracts (Department of Justice 2011).

4. Conclusion

Real estate derivatives and REITs are new investment tools, and Hong Kong's investors and legislators are still in the discovery stage regarding these. Common law has its principles and issues and can be classified into different types and sources. It has some drawbacks as well as benefits as compared to the civil law system; for instance, it is more consistent because similar cases are given similar judgments as a result of considering the precedents of the courts. In view of these advantages and the trend of globalisation, a mix of common law and civil law systems may be observed. Besides, because REITs and derivatives are relatively new financial products, business activities as such are governed mainly by rules that are applied to other similar products in Hong Kong. The subprime financial crisis, however, underscored the importance of appropriate regulations. It is expected that regulations will be designed specifically for these tools.

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INCOME TAX SHIFTS – CAUSES AND EFFECTS ON ROMANIAN ENTERPRISES

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Abstract

This paper aims to make a point in what the fiscal environment has been and is about in Romania. In 2008, the crisis was obvious to our authorities, who before declared with nonchalance that our system is way back from Europe's and the crisis will pass near us. This didn't happened and here we are, in front of it. The financial crisis has reduced the state budget incomes in a drastic manner, making the authorities to do what they knew better – put more fiscal weight in taxpayer's burden. In this paper we will approach the minimum income tax amount, tax amount which has been the cap for more than 25% of the Romanian enterprises. The government took the easy way, more tax, no analysis on what the side effects of this tax over the economy will be on short-medium term. As you guessed, the only good that came from this measure was more money at the budget, but only for a couple of months because, as previously said, 25% of the enterprises closed their activity, meaning no more income tax payments, no more social and health contributions, no more wages paid etc. The budget has got a big hole because now, beside the fact that it didn't cashed in from the closed enterprises, has to pay unemployment help for those who worked in those firms. As the crisis goes deeper, the government removed at the end of 2010 the minimum income tax amount, declaring with "drums and trumpets" that these measures are in order to revive the economy and the enterprises activity. We shall see about that.

Keywords*: SMe, income tax, level of taxation, Romanian legislation, global crisis.*

Introduction

After the communist regime has fallen, a sort of market economy has been installed. Since then, a proper fiscal legislation has not been conceived. As Ovidiu Nicolescu (the vice-president of the Worldwide SMes Organization) said: " Sudden decline of economic and political institutions of the old system, institutions that provided leadership through orders received from the center, along with emergence of democratic political institutions has created an incompatibility between various components of the socio-economic mechanism. The hybrid institutional and economic system reform cannot be achieved only by corrections and by adjustments, it also requires making some structural changes in its substance. This process should not be allowed to run as a "natural" process, it must be based on decisions arising from a political will, materialized through strategies and programs, meant to reduce the duration of the transition and to achieve a

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viable system within a reasonable amount of time. Abrupt canceling of strictly centralized planning system without replacing it with other institutions to take over, at least in part its functions has generated a huge gap in the functioning economic system, fact which led to strong disruption of the entire mechanism of social production. At that time it has been intervened with corrective measures - price liberalization (01/11/1990). It has been tried in this way a removal of distortions and existing inconsistencies in the system of command economy and settlement of the prices on natural principles, related to costs and demand/supply. It has been "hoped" that in this institution, of market economy - the price could replace the central planning, by taking (by the price system) the mechanism for allocating resources, without a real competition in the economy, dominated by producers of "monopoly", the price liberalization has not had the desired effect, but generated a abusive economic behavior of monopoly operators function in the economy"

The legislation in function is meant to put weight on taxpayers, the reason there were more taxes than in any European Union state, an worldwide behind only Belarus, Uzbekistan and Ukraine[1]. The effective taxation percent was at 57,2%. Since the EU accession, Directives have been given to implement. There were many effective systems to copy and implement but no such things have been done yet, only a small reduction of the total taxation percent, which is actually at 44,9%, and overall, the Romanian government has been taken very few action in order to simplify the tax system and ease the taxpayer's fiscal burden.

During the past years, the government has introduced fiscal measures aimed at helping to achieve budget deficit targets. This measures include the minimum income tax, increase in the VAT rate from 19% to 24%, along with the introduction of additional VAT compliance measures[2]; an increase in local taxes (e.g. taxes on the issue of building certificates, higher vehicle taxes, advertising taxes); and the introduction of a new late-payment penalty system.

Local legislation matters

The government has approved a series of austerity measures due the financial crisis, without a proper analysis of medium and long term effects over economy and population. One of the measures was the instatement of the minimum income tax that each firm had to pay no matter the profit or loss it had obtained during the financial exercise.

This measure, which had no reasoning but the desperation of bringing more money at the state budget, did not took into consideration the diminution of the absurd expenses the state system employees are making with no verification and accountability (and we do not refer to the 25% diminution of wages).

Analyzing the down effects of this measure, we infer that all was in vain. It did not do anything but to put more weight that a microenterprise or SMe can handle. In Romania worked about 1.2 million enterprises, from which approximately 320,000 have vanished as an effect of those measures, meaning 25%. Because of this fact the state loss massive, in the sense that this enterprises paid contributions at the social security budgets and at the special budgets, paid income tax, mostly paid VAT and the most important, it paid wages. Now, the state does not cash in from their account and furthermore it pays unemployment help for their former employees.

In all strong working economies, the state is helping the small and medium enterprises, which generate over 90% of GDP and hires over 95% of the occupied work force[3]. In Romania everything seems backwards. In the present, 70 percent of Romanian's GDP is produced by small and medium enterprises. It, also provide in our country about 70% of overall jobs.

[1] According to a report prepared by PWC and the World Bank on 178 states – *Paying taxes 2008*.
[2] Raluca Rizea, Radu Filip, *Codul fiscal 2011 cu Norme medodologice de aplicare, 2010, Ed. Indaco*
[3] Ovidiu Nicolescu, *Intreprenoriatul si Managementul IMM*, 2008, Ed. Economica

Furthermore, info on the European Union states:

Country	% SMe's in overall enterprises	% SMe's in GDP	% SMe's in overall employers
Austria	99.60	50.86	65.50
Belgium	99.80	64.49	68.90
Denmark	99.70	58.75	68.74
Finland	99.75	44.33	59.15
France	99.79	45.76	66.86
Germany	99.63	60.17	59.85
Greece	99.95	82.87	86.68
Ireland	99.59	33.02	69.59
Italy	99.94	71.38	80.34
Luxembourg	99.62	74.20	72.32
Holland	99.56	56.06	62.47
Portugal	99.87	66.80	78.87
Spain	99.89	55.30	79.45
Sweden	99.67	51.51	61.37
Great Britain	99.80	38.40	55.30
EU - 15	99.81	51.69	66.32

(source: The white cart of SMe's in Romania)[4]

In Denmark for instance, small and medium enterprises are characterized by a high level of specialization. The particularity is the fact that the enterprise did not develop such sensitivity at global market changes, like the counties that have their industry specialized in just a few sectors. The unique tax percentage is 28% and, from 1976 an avoidance convention for double taxation was signed with Romania, which impose a reduced tax income of 15%.[5]

France has the standard rate at 33,33%. Small enterprises (the enterprises in which less than ¾ of the shares are owned directly or indirectly by individuals or companies that declare business less than 7,7 million Euro) are taxed with 15% for the less than 40k (approximately) Euro taxable income, or at standard rate for what exceeds this amount. The reduced tax amount is applied to industrial royalties also. The latest news in the taxes domain is that France wishes to harmonize it's tax system to Germany.

This harmonization is intended primarily for the elimination of the differences and to create a more stable environment (and here we refer to the global crisis). One of the first measures was that France has dropped the wealth tax.[6]

In Great Britain there are a series of encouragement policies for small and medium enterprises from which we only mention the reduction of income tax from 20% to 19%. The

[4] Prof.Dr. Ovidiu Nicolescu, *CARTA ALBA A IMM-urilor din ROMANIA*, ed. CNIPRMM

[5] Harm Gustav Schroeter, *The European enterprise: historical investigation into a future species*

[6] Kevin Keasey, R. S. Thompson, Mike Wrig, *Corporate governance: accountability, enterprise and international comparisons*

income tax for the first year of activity is reduced from 10 to 0%. This also applies to companies that does not exceed 10,000 Pounds profit (the equivalent of almost 12,000 Euro – at a 1,18 EUR/GBP rate)

One of the strongest European economies is the Austrian. Most of the companies are small and medium, about 80% of these have least than 100 employees and only 1% over 1,000 employees. The state charges with a minimum 1,600 Euro minimum income tax from limited liabilities companies (GmbH) and 3,200 Euro from share companies (AG). But, the state sustains the companies with lots of coaching programs, funding, cooperation with R&D institutes etc. The state also subsidizes 25 to 35% from research and development expenses, until 20% of personnel training expenses etc.

In Germany the economy works with the same types of companies as in Austria. The most common type is the limited liability enterprise (GmbH). This implies a minimum capital of 25,000 Euro. One or more individuals or companies, domestic or foreign can associate trough a society agreement that must be signed by all owners and authenticated at the notary. In the situation that one of the associates could not assist personally, he can be represented by another, but only with a notarized authorization. The registering form must be submitted at the Commerce Registry of the local territorial administration.[7]

The state is also protecting the small and medium enterprises, the competition is strongly shielded and globally promoted. Another particularity is that in Germany, the big companies, like the machines one, do not produce the components, they lend this activity to small and medium enterprises, only dealing with the installation and assembly.

Czech republic is a country with lots of foreign capital in it's economy. In present there are over 1,600 foreign companies, the foreign investments providing during 1990-2004 about 350,000 work places and saving another about 600,000. Trough personnel reconversion, in 2002, 23,000 new work places were created on an direct foreign investment in amount of 9,1 billion Euro. A qualified analysis revealed that about 65-70% of the export production belong to foreign investment companies. The taxation system contains income taxation (for individuals and companies), VAT, excise (on fuel and lubricant, distilled and alcoholic beverages, beer, tobacco and tobacco products, alcoholized wines, sparkling wine and champagne), the real estate property tax, road tax, tax on inheritances and donations and real estate transfer tax

Next to Ireland, Luxembourg has the lowest taxation level of EU, the global tax reaches 30,38% (from which 16% retirement fund – 8% paid by the employer and 8% by the employee, health insurance 7,5% - 2,6% paid by the employer and 4,9% paid by the employee, unemployment fund of 4% etc), tax income is 22% and local taxes about 7,5%. VAT in Luxembourg is applied in the following percentages: 3% for food and base necessity goods), 6%, 12% (as intermediary VAT) and the general tax of 15%

In Romania, since September 2010, when the negative effects of the minimum income tax were finally obvious for the government, it was removed by GEO 87/2010, measure that is supposed to sustain and re-launch the economy, and I quote from it:

"[...] *In the context of maintaining the current financial and economic crisis that affected Romania and still affects the business environment;*

Considering that this crisis affects the cash flow of economic operators, which in his part generates major negative effects like financial blockages, insolvency, with influence over the survival of economic operators and loss of many jobs;

Premises in order to create economic recovery by reducing the tax burden of the taxpayer [...]"[8]

[7] Russell A. Miller, Peer Zumbansen, *Annual of German & European law, Volumes 2-3*, 2006

[8] GEO 87/2010

Following this measure, 2010 has two financial exercises. It is an unprecedented situation that has puzzled all accounting professionals that will have to fill two income tax statements. The problem it's not here, it's in the fact that just like any article of law issued by the Romanian authorities, this one is incomplete and does not refer to the situation in practice. The problem in practice is who will fill two statements?

The majority, including the representatives of the Ministry of Finance, consider that all contributors, except for those who were founded during 2010, must fill in two income statements. I consider that the law in force is clear enough in this matter:

Article18, paragraph 2 of the Fiscal Code, as amended by Ordinance 34/2009 states:

"(2) taxpayers, except those provided in paragraph (1), art. 13 letter. c)-e), Art. 15 and 38, where their tax is less than minimum corresponding to their income amount, under par. (3), are obliged to pay tax at minimum amount."

Article 34, paragraph 16 of the Fiscal Code, introduced by GEO 87/2010 states:

(16) Taxpayers who, until September 30th 2010 inclusive, had to pay the minimum tax, the income tax due calculation for the fiscal year 2010, will comply with the following rules:

a) for the period between January 1st and September 30th, 2010:

calculation of the profit tax for that period and the effectuation of the comparison with the minimum annual tax amount, as provided by art. 18 paragraph (3), recalculated accordingly for the period January 1st to September 30th, 2010, by dividing the annual minimum tax to 12 and multiplying the number of months in that period, in order to establish the income tax due[9];

By exception from the provision of paragraph (1),(5) and (11) and Article 35 paragraph (1), submission of income tax statement for the period January 1st to September 30th, 2010 and income tax due payment from the completion of taxation, is to be made until February 25th, 2011;

b) for the period between October 1st and December 31st, 2010:

taxpayers submit the tax statement and pay income tax due under paragraph (1), (5) and (11) and Article 35. Paragraph (1)."

We interpret that, in the prementioned context, the statements in the two periods only draw those who were forced to pay the minimum tax, those who had, between January and September 2010 period, the income tax lower than the minimum tax amount. The opinion according to which all taxpayers (with few exceptions) were required to pay minimum tax, which on those who are of the opinion that all taxpayers must fill the two statements we believe it is not correct and does not comply with the law in force.

The entities who registered income tax (not minimum income tax) do not apply the provisions of paragraph 16, so, will only fill a single income tax statement for the fiscal year of 2010.

Article (18) tax loss recorded in this two periods for the year 2010 shall be recovered according to Art. 26, each fiscal year period being considered as a fiscal year meaning of 5 to 7 years. "

As you can see, there is no distinction between taxpayers nor any reference to an article that makes this distinction.

Currently, as the articles of the Fiscal Code are, the problem is only for interpretation. The application rules cannot modify the law, they should only bring more light in understanding it and more details. The phrase "have been forced to pay the minimum income tax" can be changed only by amending the law.

[9] Raluca Rizea; Radu Filip *Ordinul MFP 3055 pe 2009. Reglementări contabile*

The comparison between calculated and minimum income tax (for the verification that the calculated income tax is greater than the minimum one) can be based on the Register of Fiscal records at a tax audit.

This change in Art. (18)" tax loss recorded in the two periods for the year 2010 shall be recovered according to Art. 26, each period being considered as one fiscal period meaning 5 to 7 years." is the only one from which we can conclude that in the year 2010 there are two financial exercises.

Conclusions

Since the accession in EU, the total tax rate has been reduced, mainly as a result of falling labor tax rates for social security, health insurance, and unemployment contributions. In the most recent years, the Romanian government has taken several measures to help and support the business environment during the economic recession, very few being truly helpful. Taxpayers have been granted social security exemption during periods of temporary inactivity, and also the potential to defer tax liabilities under certain conditions. These measures, however, didn't improve the economy and as we actually see, 2011 is going to be the toughest year since the crisis.

In 2010, due to economy recession the minimum income tax has been introduced. This desperate measure battered the economy and closed about 25% of the total number of companies. After realizing this measure was not bringing any benefits, the government approved its removal, as stimulation for both the economy and enterprises. The true effects on this minimum income tax amount have been presented in the upper pages, along with the accounting practice problems.

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THE ROLE OF DECENTRALIZATION FOR EFFICIENT PUBLIC ADMINISTRATION

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Abstract

A modern public administration is focused on meeting the needs of citizens, provides comprehensive information on matters concerning their community with full cooperate with citizens and public control exercised carefully and neutral on the achievement of public services. Modern public administration seeks to determine how greater participation of civil society in decision-making process that local corporate and also provides administrative transparency and direct communication with citizens as possible.

In this sense, decentralization of public administration, involving public services decentralization and strengthening local autonomy in administrative and financial point of view, realizing and working to enhance local involvement in management issues they face and to build policy own - in the context of overall national economic and social development - to increase economic performance and to improve the social life of local citizens by defining and local responsibilities regarding local services and financial performance, for their accomplishment.

Keywords*: decentralization, local autonomy, strategy, **financial resources, financial autonomy, subsidies,** fiscal consolidation, Equalize local government revenues*

1. Introduction

Public administration reform strategy included many aspects, the main elements among its designed to monitor the conduct of activities. In this direction were the creation of the Government for Public Administration Reform and Monitoring Unit of the Central Public Administration Reform and the groups of the ministries and counties to monitor public administration reform.

Support public administration reform process must be carried out both by measures to improve economic activity in different areas - energy, construction, research and development, etc. -, subject for specific government programs, also by developing and implementing viable programs for funding these programs, which includes making program budgets (which, generally, in financial practice are basic budgets zero) and by rethinking the system of financing public services, which involves decreasing the share of resource allocation from the central budget and the corresponding increase in funding from their local sources.

Our country**, like other** Central and Eastern European countries had**,** before the imposition of the communist regime**, a** strong decentralized government**,** composed of county and municipal councils having a significant degree of autonomy and financial management**,** but their powers were taken by the central authority in the period 1945-1990

In 1991, Romania adopted a new constitution, which stipulates that the responsibility of management and financing of local affairs to return to be of the local public authorities, formed as

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a result of legislation. Thus, the Act created nr.69/1991 institutional framework of local government, which shall revert to the Romanian public administration system with two-stage decision-making and management, namely the central level, represented in Romania, which is a unitary state type, the central government and local authorities, is that equal powers of decision centers at county, city, towns and villages, the latter comprising generally more rural areas.

2. Managerial and financial aspects of decentralization

Although local governments are democratical elected, which means mainly political in nature, crossing local government responsibilities in their pregnancy had important economic consequences because the decision-making and financial autonomy gives local officials the opportunity to obtain information on local needs and preferences directly the beneficiaries of public services, increasing the so-called "efficient allocation". In addition, by introducing competition between operators of local services (legal or natural persons authorized to make public services), is achieved through decentralization of their lower cost, in the same quality and, of course, volume. This is characterized by the so called "technical efficiency or cost point of view", which became one of the key concerns of local public managers ..

One of the major problems they face in service delivery is the dependence of local public resources, possible to be collected in accordance with the law in that geographical area. This can significantly affect horizontal equity in the country and the access of people of with the same needs to economic and social services that promote the local authorities.

At national level, the targets of macroeconomic stability and sustained fiscal consolidation entails need for fiscal consolidation and discipline in public expenditure at all levels of government, whether public or private, central or local.

Currently, public authorities in many countries have promoted policies of liberalization, privatization, concession or public services, either on its own initiative or at the instigation of international financial organizations.

The overall objective pursued by the most important state in such actions is economic efficiency, the role carried out by the public mainly consisting in the creation of businesses able to facilitate the operations undertaken by the private sector. In this respect, the firm strives to provide the institutional infrastructure, legislative and operational activities aimed at achieving profitable by protecting domestic competitiveness in all markets. Market failures, even if often are unavoidable, will be corrected by special programs implemented for this purpose.

The private sector acts as the main instrument of economic growth in an environment of competition environment in which entrepreneurship develops the trader, who is trying to drop operating costs to be able to offer attractive prices on the market.

Through a well-run political liberalization, consumers will benefit from lower prices, manufacturers lower costs and increase production and productivity, as a whole recorded an increase of output macro.

It is also generally accepted that liberalization and privatization programs implemented in both developing countries and countries in transition towards a competitive economy meant entering a process - often lengthy - the restoration and modernization of the economy. This tendency to privatization is most often accompanied by distrust in public sector capacity to provide effective and efficient public services, the importance and correlation with demand.

Experience has shown, however, that not all public services can be privatized, but for better management, they will need to be made by public agencies, which are located closer to consumers and they may be local, in accordance with the administrative organization the state.

Many elements that advocates the principle that should be left to market to provide goods and services. Indeed, private companies are forced to survive, to product and distribute products and benefits that consumers demand, in fact, competition between companies should ensure their production efficiency of goods and services. But privatization is not the only and best solution for improving public services, one of the alternative being the decentralization.

Decentralization is the transfer of powers and / or financial resources from the central administration at lower administrative levels and refers to a wide range of activities, from transmission to the central government responsibilities to the total local privatization.

Technical efficiency of the decentralized services may be reduced due to budget constraints. Thus, liabilities and responsibilities of institutional change may adversely affect the efficiency gains in areas where local services are used - social, educational, communal, etc.. - if too rapid decentralization can not provide adequate funding for the provision of these services costs.

At the same time it should be noted that public service providers are closely tied to government, whether central or local, because it is the main funder of public services. There are, in this sense, regulations on most of the services performed by operators other than governments themselves, but different management responsibility on the one hand and funding, on the other hand, may adversely affect the capacity to achieve the pubic service. An example is pre-university education, where educational activity is coordinated by the specialized ministry (Ministry of Education, Research and Youth), so the central government, while the current funding of schools is provided by local budgets, which produces often malfunction.

In this context, a cross-financing power of decision responsibility is essential, while granting real autonomy factors which manage work in a field. For example, all of the pre-university education in Romania is currently experiencing giving responsibilities - and of course, and financial resources - school directors, they must become managers of educational institutions and, of course, tertiary relationship with public authorities local.

The problem lies in the center of attention in most countries of the world refers to finding the best proportions of the duties and responsibilities of the various levels of state authorities regarding taxation and management of public services that their funding.

The balance between central and local in the unitary type states is especially important in developing countries and countries in transition, because they are faced with the need for rigorous controls carried out in all areas of economic - social instability economic, on the one hand and, on the other hand, because of the increased tendency of the power of decision awarding most direct representatives of the public, local elected officials concerned.

Decentralization and local government to develop a system based on local autonomy is a dynamic and continuous process, but this autonomy is possible only under the condition that appropriate funding. To achieve self-financing territorial units, in addition to government support is necessary to enhance the responsibilities by the local bodies of each administrative territorial unit, in line of finding new sources of revenue mobilization and spending most of their existing ones with a lot of sense of responsibility and discernment.

Local government finance represents all financial resources that fund expenses throughout the local community. The local public finance budget includes administrative units, which presents the highest share in total and other public budgets, with financial autonomy.

The role of local public finance has increased continuously, along with the multiplication of needs on the ground, as socio-economic development and growth as a result of local government functions. Self-financing, however, can not be achieved in all cases, requiring the intervention of central authorities to local funding in the form of transfers.

On the other hand, the central government develops and implements financial policies at the macroeconomic level, which applies throughout the country, also affecting and involving local communities.

Centralization / decentralization report differs from country to country, depending on the level and the peculiarities of economic development, the territorial organization and public finance, according to the directions and objectives stages of development of the country, even on traditions.

In conjunction with this report, the degree of centralization varies by concentrating financial administration of the country, the extent to which local authorities are subordinate to the central management.

Major issues of national interest, strategic, those that affect all citizens, being subject to public services are managed and, of course, financed by the central government. Among these public services can be found national defense, external public relations, justice, etc.

Also, macroeconomic and social policies at national level, regarding regulation, stability and welfare are managed and financed by central state authorities. Managerial and financial centralism can not, however, to act beyond the limit in the area use public goods and services of national interest begins to narrow, and the cost camparativ decision-making at central level is too high. From this point, must act decentralization, both managerial and financial one.

In this respect it should be remarked that not all public goods and services are of national interest, but many are used strictly local, with a restricted territorial aspect. This is the case of utilities to build roads, settlements public order, public lighting, municipal services, local transport, schools, etc. up to university level.

There are differences in the demand for public utilities and the possibility to offer them in a territorial unit to another. Moreover, local communities are open, have different relationships between them. All this requires proper management of public services for the local population and, consequently, local self-financing.

As in most local communities, their financial resources are not sufficient to cover the financing of public services consumed by local people, financial flows from central to local government are the only complete solution for local resources and for controlling and guiding land development, according to the country's overall development. Financial decentralization is given the degree of local autonomy, with the reason to extend the benefits of public goods geographical, relatively low cost of making and public control over public institutions.

On the other hand, a notable aspect is that the relevant administrative decentralization of public services, accompanied by decentralization of their expenditure, may remove the financial pressures on the central budget and lead to a better balance of public finances in general. More efficient administration of local taxes, what can be achieved due to its proximity to "the assessment" of the taxable supply, leading to appropriate administrative and fiscal management correlated to community characteristics, contributing to the stability of general government.

Relations between public authorities powers in the financing of public services applies not only to share revenues from some taxes, but to a multitude of issues, most subject to government economic policy decisions.

Under the terms of Article 3 of the European Charter of Local Autonomy, local communities should have the right to regulate and manage an important part in public affairs. In particular, one can expect them to share the power of central public sector activities in the economic and social. These activities refer to three categories: stabilization, redistribution and allocation economic and financial resources for producing and distributing goods and services.

Local participation in the stabilization and distribution activities causes some problems, it is interesting to examine its because some issues raised on this occasion will be useful for studying the introduction of adequate systems for financing local government.

Administrative decentralization is not just replacing a central decider, centrally located, with one local, it profoundly changing the reference conditions under are chosen targets, set based options and decisions.

Decentralization can be defined as a process of rationalization in the public administration, a sign of modernization.

Using methods of financing by general transfers from the central to the local levels, which are responsible for carrying out public services tends to generate decentralized expenditure overruns and loss of financial responsibility.

Thus, scheduling transfers require an evaluation and quantification, for the purposes of establishing quantitative control as a lever to encourage revenue permanent mobilization, cost-effectiveness for expenditures at sub-national level.

Also, not least to consider administrative matters. At sub-national level it is required a process of building management capacity and financial management, because the lack of professionalism will negatively affect the benefits of fiscal decentralization. For example, in terms of revenue collection, it would achieve a level lower than programmed, endangering the financial balance of sub-national government and economic objectives pursued by public finance at the macroeconomic level.

People involved in local government management have practical opportunity to establish future of the community, to provide important programs and services. Actions can be taken to progress the community must be determined locally, because the processes at this level can be managed and administered in an efficient way and well thought.

In all Member States of the European Union, it is seeking solutions to ensure an equitable distribution of financial resources as between different levels of administrative organization, taking into account the budgetary rigor required at all levels of government.

At the same time, all countries have recognized that financial autonomy is a sine qua non condition of administrative decentralization, the local authorities consisting in the possibility of having its own budget, separate from the state in which they figure their income and expenses.

It is recognized that, regardless of the concrete forms as is practiced in different countries, decentralization of public administration is a reality of present and future society, with important implications for economic and social life. Applied judiciously, with limits determined by the concrete conditions of each country, it can contribute to a significant improvement in efficiency of resource allocation and quality of administrative functions of the state.

In terms of proper planning, decentralization costs may remove local pressures at the national government budget and leads to stabilization of public finances in general. The local administration of taxes and tax efficient, sub-national expenditure decentralization can lead to obtaining successful results in the entire country, because sub-national entities were able to more accurately sized tax base.

From the national perspective, the targets of macroeconomic stability entails sustained fiscal consolidation in the context of public finance including discipline at all levels of government.

In a modern state, local communities maintain significant control over public services they provide. In addition, they can pursue activities as an agent of the state. It is important to distinguish between true local services and functions delegated by the state, because these two types of activities require different financial arrangements.

In this sense, the central authority passes a public service responsibility of the local authorities should, together with responsibilities, to deliver economic and financial resources required to create these services, resources that are intended towards these goals. Thus, although the local authority has the necessary funds, managerial capacity does not increase because services are targeted to local government and not the task effectively decentralized.

The degree of financial autonomy and fiscal decentralization are strictly related to giving local authorities responsibility in most democratic countries, whether they are developed industrialized countries, developing countries or countries in transition to a competitive economy.

The delegation is due to the statutory responsibilities of the central authorities to provide financial resources through strict sizing of amounts transferred to local budgets.

In developing countries and countries in transition, economic and social development requires a mix of policies on public administration and finance public services in many cases there are very relevant arguments for maintaining centralization, at least for a while longer or shorter, depending on economic progress. Centralization of management, financing and control refers to the main fiscal instruments - the state budget at its disposal: the tax system, public spending, public borrowing policy. In a country with an administrative - territorial strong decentralized local authorities collect and manage a large part of public revenues created on the territory, the central government will have difficulty finding the necessary financial resources to cover the budget deficit - especially since the financing needs far exceed the central resources, especially tax that may be raised at this level.

Furthermore, if the government intends to implement active fiscal policy to reign in inflation and balance of payments and, further, to stimulate savings and hence economic development, will be able to use the most powerful levers of economic policy to the authorities in a democratic state and these are: fiscal and budgetary system, including public investment, monetary system and currency regime so.

In countries with a high degree of decentralization, facing a large deficit of the central budget authorities led to the decision to restrict state spending, including transfers and subsidies to decrease the local budgets, which affect the achievement of even the decentralized public services.

Countries in transition from a highly centralized economy to the one based on relations of competition go through an extensive process of privatization of economic assets and simultaneously reforming its institutional structure and upgrading its industrial infrastructure. To achieve this, countries should adopt and implement coherent investment policy, which is another important argument for maintaining a certain degree of centralization of taxation in the national territory, as the resources to finance capital investments are limited and can produce maximum efficiency only under a financial control and strictly economic, which may be exercised only at the central level.

If local authorities have the right to manage some of the major tax in economy - the value added tax, personal income tax, income tax or turnover, etc.. - they will limit the amounts collected centrally and, thereby, the possibility of making a central government macroeconomic policies.

Conversely, centralization allows central government to allocate resources to those goods and service tax that is consumed at national level, with a lot of beneficial effects of the economic and social.

Maintaining a certain fiscal centralization is also supported by several considerations:

- transfers between levels of power are a compromise resulting from the debate of authority to collect income - and tax revenues - and the responsibility of carrying costs;

- transfers allow the central authority to maintain control over basic financial resources, but guarantees at the same time, a certain level of income. The system using grants represent a first step towards fiscal decentralization necessary to finance decentralized public services.

However, the degree of autonomy that use of grants provides local authorities with the opportunity to decide, without restriction on spending its budget depends in very important measure of the structure of grants.

Regarding the actual method of tax sharing between the central budget and local budgets, it consists in sharing public revenues collected from that tax in a good proportion between the two authorities.

In such a system, the local authority can not exercise any control over that tax rate or tax base. From this point of view, one can say that this type of allocation is, in fact, an intergovernmental transfer and not behave like a local budget own income

Main trends in European and global management of public services and financing local and regional public authorities refer to:

- optimizing relationships between central and local / regional level;
- institutional reform and / or restructuring of public services locally, including privatizing them where possible and effective;
- transition to financing investment project, as increasingly more private entrepreneurs specializes in the development of public services;
- facilitating access to local government / regional financial market, coupled with the development of national financial markets;
- improvement of legal, administrative and economic procedures in order to address the state of the wound can find some local government / regional;
- actions to improve the managerial skills of local government by training their personnel in various fields of activity, as well as the accounting and internal audit techniques, etc..

In economically advanced countries, especially in the European Union, local and regional development relies increasingly more on modern methods of funding, following in this respect, the American model. These methods calling both bank credit, commercial banks and asked for large projects, investment banks and, in an increasingly proportion more on capital market by issuing municipal bonds.

Economic and financial management of local public services is the responsibility of local governments, leaders of these governments are elected by the community, in accordance with the laws of that country. These, together with the municipalities bureaucracy carries out the operations necessary management. Form of organization and financing of local public service management is of several types, and local governments can use simultaneously two or more of these types, depending on the specific service action partners, their management skills and the legislative framework general.

As a management and surveillance tool used by the local public authority, budget, unlike traditional accounting records - which are retrospective - is a project revenue and expenditure forecasts for the next year, used as a method of controlling economic transactions and, in return, financial ones, as well as management and planning tool. Funding planning activities and objectives of each service are part of the public budget of the respective public authority.

As a means of development and operation, also as the primary purpose, it is distinguished three types of budgets:

- budget on revenue and expenditure categories;
- budget based on performance;
- program budgeting.

It should be noted that in practice, the budget of public authorities is, in most cases, a combination of two or even three of the types listed.

Any budget includes a chapter income and expenses each, but the layout and operation - meaning the way they are made revenue collection operations, on the one hand and making public spending, along with supervision of compliance with the law budgetary and spending control efficiency of public funds, on the other hand - is different from one type to the other budget, as follows:

- budget categories of revenue and expenditure is directed to the management and performance of revenue collection costs, for so-called "rated services";
- budget based on costumer performant efficiency of public money, for which purpose specific indicators are constructed to express qualitatively and quantitatively, how it was done a public service scheduled in the budget;

- program budgeting is essentially a planning tool targets or actions that are considered of particular importance to the community. Depending on the activity planned budget programs will be developed with a time horizon of one year or several years, specifying the objectives for each stage and maturity. This budget, like a plane containing the business of private companies, will pursue and efficiency performance indicators and the impact on improving the socio - economic community.

In unitary states, such as Romania, the budget system consists of a coherent set of budgets and public funds, which, in addition to their financial role of public expenditure to achieve coverage of public services and the role of principal instrument rated macroeconomic policy.

The general budget includes central government and a number of special funds - to finance specific activities. The central government comprises central government budget, most commonly called the state budget, local government budgets and state social insurance budget.

3. Conclusions

For local government autonomy is fully, you must refer to both managerial independence and financial autonomy of these, which is manifested primarily by the possibility of covering the costs of the local community with its own resources.

Moreover, the European Charte of Local Autonomy defines local autonomy as "the right and effective capacity of the local community to solve and manage within the law, under their own responsibility and for their population, an important part of public affairs."

With regard to financial autonomy, the practice is done in part because local authorities are not entitled to collect all public revenues that are collected from the territory, so it is necessary that local budgets receive transfers from central government.

Budget transfers from central government to local governments can serve a variety of purposes:

- Finance the fiscal deficit, covering part of the difference between own spending, imposed mandatory tasks of local authorities and their income which they can collect;
- Equalize local government revenues, which means reducing disparities between the richest local government resources and the poorest, so as to ensure all citizens access to a minimum level of vital services;
- Contribute to cover the negative externalities - the work of a community has an adverse effect on neighboring communities and to offset the positive, when a particular local government provides services that benefit other areas beyond its borders administrative and fiscal (e.g. hospital regional interest, etc.);
- enable the central government to achieve its development objectives through the implementation of macroeconomic fiscal policy, aimed at achieving specific targets.

The existence of a significant amount of transfers as a source of revenue for local budgets imply, however, some negative aspects, both for local authorities and for central government:

- Risks of managerial nature. Thus, although the use of income from transfers can reduce the need for local authorities to take unpopular measures, such as the imposition of new taxes, increase local tariffs etc.., it may determine, at the same time, an increased level of intervention central government and a significant loss of decision-making autonomy;
- Economic risks. A transfer system that takes no account of the economic potential of the community may cause local governments to reduce their efforts to collect and redistribute local public resources more effectively. As a consequence, central government could be forced, according to the criterion of fairness in terms of the life assured to every citizen of the country,

increased transfers to a level well above the normal, thus diverting budget resources from other potential destinations more productive.

The grant awarded by a public authority means, in general, an expense definitively granted a public or private financial to cover in whole or in part, an obligation of that person or to encourage the achievement of certain activities. The term refers particularly to transfers made by a public authority to other public authorities, social institutions or enterprises.

Subsidies and transfers of indirect nature - tax breaks, preferential rates, etc. are subject to special regulations as they may affect free competition.

Therefore, the laws of the countries signatory to the European Charter of Local Autonomy states that subsidies which benefit local communities should be allocated to development activities, usually an investment project in your area, for example to develop the road network. Grants may finance large-scale actions or specific service, low amplitude and usually are directed strictly to carry out that action, which means that decision-making power of local authorities benefiting from the subsidy is, in most cases, limited.

In general, subsidies should be conditional or constitute a counterpart to that stimulates or local tax effort and discourage unnecessary spending. Subsidies should be as transparent and subject authority control and are granted only in accordance with the law.

Another general rules, enshrined in any law of public finances, either central or local, provided that in the budget - central or local - does not provide a public service achievement without any source of its financing.

If the central authority goes the responsibility of local government public service or if it intends to finance a new public service from the local budgets, ensure the necessary funds from the revenues of the beneficiary community and by providing subsidies and transfers or as the preferred method of democratic countries with economies based on competitive relationships, the amount deducted from certain revenues of the central budget. In this respect, it should be noted that the amounts deducted amount is considerably higher than the subsidy, because these amounts allow, in addition to the financing of decentralized services and vertical and horizontal imbalances.

Local financial autonomy also means costs, due to the role, large or small, that the central authority and assume the decentralized management and financing of public services, as follows:

- Central authority plays a substantial role in shaping local authorities resources, which decreases the risks that local authorities may face in implementing and collecting taxes;
- Local authorities assume their own financial resources management, including all financial and political consequences of autonomy, such as the risk to public dissatisfaction and loss of face voter support.

To minimize the inconvenience caused by the interference of the central authority to manage local public affairs is necessary to diminish the growth of transfers and subsidies and own funds or similar, which would ensure the real independence of local government, both financially and decision making. To this must be fulfilled several conditions, such as:

- Adoption of a legislative framework that strictly define the tasks and responsibilities of public authorities on different levels of government;
- The economic environment has to be developed properly, so that local communities can benefit from public services like quantity and quality over the entire country;
- There are, at all levels of public administration, personnel with appropriate training to acquire and manage decentralized public services, etc.

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PROS AND CONS OF INFLATION TARGETING STRATEGY

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Abstract

The purpose of this paper is to define the inflation targeting strategy and its characteristics. Inflation targeting is a monetary policy strategy in which the central bank projected estimates and makes public, or "target" inflation rate and then, attempts to steer actual inflation towards the target through the use of interest rate changes and other monetary tools. Early proposals of monetary systems targeting the price level or the inflation rate, rather then exchange rate, followed the general crisis of the gold standard after the World War I. Inflation is usually measured as the change of prices for consumer goods, called Consumer Price Index (CPI). Inflation targeting assumes that this figure accurately represents growth or money supply, but is not always the case. The most serious exception occurs when factors external to the national economy are the cause of the price increase. A more essential objection to the strategy of inflation targeting is that it does not really comprise a specific set of monetary policy recommendation would traditional monetarism did, but just constitutes an explicit statement of the aims of the monetary authority.

Keywords: *inflation targeting, monetary policy, central bank, monetary strategy*

Introduction

Monetary policy is the process by which the government, central bank, or monetary authority of a country controls (i) the supply of money, (ii) availability of money, and (iii) cost of money or rate of interest to attain a set of objectives oriented towards the growth and stability of the economy[1]. Monetary policy plays a central role in each country which participates in the international financial system and inflation targeting has become a leading concept for management of monetary policy.

The definition of inflation targeting given by Ben Bernanke is the appropriate one. Accordingly, inflation targeting is "a framework for monetary policy characterised by the public announcement of official quantitative targets […] for the inflation rate over one or more time horizons, and by explicit acknowledgement that low, stable inflation is monetary policy's primary long-run goal. Among other important features of inflation targeting are vigorous efforts to communicate with the public about the plans and objectives of the monetary authorities, and, in many cases, mechanisms that strengthen the central bank's accountability for attaining these objectives." The definition can be wrapped up by adding instrument independence for the Central Bank and the lack of an explicit intermediate target, as all factors affecting inflation are taken into consideration.

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[1] Federal Reserve Board. January 3, 2006.

Inflation targeting as a monetary policy strategy

Inflation targeting is a monetary policy strategy based on periodical setting of inflation rate target for attaining price stability.[2]Inflation targeting as a framework for the conduct and evaluation of monetary policy has a short history of less than 25 years.

First countries that have shifted to the new monetary policy regime, *Inflation targeting,* were New Zealand, United Kingdom, Sweden and Australia, during the 1990's.

In New Zealand inflation targeting has been a success and monetary authority has been able to maintain the price stability, to reduce the long – term inflation below the levels that it should attained in the absence of inflation targeting and to gets the economic growth. That was the reason for which other countries adopted inflation target strategy. For example, Central and Eastern European countries have abandoned the different variants of fixed exchange rate regime (from currency boards to adjustable pegs) in favor of more flexible arrangements, such as inflation targeting. The Czech Republic (in 1998), Poland (in 1999) and Hungary (in 2001) introduced this monetary policy strategy, giving up the solution they had opted for in the first stage of transition, i.e. use of the exchange rate as a nominal anchor.

Theoretically, inflation targeting can, by its simplicity and grace to a better channeling of inflation expectations to strengthen the credibility and transparency of the central bank. It assumes, however, that the authorities put in place the institutional arrangements necessary to meet the target.

In contrast to monetary targeting, another possible monetary policy strategy, inflation targeting has the advantage that does not depend on relationship between money and inflation and also has the advantage that it is easily understood by the public.

Unstable relationship between monetary aggregates and inflation rate, on the one hand, and economic activity, on the other hand, made the central bank to abandon the old monetary strategy and choosing inflation targeting.

An inflation targeting regime allows monetary policy to focus on issues relating to the domestic financial environment and to better respond to shocks in the domestic economy. The money inflation relation is not the characteristic element of the direct inflation targeting, but represents a favourable prerequisite for the adequate determination of the monetary tools chosen by the monetary authority.

To enjoy the benefits of inflation without suffering too many ill effects, governments try to maintain a low level of inflation, typically below 5 percent. A government's central banks can help moderate inflation by regulating interest and lending rates. Higher interest rates reduce the money supply and slow inflation. Alternately, governments can fix wages or the costs of goods in order to prevent prices from rapidly rising. Other methods involve manipulating the supply and demands of goods through import and export regulations[3]

First, inflation targeting was mentioned in Romania's Medium – Term Strategy for Economic Development, in 2000, and then Romanian National Bank officially adopted it since 2005. Adopting inflation targeting was not just a matter of choice, but also of fulfilling a number of key requirements:

- by year end 2004, inflation was brought down to single digit levels for the first time from 1990 onwards;
- since 2004, the National Bank of Romania has benefited from full operational independence, as stipulated by Law No. 312 of June 28, 2004;
- the success in disinflation over the last years until adopting inflation targeting regime has strengthened the NBR's credibility;

[2] Sherwin, Murray – "Institutional Framework for Inflation Targeting", Reserve Bank of New Zeeland, 2000
[3] How Does Inflation Affect Monetary Policy? | eHow.com

The adoption of Inflation targeting regime was judged as a means to bring major benefits for Romanian monetary policy[4]. First of all, by enlarging the projection period in which an inflation target is pursued, the central bank would escape from the trap of time inconsistency. Second, by adopting a single publicly acknowledged goal, such as an inflation target pursued over the medium term, the central bank could manage inflation expectations so that the required short-run deviation from the target does not jeopardize the final goal. Third, the central bank might benefit from a kind of 'demonstration effect' by using a method adopted in some of the EU's newest members.

The inflation targeting strategy adopted by the National Bank of Romania has the following characteristics[5]:

1. a CPI-based inflation target, i.e. headline inflation, taking into account the general public's awareness and the need to ensure transparency and credibility of monetary policy decisions; CPI is the weighted of prices of a basket of goods and services, that in Romanian economy, currently consisting in 37% food goods, 45% non-food goods and 18% services.
2. target set as a midpoint within a target band of ±1 percentage point aimed at better anchoring inflation expectations;
3. announcement of annual inflation targets for longer time horizons (initially two years), thereby emphasizing the focus of monetary policy on medium-term developments;
4. maintenance of a managed float exchange rate regime;
5. ex ante definition of a narrow set of circumstances ("exceptional circumstances") that are beyond the control of monetary policy and therefore circumscribe the responsibility of the National Bank of Romania for achieving the announced inflation targets;
6. Joint formulation and announcement of inflation targets by the NBR and the government.
7. Given the ongoing disinflation process in the domestic economy - a sustainable inflation rate over the medium term in line with the quantitative definition of price stability has yet to be attained - inflation targets are formulated on an annual basis (December/December) and are set over a two-year horizon.

	Inflation target	Variation band
2005	7.5	6.5-8.5
2006	5.0	4.0-6.0
2007	4.0	3.0-5.0
2008	3.8	2.8-4.8
2009	3.5	2.5-4.5
2010	3.5	2.5-4.5
2011	3.0	2.0-4.0

Source: NBR, Inflation Report, November 2011

[4] Daianu, Daniel; Kallai Ella - *Disinflation and Inflation Targeting in Romania*, Romanian Journal of Economic Forecasting – 1/2008

[5] www.bnro.ro

Romania's monetary policy is based on an inflation targeting framework. Inflation is currently running within the range of target rate. In these circumstances, the NBR has needed to maintain a firm policy stance, dampening downward pressure on the exchange rate, in order to ensure that inflation returns to the target range. Other measures have also been introduced to discourage unhinged foreign currency borrowing, especially by households, as well as to constrain household debt exposures, especially with regard to mortgage debt. In November 2008, as the financial crisis worsened and the liquidity position of the banking system shifted to a deficit, MRR on Leu deposits was cut from 20 percent to 15 percent. More recently, MRR on foreign currency deposits with over 2 years residual maturity was reduced to zero. Although the NBR recognizes that high MRR is no longer needed to contain credit expansion, it also recognizes that a significant easing could lead to substantial capital outflows. Consequently, any easing of MRR is likely to be gradual. The NBR also acted to counter adverse spillover effects from the global crisis on domestic money market liquidity conditions and interbank interest rates. Romania also followed the EU lead in raising household deposit insurance coverage.

Lars Svensson[6] defines inflation targeting strategy using its characteristics:

(1) there is a numerical inflation target, in the form of either a point target, with or without a tolerance interval, or a target range. This numerical target refers to a specific price index, such as Consume Price Index (CPI);

(2) there is a high degree of transparency and accountability, the central bank being accountable for achieving the inflation target;

(3) The decision – making process can be described as "inflation – forecast targeting", which means that the central bank can choose the monetary instrument for achieving the inflation target.

The institutional commitment towards price stability implies that monetary policy should be given a clear mandate whereby this objective is considered fundamental and thus takes priority over other objectives such as economic growth, external competitiveness or increase in employment.

Major advantages offered by direct inflation targeting strategy, provided by its specific characteristics are:

1. ensuring and maintaining price stability, with the lack of an explicit intermediate target. But, the adoption of inflation targeting as a monetary policy framework does not guarantee exchange rate stability. On the margin, if inflation targeting contributes to better economic performance, including reduced inflation variability, it should make a small contribution to enhanced exchange rate stability.
2. increase in the central bank's accountability for attaining the inflation target;
3. requires an increased independence of the central bank in conducting monetary policy, which means independence from the government and grant to the central bank full and exclusive control over the choice and implementation of the monetary policy rules;
4. Transparency of the monetary policy strategy by communicating the monetary policy objectives and decisions to the public;
5. independence on having in due time a whole set of information on relevant variables concerning the four macroeconomic areas (real, monetary, fiscal and external areas)

Critics of inflation targeting have noted a few major disadvantages of this monetary policy strategy[7]:

[6] Svensson, Lars E.O – "*Inflation Targeting: Should It Be Modeled as an Instrument Rule or a Targeting Rule?",* Princeton University, December 2001

[7] Mishkin, Frederic; Posen, Adam – "*Inflation Targeting: Lessons from Four Countries"*, Federal Reserve Bank of New York, FRBNY Economic Policy Review, august 1997

- The inflation targeting is too rigid;
- Inflation targeting allows too much discretion;
- Inflation targeting has the potential to increase output instability;
- Inflation targeting will lower economic growth;
- Inflation targeting cannot prevent fiscal dominance;
- Exchange rate flexibility required by inflation targeting might cause financial instability;
- In contrast to exchange rates and monetary aggregates, the inflation rate cannot be easily controlled by monetary authorities.

Adopting the direct inflation targeting regime suppose to fulfill some preconditions, classified in two categories: institutional prerequisites and technical prerequisites.

Institutional prerequisites are: consider price stability like a fundamental objective, the independence of the central bank in conducting monetary policy, harmonization of monetary policy with fiscal policy, a well-developed financial system, flexible exchange rate, transparency and accountability.

Consider price stability like a fundamental objective and with priority over other objectives, such as economic growth or increase in employment is first condition for adopting inflation targeting.

The second one consists in *the independence of the central bank in conducting monetary policy*.

Harmonization of monetary policy with fiscal policy is the third institutional condition. The *de facto* independence of central bank, defined as the discretion to use the available instruments in the way the central bank deems appropriate for attaining its objective is constrained by fiscal dominance which reduce the efficiency of the monetary policy measures. Therefore, the independence of central bank is fully only when the operational framework ensures that the inflation target overrides the fiscal objectives.

A well-developed financial system. If the capital market doesn't function, then the government possibilities to borrow on the domestic market are limited and financial markets cannot provide information on medium – term inflationary expectations, which the central bank needs to prepare the direct inflation targeting strategy.

Flexible exchange rate. The flexibility of the nominal exchange rate is a condition of the inflation targeting regime, but the related risks are important. Thus, the sharp depreciation of exchange rate involves the rise of currency debt, while an appreciation of the local currency may lead to trade balance worsening. That's why, before adopting targeting inflation regime, must been adopted prudential settlements which should ensure the system capacity to absorb exchange rate shocks. The central bank's policy on forex market intervention wasfurther steered in this new environment by the philosophy that a high volatility of the exchange rate is detrimental to the inflation target as well as to thefinancial soundness of the real and financial sectors. A small emerging economy with a significant openness is exposed on an ongoing basis to the threat of capital movements likely to adversely affect the stability of the financial market, the foreign exchange market in particular. Firstly, the NBR's interventions in the foreign exchange market were meant to avoid an excessive weakening of the domestic currency, while also linking the level and the pace of the depreciation to the progress in the current account adjustment. With this goal in mind, the central bank monitored the developments in the real effective exchange rate of the domestic currency, along with the pressures on external competitiveness stemming from wage bargaining.

Transparency and accountability. Monetary policy transparency is extremely useful to a central bank, enhancing its credibility and its accountability towards the general public. Monetary policy needs to be conducted in an open and forward-looking way. A forward-looking focus is essential as policy adjustments affect activity and inflation with a lag and because of the crucial role of inflation expectations in shaping actual inflation outcomes. In addition, with a clearly defined inflation objective, it is important that the central bank continues to report on how it sees developments in the economy, currently and in prospect, affecting expected inflation outcomes. These considerations point to the need for effective transparency and accountability arrangements

Technical prerequisites refers to:

- choosing an adequate price index, representative for the purchasing power of money and easily understandable by the public, in relation to which the inflation target is set;
- explicit setting of a quantitative target, of the accepted fluctuation band and of the time horizon over which the target is pursued. Because of the imperfect control of monetary policy over the inflation rate appears the need to specify a bandwidth.

A narrow band indicates a strong commitment of the central bank to pursue the price stability objective, but may undermine the credibility of the monetary authority and may induce instability in the instruments of the monetary policy, for achieving a given movement in inflation rate.

Regarding on setting the time horizon of the target, this depends on the initial inflation rate and the duration of the transmission mechanism.

- the central bank's forecast of inflation. This means that the central bank must respond to the gap between the inflation forecast and the target, before the inflationary pressures become visible.

In the case of the ECB, the primary objective, as assigned by the Treaty on the Functioning of the European Union, is to maintain price stability. Thus, the Governing Council of the ECB assesses whether the impact that monetary policy is having on the economy and ultimately price stability – i.e. its monetary policy stance – is appropriate in order to achieve its primary objective, taking into account all the factors that affect the medium-term inflation outlook. The stance deemed appropriate at the previous monetary policy meeting may require adjustment, with new information having become available. The Governing Council then decides on the monetary policy course that will realign its stance with the price stability objective.

The severity of the financial crisis since the autumn of 2008 and its spillover to the real economy, together with the resulting high levels of uncertainty, have complicated both the assessment of risks to price stability and the way in which monetary policy is able to influence the euro area economy in order to ensure price stability. In such circumstances, the maintenance of price stability over the medium term has required both the rapid lowering of the key ECB interest rates and the introduction of temporary measures to ensure their effective transmission to the economy, with a view to tackling the financial crisis and cushioning its impact on the real economy. As economic and financial conditions have now improved, not all exceptional measures are needed to the same extent as in the past. Indeed, continuing them could even have adverse economic and financial effects[8].

In Romania, the central bank will seek to calibrate the path of the monetary policy rate so as to adjust real broad monetary conditions, aiming at consolidating the prospects of keeping the inflation rate inside the target band and achieving a sustainable recovery of lending to the economy. The balance of risks to the inflation rate projected in the baseline scenario appears to be

[8] ECB, Monthly Bulletin, January 2010

broadly balanced in the short term. Over the medium term however, the overall balance of risks is still significantly tilted to the upside, albeit to a lower extent than in the previous round. Potential sources of risk relate to external developments, the fiscal policy stance, and administered price adjustments. Major external risks are associated with a possible heightening of tensions on global financial markets following the delay in resolving the sovereign debt crisis. Such a scenario cannot be entirely ruled out, despite the recent scaling-up of the rescue fund for the countries facing such difficulties. Thus, the stronger risk aversion of increasingly jittery investors could lead to higher financing costs and scarcer funding sources also for non-euro zone economies, Romania included. Such effects becoming manifest would tighten financing of both the fiscal deficit and the private sector, translating into higher interest rates, as well as depreciation pressures on the leu[9].

Conclusions

The inflation target is defined as a medium-term average rather than as a rate (or band of rates) that must be held at all times. This formulation allows for the inevitable uncertainties that are involved in forecasting, and lags in the effects of monetary policy on the economy. Experience has shown that inflation is difficult to fine-tune within a narrow band. The inflation target is also, necessarily, forward-looking. This approach allows a role for monetary policy in dampening the fluctuations in output over the course of the cycle. When aggregate demand in the economy is weak, for example, inflationary pressures are likely to be diminishing and monetary policy can be eased, which will give a short-term stimulus to economic activity.

Regarding the perspectives of inflation targeting in Romania , this monetary strategy would be maintained, according to NBR strategy at least till ERM 2[10].

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[10] The **European Exchange Rate Mechanism**, **ERM**, was a system introduced by the European Community in March 1979, as part of the European Monetary System (EMS), to reduce exchange rate variability and achieve monetary stability in Europe, in preparation for Economic and Monetary Union and the introduction of a single currency, the euro, which took place on 1 January 1999. After the adoption of the euro, policy changed to linking currencies of countries outside the Eurozone to the euro (having the common currency as a central point). The goal was to improve stability of those currencies, as well as to gain an evaluation mechanism for potential Eurozone members. (according of www.wikipedia.com)

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COMPARATIVE ANALYSIS OF THE LEVEL OF TAXATION IN ROMANIA AND EUROPEAN UNION

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Abstract

This paper contains a statistical and economic analysis of the tax system of Romania in the last decade, as well as comparisons with the other states of the European Union.The overall tax ratio of Romania, i.e. the sum of taxes and social security contributions in the Gross Domestic Product (GDP), is the lowest in the European Union. Considering the fact that the GDP value, that constitutes the denominator of the overall tax ratio, includes estimates of production by the informal sector (the "grey" and "black" economy), this reduction can be explained not only by tax reductions, but also by the high tax evasion.

Keywords: *taxation, tax revenues, tax policy, tax system, implicit tax rates*

Introduction

Taxes bring revenues to the public budget and those who pay them are directly interested by the system and the way in which the government spends the money. Taxes are the basis of a stable and prosperous society. As a result of the global economic crisis, the collecting of taxes is more and more difficult. Although is quite obvious that governments have to increase taxes and reduce public expenses, they will have to take these measures carefully, given the fact that „too much tax kills the tax".

We shall present in this work in a concise and theoretical way the concept of tax burden (emphasizing the factors which determine its level and the consequences of the level of tax burden upon the economy of a country), then we will analyse the level of taxation in EU and Romania in the last decade, and finally we will try to identify the taken fiscal measures and the ones that should be taken by the government of Romania, and by the governments of other Member States, for answer to the present global financial crisis.

The greater part of data presented and analysed in this work are taken from the 2010 edition of the report „Taxation trends in the European Union"[1], published by Eurostat, the Statistical Office of European Union and European Commision - Taxation and Customs Union. This report presents a number of fiscal harmonized indicators, based upon The European System of Accounts (ESA95), a system which allows a fair comparison of taxation systems and fiscal policies between the Member States of EU.

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[1] http://ec.europa.eu/eurostat

The present work focuses also upon the report „Doing Business 2011"[2], realised by the World Bank (WB) in co-operation with International Financial Corporation (IFC) and upon the study „Paying taxes 2011"[3], realised by WB, IFC and PricewaterhouseCoopers (PwC). This last report looks at tax systems from the business perspective, because business plays an essential role in contributing to economic growth and prosperity by employing workers, improving the skills and knowledge base, buying from local suppliers and providing affordable products that improve people's lives. Business also pays and generates many taxes. As well as corporate income tax on profits, these include employment taxes, social contributions, indirect taxes and property taxes. Therefore, the impact that tax systems have on business is important. The two reports of WB, IFC and PwC analyze the facility in paying taxes in 183 economies from world-wide. The indicators used measures the cost of taxes paid by a standard company, but also the administrative charges due to accomplishment of fiscal obligations. Both aspects are very important for a company. These are measured through the identification of three sub-indicators: total tax rate (cost of all paid taxes), necessary time to accomplish the fiscal obligations (income tax, social security contributions paid by the employer, property taxes, transfer of properties taxes, dividends tax, capital income tax, financial transactions tax, wastes collecting taxes, as well as motor vehicle taxes and road taxes), as well as the number of fiscal payments made by the company during a fiscal year.

1. Tax burden. Factors of influence and consequences

Tax burden shows the level of pressure of taxes or in other words, how much is the fiscal burden lying heavy on tax payers' shoulders. The most common way to measure the tax burden of a country is the overall tax ratio (OTR), i.e. the sum of taxes and social security contributions as a percentage of gross domestic product (GDP). This indicator reflects the part from revenues created at the level of real economy that is shifted to the State through the taxes and social contributions. OTR is influenced by two categories of factors: external and internal.

Through the external ones, we can mention:

- the level of development of the country, given by the GDP value per inhabitant. Usually, the tax burden is greater in the countries which have a high level of GDP per inhabitant since the capacity of fiscal contribution of inhabitants is higher in these States.
- the level of taxation from other countries. The fiscal policy of a state has to take into consideration the fiscal policies of other countries, since a high tax burden can determine a migration of money and manpower to countries with a lower taxation.
- the level and structure of public expenses. In countries where public expenses for education, culture, health, social security etc. are greater, the State can pretend higher taxes, since their degree of reversibility is substantial.

The internal factors which influence the level of taxation are:

- the type of used tax rates (generally progressive or proportional rates). In states where the progressive rates are most used, the tax burden is higher.
- the methods of valuation and determination of the used tax base. Different methods can determine an overvaluation or an undervaluation of the taxable product.

[2] www.doingbusiness.org
[3] www.pwc.com/payingtaxes

- the offered fiscal facilities (exemptions, deductions or reductions to tax payment). The higher their number, the lower the tax burden.

Knowing the level of taxation is important because its high level can have bad consequences upon the economy of a country. Among these effects, we can mention:

- effects upon the production. A high level of taxation of labour, savings and investments determines the diminution of production under two aspects: discourages the setting up of a business (diminishes the enterprising spirit) and also discourages work.

- effects upon the purchasing power. When taxes increase, companies seek to include in the sale prices of these rises, and the employees want higher salaries to compensate for the reduction of purchasing power resulted from the rise of prices. The wage rises are introduced also in the sale prices and therefore we are put face to face to a vicious circle.

- effects upon the degree of tax receipts. In the case of tax burden rise, it appears the phenomenon of tax resistance, expressed by the underground economy and international tax evasion.

2. Level of taxation in European Union

In 2008, the first year of economic and financial crisis, the overall tax ratio was of 39,3% in EU-27[4], in a slight decrease as compared to 2007, when it was situated at 39,7% **(table no. 1)**. This ratio, which was of 40,6% in 2000, decreased till 38,9% in 2004, before rising till 2007.

Table no. 1. Total tax revenue (including social security contributions) in % of GDP

	2000	2001	2002	2003	2004	2005	2006	2007	2008
Belgium	45,0	45,0	45,1	44,6	44,7	44,7	44,3	43,9	44,3
Bulgaria	32,5	30,9	29,6	32,2	33,1	34,0	33,2	34,2	33,3
Czech Republic	33,8	34,0	34,8	35,7	37,4	37,1	36,7	37,2	36,1
Denmark	49,4	48,5	47,9	48,0	49,0	50,8	49,6	49,0	48,2
Germany	41,9	40,0	39,5	39,6	38,7	38,8	39,2	39,4	39,3
Estonia	31,1	30,2	31,0	30,8	30,6	30,6	31,1	32,3	32,2
Ireland	31,6	29,8	28,5	29,0	30,3	30,8	32,3	31,4	29,3
Greece	34,6	33,2	33,7	32,1	31,2	31,8	31,7	32,4	32,6
Spain	33,9	33,5	33,9	33,9	34,5	35,6	36,4	37,1	33,1
France	44,1	43,8	43,1	42,9	43,2	43,6	43,9	43,2	42,8
Italy	41,8	41,5	40,9	41,3	40,6	40,4	42,0	43,1	42,8
Cyprus	30,0	30,9	31,2	33,0	33,4	35,5	36,5	40,9	39,2
Latvia	29,5	28,5	28,3	28,5	28,5	29,0	30,4	30,5	28,9
Lithuania	30,1	28,6	28,4	28,1	28,3	28,5	29,4	29,7	30,3
Luxembourg	39,1	39,8	39,3	38,1	37,3	37,6	35,6	35,7	35,6
Hungary	39,0	38,2	37,8	37,9	37,4	37,5	37,2	39,8	40,4
Malta	28,2	30,4	31,5	31,4	32,9	33,9	33,7	34,6	34,5
Netherlands	39,9	38,3	37,7	37,4	37,5	37,6	39,0	38,9	39,1

[4] Belgium, Bulgaria, Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden, United Kingdom

Austria	43,2	45,3	43,9	43,8	43,4	42,3	41,9	42,2	42,8
Poland	32,6	32,2	32,7	32,2	31,5	32,8	33,8	34,8	34,3
Portugal	34,3	33,9	34,7	34,8	34,1	35,1	35,9	36,8	36,7
Romania	30,2	28,6	28,1	27,7	27,2	27,8	28,5	29,0	28,0
Slovenia	37,5	37,7	38,0	38,2	38,3	38,6	38,3	37,8	37,3
Slovakia	34,1	33,1	33,1	32,9	31,5	31,3	29,2	29,3	29,1
Finland	47,2	44,6	44,6	44,0	43,5	44,0	43,5	43,0	43,1
Sweden	51,8	49,9	47,9	48,3	48,7	49,5	49,0	48,3	47,1
United Kingdom	36,7	36,4	34,9	34,7	35,1	36,0	36,8	36,5	37,3
EU-27 average									
- GDP-weighted	40,6	39,7	39,0	39,0	38,9	39,2	39,7	39,7	39,3
- arithmetic	37,2	36,6	36,3	36,3	36,4	36,9	37,0	37,4	37,0
EA-16 average									
- GDP-weighted	41,2	40,3	39,8	39,8	39,5	39,6	40,2	40,4	39,7
- arithmetic	37,9	37,6	37,4	37,3	37,2	37,6	37,7	38,1	37,6

Source: http://ec.europa.eu/eurostat

The total tax burden in euro area (EU-16[5]) was of 39,7% from GDP in 2008 as compared to 40,4% in 2007. From 2000, taxes in euro area had a similar tendency to EU-27, though at a slight higher level.

In comparison with other countries, generally the tax burden remains high in EU-27. Thus, in 2008 OTR in EU-27 was with 13,2% higher than that registered in United States, with 11,2% higher than that from Japan and with 4,5 % higher than the average of OCDE Member States[6].

In spite of all these, the tax burden varies significantly from a Member State to another. In 2008 the most reduced levels of OTR were registered in Romania (28,0%), Latvia (28,9%), Slovakia (29,1%) and Ireland (29,3%), and the highest in Denmark (48,2%) and Sweden (47,1%).

Between 2000 and 2008, the highest reductions of OTR were registered in Slovakia (from 34,1% in 2000 to 29,1% in 2008), Sweden (from 51,8% to 47,1%) and Finland (from 47,2% to 43,1%), and the highest rises in Cyprus (from 30,0% to 39,2%) and Malta (from 28,2% to 34,5%).

In 2008, the effects of financial crisis were felt most at the level of public expenses than at the level of public revenues, because of the choosing of expenses programs meant to prevent the impact of crisis. OTR rose in nine Member States as compared to 2007.

Implicit tax rates (ITR) measure the effective average tax burden on different types of economic income or activities, i.e. on labour, consumption and capital, as the ratio between revenue from the tax type under consideration and its (maximum possible) base. The data from the **table no. 2** help us to understand how the level of taxation evolved under the aspect of these three economic incomes.

[5] Belgium, Germany, Ireland, Greece, Spain, France, Italy, Cyprus, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Slovakia, Finland

[6] http://www.oecd.org

Table no. 2. The ITR by type of economic functions in EU Member States

	Implicit tax rates (%) on					
	Consumption		Labour		Capital	
	2000	2008	2000	2008	2000	2008
EU-27 average	**20,9**	**21,5**	**35,8**	**34,2**	**:**	**:**
EA-16 average	**20,5**	**20,8**	**34,5**	**34,4**	**26,5**	**27,2**
Belgium	21,8	21,2	43,9	42,6	29,3	32,7
Bulgaria	19,7	26,4	38,7	27,6	:	:
Czech Republic	19,4	21,1	40,7	39,5	20,9	21,5
Denmark	33,4	32,4	41,0	36,4	36,0	43,1
Germany	18,9	19,8	40,7	39,2	28,9	23,1
Estonia	19,8	20,9	37,8	33,7	6,0	10,7
Ireland	25,9	22,9	28,5	24,6	:	15,7
Greece	16,5	15,1	34,5	37,0	19,9	:
Spain	15,7	14,1	28,7	30,5	29,7	32,8
France	20,9	19,1	42,1	41,4	38,1	38,8
Italy	17,9	16,4	43,7	42,8	29,6	35,3
Cyprus	12,7	20,6	21,5	24,5	23,8	36,4
Latvia	18,7	17,5	36,7	28,2	11,2	16,3
Lithuania	18,0	17,5	41,2	33,0	7,2	12,4
Luxembourg	23,1	27,1	29,9	31,5	:	:
Hungary	27,5	26,9	41,4	42,5	15,9	19,2
Malta	15,9	20,0	20,6	20,2	:	:
Netherlands	23,7	26,7	34,5	35,4	20,8	17,2
Austria	22,1	22,1	40,1	41,3	27,3	27,3
Poland	17,8	21,0	33,6	32,8	20,5	22,5
Portugal	19,2	19,1	27,0	29,6	32,7	38,6
Romania	16,8	17,7	32,2	29,5	:	:
Slovenia	23,5	23,9	37,7	35,7	15,7	21,6
Slovakia	21,7	18,4	36,3	33,5	22,9	16,7
Finland	28,6	26,0	44,1	41,3	36,0	28,1
Sweden	26,3	28,4	47,2	42,1	43,4	27,9
United Kingdom	19,4	17,6	25,3	26,1	44,7	45,9

Source: http://ec.europa.eu/eurostat

The labour taxes remain the most important source of fiscal incomes, representing over 40% from total revenues in EU-27, followed by the consumption tax at about a quarter and capital tax, which represents little more than a fifth.

ITR on labour[7], which measures the degree of labour incomes taxation, remained as a matter of fact unchanged in EU-27, being situated at 34,2% in 2008 as compared to 34,3% in 2007, after has decreased from 2000, when it was of 35,8%. Among Member States, ITR on labour varied in 2008 from 20,2% in Malta, 24,5% in Cyprus and 24,6% in Ireland, to 42,8% in Italy, 42,6 % in Belgium and 42,4% in Hungary.

[7] The ITR on labour is calculated as the ratio of taxes and social security contributions on employed labour income to total compensation of employees.

ITR on consumption[8], which increased in EU-27 between 2001 and 2007, it decreased from 22,2% in 2007 to 21,5% in 2008. In 2008, the lowest values of ITR on consumption were in Spain (14,1%), Greece (15,1%) and Italy (16,4%) and the highest in Denmark (32,4%), Sweden (28,4%) and Luxemburg (27,1%).

In EU-27 ITR on capital [9] was of 26,1% in 2008 as compared to 26,8% in 2007. The lowest values of the ration were registered in Estonia (10,7%), Latvia (12,4%) and Ireland (15,7%), and the highest in United Kingdom (45,9%), Denmark (43,1%) and France (38,8%).

In order to compare the maximum personal income tax rate and corporate income tax rate, we will use the data from **table no. 3**.

The maximum personal income tax rate (PIT)[10] rose in EU-27 in 2010, mostly because of an increase of 10 percentage points in United Kingdom. In 2010, the maximum personal income tax rates were highest in Sweden (56,4%), Belgium (53,7%) and Netherlands (52,0%), and the lowest in Bulgaria (10,0%) and Czech Republic (15,0%) and Lithuania (15,0%). Between 2000 and 2010, the highest diminutions were registered in Bulgaria (from 40,0% in 2000 to 10,0% in 2010), Romania (from 40,0% to 16,0%) and Slovakia (from 42,0% to 19,0%), these countries applying the single tax rate system. The highest rises of the rate in the same period were registered in United Kingdom (from 40,0% to 50,0%) and Sweden (from 51,5% to 56,4%).

Table no. 3. The maximum income tax rate, in %

	Personal income tax rate				**Corporate income tax rate**			
	2000	**2009**	**2010**	**Difference 2000-2010**	**2000**	**2009**	**2010**	**Difference 2000-2010**
EU-27 average	**44,7**	**37,1**	**37,5**	**-7,2**	**31,9**	**23,5**	**23,2**	**-8,7**
EA-16 average	**48,4**	**42,1**	**42,4**	**-6,0**	**34,9**	**25,9**	**25,7**	**-9,2**
Belgium	60,6	53,7	53,7	-7,0	40,2	34,0	34,0	-6,2
Bulgaria	40,0	10,0	10,0	-30,0	32,5	10,0	10,0	-22,5
Czech Republic	32,0	15,0	15,0	-17,0	31,0	20,0	19,0	-12,0
Denmark	59,7	59,0	51,5	-8,2	32,0	25,0	25,0	-7,0
Germany	53,8	47,5	47,5	-6,3	51,6	29,8	29,8	-21,8
Estonia	26,0	21,0	21,0	-5,0	26,0	21,0	21,0	-5,0
Ireland	44,0	41,0	41,0	-3,0	24,0	12,5	12,5	-11,5
Greece	45,0	40,0	45,0	0,0	40,0	25,0	24,0	-16,0
Spain	48,0	43,0	43,0	-5,0	35,0	30,0	30,0	-5,0
France	59,0	45,8	45,8	-13,2	37,8	34,4	34,4	-3,4
Italy	45,9	45,2	45,2	-0,7	41,3	31,4	31,4	-9,9
Cyprus	40,0	30,0	30,0	-10,0	29,0	10,0	10,0	-19,0
Latvia	25,0	23,0	26,0	1,0	25,0	15,0	15,0	-10,0

[8] The ITR on consumption is the ratio between the revenue from all consumption taxes and the final consumption expenditure of households.

[9] The ITR on capital is the ratio between taxes on capital and aggregate capital and savings income. Specifically it includes taxes levied on the income earned from savings and investments by households and corporations and taxes, related to stocks of capital stemming from savings and investment in previous periods. The denominator of the capital ITR is an approximation of world-wide capital and business income of residents for domestic tax purposes.

[10] The top statutory personal income tax rate reflects the tax rate for the highest income bracket. The rates also include surcharges, state and local taxes.

Lithuania	33,0	15,0	15,0	-18,0	24,0	20,0	15,0	-9,0
Luxembourg	47,2	39,0	39,0	-8,2	37,5	28,6	28,6	-8,9
Hungary	44,0	40,0	40,6	-3,4	19,6	21,3	20,6	1,0
Malta	35,0	35,0	35,0	0,0	35,0	35,0	35,0	0,0
Netherlands	60,0	52,0	52,0	-8,0	35,0	25,5	25,5	-9,5
Austria	50,0	50,0	50,0	0,0	34,0	25,0	25,0	-9,0
Poland	40,0	32,0	32,0	-8,0	30,0	19,0	19,0	-11,0
Portugal	40,0	42,0	42,0	2,0	35,2	26,5	26,5	-8,7
Romania	40,0	16,0	16,0	-24,0	25,0	16,0	16,0	-9,0
Slovenia	50,0	41,0	41,0	-9,0	25,0	21,0	20,0	-5,0
Slovakia	42,0	19,0	19,0	-23,0	29,0	19,0	19,0	-10,0
Finland	54,0	49,1	48,6	-5,4	29,0	26,0	26,0	-3,0
Sweden	51,5	56,4	56,4	4,9	28,0	26,3	26,3	-1,7
United Kingdom	40,0	40,0	50,0	10,0	30,0	28,0	28,0	-2,0

Source: http://europa.eu/

The corporate income tax (CIT)[11] rates continued to decrease in 2010 in EU-27. The highest levels of CIT in 2010 were registered in Malta (35,0%), France (34,4%) and Belgium (34,0%), and the lowest in Bulgaria (10,0%), Cyprus (10,0%) and Ireland (12,5%). Between 2000 and 2010, the highest diminutions of rate were registered in Bulgaria (from 32,5% to 10,0%), Germany (from 51,6% to 29,8%), Cyprus (from 29,0% to 10,0%) and Greece (from 40,0% to 24,0%).

According to the data from **table no. 4**, in EU-27 the VAT standard average rate rose from 19,8% in 2009 to 20,2% in 2010. As compared to 2000, in 2010 the rise of VAT average rate was of 1%. In 2010, the VAT standard rate varies from 15,0% in Cyprus and Luxemburg, to 25,0% in Denmark, Hungary and Sweden.

Table no. 4. Standard rate of value added tax, in %

	2000	**2009**	**2010**	**Difference 2000-2010**
EU-27 average	19,2	19,8	20,2	1,0
Belgium	21,0	21,0	21,0	0,0
Bulgaria	20,0	20,0	20,0	0,0
Czech Republic	22,0	19,0	20,0	-2,0
Denmark	25,0	25,0	25,0	0,0
Germany	16,0	19,0	19,0	3,0
Estonia	18,0	20,0	20,0	2,0
Ireland	21,0	21,5	21,0	0,0

[11] Taxation of corporate income is not only conducted through the CIT, but, in some Member States, also through surcharges or even additional taxes levied on tax bases that are similar but often not identical to the CIT. In order to take these features into account, the simple CIT rate has been adjusted for comparison purposes: notably, if several rates exist, only the 'basic' (non-targeted) top rate is presented; existing surcharges and averages of local taxes are added to the standard rate.

Greece	18,0	19,0	23,0	5,0
Spain	16,0	16,0	18,0	2,0
France	19,6	19,6	19,6	0,0
Italy	20,0	20,0	20,0	0,0
Cyprus	10,0	15,0	15,0	5,0
Latvia	18,0	21,0	21,0	3,0
Lithuania	18,0	19,0	21,0	3,0
Luxembourg	15,0	15,0	15,0	0,0
Hungary	25,0	25,0	25,0	0,0
Malta	15,0	18,0	18,0	3,0
Netherlands	17,5	19,0	19,0	1,5
Austria	20,0	20,0	20,0	0,0
Poland	22,0	22,0	22,0	0,0
Portugal	17,0	20,0	20,0	3,0
Romania	19,0	19,0	24,0	0,0
Slovenia	19,0	20,0	20,0	1,0
Slovakia	23,0	19,0	19,0	-4,0
Finland	22,0	22,0	23,0	1,0
Sweden	25,0	25,0	25,0	0,0
United Kingdom	17,5	15,0	17,5	0,0

Source: http://europa.eu/

Between 2000 and 2010, the VAT rate remained unchanged in 13 Member States, rose in 12 Member States and diminished only in Slovakia (from 23,0% in 2000 to 19,0% in 2010) and Czech Republic (from 22, 0% to 20,0%). The highest rises were registered in Greece (from 18,0% to 23,0%) and Cyprus (from 10,0% to 15,0%).

The EU Commission forecasts that in 2009-2011 the overall tax ratio will remain well below 2008 levels, as governments are keen to maintain favourable conditions for business development. However, in the longer term, the accumulation of debt by Member States leads to expect that governments will try to consolidate their budgets, so that the tax cuts will be limited. In addition, EU general government expenditure has increased considerably: from 2007 to 2010 it has risen by more than five points of GDP, surpassing the 50% mark. The expenditure ratio is expected to start declining only in 2011.

3. Level of taxation in Romania

According to the data from **table no. 5**, the overall tax ratio in Romania was of 28,0% in 2008, with 9 percentage points lower than the average EU-27 (37,0%). The taxation level in

Romania is the lowest from EU and significantly lower than in neighbouring countries Bulgaria (33,3%) and Hungary (40,4%).

Table no. 5. Taxation in Romania (2000-2008)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	Ranking in 2008*
A. Structure of revenues (% of GDP)										
Indirect taxes	12,2	11,3	11, 6	12,3	11,7	12,9	12,8	12,6	12,0	**22**
VAT	6,5	6,2	7,1	7,2	6,7	8,1	7,9	8,1	7,9	**12**
Excise duties and consumption taxes	3,0	2,8	2,6	3,5	3,6	3,3	3,2	3,0	2,7	**17**
Other taxes on products (including import duties)	2,2	1,6	1,3	1,0	1,0	1,0	1,2	0,7	0,6	**21**
Other taxes on production	0,5	0,6	0,6	0,6	0,5	0,5	0,6	0,8	0,8	**17**
Direct taxes	7,0	6,4	5,8	6,0	6,4	5,3	6,0	6,7	6,7	**26**
Personal income	3,5	3,3	2,7	2,8	2,9	2,3	2,8	3,3	3,4	**25**
Corporate income	3,0	2,5	2,6	2,8	3,2	2,7	2,8	3,1	3,0	**15**
Other	0,6	0,5	0,4	0,3	0,3	0,3	0,3	0,4	0,3	**22**
Social contributions	11,1	10,9	10,7	9,4	9,1	9,6	9,7	9,7	9,3	**19**
Employers´	8,1	7,1	6,5,	6,2	5,9	6,4	6,3	6,2	6,0	**15**
Employees´	3,0	3,8	4,2	3,1	3,0	3,0	3,3	3,3	3,2	**13**
Self- and non-employed	0,0	0,0	0,1	0,2	0,2	0,2	0,1	0,2	0,1	**25**
TOTAL	**30,2**	**28,6**	**28,1**	**27,72**	**27,2**	**27,8**	**28,5**	**29,0**	**28,0**	**27**
Cyclically adjusted total tax to GDP ratio	32,6	30,1	29,2	28,4	26,8	27,3	27,0	26,7	24,8	
B. Structure by level of government (% of total taxation)										
Central government	59,5	59,7	60,1	62,8	63,4	63,0	63,0	62,2	62,9	**10**
State government	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	**n.a.**
Local government	3,9	3,8	3,1	3,5	3,4	3,1	3,4	4,0	3,2	**22**
Social security funds	36,6	36,5	36,8	33,7	33,2	33,9	33,6	33,0	32,9	**12**
EU institutions	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	**n.a.**
C. Structure by economic function (% of GDP)										
Consumption	11,5	10,6	10,9	11,5	11,1	12,3	12,1	11,8	11,2	**16**
Labour	13,2	12,9	12,4	11,1	10,7	11,0	11,6	11,8	11,6	**23**
Employed	13,2	12,8	12,3	11,1	10,7	11,0	11,5	11,8	11,5	**23**
Non-employed	0,0	0,0	0,0	0,0	0,0	0,0	0,0	0,1	0,1	**26**
Capital	5,5	5,1	4,8	5,0	5,4	4,5	4,9	5,4	5,2	**22**
Capital and business income	4,3	3,9	3,8	4,0	4,5	3,6	3,9	4,2	4,2	**22**
Income of corporations	3,0	2,7	2,6	2,8	3,2	2,7	2,8	3,1	3,0	**15**
Income of households	1,2	1,1	1,0	0,9	1,0	0,6	0,72	0,8	0,9	**12**

Income of self-employed (including SSC)	0,1	0,2	0,2	0,3	0,4	0,3	0,3	0,4	0,3	**25**
Stocks of capital / wealth	1,2	1,2	1,1	1,0	0,9	0,9	1,0	1,1	1,0	**20**
D. Environmental taxes (% of GDP)										
Environmental taxes	3,4	2,4	2,1	2,4	2,4	2,0	1,9	2,1	1,8	**25**
Energy	3,2	1,9	1,7	2,0	2,1	1,8	1,7	1,7	1,4	**23**
Transport (excl. fuel)	0,1	0,1	0,1	0,1	0,1	0,1	0,1	0,3	0,4	**17**
Pollution/resources	0,1	0,4	0,3	0,3	0,2	0,1	0,1	0,0	0,0	**22**
E. Implicit tax rates (%)										
Consumption	17,0	15,6	16,2	17,7	16,4	17,9	17,8	18,0	17,7	**21**
Labour employed	33,5	31,0	31,2	29,6	29,0	28,1	30,1	30,2	29,5	**21**
Capital	:	:	:	:	:	:	:	:	:	

Note: **The ranking is calculated in descending order.*

Source: http://ec.europa.eu/eurostat

According to data published by the Ministry of Public Finance of Romania, in 2010 Romania registered the lowest value of the overall tax-to-GDP ratio from the last decade: 27,1%, in decrease as compared to 2009, when it was of 27,4% **(table no. 6)**.

Table no. 6. Taxation in Romania (2009-2010)

Structure of revenues (% of GDP)	2009	2010
Indirect taxes	**10,7**	**11,7**
VAT	7,0	7,7
Excise duties and consumption taxes	3,2	3,4
Other taxes on products (including import duties)	0,1	0,1
Other taxes on production	0,4	0,5
Direct taxes	**7,0**	**6,4**
Personal income	3,8	3,5
Corporate income	2,2	2,0
Other	1,0	1,0
Social contributions	**9,7**	**8,9**
TOTAL	**27,4**	**27,1**

Source: http://discutii.mfinante.ro/static/10/Mfp/buget/executii/anexa2_bgcdec2010.pdf

The fiscal structure from Romania points out in many respects. In Romania the indirect taxes have a very great weight, since in 2008 Romania occupied from this point of view the fourth place in EU-27 after Bulgaria, Cyprus and Malta. Indirect taxes ensure 42,7% from total fiscal revenues, as compared to 37,6% EU-27 average, while the weight of social security contributions is of 33,3% (as compared to the EU-27 average of 30,2%) and of direct taxes of only 24,0% (the average in EU-27 is of 32,4%). An important element which determined this structure is the VAT high weight in total tax (28,2% in 2008), the third biggest within EU-27. The low level of direct

taxes is due mainly to low personal income taxes (only 3,4% from GDP), comprising about 42% from EU-27 average. If in 2009 the structure of revenues from the three types of taxes modified in the sense of reduction of the weight of indirect taxes to 39% and of rise of weight of social security contributions to 35,4% and of direct taxes to 25,6%, in 2010, the structure of taxes was very close to that from 2008. **(table no. 7)**

Table no. 7. Taxation in Romania (2008-2010)

Structure of revenues (% of total taxation)	**2008**	**2009**	**2010**
Indirect taxes	42,7	39,0	43,1
Direct taxes	24,0	25,6	24,0
Social contributions	33,0	35,4	32,9
TOTAL	**100,0**	**100,0**	**100,0**

Source:
http://discutii.mfinante.ro/static/10/Mfp/buget/executii/anexa2_bgcdec2010.pdf
http://discutii.mfinante.ro/static/10/Mfp/buget/executii/dec2008.pdf

In 2008, the weight of central government revenues is more than a half from total (62,9%), while the local government revenues are marginal, composed of only 3,2%. The weight of social contributions is of 32,9%, with almost four percentage points over EU-27 average. In spite of all these, in percentage from GDP, the revenues from social security contributions are with 1,5 percentage points under EU-27 average.

The overall tax ratio decreased continually within the period 2000-2004 with a total of three percentage points, mainly due to a reduction of revenues from social security contributions paid by employers, which diminished with more than one quarter. The rise of revenues from all three major fiscal categories, lead later on to a rise of OTR from 27,2% (in 2004) to 29,0% in 2007. In the following three years, the ratio registered again a descending trend, arriving to 28,0% in 2008, 27,4% in 2009 and 27,1% in 2010.

In order to compare the level of taxation from Romania with the one from EU-27 under the aspect of the three economic functions: consumption, labour and capital, we shall analyse the data from **table no. 5.**

The ITR on consumption is of 17,7% in 2008, with 3,8 percentage points lower than EU-27 average. As a result of the very big weight of final consumption of households in GDP, the consumption taxes as per cent of GDP are still in conformity with EU-27 average (11,2% as compared to EU-27 average of 12,0%).

The ITR on labour decreased constantly during the period 2000-2005, in total with more than five percentage points. The most significant reduction, of about a percentage point, can be noticed in 2005, the year of introduction of flat rate of personal incomes taxation (16%). Although, in 2006, ITRL increased with two percentage points and remained enough stable in 2007, but decreased in 2008 to 29,5%. ITRL was significantly below EU-27 average (34,2%), mainly as a result of low receipts from wage income tax. The cause is not only the reduced level of rate, but also the illicit work that is a common practice in Romania.

Capital taxation is one of the lowest in EU-27, obtaining only 5,2% from GDP, as compared to EU-27 average of 7,5%. This is due to reduced revenues from all categories of capital taxes. Because of the lack of data, ITR on capital is not available for Romania.

On the basis of available data, the environment taxes of 1,8% from GDP in 2008, are much below the EU-27 average (2,6%). In fact, this value is the third lowest in EU. Most of these taxes are applied to energy. Each of the other two categories of environment taxes, transport and pollution taxes, raise at least than half from EU average. The incomes from environment taxes decreased in the last years.

In **table no. 8** there are comprised the structural modifications of main taxes according to „Fiscal-Budgetary Strategy" of the Government during the period 2011-2013.

Table no. 8. The structural modifications of taxes in Romania in 2011-2013

Taxes	**% in GDP**
Personal income tax	3,3%-3,4%
Corporate income tax	2,1%
VAT	7,9-7,8%
Excise duties	3,2%-3,1%
Social security contributions	8,9-8,2%

Source: http://discutii.mfinante.ro/static/10/Mfp/strategbug/STRATEGIA_FB_27sept.pdf

For this period, there are planned the following measures in the fiscal domain:

a) Personal income tax. The rate of 16% will be maintained.

b) Corporate income tax. The rate of 16% will be maintained.

c) VAT. The standard VAT rate was increased from 19% to 24% beginning with 1st July 2010. Regarding the reduced rates, the Government's goal is to maintain the present values, respectively the 9% rate for some deliveries of goods and services stipulated by Fiscal Code and the 5% rate for delivery of dwellings as part of the social politics.

Also, the Government will follow the continuation of legislation improvement for the harmonization with the EU legislation, by transposition into national legislation of directives adopted at european level in VAT domain.

Regarding the legislative measures of reduction of fiscal fraud in VAT domain, these were concretized in:

- setting up of the Register of Intra-Community Operators, beginning with 1st July 2010, a measure introduced with the purpose of diminishing the fiscal evasion in the domain of intra-community operations.

- application of inverse taxation mechanism for deliveries of goods within the country from the following categories: cereals and technical plants, vegetables, fruits, meat, sugar, flour, bread, and bakery products, between taxable persons registered normally for VAT purposes. This measure will be applied after the obtaining by Romania of the authorization for application of derogation from provisions of art.193 from 112/2006/CE Directive regarding the common system of VAT with the ulterior modifications and completions, and it will come into force till 31st December 2011.

d) Excise duties. The Government aims at rising the excise duties in view of attaining the minimum level imposed by the community legislation in field, according to transition periods offered to Romania by European Commission, stipulated in the Adhesion Treaty and in 2010/12/CE Directive of modification of tobacco directives.

e) Social security contributions. The rates of social security contributions will be maintained on middle term.

The moderate evolution of gross average salary on middle term and gradual implementation of second pillar of pensions will lead to the diminution of weight of social security contributions in GDP till 2013 as compared to the level registered in 2008.

f) Local government taxes. We have in view the modification of fiscal legislation in the sense of granting the right to local authorities to modify the level of local rates and taxes depending on local necessities and the degree of supportability of population and through the implementation of a calculation system of the tax value of buildings and lands from built-up area by relating to their market value, where this is obviously greater than that determined through the calculus formula.

4. Fiscal reform as anti-crisis solution

According to the study „Paying taxes 2011”[12], almost 60% of the States from world-wide made legislative and procedural modifications meant to facilitate the taxes payment, despite the impact of recession and of heavy economic recovery.

The report shows the fact that in the last year, 40 States simplified the payment procedures of taxes. For countries in question, the necessary time to accomplish the tax liabilities decreased with a week on average, the cost of fiscal administration decreased with 5% on average, and the number of payments decreased with almost four. In total, 90 States reduced the corporative tax burden as compared to 2006.

According to the study, a typical company uses almost half of its profit for the payment of rates and taxes and spends seven weeks on average accomplishing the administrative charges due to tax liabilities payment, making a payment on average at each 12 days.

The report shows that the payment of taxes is easier for companies from developed economies which have the lowest costs to accomplish the tax liabilities and the most reduced bureaucracy. These economies tend to have mature fiscal systems, a much reduced administrative burden and use more the electronic means for tax payment and filling out the financial statements.

The conclusions of the study „Paying taxes 2011”regarding EU can be synthesized thus:

- Seven States from EU implemented during 2009-2010 fiscal reforms to facilitate the taxes’payment: Bulgaria, Czech Republic, Hungary, Lithuania, Netherlands, Portugal and Slovenia.

- UE situates below the global middle level as regards all the three sub-indicators. The total tax rate is of 44,2% (as compared to global average of 47,8%), the necessary time to observe the tax liabilities is of 222 hours (global average: 282), and the number of payments is 17,5 (global average: 29,9).

- The average number of taxes that the standard company must pay is of 9 at global level. The average in EU is of 10,9, varying from 5 in Sweden to 17 in Hungary, Romania and Italy.

[12] http://www.pwc.com/gx/en/paying-taxes/pdf/paying-taxes-2011.pdf

- The taxes and contributions on wages and salaries represent the biggest part of the tax burden in EU – that is 64,3% from total tax rate in EU, as compared to global average of 33,8%.

- Many EU Member States have numerous taxes and contributions on wages, fact which increases the fiscal bureaucracy.

- The VAT rate is regulated at the community level, but the necessary time to observe the tax liabilities comprised in the VAT legislation varies depending on various administrative used practices. For example, the observance of tax liabilities regarding VAT needs 222 hours in Finland and 288 in Bulgaria.

In the analyse that gathers 183 of 191 States recognized in the world, Romania situates on the 151 place from the point of view of the facility with which taxes of a business can be paid, in a slight regress in comparison with the previous edition when it came on 147 place. This positioning is not due only to the Romanian tax system itself, but also to the tax reforms implemented in other countries.

The position of Romania in the second half of the classification is strongly influenced by the great number of payments of rates and taxes: no less than 133 payments during a year, of which 84 refer to payments of social security contributions. Romania occupies the second place at global level regarding the number of payment of taxes, being surpassed only by Ukraine (135). The biggest problem is the fact that there is no functional electronic system for payments.

The number of necessary hours for the compliance with fiscal legislation increased during last year from 202 hours to 222 hours in this year report. This is due mainly to the introduction of more difficult regulations regarding the employment contracts, as well as to the regulations regarding the profit tax payment (the minimum tax was removed since 1st October 2010).

More, specialists expect that the fiscal measures taken by the Government during 2010 affect in the future the indicator regarding the tax payment. It's about the VAT increase from 19% to 24%, together with the introduction of new regulations regarding the VAT payment, an increase of local taxes (for example the motor vehicle tax, certificate issue tax, notifications and authorizations for publicity), as well as the introduction of a new system of penalty for delays in paying taxes.

The Romanian Government has also postponed the introduction of a simplified advance corporate income tax payments system (already implemented for banks), until 2012. When the system is introduced, it is expected that it will make the compliance procedure easier for the taxpayer and reduce the number of hours required.

The reduction of bureaucracy and of taxation level could have a good effect now when investors run from neighbouring countries because of the tax increases and seek new alternatives. Romania can profit by the unattractive economic policies of its neighbours to bring more foreign capital in the country.

In the last years, Hungary was a destination loved by foreign companies. The Hungarians surpass us in the classification of most propitious countries to start a business, as it results from the report „Doing Business 2011". They situate on 52 place and Romania on 54. But last year, the Government from Budapest decided the imposing of new „crisis" taxes and increase of some taxes to bring money to budget. Thus, the profit tax for earnings of over 2,5 millions dollars was increased from 16 to 19%. The energy, telecommunication and retail domains (dominated by foreign investors) must now pay additional taxes, called by economists the „Robin Hood taxes", comprised between 1,05% and 6,5%. Moreover, although approved at the end of last year, they will be applied retroactively also for 2010. Many foreign companies warned Hungarian Government that if the situation didn't change, they would relocate their operations. Romania could become a target for them, with minimum of effort.

Global crisis is only one of the causes which led to the decrease of foreign capital in Romania. Our country didn't attain its maximum potential not even in the boom period of direct foreign investments (2008). If we look at the total tax rate (**table no. 9**), Romania is more competitive than its Austrian, Slovakian, Czech, Ukrainian, Hungarian neighbours. But, we still have a lot of work. For example, we should eliminate the great number of taxes that an entrepreneur must pay in Romania.

Table no. 9. Total tax rate in states of Central and Eastern Europe

	States of Central and Eastern Europe	Total tax rate (%)
1.	Belarus	80,4
2.	Austria	55,5
3.	Ukraine	55,0
4.	Hungary	53,3
5.	Czech Republic	48,8
6.	Slovakia	48,7
7.	**Romania**	**44,9**
8.	Poland	42,3
9.	Albania	40,6
10.	Slovenia	35,4
11.	Serbia	34,0
12.	Croatia	32,5
13.	Moldova	30,9
14.	Bulgaria	29,0
15.	Bosnia and Herzegovina	23,0
16.	Macedonia	10,6

Source: http://www.pwc.com/gx/en/paying-taxes/pdf/paying-taxes-2011.pdf

Conclusions

As a result of the current economic crises, the focus on the role that tax can play in international development has increased. Tax revenues are a more sustainable source of financing for developing countries than debt or aid. But there are many challenges to tackle in increasing tax revenues in developing countries, including combating capital flight from these countries, reducing the size of their informal economies and helping their tax authorities to monitor compliance and collect the taxes due. The "Paying Taxes-2011" study results show that tax rates tend to be higher and the compliance burden heavier in the developing world. Reducing tax rates, broadening the tax base and making it easy to pay, can be important in encouraging local business to register and pay tax.

In the last three years, in European Union the trend was of reduction of taxation level, especially in the domain of corporate income tax. The reason is the competition between States to attract foreign investments which imply new jobs and prosperity. All the States try to create a competitive business environment, a fact proved by the reduction of total taxes ratio in the

commercial profits, whose average decreased from 50,6% in 2004 to 49,8% in 2008 and 47,8% in 2010[13].

Romania can boast with the most reduced level of taxation from EU. Though, because of the bad assigned tax burden (high weight of social security contributions and of indirect taxes) and because of the bureaucracy, corruption and legislative instability, Romania is far to be a „tax haven".

The fiscal policies promoted by Romanian Governments influenced not only the structural evolution of fiscal system but also the size of taxes. The level of taxation was determined by the proportions of granted fiscal facilities (exemptions, reductions, deductions), of the level and type of rates, but also by the sensibility of taxable product. The social-economic policies promoted in economy influenced the tax burden through some factors as: degree of economic development, structure of property, structural distribution of revenues, structural evolution of global consumption etc. More, the quality of fiscal debts administration and the level of fiscal education of the population influence, through the fiscal fraud, the tax receipts and the tax burden.

Having a the reduced level of taxation, Romania can profit by the fact that the investors run from neighbouring countries because of the tax increases and seek new alternatives. We consider that the following measures in the fiscal domain could prove efficient to attract more foreign capital in the country:

- Reduction of bureaucracy. The time lost by Romanian companies to pay their taxes to the State represents a too great obstacle for potential investors. The introduction of unique printed form for payment of taxes and social security contributions is the first step to the reduction of bureaucracy.

- Tax reduction. Although if we look only at the total tax rate, Romania is doing better than other neighbours, the indirect taxes and the social security contributions remain between the highest in Europe. Their diminution will stimulate investors, stir up the labour market and finally it will be reflected in the consumption increase.

- Fiscal predictability. In the last six years, the Fiscal Code was modified of 60 times. The situation is more critical as, in many cases, the changes came into force immediately, as it happened with the increase with five percentage points of the VAT (from 19 to 24%).

- Simplification of juridical system. If the period to solve litigation is long, the investors prefer to avoid the respective State. An inefficient juridical system is one of the first things that damages to the attraction of foreign capital.

If Romania will take these measures and know to use its advantages (cheap labour, geographical position, available agricultural land, easy access to natural resources with advantageous price, potential of market growth in financial-banking, energy, telecommunications, transports, retail domains etc.) it could attract foreign investors, situation that generates many taxes.

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APPROACHES FOR EVALUATING AND FINANCING INVESTMENT PROJECTS

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Abstract

This article presents the financial investment approach and the investment evaluation methods, which are criteria for assessing both investment projects and their funding sources. An important role in the analysis carried out is played by the investment decision and financing decision quality. Making an investment decision implies computing the related investment efficiency indicators. They allow the comparison of several variants of the same investment project as well as their comparison with other projects in the same industry or in other industries. The financing decision concerns the selection between their own sources (share capital, depreciation fund, profits, reserve funds, additional capital, revenues from investments), attracted sources (domestic resource mobilization) and borrowed sources (credits).

Keywords: *financial approach, investment evaluation methods, investment decisions, profitability, funding sources.*

Introduction

Adopting an investment project involves a careful analysis of the company overall standing. Investment projects have a particular importance for developing a business as they prepare the production capacity and conditions to be achieved, therefore influencing the results and the financial balance. The project idea comes from the need to meet a current demand or from the desire to take advantage from some opportunity.

The decision regarding the project accomplishment requires that a lot of elaborated basic actions should be carried out by specialists from various fields of interest. As investments require important long-term financial resources, investment projects present significant risks, most often their launching being irreversible. Favorable financial perspectives can be obtained either by continuing the existing activities or by making investments and launching new activities. The company's financial managers must assess past investments and future investment needs. The past investments must be evaluated and the effects of the future accepted projects must be foreseen.

The term "investment" means, strictly speaking, the use of financial resources that are meant to allow the entry into the company's patrimony of fixed inputs (buildings, constructions, machinery, plants, equipment, tools, etc.) either by acquisition or by their effective creation.

In financial terms, investment means a long-term capital asset undertaking so as to achieve higher future returns.

The funding of investments covers, to a large extent, the sphere of financial requirements at company level and takes into account both the own and borrowed sources as well as the permanent and temporary sources.

The investment effect enhances the volume and quality of a company's activity.

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1. Financial approach of investment projects

Defining investment and delimiting the field of investment policy can be made in various ways. In terms of accounting and legal areas, expenses are considered investment only when they result in a purchase of durable goods, as tangible, financial or intangible assets. Thereby the purchase of a building, of a land, of means of transport, of the shares or investment certificates appearing as investment operations. Any expense that has no direct patrimonial incidence is not considered an investment, even if it increases the potential and business performance. This exclusion doesn't seem to be justified because recent economic studies evaluate only about 40% of the investment property in the global effort of investment of the companies and thus emphasize the determinant role, of 60% of "immaterial" investments which are not found in simple purchases assets.[1]

While accounting and legal approach of investments highlights the nature of the items purchased by making expenditures, the psychological definition is focused on the intention of the individual or the company which invests, insisting that, in time, investment leads to the offset consumption. From this perspective, the investment is giving up immediate goods in exchange for future goods.

The monetary definition considers that investments are all costs incurred in order to obtain monetary income in the future. Any immediate payment which is capable to bring future revenue is assumed as investment policy.

The investment decision is based on complex and accurate information about need, opportunity, duration of implementation and operation investments, the expenditure volume and financial resources, the input and output flows of funds throughout the investment operation, the ensurance of profitability and liquidity, the recovery of invested capital, etc.

The investment decisions are founded on a convenience and efficiency study based on several versions of the project from which is going to be chosen the one that ensures maximum results with minimum effort.[2]

The opportunity is closely related to the need, the effectiveness and the optimal time for delivery and commissioning of the production's capacities, to the formation of financial resources and supplying and trading conditions.

Efficiency is reflected in the ratio of operating results or in the outcomes of the investment and the efforts or expenditures for the investment. The efficiency of investments depends on a number of factors, the most important being the cost of production and the sales volume. Unit production costs will be even lower, since the investments and operating costs will be distributed on some higher sales. Therefore, it is necessary for strategic analysis of markets to be made, knowing that the investment requirements and profitability will differ depending on the sellers and the degree of competition. A dominant enterprise will be more profitable than those that own small market segments.

Assessment indicators of investment efficiency should allow the comparison to other projects from the same branch, from other branches and even from across the entire economy as well as the comparison of several project variants for the same investment and choosing the best among them.

All operations that represent lasting enrollment of various capital forms (monetary, material, human) are subscribed in the area of investment policy in order to maintain or to improve business potential and performance.

In an enterprise, investments are of great diversity: technical, human, social, financial, commercial, for publicity and advertising etc.

[1] Ilie, Vasile, *Gestiunea financiară a întreprinderii*, Meteor Press Publishing House, Bucharest, 2008, p. 244
[2] M. Adochiței, *Finanțele întreprinderii în economia de piață*, Mitrea Typographer, Piatra Neamț, 1994, p. 62-71

Depending on the risk that investments involve for the enterprise's future, we can structure them in: replacement, modernization, development (expansion) and strategic investment.

Replacing investments of completely absolute equipment has a very low risk because it doesn't involve changes in the manufacturing technology, the new equipment generally have, similar characteristics to the old ones.

Modernization investments for the operational existing equipment involves a low risk as a result of a few essential changes in the manufacturing technology. These investments are intended to improve profitability and productivity, resulting in: lowering the production's costs, direct labor savings, standardization of production process.

Development investments, the expansion of some sections, plants, require a higher risk related to the enterprise growth in traditional or recent markets.

Strategic investments structurally involve the enterprise and they assume a high degree of uncertainty and considerable risk. These investments relate to automating the entire manufacturing process, the merger with another company or the setting up of foreign subsidiaries.

Financing sources for the first two categories of investments are generally long-term credits granted under advantageous conditions of payment, repayment and guarantees because profitability is safe and has low risk. The last two categories will be funded, particularly from their own sources or external sources. The latter are more difficult to obtain due to the high risk and less probability of investment's profitability.

The financial criteria for evaluating the investment projects are:

- the projects' influence on the enterprise's results and profitability;
- the influence on financial stability;
- the impact of projects on the risk borne by the enterprise.

The projects' influence on the enterprise's results and profitability. Each investment project taken under consideration or made on business's expenses needs income throughout its lifetime. The evaluation of the project contribution to the profit of the company is made through results which are determined by comparing the initially allocated funds with the future possible results. On the one hand, the project evaluation is based on accounting profits resulted from the comparison of the total revenue with the total expenditure incurred during each project, and on the other hand the assessment could be based on gross income or cash flow, the additional revenue resulting from the deduction of the additional payments of the companies' activities that are incurred by implementing the investment.

The influence on financial stability. This criterion takes into account the investment operations incidence over the enterprise solvency. The initial project funding allocation for the purchase of fixed assets questions global financing, either by purchasing additional external resources or by carrying out a sampling of the working capital and accepting a certain damage to the treasury. The investment involves over its lifelong the need for additional working capital. This corresponds to the attributable allocations to the project deemed necessarily. This can be written as:

The need for additional working capital due to an investment project = investment + Changes in inventories attributable to trade receivables - Change in liabilities to suppliers[3]

The incidence of financial investments on the financial balance results from the deduction of additional resources with additional needs which they generate:

[3] Vintilă, Georgeta, *Gestiunea financiară a întreprinderii*, EDP Publishing House (Editura Didactică i Pedagogică), Bucharest, 2000, p. 353

Additional Needs	Additional Resources
- Initial costs (property acquisition and related expenses) - Additional working capital needs	- Additional cash flow - Recoveries of possible assignments

Source: Ilie, Vasile, *Gestiunea financiară a întreprinderii*, Meteor Press Publishing House, Bucharest, 2008

The impact of projects on the risk borne by the enterprise. The investment projects taken under consideration or launched by the company affect the level of risk which the enterprise bears. Three types of risk can be identified:

- The expenses for treasury business finances which affect investment involve a risk of solvency or bankruptcy

- The uncertainty of future operations and results imply a worsening of the risk of exploitation. The specific risk is defined in relation to the variability or instability of the results and the company is, therefore doubly affected by the new investment which increases the dispersion of possible results and tends to increase the fixed costs incurred by it.

- Additional funding required to cover additional needs arising from the investment project exposes the company to financial risk whose magnitude depends on the ratio between the rate of return of invested assets, the economic profitability, and the cost of the used resources, which are mainly acquired.

2. The evaluation of investments profitability

The financial evaluation of investment projects generally aims at two objectives. It primarily aims at making comparisons between competing projects, in order to set up priorities. Secondly an assessment of the inner value of the project should be made.

The investment profitability is one of the basic criteria on which the decision of choosing a investment is made. Financial evaluation of investment projects can be done either by putting emphasis on the average profitability or through updated methods.

The methods based on the average profitability are:

- Average rate of return to service
- The term of recovery of costs

The searching methods based on measuring the size of the *average return rate* of type are the relationships between the average annual outcome and the average annual operating expenditure. Their application determines various formulations according to the indicator chosen to measure the annual results (benefit accounting, gross operating surplus) and the size chosen for the used capital.

Cost recovery period is the time for the fund investor to reconstruct the original advanced funds.[4] This is the number of years in which the initial investment is recovered, based on annual cash flow released from the project and it is a way of choosing the investment alternatives according to the duration of the initial investment recovery.

The term recovery can be determined by summing annual flows that the investment yields until the initial value is reached, without exceeding it, resulting the number of years of recovering the project. It is calculated as the ratio between the initial cost of investment and the annual cash-flow environment.

According to a variant of this method, at the end of each year we calculate the recovery period by comparing the cash flow obtained from the commissioning of the investment with the initial cost of investment.

[4] Ilie, Vasile, *Gestiunea financiară a întreprinderii*, Meteor Press Publishing House, Bucharest, 2008, p. 251

The interest in such a method is that it takes into account the time, the duration of operation, but the methods of evaluation of the investment projects based on updating take into account time in a much more satisfactory way.

The methods based on updated cash flows are:

- Net Present Value (NPV)
- Profitability Index (PI)
- Internal rate of return (IRR)

The three methods are in the mean time criteria for the evaluation of investment projects.

Net Present Value (NPV) of an investment project is the difference between the total expected discounted cash flows and the initial cost of investment.

NPV criterion determines actuarial profit which is generated from the investment project as the difference between the sum of all discounted future cash flows and the initial investment.

If NPV <0 then the project is rejected because the rate of return of the investment project is less than the cost of capital.

If NPV = 0 the project can be accepted or not because the capital invested is remunerated at compound interest charged by commercial banks.

If NPV> 0 the project is accepted for the return of the investment is higher than the interest rates or the cost of capital.

Out of the projects that the company holds, by applying the NPV criterion they can identify the acceptable set of projects.

Concerning investment project that requires initial funds F_0 and determines a set of cash-flow forecast F_1, F_2, F_3, ... F_n during its lifetime, if the discount rate applied by the firm is r, NPV can be calculated as follows:

NPV(r) = - cost + initial amount predictable cash-flows discounted

$$NPV = -F_0 + \frac{F1}{1+r} + \frac{F2}{(1+r)^2} + \ldots + \frac{Fn}{(1+r)^n} \text{ or } NPV = -F_0 + \sum_{j=1}^{n} \frac{Fj}{(1+r)^j}$$

Applying NPV meets two difficulties. The first is to forecast the cash-flows that will be generated by the investment. Technical, economic and financial studies prior to the financial evaluation of the investment are needed.

The profitability index (PI) is the net return on invested monetary unit and it is the relative form of expression to net added value. This index is calculated as the ratio of future cash flows and initial expenses. The disadvantage of this indicator is that it supports projects with low initial costs and that is why the NPV indicator is used.

For each project – exclusively, the IP profitability index falls often in conflict with the NPV. In such a case the project as best shown by the NPV is selected.

Internal Rate of Return (IRR) is the discount rate that makes net present value of zero.

$$F_0 = \frac{F1}{1+r} + \frac{F2}{(1+r)^2} + \ldots + \frac{Fn}{(1+r)^n}$$

This rate corresponds to the maximum cost that the company could bear for financing the investment. IRR should be interpreted by comparing with the *weighted average cost* (WAC) of the enterprise resource. If r > WAC, the investment cost is low and allows compensation resources. Internal rate of return is an important criterion to classify the degree of potential investment return.

This involves determining the rate of profitability of the investment capital equivalent to the return that would be obtained if the investor would put the net investment value over a period of time equal to the lifetime of the project, in the system of compounded interest at a bank. Basically, this internal return of investment value is obtained by equating the sum of all future financial flows discounted at the specific rate which is generated during the lifetime of the investment.

The use of IRR criterion is limited. If the company has several projects available for investment then it will choose that internal rate project of return which is the highest. Limited nature of this criterion is that it does not give any reference if the project is accepted or not. For the acceptability of an investment project, in financial practice the NPV is used.

3. Sources of investment funding

In practice, the decision to finance and investment can not be separated. Concerning the capital, with impact over the investments, there are a number of limitations determined by the ability of the company's debt, the market conditions, etc. Such a situation requires rationalization of capital and it implies taking into account the financial factors in measuring the expenses of the investment.

As usual ways of overcoming the financial constraints, expenditure distribution with investments is used for a period of time or doing it in cooperation. In case of financial constraint the decision rule seeks to achieve maximum efficiency for the activity, taking into account the capital costs and the risk class of the project.

If self-financing capacity is insufficient, the company uses external sources of capital.[5] Financing on investment can be made through their own sources (capital fund, depreciation, profits, reserve funds, additional capital, income from investments), attracted sources (domestic resource mobilization) and borrowed funds (loans).

The social capital is the source of financing the investment by which a company is created. Its size is determined by the initiative group, which proposes to the holders of capital the development of the business that the future company is represented by. The depreciation fund aims to replace of fixed assets when they are out of service. Since creating the fund is gradually made on account of sales, the fund is available between the time of formation and the time of use, so that during this time it can be used to finance the investment.

Its destination is thus expanding the volume of additional fixed assets and, on this occasion, their technical improvement (technical progress).

Profit as a source of investment financing, aims at increasing the stock of capital (net fixed capital formation company) and as a complementary destination the replacement of fixed assets. The part of the profit used for this purpose is included within the profit it is determined annually by the Board of Directors in conjunction with the dividend policy, but also with other factors, such as investment, financing needs and other activities/operations, attracting other sources, size profit etc.

Reserve funds are made by profits, annually, through allowances provided either in legal rules (which lead to the formation of legal reserves) or in the status of the company's formation or in the decisions of the Board of Directors. In terms of balance sheet, these funds have equity scheme. The formation of these funds is the existence of additional resources which ensures their reserves of major financial risks. The continuity of collecting these funds makes their quantum important.

The investment decision to use the part of the legal reserve that exceeds the rate established by law is taken as a decision of additional social equity.

The company can earn income from investments in the form of dividends, interest and exchange differences. These revenues "round" the existing availability and can be used to finance the investments when one of the projects for expansion, modernization, renewal included in the company's long term strategy becomes useful.

Mobilizing domestic resources is another source of financing the investment. This source is temporary and it can be used for a relatively short time (three months, usually), until the possibility

[5] Stancu, Ion, *Finanțe.Gestiunea financiară a întreprinderii*, vol. III, Economica Publishing House, Bucharest, 2003, p. 329

to establish long-term sources arises. Unlike all other sources of investment, which are recorded in separate accounts, this one doesn't appear in any account.

Domestic resources represent only a temporary release of resources resulting from changes in a given time (one month, one quarter), of the accounts balances of uses and requirements that reflect the investment business.

Loans are another important source of investment financing. The call for credits can be:

- short term (less than one year) to cover monthly or quarterly gap between the investment is borrowing requirements (planned spending is for investment or just starting current) and their sources available for such investment
- medium to long term (over one year) to supplement its own resources.

In the second case the call credit is usually established when the investment project is made. The repayment of loans and associated expenses is made by the company's current and future results and by the net financial flows released from the investment after its entry into service. For short-term loans, the repayment is made from their own sources, if they are available in the following period, in conformity with the existing funding schedules which are approved by the investment project. The formulas of financing the investment through loans vary a lot:

- *Issuance of single-issue bonds*
- *Issuance of convertible bonds*
- *Eurobond* issuance is usually made by banking groups, with multinational interests, in order to invest in an area of interest without having to export capital.
- *Loans from financial institutions* are based on economic resources mobilized by them as investment funds or from insurance companies.
- *Bank credit* is obtained from banks (commercial, investment, mortgage, etc..) under a loan contract credit which states the repayment terms and the guarantees that are required to be established by the debtor.
- *Credit-lease*, called lease or "creditbail", the entrepreneur is the beneficiary of the credit, the creator of the investment and life interest of the resulting object from the investment he made.

The leasing contract is concluded for a period equal to the required one for the full amortization of the investment and cannot be cancelled at the same time by either party. The object of the investment appears only in the annual balance sheet of the owner, while in the entrepreneur's balance there are included only the financial commitments assumed through the contract.

Other sources. This category includes amounts derived from the liquidation of fixed assets, asset sales and recovery of materials resulting from the preparation of the land for construction, from digging foundations or liquidation of temporary buildings on the site.

Conclusions

Given that each investor is interested in obtaining higher profits from the invested funds, considering the specific circumstances of each year and the existing market standing, it is necessary to make assessments of the project or the investment level, in other words this means making the financial analysis of the investment project.

The development of procedures for diagnosing, evaluating and investment decision–making requires a prior delimitation of the operations defined as investments. The analysis based on investment project appreciation criteria leads to the selection of the most beneficial ones.

The provision in due time of the resources needed for the financial covering of investments is a first order necessity and an objective of the company's finances. Investments involve a significant capital mobilization, which determines the need for purchasing or acquiring the related resources.

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TERRITORIAL-ADMINISTRATIVE REORGANIZATION, A PERSPECTIVE OF THE SCIENTIFIC CONCEPTS

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Abstract

The traditional problem posed by the organization of public administration is to determine whether the activities that offer it content are going to be entrusted to one and the same administration – the State's one – or are they going to be distributed to several components, having their own authority and territorial dispersion. Without denying the unity of Romanian public administration, we are going to notice that we are facing in front of an administration built in such a manner to ensure two main categories of interest: the national interest and the local ones. In the field literature we find the opinion of two subsystems of the public administration: the national subsystem and the local subsystem. Both public administrations have a common territorial support, even if it has different significations as the one of administrative circumscription in the national subsystem and the other one of collectivity in the local subsystem The reorganization of the Romanian public administration must be grounded on the consecrated scientific significance of the terms employed, the present study aiming to be a contribution to this process of clarification.

Keywords: *public administration, system, administrative unit, local collectivity, reorganization.*

1. Introduction

The study of the organization of public administration involves the research of the principles that ground the constitution of the assembly that formally form this system, the rapports between them and the characteristics of e ach component.

From a material point of view, as an activity that serves the public interest transposed into law, public administration is realized through a variety of organizational forms that make the public administration system.

At its turn, this gearing is a subsystem of the global society.

Having the role to accomplish political values, through which the general interests of the society are expressed, public administration is related to the state power. Executive power is the one that ensures the management and the control of the whole public administration system, established for the realization of the general interests of the society.

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As an activity, public administration represents the organization of the application and the concrete application of the law, in the most varied fields of social action and in relation to some human collectivities that form the global social system. The grouping of social collectivities in relation to which it is constituted the public administration system is made on the basis of the territorial criterion, criterion of the organization of the society. Human collectivities of urban or local type constitute themselves in social ambient for their members and contribute to their quality of life and wellbeing (Morrison, 2011)

The problem of reorganizing public administration in relation to territory has become lately a prevailing subject on the political agenda, fact that stimulates us to bring into attention some conceptual aspects consecrated by the administrative science and the public law science as scientific truth.

Our study combines juridical research with the interdisciplinary approach in order to capture the complexity of the analyzed phenomena.

The research methodology employed involves bibliographic analysis and the research of classical, traditional, doctrine as well as the perspective of the contemporary doctrine on regionalization.

2. Literature review

As it is noticed in the field literature, the organization of public administration appears together with the state (Iorgovan, 2005), but the systemic research of this phenomenon, the scientific criteria are shaped later, starting with the end of the 18th century, with the apparition of the elements of administrative science and public law science. The existence of some historical types of states led to the existence of several types of administrative organization.

The diversity of the opinions expressed in the field carry the mark of each school of thought of every author. The French works on administrative law promote a technical-juridical orientation, understanding the organization of public administration as a organization of executive power. (A. de Laubadere, 1996)

The structuralist school provides the theory of the systemic organization of the state, which stresses the inter-relations between public authorities against the rigid interpretation of the theory of the state's separation of powers. (J.Gicquel, 1991)

The Romanian interwar doctrine imposed for the theory of the organization of public administration concepts as *moral person of public law, public establishment, territorial -political persons.* (Negulescu, P., 1934)

The nowadays Romanian school adapted the theory of organization of the administration to the new political and constitutional context, promoting the distinction between the administration of the state, belonging to the government, and the local administration, placed in relations of cooperation and under the control of legality of the administration of the state. (Iorgovan, 2005)

3. Organization and re-organization of the Romanian public administration

The administrative regime that exists in each country represents the result of some factors mainly exogenous: it reflects the social, economical and political system of the respective state. The tradition, culture and habits as well as the geo-political factors represent elements that allow the understanding of the way the administrative regime is constituted.

The present Romanian Constitution consecrates, through article 3, the organization of the territory of the country in communes, cities and counties, some of the cities being able to be declared, according to law, as municipalities. It is not observed an explicit qualification, by law, for the communes, cities and counties as local collectivities. Other texts of the fundamental law, as it is, for example, article 120, use the phrase territorial-administrative unity.

Historically, the nowadays organization of the Romania's territory was instituted by Law no 2/1968, which enounced as criteria for the delimitation of the territorial-administrative unities the geographical, economical, political and social conditions, culture and education, criteria that changed heavily as the time passed.

The integration of Romania into the European Union puts again into discussion the theme of the organization of the State at administrative level and imposes re-thinking of the relationship between centre and territory.

By the Law no 151/1998 there were created the development regions, without juridical capacity, as a result of a free agreement between the councils of the counties and the local ones, a solution which does not have major economical and social effects.

Law no 315/2004 brought new premises in the field, proclaiming some principles of the regional development as: subsidiarity, de-centralization and the partnership. Taking into account that the attempts of transforming the region in an territorial-administrative unity or a local collectivity did not reach the desired result, it would impose the constitutional consecration of the principle of subsidiarity according to which the superior administrative entity acts only and in the measure in which the objectives of the activity cannot be reached by another state administrative entity at inferior level (The Rapport of the Presidential Commission for the Analysis of the Constitutional and Political Regime of Romania – for the consolidation of the state of law - 2009).

A concrete form for facilitating the implementation of the principle of subsidiarity could be the consecration, at the level of the fundamental law, of the rule of flexible cooperation of the territorial-administrative unities. This form of cooperation could give birth to new entities, having juridical capacity, which could administrate together public services to costly to be ensured separately.

The exploration of the European experience, combined with the valorization of tradition and the specific of the Romanian space must lead to e reform of the organization of the public administration, in a lasting, scientific framework.

4. General principles of the organization of the public administration

The traditional problem posed by the organization of public administration is to determine whether the activities that offer it content are going to be entrusted to one and the same administration – the State's one – or are they going to be distributed to several components, having their own authority and territorial dispersion.

- The general principles of organization of the public administration system, recognized by the administrative doctrine are the principle of centralization and the principle of decentralization.

Centralization implies the concentration of all the administrative tasks on the territory of a country in the person of the State, tasks whose accomplishment is ensured through an hierarchical and unified administration. The assembly of the decisions concerning administrative activities belongs to the central organs of the state administration.

Through centralization it is defined the problem of the relation with human local collectivities and also a method of organizing the administration of the state. If a state is organized in such a way that the satisfaction local or social interests is made through public services, depending

directly on the central public authority and whose titulars are directly appointed by it, that state is a centralized one. Through centralization it is understood the administrative regime where specialized public authorities from the local level are appointed by the central public authority, being subordinated to it. (Prelot, M., 1972)

Under its most rigorous form, centralization does not recognize to local collectivities the right to administrate; only the state, through its civil servants and budget assumes, for the entire national territory, the satisfaction of the needs of general interest. This system does not exclude the organization of the state territory in administrative units. In a centralized regime, there are organized territorial administrative units but local collectivities are not granted autonomy. (Petrescu, R.N., 2001)

Sometimes, practical considerations determined a diminishing of the centralized system, some services and some civil servants of the state being granted the right to solve, by themselves, in the framework of the territorial-administrative units, the problems which are not put forward to the centre for solving.

By administrative ***de-concentration*** it is understood the transfer of some attributions of the structures of central administration to some subordinated institutions that function in the territory. We are facing a diminished form of centralization.

In the situation of administrative de-concentration, on territorial basis, in the territory there are established structures of the state administration, who are appointed, revocable and responsible in front of the authorities of the central administration of the state.

The regime of administrative centralization, with the variant of de-concentration, in fact co-exists with the ***decentralization*** regime, which allows local collectivities juridical recognized to administrate by themselves important common interests.

The local territorial collectivity represents a part of the national territory, with the corresponding population, having juridical capacity and constituting the headquarters of a local administration.

The principle of administrative decentralization implies that an important share of the decisional power in administrative matter to be transferred from the administration of the State to juridical persons distinct from the state, that enjoy, against it, of autonomy and have decisional power on a collectivity territorially determined power which is not placed under hierarchical rapports with the central power (Bălan, E., 2008)

The juridical capacity of local collectivities allows them to have their own rights and obligations, to exercise competencies, to be titulars of patrimony, to stay into justice in their own name. (Oroveanu, M.T., 1994)

Decentralization is grounded on the principle of liberty, liberty for the collectivities constituted in territorial-administrative units, which allow them to solve, through their elected authorities and by their own means the problems of local interest.

5. Administrative units vs. local collectivities

Without denying the unity of Romanian public administration, we are going to notice that we are facing in front of an administration built in such a manner to ensure two main categories of interest: the national interest and the local ones.

In the first category there are activities, services that tend to ensure the interests of the state collectivity, as a whole: the defence of the country, international relations, the great national public services, etc. in the second category there are included the activities, public services that

correspond to some local needs, belonging to some defined and legally recognized collectivities as being local: water supply, public transport, providing thermal energy, primary education, etc.

Each of both categories of public interests is ensured by an assembly of structures that compose each of the administration's sub-systems:

- The subsystem of the national/state public administration;
- The subsystem of the local public administration.

While the firs subsystem acts directly under the management of the Govern, which is placed on the top of the administrative pyramid of the state, the second one is established by administrations belonging to each local collectivity: county, city, commune, administrations that are led by presidents of the county assemblies, respectively by mayors.

On the correspondence of the two subsystems of the Romanian administration and on the way they meet themselves on the territory, the field literature reveals the following:

Romanian public administration has a unitary character, like the state, and the unity is ensured, on the basis of the provisions of art. 102 paragraph 1 from the Romanian Constitution, by its general leading by the Government. This does not exclude the organization – on the basis of different administrative regimes – centralization, respectively decentralization – of some components. Administrative decentralization in relation to the territory is placed, moreover, at the basis of constituting the subsystem of the local public administration.

Both public administrations have a common territorial framework, even if it has different significations as: the one of ***circumscription/administrative territorial unit*** in the state subsystem and, respectively, of ***collectivity*** in the local subsystem.

Local collectivities at the level of city or commune are, usually, natural collectivities established in the framework of some pre-existing human settlements. The county appears as an artificial construction that reunites several local collectivities of city and commune type, its dimension and position being the result of some state political decisions.

The concept of local collectivity defines the unity of three elements: population, territory, administrative power.

The state and its administration, concentrated at its top, must find the methods to get near the collectivities inside the country. One method to answer this desideratum is de-concentration, which implies that the State to place subordinated institutions in territorial divisions established as territorial-administrative units. At the present moment, these territorial divisions correspond to the legally recognized local collectivities, but this is not mandatory! It can also be imagined an asymmetric system, were the territorial borders of the territorial-administrative units and those of the local collectivities to be partially or entirely different.

The problem of the administrative reorganization of the territory can be understood as one that concerns just the delimitation of the territory in subdivisions, that allow the de-concentration of the administration of the state, without affecting the legally recognized local collectivities, as like one that concerns the whole system of the public administration.

Until now, each territorial-administrative unit corresponded to the boundaries of a local collectivity. But we can also imagine the existence of some local collectivities that are not, at the same time, territorial-administrative units or some administrative territorial units that don't correspond perfectly to the borders of a local collectivity.

As a consequence, it would impose the normative clarification and the elimination of the confusion between territorial-administrative units and local collectivities. The administration of the last ones could remain unmodified, the reform concerning just the national/state administration.

We could imagine, for example, the establishment of the region as a territorial-administrative unit, without recognizing it the character of local collectivity.

The region would be, in this case, the framework for the de-concentration for national services: prefect, de-concentrated ministerial organs, etc., followed by setting-up ways of communication with the local collectivities that are legally recognized: county, city, commune.

Summarizing, form the point of view of public administration, it is fundamental the concept of territorial collectivity. It can be distinguished between a national collectivity and several local collectivities (internal and included into the national one).

Each of those collectivities is recognized the right to administrate a certain category of public interests and has associated a public administration, by which it fulfils the missions of general interest, established by law, in relation to supplying some public services or the assurance of public order. The administration of the national collectivity – central administration, is effectuated in the name and interest of the state. For a better administration of the public interests, the state administration must get closer, through its structures, to the territorial communities, implementing the mechanism of administrative de-concentration. But a territorial support is needed for de-concentration – the territorial-administrative unity as a necessary delimitation for the distribution of competencies.

The optimal determination of the number and size of the territorial-administrative units results from a complex analysis: political, social, economic, cultural, etc. it must be accepted the historic character, different in time, of the territorial-administrative units.

Local collectivities received, in the virtue of the recognition of their administrative autonomy, the right to administrate common interests, belonging to their members, in their own name an don their own responsibility. (Halpern, D., 2005) Thus we identify the existence of a public administration belonging to each local collectivity, whose mission is oriented towards ensuring those interests that make the members of the community solidarity.

In the respect of those stated above, the Constitutions of some developed states give evidence: France, Italy, Spain, as well as international documents, as the case of the Charter „Autonomous Exercise of Local Powers".

6. Conclusions

In the Romanian law, inclusively in the Constitution, recognizing the existence of collectivities is implicit, and not explicitly made, being promoted the confusion between collectivity and territorial-administrative unity, two different realities, that may have in common, sometimes, the territory.

The concept of collectivity is more complex and captures different qualitative elements. Local collectivity, in contrast with the territorial-administrative unity (circumscription, in the French law) has juridical capacity, can raise its own juridical will and sit in its own name in juridical rapports.

It would impose, as many times it was proposed by the field literature, the modification of the constitutional text, in the respect of a explicit recognition of the local collectivities as a subject of administrative autonomy, different from the territorial-administrative unities, understood as circumscriptions where the state can divide the territory for a better accomplishment of the central administration.

In the presented logic, the reform of the administrative organization of Romania, in relation to its territory, should specify the public administration subsystem they refer at: state or local, or both.

At the same time, it imposes to decide if the preservation of the actual system is desired, when local collectivities coincide with the territorial-administrative units, or is it intended the establishment of different, asymmetrical system.

Only afterward can be built strategies concerning the effective identification of the desired territorial-administrative units, and eventually, of the local collectivities, on the basis of a complex analysis and the political, social, cultural, economic values that are followed.

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THE PUBLIC IMAGE – FACETS AND STAGES IN ITS CREATION

Corina RĂDULESCU[*]

Abstract

Public image is the representation or the idea that the public envisages as to an institution/organization and that special literature coins as: institutional image, enterprise image, prestige publicity, brand image, product image, institutional communication – all of these phrases representing multiple "facets" of the public image whose unique goal is to create a positive representation of an institution. These facets – which are essentially different – often overlap. Thus, in this paper, we intend to distinguish between the multiple facets that the public image implies and, in order to do this, we firstly refer to the definition, characteristics and structure of the public image, so that we separately analyse its forms of manifestation and reveal the specific difference of the institutional image – which in its pure form aims at creating in the consumer's/citizen's mind an identity and a clear organizational representation, which is particularly different from commercial mark images. In the conclusion section to our paper, we indicate the steps that have to be followed in order to create a positive image for an organization.

Keywords: *public image, organizational culture, institutional image, identity, brand image, product image.*

Introduction

Public image is a generic concept which comprises **multiple facets** and, from this point of view, one can mention the following forms under which image can be identified: **the image of an enterprise, the organization of an institution, prestige publicity, brand image, product image, and institutional communication.** These facets interweave and influence each other resulting in the creation of an entire whole whose common goal is to build a positive representation of the enterprise / organization / institution and of its offers, in other words, to create reputation or prestige, which represents a generally aimed at ideal. However, one can see that these different"facets" of the image often merge into one another. For example, brand image and institutional image often overlap; in fact, they are complementary; at the same time brand image and product image also overlap, though in reality, a brand mark can create a particular image, and, on the other hand, the products themselves can create a particular image thanks to the inner qualities they have.

Consequently, in this paper **we intend** to conceptually define each facet of the public image so that we could more accurately point out the specific difference of the institutional image –

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which in its pure form aims to create for the consumer a clear and precise image concerning the identity and personality of the represented institution. For accomplishing this task, we are going to refer to the definition, characteristics and structure (composing elements) of one institution's image and then to minutely analyze the different facets of the public image (institutional image, the image of an enterprise, brand image, product image), to finally indicate a few"steps" that have to be taken in order to create in the consumer's/citizen's eyes a positive representation of our organization.

Building the image of an organization/institution is a long and complex process which implies a set of phenomena that are meant to reflect the institutional reality in its real light – unfeigned and undisguised, starting with its "infrastructure", i.e. organizational culture, and continuing with all communication directions and the quality of the products that are offered to the consumer/citizen; at the same time, the degree to which an organization is socially involved in the community is of major significance for its image. The efforts made by the organization to become "visible" are finally rewarded with trust and fame.

According to special literature, an institution's/organization's image is defined in relation to two"poles": organizational culture and public image. **Organizational culture** is a set of values, significations, behaviours and organizational practices, as well as a way of directing organizational behaviour. It is specific for the informal structure of organizational culture and it aims at specific behaviour patterns, myths and symbols that are meant to support individual and group interests of the organization's members**.** The other pole – **public image** – the representation or the idea that the public envisages as to an institution or an organization – is, however, more visible than organizational culture, because it is explicitly expressed and it is communicated on the public scene. It becomes real after the consumer or citizen has made an opinion of the character and the personality of the institution.

Consequently, we reiterate – an organization's personality is defined in relation to two reference poles: organizational culture and public image, the two realities complete each other and interact, their relation being a dialectical one. In the present paper, we are going to pay particular attention to the multiple facets which public image can have, as well as to the "steps" that have to be taken in order to accomplish this task, and, in this respect, we emphasize the particular characteristics of the institutional image – the creation in the receiver's mind (consumer or citizen) of a clear representation concerning the identity and specific features of that organization, these representations being different from commercial brand images.

Public image – definition, characteristics, structure

According to special literature, the **public image is defined** as "the favourable representation of an institution or organization in the eyes of its public, with a view to drawing the clients' attention" (Rosemarie Haineş, 2010, p. 142). Public image can also be defined as the representation or the idea which the public envisages as to an institution or organization. In this case, the image is built thanks to the **opinion which the consumer or citizen has as to the character and personality of the institution or organization.** The term public image comprises all the forms that the image can epitomize. In special literature one can find different expressions used to refer to image: enterprise image, prestige publicity, brand mark, product image, institutional communication – all of these notions represent multiple forms or "facets" that the public image of an enterprise or institution can acquire.

Public image comprises a **set of phenomena** that are meant to structure the personality of an enterprise/institution, respectively the personnel's attitude, the enterprise's/institution's social

involvement, publicity of offers, the quality of its products, the success of that organization etc. The consolidation of loyal relationships is applied both in the private and the public sectors. The electorate, like the consumer, aims at short term and immediate solutions for the problems it has. However, loyalty to a party or a brand should cover more than the short term. **Public image depends on many factors,** it is deeply rooted in human perception (and considered similar to human perception) and that is why it is very fragile. Sometimes there might be a gap between the image built by the organization and the image perceived by the public categories. The image **is built in time, but it can be quickly destroyed** if the affected institution does not take measures for protecting its image. Memory and human attitudes are extremely unstable; consequently it is necessary to devise a continuous programme of activities that are meant to maintain the same perception of the public image. The institution, the organization or the enterprise has to adapt to the circumstances in which it pursues its activities in order to keep up with the new times. **The mass media system is a partner** one cannot ignore, a partner that can facilitate or, on the contrary, hinder the creation of a positive image.

From the very beginning we point out the fact that the **private organization does not build its image as the public institution does**. These two types of organizations do not share the same objectives, though, however, both of them share the same principles. That is why the notions used to describe the private sector can easily be applied to the public sector, but the notions used to describe the public sector cannot be applied to the private one. Both types of organizations try to convince the population to choose their offer, and from this point of view both organizations have to adapt their image to the objectives which they establish and the social milieu they address to. **From an organizational point of view, there are two large social sectors:** the public and the private sectors, to which we can add the independent or non-profit sector (Mihaela Vlăsceanu, 1999, p. 56). The public sector is managed by the state (government), while the private sector functions in accordance with the free market laws, which depend on private property and profit. Non-profit organizations are private organizations as far as property and profit are concerned and they are public as far as their goals are concerned, because they offer *collective goods*. Private organizations pursue their activity "in accordance with the *company pattern,* while public organizations pursue their activity in conformity with the *office pattern***"** (George Moldoveanu, 1998, p. 92).

Public organizations	**Private organizations**
- serve the public; - the citizen is the client and a partner in social dialogue; - depend on public bodies; - pursue their activity in a reasonable and legal way; - pursue their activity in accordance with the separation of powers principle; - elaborate public policies; - their autonomy is limited and delegated; - are financed from the state budget; - are subject to political authority; - are conservatory; - the customer cannot sanction the quality of the activities and the services he is offered; - fundamental value: equity, general interest;	- their goal is to obtain an as big as possible profit; - pursue their activity according to the free market rules; - competition defines the framework within which they pursue their activity; - autonomous and flexible; - political influence is indirect; - privilege innovation; - customer-oriented; - fundamental value: efficiency in maximizing the profit; - precise goals and objectives; - managerial authority is founded on competence; - incentives for obtaining performance; performance-oriented.

- their goals are vaguely and ambiguously defined; - public authority is delegated and, in consequence, limited; - bureaucracy and lack of incentives prevail; - the political factor disturbs the current activity; - today, public organizations tend to adopt a behaviour which previously was characteristic of private organizations (re-inventing governing); - a new social management based on flexibility and decentralization.	
Both types of organizations have their own	intra-organizational values.

Source: Rosemarie Haineș, *Imaginea instituțională*, 2010, p.23

Similarities and differences between private and public organizations in society

Both types of organizations try to convince the population to choose their offer, and from this point of view both of them need to adapt their image to the objectives they intend to accomplish and to the segment of population to which they address. All important organizations are concerned with creating a better public image for themselves and this is true both for the private sector and public institutions. The **private enterprise** was first of all perceived as an organization which granted priority to the consumer and not to the citizen. However, in time, the private enterprise was obliged to adapt itself to social needs and in consequence it had to pay attention to the quality of its products and to get involved in social activities – to support charity work, to gather funds for humanitarian purposes – to sponsor cultural events etc. Not only economic performance of the private organization is becoming more important, but also the extent to which this organization gets socially involved in the community, as well as the quality of its products, the efforts it makes to create a particular profile for itself – i.e. the same image "indicators" which are important in a public organization.

As to the **public institution representatives** their survival depends on the image they build. Political parties are elected or re-elected according to their accomplishments or to the image that they have built and that may be associated with their integrity or excellence.

Public institutions have more facets. For example, on the political scene any government follows three directions**:** the political, electoral and administrative. **Politically**, the lawmaker enacts laws that correspond to the citizens' will and, at the same time, it develops political marketing strategies in order to convince population of its fair political choices. To adjust its action, the government has to identify the population's expectations and to carefully supervise everything which mass media write and say; daily monitoring of the newspapers is an indispensable tool for identifying the population's satisfaction and needs and for preventing criticism. TV broadcasting of parliamentary debates offers politicians the possibility to be present on the public scene. **On the electoral scene**, political parties organize surveys to find out the electorate's expectations, to evaluate the public's attitude to the actions and activities performed by political parties. The image of political parties fluctuates according to the social, political and economic context, and the way political parties act takes into consideration these fluctuations and

adapts to them. A politician who is **responsible with managing a ministry** becomes an administrator. In this situation, he initiates complex social campaigns and applies programs and services that best fit the populations' expectations. "In order to create a powerful image, these three public sector spheres have to make use of techniques and concerns that are specific for private organizations."(Rosemarie Haineş, 2008, p. 169)

Taking into consideration the fact that the public image relies upon organizational culture - "the infrastructure" of an institution, we would like to point out the **fundamental differences that exist between the public and the private organization values** (we refer to both profit and non-profit organizations), as well as between the projects they implement. Mihaela Vlăsceanu, when referring to the fundamental values of an organization, states in her book *Organizaţiile şi cultura organizării* (p. 62) that **public organizations** regard **equity** as a fundamental value, which is reflected in the public services and collective goods that anyone can afford and that the organization offers in the name of its general concern for the whole population; **efficiency** is the fundamental value of public organizations, as it is with **private organizations whose main goal is represented by profit,** i.e. the increase of profit; on the other hand, in **non profit organizations** the fundamental value of the organization is represented by **flexibility.** Direct relationships with the citizen and the need to enter a niche together with other organizations in the busy social sphere determine non-profit organizations to choose flexibility as their fundamental value. Besides the values that are cultivated and that are specific for each type of an organization, there are also **secondary values** which structure organizations. D. Katz and R. L. Kahn (1978, p.52) point out five organization subsystems, which they regard as privileged areas in which power is exercised:

- The production subsystem
- The subsystem of institutional relations;
- The functional role participation subsystem;
- The adaptation subsystem which aims at modifying the organization;
- The direction subsystem which deals with administration, arbitration and control.

Other authors identify another organization subsystem, the sixth one, i.e.: communication subsystem in which power is also exercised by other actors who act in the field of institutional publicity, public relations and informatics.

Structure, facets and steps to be taken for building the public image

Useful details concerning the concept of representation

Taking into consideration the fact that image is a representation or an idea which the consumer or citizen envisages as to the character and personality of an institution, we should first of all bring a few explanations for the concept of representation, as it is studied by psychology, and also for the fundamental constructivist statement (illustrative for the Palo Alto School) which asserts that **we build the world when we think that we perceive it** and that **what we call reality is an interpretation that is built through communication;** afterwards we are going to bring into evidence the elements which compose public image.

Phenomenology of social sciences has proved that reality is socially built, stating that the human fact needs to be built even at the ordinary level of mundane relationships and exchanges. All realities which make up our daily life are the result of a collective building activity accomplished through interpersonal exchanges and they are based upon reasoning rules that are commonly shared by our cultural group members. In other words, whatever does not have an a priori significance to somebody acquires a meaning after it was transformed through communication, structured through the organization and then interpreted. We bring into evidence

the fact that, on the one hand, our perceptions depend on our beliefs, wishes and values to a great extent and, on the other hand, the fact that we act as we perceive. At the same time, success or failure of our actions determine the different ways of perceiving, which we are going to present below.

After the **transformation** – through communication, the **combination** – through organization and the **interpretation** of elements – i.e. finding significance for an emerging reality, one has to search for its **representation**. Any representation is, first of all, a mental one and it implies the convergence of a fact, emotions, feelings, and memories etc. – all of them being stored in memory. Reality can be interpreted on more levels. The representation of reality implies another level of interpretation: the "translation" of the perceived element. We refer to translating what we have imagined, structured, built and formed into something which is comprehensible for ourselves and for the others.

Thus, the concept of representation studied by psychology covers more levels of analysis for social phenomena (A. Mucchielli, 1996. p. 80):

a. at the surface level, the outer level (maximum visibility), a representation resembles a painted image, it is what is offered to be seen, what is symbolically restored, i.e. what bears the mark of the subject and his/her activity exactly like in a work of art (painting, literature etc.); we see the topic, the characters, the strong contrasts, the effects of the perspective or the effects of tonality, depending on what we are talking about: a painting or a piece of music etc.

b. at a different level, representation is a form of practical knowledge, a sort of modelling and personal or social integration of the information that one subject possesses.

Consequently, at inner level, social representations are a system of representation and they determine our relations to the world, as well as to the others, while directing and organizing behaviour and social communication. They function as a cognitive system of interpretation and influence our vision of the world (Weltanschauung). At a different level, also at an inner one, social representation is a foundation of the socially acquired knowledge which builds a common reality for a social aggregate. As P. Watzlawick said – **human relationship is a pure construct,** a matter of opinion which, in the most optimistic scenario, partners share to a smaller or greater extent. The world is a world of interaction, where the individual is defined in relationship with the others and also through his own relationship. In any process of communication, P. Watzlawick says, partners offer themselves in order to define their relationships or, to put it directly, each person tries to determine the type of relationship he has with the other one. The notion of influence is intimately linked to the notion of interaction and to the one of interaction system. "Any behaviour adopted in relationship with a person, no matter who this person is, finally proves to be a communication of the way in which the relationship with this person is seen and, consequently, of the influence it has over that person."

A. Elements which make up the image of an organization

Taking into considerations the explanations given as to the different levels of analysis, with more or less degrees of visibility that exist in the structure of public image, as well as in the human tendency to "build" and interpret the perceived reality (intentional character of perception), we are going to bring into evidence the elements which make up the image of an institution.

According to **M. Cohen and P. Gschwind** (1971, p. 73) the public image concept overlaps two types of images, which are often mistaken**: material** and **immaterial image.**

1. Material image refers to what is tangible and palpable: **nationality** (is taken into consideration when the organization pursues its activity in several countries), **size** (the enterprise with a higher number of employees and a high turnover can offer more advantages than a small enterprise), **dynamism** (is associated with high technology), **products and services** (are the

ambassadors of the enterprise), **physical image** (all visual elements: from products to premises). **Visual identity** of an organization (the spirit of the organization) includes: the logotype (an expressive image), the monogram, the graphical elements, the institutional colours. In most cases, an enterprise or an organization is judged according to its physical image, so the enterprise/the organization is interested in harmonizing this image with its fundamental objectives. Visual identity is a form of institutional communication because it expresses and represents the presence of the organization in all its forms of existence; visual identity materializes an abstract concept, i.e. the spirit of the organization. Visual identity translates organizational culture and personality. The code of colours and sounds, the way in which the brand or the organization's name are written, the chosen visual symbol – all of them make up the **business card** of the organization. The endurance of visual identity supports its fame and the way in which the organization is perceived.

When referring to the logo, Jean-Marc Decaudin (1995, p. 133) pointed out the following qualities which he considers to be fundamental:

The qualities of a logo

Loyalty	The Logo translates institutional image
Legibility	Simple, legible on all documents, the logo has to facilitate its memorization
Differentiation	The logo does not have to be mistaken for the one of the competitors
Unification	The logo has to be recognized and accepted by the internal and external public
Adaptability	The logo has to be present on business cards, invoices, labels
Endurance	On average, a logo lasts between 10 and 30 years

2. Immaterial image is made up of several types of image which overlap: social image, financial or stock exchange image, employer image and the global reputation of the organization. Immaterial image represents the personality of the enterprise or organization as it is perceived by different types of public. Personality is built rather through subjective perception than through objective evident details. Institutional image makes deep psychological factors, such as sensitivity and emotion, interact.

J. Perlstein, in his book *L'angoisse du gardien d'image; La publicite, nerf de la communication* (p. 73), comes with an approach which comprises different **communication levels as to the building of an image:**

1. identity elements: name, nationality, size, enterprise position, the region in which it is located, its financial situation and export capacity;

2. performance parameters: production, efficacy, products or services, perspectives, management, financial relations and export capacity;

3. affective relations: congeniality and capacity to speak the truth, contribution to the wealth of a country, conservation of energy, the will to reduce pollution problems etc.

Concerning the same aspect – the elements which make up the image of an organization, **Thierry Libaert** and **Andre De Marco** (2006, pp. 106 – 109) suggest that public image is a sum of **three factors**:

1. **notoriety:** this value can be measured by surveys, asking those who are questioned to classify organizations which pursue their activity in the same domain. Notoriety of an organization is associated with its leading position: the name which first comes to our mind when we refer to a category of organizations that deal with the same type of activities is the name of the organization which enjoys the advantage of notoriety;
2. **identity:** is set of physical characteristics that are specific for an organization (type of activity, nationality, turnover, number of subsidiaries, geographical location, number of employees, leaders etc.). Each variable can be measured and if it is necessary it can be improved;
3. **attractiveness:** is a set of subjective representations, often affectively grounded – an organization can be appreciated because it invests in social actions and it equips schools in deprived areas with computers, another organization can be appreciated for its environmental actions.

Referring to this topic, in one of his previous books, **Thierry Libaert** (2008, pp. 84 -85) distinguishes several elements which can circumscribe the **image of an organization:**

- the expectations concerning the image of the organization: what is the aim of creating an image which brings into evidence certain characteristics: to increase sales?, to convince investors to make investments?, to enhance community's trust in the organization? etc.;
- the gap between image and the activities of the organization: is it possible for the image to be wrong?;
- the parameters of the image: is the organization known?, is it notorious at least to a small extent in society or community?
- the elements which make up the image: what are the public categories that the image is built for?, what are the characteristics of these types?, which might be the elements of the image that would meet the public's expectations?
- the factors that are fundamental for the image: there are a lot of variables – from the architecture of the organization's premises to the employees' uniforms, from the mass media discourse regarding the organization to the public events in which this is involved – which can be enumerated here.

B. Different facets of the public image

a. Institutional image

It includes all of the following**:** the quality of the institution's products, its success, the degree to which it is socially involved, as well as the sum of efforts it makes for imposing its own specificity. The institution must create its own independent personality as far as the brand, products and services are concerned. It **must enhance the degree of credibility and notoriety it enjoys** (e.g., the image of a government means more than the services it offers to the public, it also means the way in which the public perceives that government). Institutional image is built upon institutional communication forms and, in general, on the global communication policy or the enterprise project as it is known in special literature.

Consequently, **institutional communication** comprises all communication forms which are meant to turn to good account an organization's personality. The main objective for an institution is to devise, make or distribute a product or a service. Institutional communication has two particular features: it refers to the organization itself and it borrows the mass communication style. This type of communication leads to commercial communication (when an organization has managed to impose its image, it is much easier for this organization to have its products accepted). It is very important to bring into evidence the fact that institutional communication attempts to build and maintain the image of an organization or institution **without having a commercial goal**. It is important for the public to be informed about the way in which the organization contributes to

the general welfare, by creating public interest messages, by adopting a certain position as to the existing problems which are of public interest and by aiming at the public welfare, the organization is perceived as a good community actor. The institutional image is created in time, which is why institutional campaigns last a long period of time. In order to sell an image, it is necessary to define it and then to broadcast and to permanently consolidate and renew it.

Institutional image has to address both to the **internal and the external public**. In an age in which products have been standardized, competition has become stronger – each organization or enterprise has to be different from the others, to impose its image and to impose its legitimacy and personality. Institutional publicity helps an organization create a strong personality, it removes external obstacles, it gives coherence to the activities performed by the institution and it also brings dynamism to its activity. The organization, no matter if it is public or private, has to try to make itself known, to explain or justify its existence and role in society.

Many authors, such as Cristina Coman, Joe Marconi, Sandra Oliver consider that "public relations are a form of institutional communication" (2009, p. 51). This persuasive element is meant to influence the consumer's opinions, attitudes and beliefs in order to sell the notoriety of the enterprise. Each organization or institution has an individual personality and it is important for its image to be perceived by society in a favourable light. "Public relations try to create a psychologically favourable image for the organization and its activities. They create an atmosphere of congeniality which depends upon knowing, understanding and relying on that organization." (Cristina Coman, 2009, p. 46) The organization makes use of publicity in order to build the image it intends to present to the public. At the same time, **institutional publicity** aims at selling ideas not products. It tries to influence the perception and the vision of the public. Publicity makes use of two strategies: **self-publicity** (the message explains the public that it refers to the way in which the organization contributes to the public welfare); **public utility publicity**: by means of a social interest message, the organization expresses its position as to certain problems which affect the public welfare (drugs, domestic violence, pollution etc.).

As to the public relations activities and their aim to create an image, Joe Marconi (2007, p. 83) underlines the **importance of the message**, which is a means of bringing into evidence the image of an organization. "The message is the fundamental statement for the subject of a PR plan and the main reason for which the public has to take into consideration the subject – it is a declaration of value since it describes or indicates the value of a subject to the public.". The **image is** what the public probably regards as the representation of the subject, insisting on what the organization/company/PR adviser could have found out after hearing a series of discussions, comments, commercials, mail, recommendations or direct criticism or from any other source. In consequence, public relations are a fundamental factor which determines the way in which the public image stands out; the emphasis on details, colours or glamour, as well as beauty – all of them are subjective aspects.

At the same time, the above mentioned author emphasises the dangers which can emerge if we separate the concept of image from the one of reputation and responsibility. **The image which is similar to perception** (from this point of view, the image can have a more superficial connotation, being associated with **illusion**). PR practitioners are often described as "creators of image"; their clients and employers hire them because the former are interested in how their image looks and they want it to look as well as possible. Image is similar to perception, though, according to other people's opinion, there is a significant difference between perception and reality. Anyway, if we consider that perception does not coincide with reality, this means that the image envisaged y the subject is a lie. Obviously, this is not always the case (or one wants this to happen as rarely as possible). One of the PR specialist's main priorities should be not only the task to create a positive image, but also the task to validate this image so that the created image would

not appear as a fake, and it should not rely upon any tricky cliche. Thus, **"the image should be similar with reputation**, a term which implies a certain level of truth; when separated from reputation, the image has superficial connotation and it is even associated with illusion." (Corina Rădulescu, *Lex et scientia*, 2009, p.35).

Joe Marconi reminds the fact that PR national agencies have created "reputation management" practices and he underlined the seriousness with which this problem is tackled, but no one has ever created an "image management" practice, hoping to be seriously taken into consideration.

As to an organization's or person's reputation actions speak better than words, but, however, words really matter in creating and maintaining reputation. In the next lines, we are going to present a few aspects which help us define image in relation to reputation.

- The importance of being consistent when creating reputation.

A single event or one single presence in a certain place, at a certain time may build an image, but, however, reputation is built in time, usually implying a history, consistency and a certain degree of predictibility regarding one's performance or behaviour (for example, a leader acquires enormous force simply thanks to his consistency, to the continuity he proves in everything he makes and anywhere he is present: in the public, in books, in personal conversations, press releases or in other circumstances; on the other hand, persons who have an unpredictible behaviour fail to build a reputation).

- Overcoming a negative image.

Once created, these perceptions can be modified, but any modification requires time and it is expensive, implying large sums of money which could be allotted for new marketing programmes and not for correcting past mistakes. In such a situation, the company's image is affected on short term, while reputation is affected on long term. Unfortunately, sometimes such problems cannot be controlled by anyone. For example, when negative reviews are published in the press and on the Internet, they can be consulted any time someone accesses the name of the company or of the organization by using an Internet browser.

b. The image of an enterprise:

First of all, an enterprise reflects the charisma, management phylosophy, culture, leadership, creativity, boldness and clear-sightedness of those who set it up or run it, as well as their aspirations, attitudes, accomplishments, satisfaction degree and their employees' cohesion. The enterprise is ranked according to its performance, quality and cost of products and services, its integrity and, finally, according to its social and community involvement.

c. Brand image/Institutional image

Brand mark refers to any sign that helps us distinguish the products beloning to an enterprise or to another one. **Brand image is complementary with institutional image**. Brand image can rely on a characteristic of the product or on the good repuation of the enterprise which produces it, e.g. Adidas, Mercedes etc**. Institutional image in its pure form** aims at creating sufficiently clear and precise organizational image in the consumer's mind so that this image distinguishes itself from other brand mark images. We refer to the **identity of the enterprise.** The dictionary of psychology defines identity as a social fabric which is created through "names, roles and social functions, as well as by recognizing legal rights and duties, adherance to history, tradition and involvement in social actions." (Ursula Şchiopu, coord., 1997).

The brand image of a product depends upon the type of personality which is imposed on it by the producer organization. For example, the brand image which Pierre Cardin created is a

luxury image and this perception applies to a series of products belonging to this brand. For the brand image to be strong, the product behind the brand mark has to be original as far as its quality, design and content are concerned. The brand is a verbal means, a figurative or abstract sign which allows a physical or moral person to differentiate its products or services. A brand image is more penetrating than the organization image because buyers have more information about the brand itself than about the company that has created it. **Brand image is often mistaken for institutional image**, in fact there are two different perceptions which overlap in the public's consciousness. In reality, the public does not know whether the enterprise makes use of the so-called institutional communication or brand communication, it is enough to have a positive perception of the enterprise, reinforced by these two methods**. Brand image is always subjective and emotional: it defines the product's personality**. It tends to create an emotional image in a positive way, while trying to make the target public love the enterprise and buy. Today the brand has come to make a product notoriuos.

The brand is first of all a signature/a name by which the organization acquires personality. The signature which an organization chooses to represent and individualise itself can have **different forms: the logo, the corporatist signature, the symbol.**

The brand is represented by a series of symbols. These can be **intentional symbols** (they describe the object of the sale), **interpretative symbols** (they invite the consumer to link the brand to his/her personality) and **connotative symbols** (they describe the attributes of the object, for example: the name of the parfumes).

The brand has **more functions:**

- it identifies the product;
- it individualizes the product from other products with which it competes;
- it offers warranty for the product, it indicates the origine of the product, it helps the product adapt to the psychological needs of the public;
- it can serve as a channel of communication when the brand image is well received by the public.

There are **several types of brands:**

- the producer's brand (it guarantees the origine of the product, e.g.: Mercedes)
- the distribuitor's brand;
- the brand mark (it confirms the line and the quality of the product);
- the country brand.

The power of images and marks

The buyer's option to buy a famous brand product to the detriment of another cheaper one reflects the power that marketing has and the way in which the customer answers to the brand image. People buy image as they buy clothes, cars and other products (they obtain a style – e.g., the Calvin Klein's style).

A well-known example of the power of the brand is the one in which **the name –** the element which helps us define the brand – has little or nothing to do with the design, the manufacturing, development, marketing or delivery process of that very brand (as it happens with secondary products in the fashion industry, in which designers use their own names for perfume, jewellery, colours, furniture brand). For example, Calvin Klein has launched not only products, but also brands, and their power is visible in the clothes he creates, because the labels which have been sewn on clothes for years and years have become the key to success, whereas design has become less important. As brand images are becoming the engine of selling and "the original style" of a designer – Calvin Klein, Tommy Hilfiger, Burberry, Ralph Lauren etc. – is no longer enough (this is so also because of the low price copies of their original products which are on sale), famous designers, as the ones we have just mentioned, and traders have started not only to apply their

logos on clothes and secondary products or accessories, but also to display them wherever they are visible.

Market research must be an important part in the PR plan. For several decades studies have confirmed that many people decide to buy a product (from houses to cars) – relying upon image and reputation. Price, quality, guarantee, value and other aspects are shared by the most important competitors (Coca Cola and Pepsi, Ford and Chevrolet, United Airlines and American Airlines etc.), but, finally, the image of the product, brand or company is the one which is visible to the consumer. Taking into consideration this important aspect, leaders of different organizations and companies should pay particular attention to market research. Many executives do not wish to invest in research, considering it does not offer them any new information and thus regarding it as a waste of money. On the other hand, there are persons who consider that research might point out things which they did not know or they did not plan but which they should have been informed about. No matter what the situation may be, an organization or company must know the market, the preferences of the public and whether its customers are loyal to the company or whether customers expect to find better products.

d. Product image (the image a product builds thanks to its inner qualities)

Brand image/product image:

The brand of a product can create a certain image of that product; on the other hand, products themselves can build an image thanks to their inner qualities. Brand image and product image sometimes overlap. Products can build an image which overlaps other types of image. **Fame or prestige** are given by the image that one organization has created.

In the public sector, the use of the brand creates a positive image and it generates fame and a good reputation – which are all acquired thanks to the superior quality of services or products manufactured in a particular domain of activity and whose superior quality guarantees the success of these products. For example, a hospital can have an international reputation. In extenso, one can use brand image to refer to an institution's image. The brand is a guarantee for quality. Public institutions names are often written in an abbreviated form. The ennumeration of the words which stands for an institutions (e.g., MDRT = Ministerul Dezvoltării Regionale şi Turismului = *MRDT = The Ministry for Regional Development and Tourism*) can also stand for their reputation.

Not only the private sector should try to create a positive image for its institutions thanks to its products, services and organizations, but also the public sector should put to good value its services and programs which the lawmaker, the political party or the administrator tries to impose.

Sometimes this continuous attempt to build a favourable image can determine both sectors to even forget about their products, services or programmes and rather to insist upon the way their image is perceived. Citizens or consumers are often misled by appearances and they encourage in this way the enterprise, organization or institution to seduce the customers.

C. Steps in building the public image:

1. To draw attention, to create a positive perception, to communicate a feeling of congeniality. The organization/institution aims at making its characteristics, style, activities known so that it would no longer be anonymous; by means of a good institutional communication strategy the organization/institution manages to build a coherent institutional image. Research proves that the positive or negative, precise or general etc. perception that we have about an institution influences our trust in that institution and makes us speak in a favourable or unfavourable way to other persons about it. The institutional or brand image (if we discuss about the business environment) plays a key role in achieving performance and the **reputation of an organization is similar with institutional image**.

2. **To consolidate loyalty, trust**. Institutional image allows an organization to impose itself as a distinct presence and to determine the consumer to remain loyal to the brand mark launched by that organization. Maintaining on the market means investing a lot in advertising. By granting value to a mark, institutional publicity reduces the consumer's uncertainty and anxiety. The institution or organization has to make the public think of it and do this in a positive way (we could give the following example from the public sector: a government may no longer remain at power at a certain moment in time, but the political party that represented this government must try not to lose its people).

3. **To increase benefits**. Priority of a positive image in the eyes of the public brings benefits to an institution / organization / enterprise, according to the following "formula":

a. The institution is liked and supported by the public;
b. The organization acquires prestige and profit;
c. The enterprise makes profit.

4. **Capacity to overcome crises.** In case of a crisis, the credibility of an organization is affected. The image that one organization builds in a period of stability is a background for receiving messages in case of a crise; if the organization has a positive image, it will face negative pressure from the environment. As long as a period of crisis exists, a good institutional image is impossible to be created; in such a case, the following problems must be taken into account:

- Do we have to communicate or not? The general rule is to communicate in order to avoid rumour and disinformation. Not to communicate means to allow different uncontrolled senders to issue different unwanted messages. At the same time, silence can also be perceived as a lack of responsibility.
- When do we have to communicate? As quickly as possible.
- Who has to communicate? It depends upon how deep the crisis is; the deeper the crisis, the higher in rank the communicator.
- What do we have to communicate? The truth.
- What techniques do we have to use? Direct dialogue, contact with the press, public relations.
- Do we have to be ready for a situation of crisis? Yes, we do; each organization must have a crisis communication cell.

Conclusion

In this paper we have tried to prove that building the image of an organization/institution (both by the manager and also by the consumer/citizen) is a complex and long lasting process, and it cannot be confined to external communication or to other forms of communication that have a high degree of visibility (e.g., visual identity); on the contrary, the image of an institution is built in time and it comprises a set of phenomena that reflect – without dissimulation – institutional reality. We can give the following example: a tree has beautiful fruit if the root, stem and leaves are healthy and if they function well both individually and together as parts of the entire plant; in the same way, the organizational "tree" starts with the "root" – organizational culture, being followed by all forms of communication (internal and external), including visual identity; the quality of products and services offered to the consumer / citizen, the contribution brought to the community by the organization – all of them determine the representation that the receiver envisages as to that public/private institution and, in consequence, this image is "coined" as reputation (etymologically, reputation means examination, appreciation – Lat. *reputatio,-nis*).

Consequently, we firstly defined public image (its characteristics and structure), then we pointed out its different "facets" (which often overlap and are mistaken for each other) in order to reveal the specific difference of institutional image (which is basically built upon institutional communication, benefiting from the fundamental support offered by PR activities) which in its pure form aims at creating in the consumer's / citizen's mind an accurate image of the enterprise's / institution's identity; this image is different from the commercial brand. In the final part of our paper, we have briefly indicated the "steps" one has to take for building this identity.

In the present article we have brought into evidence the risk of confusion which might appear – not only between the different hyposthases of the public image (for example, between institutional and brand image), but also as to the excessive insistance upon the appearance of the institutional image (e.g., external communication, relation with the press), to the detriment of the inner - sometimes "invisible" - significance of an institution (e.g., behaviour patterns, different aspects concerning organizational culture), but, however, to the benefit of the image creation process. That is why, before presenting the characteristics of each "facet" that public image can have, we have enumerated an important number of its components, considering that all of them are fundamental and contribute to creating a specific profile for the institution.

Sometimes one can see that, in this continuous search for building a favourable image, both sectors – the public and the private ones – happen to forget about their products/ services/programmes in order to emphasise the way their institution's image is perceived. In turn, citizens/consumers are misled, thus, encouraging the organization / institution / enterprise to seduce (manipulate) them. In fact, in this paper we underline how importat it is not to transform the image building process into a goal in itself, but into a complex, long lasting process, which should mobilize the entire institution and all its levels; at the top of the "pyramid" of actions, one should find the services/products of an institution, as well as its contribution to the society and community it is a part of.

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CAREER OPPORTUNITIES IN A DOWNTURN SOCIETY

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Abstract

The world crisis that began in 2008 has negative influences over financial and economical-social structures, mainly affecting the young working population. The most affected by the current economical and financial crisis is the youth. Jobs offer for young people seems to have decreased to a significant extent, while they of all categories of job candidates are the most affected precisely due to their lack of experience and to the high costs for training new employees under the current competitive labour market conditions. Data from a study by the National Employment Agency indicate for 2010 that only 6.36% of young unemployed (under the age of 25) found jobs within the first three months. In the same time, the main specializations for which personnel was still being recruited at the end of 2010 were IT, outsourcing, accountancy, engineering, retail and pharmaceuticals, according to recruitment agencies.

Keywords: *Young graduates unemployment, EU unemployment, chances of employment, downturn, international financial crisis, learning and education, professional experience and training, emigration, broken families.*

Introduction

In Romania, a country continuously troubled by transition, reforms, motions and internal crises, all overlapping on the global financial and economic crisis, we are beginning to wonder whether we are somehow too many or too young or untrained for finding our purpose within this system. The consequences of the global economic crisis triggered in 2008 are being felt worldwide economic.

Thus, the unemployment rate among young people increased in all the Member States of the European Union. At European level, university graduates face the greatest difficulties in finding a job to be appropriate for their training level. In early 2009, approximately 17.5% of young Europeans did not have a job, compared with 14.7% in early 2008.

The labour market deterioration in Romania occurs in the third consecutive year of recession, amidst an unprecedented austerity plan. In November 2010 35.6% of young people aged between 15 and 24 years were unemployed, compared to 27.8% during the same period of last year. Women are more affected by unemployment than men, with an unemployment rate of 17% in

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2010 compared to 13.3% in November last year. According to a study made by the European Space Agency, the number of unemployed in 2010 was 692,577, meaning it was increasing with 30.2% compared to the previous year.

The purpose of this paper is not to provide solutions, but to determine, based on statistical data, the critical situation in which most graduates are found in Romania, and we are also trying to analyse some of the causes of this situation.

Literature review

The economic development, the evolution of the labour market, issues of integrating youth into the labour market and the migration of work force phenomenon represent issues that are viewed with great interest by economists and sociologists. Economic literature has gained over time from many studies of famous authors including economists such as: Theodore W. Schultz ("Investment in Human Capital") – Nobel Prize winner, Gary S. Becker ("Human Capital: A Theoretical and empirical Analysis, with Special Reference to Education") and GJ Stigler who are also Nobel Prize winners in Economics, Angel de la Fuente and Rafael Domenech ("Human capital in growth regressions: how much difference does data quality make? An update and further results"), studies of the European Council, EUROSTAT, as well as numerous surveys performed by agencies such as Daedalus Millward Brown, Catalyst Solutions and Instituto Nacional de Estadistica of Spain. In our country, the works of Ionel Muntele („Migrations internationales dans la Roumanie moderne et contemporaine"), Daniela Nicoleta Andreescu and Aurel Teodorescu ("Romanians' work migration after 1990") are significant, as well as the studies prepared by the National Agency for Employment, National Institute of Statistics, International Labour Organization and the Credit Risk Control of The National Bank of Romania.

Theoretical background

• Employability of youth in a downturn society

The global crisis that had been triggered three years ago has negative influences on the financial, economic and social structures affecting primarily the young population that is fit for work. Young people are the most affected by the current financial and economic crisis. Job offer for them was significantly reduced and they are among the most affected category of candidates, because of lack of experience and very high costs for training new employees under the present conditions of competition on the labour market. In the European Union there are currently 96 million young people between 15-29 years, which means almost 20% of the Union's total population[1].

Thus, young people from European Union become an increasingly valuable resource being essential to providing work force for national economies. For every young person the chance to receive a quality education means the opportunity to develop his skills at a higher level, to take advantage of professional counselling and guidance and thus to have increased opportunities to be

[1] Marioara Ludusan, Monica Angela Bara, "1 decembrie 1918" University of Alba Iulia in Centre for Social Research, Political and Administrative Sciences, Society and Politics no. 1, April 2010

employed. Increased investment in education and initial training, generate the most important gains in the future participation of the individual on the labour market, which makes social integration through work to represent an important part of the efforts to reaffirm their opportunities. But given the current downturn economy, safe jobs are increasingly scarce, many young people of the European Union being forced to accept temporary jobs or poorly paid compared with their training. Frequently, in the desire to find a job, young people do mind their specializations and apply for a job at any company that accepts their CVs. A study conducted in Romania, based on the "Job-Shop" Fair, organized by the Board of European Students of Technology Bucharest, shows that in 2009 young university graduates accepted wages that were lower up to 40% - 60% than those requested in the previous year. In the same time, graduates of the last two years of master's degree agree to accept jobs that do not require higher education, but rather high school education. These compromises determine many young graduates to have difficulties providing for themselves, without having the opportunity to become economically and socially independent and without being able to fully integrate into society.

In this period of downturn, job vacancies do not offer attractive wages, according to the youth's aspirations. However, according to statistics, many young graduates want to work. Also, skills and competences acquired by young people are not always fully relevant to labour market demand, which contributes to higher unemployment.

Unemployment among young people age group between 16 and 24 has increased in all Member States of the European Union (data from 2008), except for Bulgaria, where it decreased from 13.9% in the first quarter of 2008 to 13,5% towards the end of the year. At European level, young graduates face the greatest difficulties in finding an appropriate job. The same statistics show that in early 2009, approximately 17.5% of young Europeans did not have a job, compared with 14.7% in early 2008. This value of the analyzed indicator represents more than double of the unemployment rate in the EU, which, for the same period (2008 - 2009), has increased from 6.8% to 7.9%. After three years of sustained economic growth, while the indicator has decreased, the unemployment rate among young people began to grow in the first quarter of 2009 so that in the States of the European Union that have adopted the Euro currency, the seasonally adjusted unemployment rate among young people, was of 18.4%, twice higher than the European average of 27 countries (8.8%), the Euro area recording 3.1 million unemployed youth compared to 5 million unemployed youth in the European Union.

According to a study conducted by EUROSTAT[2], in 2007 (interestingly, this study provided for 2009 a youth unemployment rate of 60% at European level - 35.7% for women and 22 2% for men) the overall unemployment rate in Romania has remained stable compared to 2006, 7.2%, but it has evolved to 7.6% at the end of 2009. Recent data of the National Agency for Employment (NAE) show that the number of unemployed reached 601,673 at the end of August 2009 compared to the 403,400 level recorded at the end of 2008. In July 2008, in Bucharest the number of unemployed exceeded 18 200 persons, of whom 1,500 (8.2%) were university graduates. However, alarming statistical data are in regards to youth unemployment rate, which is a continuously increasing indicator, increasing from 17.2% in 1999 to 23.8% in 2005. In 2010, data from a study of the National Agency for Employment show that only 16,500 unemployed youth (under 25) have obtained jobs within the first three months of 2010, a total of 105,007 young graduates being registered as unemployed, more precisely a percentage of 6.36. The number of

[2] Fewer people outside the labour force in 2009 - Issue number 57/2010

university graduates who receive unemployment benefit has reached almost 53,000 in September, the highest level of post-December period, taking into account that every year, approximately 100,000 Romanian graduate a higher education institution.

The number of unemployed persons with higher education[3], has tripled in the last three years, given the fact that in 2008 there were two generations of graduates (with undergraduate studies of three and four years), following the conclusion of the Bologna Convention which provides the length of undergraduate of 3 years and 2 years for the Bachelor's degree. The employability rate of graduates has decreased as a result of the fact that private universities have lost credibility because of issues regarding the legality of the diplomas. The education system is the only one to blame or is there a combination of factors which contribute to this state of affairs?

It should be noted that in the European Union are currently 6 million young people who manage to complete only the maximum compulsory education (14.28% of youth aged 18-24 years). In the same time, approximately 108 million people have a low education level, which represents approximately 33% of the European Union workforce. Also, those in a high percentage who failed to complete high school have fewer opportunities to participate in lifelong learning. Challenges exist for preschool education also as in EU countries one of seven children aged 4 years is not attending pre-school, the majority of them coming from families with a precarious socio-economic status.

There are similar, but somewhat different, issues depending on the geographic area within the EU countries. Romania is in a disadvantageous position compared both to the average European, as well as the former states from the Eastern European space.

Romania is far from achieving in 2010 the targets established by the Treaty of Lisbon for four of the five agreed performance standards: skills in reading / literacy, reducing the share of young people who drop out prematurely the education system, increasing the number of those who complete upper secondary education and participation in lifelong learning. At the same time, at European level, only the objective regarding literacy skills is unlikely to be achieved.

As can be seen in the EUROSTAT data, Romania is far from the goal set for young people aged 18-24 who have left early the education and training system and have completed at the most the compulsory education. Although there has been a slight improvement compared to 2000, our education system faces a serious challenge represented by nearly 20% of young people aged 18-24 who leave the education system without having at least a mid-level qualification. Comparative data on the indicator of early leaving the education and training system of young people show that Romania continues to place well below most of the countries that recently joined the EU such as Poland (5.0%), Czech Republic (5.5%) and Slovakia (6.4%), etc.

[3] Ziarul Financiar, September 2009

Table 1. The performances of the European education systems for the indicators adopted as reference level in Lisbon (2007

European Union Countries	Mathematics, science and technology graduates as percentage of the total higher education graduates	The percentage of those who participate in lifelong learning	The percentage of population aged 20-24 having completed the upper-secondary education	The percentage of population aged 15 having low performance in literacy
European Union Objectives	**Maximum 10.0**	**Increase by 15% compared to the reference year**	**At least 85.0**	**Decrease by 20% compared to the reference year**
Czech Republic	**5.5**	**27.4**	**91.8**	**24.8**
Estonia	**13.2**	**43.5**	**82.0**	**13.6**
Hungary	**12.4**	**30.0**	**82.9**	**20.6**
Latvia	**19.0**	**32.8**	**81.0**	**21.2**
Lithuania	**10.3**	**35.2**	**88.2**	**25.7**
Poland	**5.6**	**36.6**	**91.7**	**16.2**
Slovakia	**6.4**	**35.3**	**91.5**	**27.8**
Slovenia	**5.2**	**26.2**	**89.4**	**16.5**
Bulgaria	**18.0**	**41.1**	**80.5**	**51.1**
Romania	**19.0**	**40.0**	**77.2**	**53.5**
U.E. Average	**15.3**	**31.2**	**77.8**	**24.1**

Source: EUROSTAT, 2008

However, one must not forget the fact that our country is facing now (like most European countries) issues related to aging population, significant emigration, youth lacking family support and an acute lack of professional qualifications.

In these precarious circumstances and influence of economic recession in which the labour market in Romania is becoming also a market which increasingly emphasizes high skills, one may believe that in the future years, population with low professional qualifications, will be more and more disadvantaged. Until the labour market record positive developments, young graduates in Romania can choose from the few options offered by the labour market in areas such as manufacturing industry, finance, insurance, real estate or the distribution of electricity, water and gas sector.

A similar situation is found in the case of the indicator on the share of youth who have completed upper secondary education. For this indicator, there is a negative deviation of 10% between the target set at Lisbon and the performance recorded by the Romanian education system in this regard. Although the number of Romanian youth attending a higher education institution has significantly increased in the last couple of years, the number of those who fail to complete the upper-secondary education is still high.

Our country is far from the EU average in terms of participation rate in education of 5-29 age group people. Meanwhile, other East European countries are close or even exceed this average (see Lithuania, Poland and Slovenia). This means that Romania still has one major disadvantage compared to the other countries within the European Union.

Another handicap is represented by the structure of migration by age group which is highlighting a higher tendency to migrate of young people of working age, those who actually have the best chance of professional achievements. Thus, approximately 50% of migrants were young people aged 26-39 years, who were already qualified and had a high potential of employment. In the last years, "the migration of clever minds" determined that the share of population aged 18-24, that were graduates or in the last years of studies, with high employment prospects or potential, to increase to 14%. Romanian higher education graduates represent approximately 10-12% of all legally immigrated persons, and this process has direct implications for young manpower resources in Romania. Immigrants with high technical and professional studies represent about 9% of the total. A third of all Romanian immigrants is held by persons who have completed only primary school or secondary school, and among them a significant share is held by children and adolescents who have emigrated with their family.

A comparative estimate demonstrates that the number of Romanians who left to work abroad in 2009 is somewhere between 2.8 million and 3 million people. However, the statistical data published in our country regarding the status of the migrated persons are outdated and they often underestimate the real situation because only those that have migrated abroad and whose residence is also abroad are being registered. Thus, according to the Statistical Yearbook of Romania from 2008, the number of immigrants is 8.830 in 2007 and from 2002 to 2007 their number is 65,874 people, which means approximately only 10.000 immigrants annually. How many Romanian citizens left to work abroad in 2009? To answer this question we can analyze two appraisal variants: one that is based on official statistics of the main countries of emigration, supplemented by survey data, and another that has as starting point surveys whose data are correlated with official data. Although the official statistical records are not updated, information known about Romanian migrants represents a valid basis for estimating. According to official statistics, requested by the CURS and provided by the Instituto Nacional de Estadistica from Spain, there were 731,806 Romanians in Spain in early 2009, of which 190.000 in the capital area of Madrid (Instituto Nacional de Estadistica:[4]). According to the latest Caritas Report "Romani a Immigrazione a Lavoro in Italia", in early 2008 there were 1.016 million of Romanian immigrants in Italy (of which 749.000 Romanian workers - 73.7% 239 000 family members - 23.5 % and 28.000 - 2.8%, other categories).

The values shown represent significant increases compared to statistical data from 2006, due in particular not so much to the new wave of immigrants, as to the formalization or legalization of the situation of many emigrants after Romania joined the EU in 2007. We can assume that in 2009 the total of emigrants remained approximately the same, the arrivals of new immigrants being practically cancelled by returning home of some of those affected by the economic recession. The official statistic, however, must be regarded as minimum values for the proportion of migrants from Romania. Statistical surveys of CURS from 2008 conducted at the request of the Metropolitan Library of Bucharest, in the capital areas of Madrid and Rome, show that approximately 35% of the Romanian workforce in these cities is working without a contract or

[4] http://www.ine.es/

work permit, some of them even carrying out criminal activities. Also, 20% of Romanian citizens who have emigrated abroad say that they are living illegally in these countries. Thus, to those approximately 1.75 million people emigrated from Romania that are officially registered in Spain and Italy, we can add about 350 thousand, meaning 20% (the percentage of those who live and work illegally). It results approximately 2.1 million Romanian immigrants in Spain and Italy. In other words, even for a minimal estimate, in these two countries are currently at least two million Romanians. The official statistics of EUROSTAT (Labour Force Survey) shows that the share of Romanian workers in Spain and Italy is about 80% of Romanian residents in the European Union. The data from the CURS survey in 2009, based on information gathered from people in migrants' households, reveal that the share of those two reviewed countries is 70% of total of people that left Romania to work in the European Union and about 60% of emigrants for employment worldwide.

Thus, if we accept an average share of immigrants from Western Europe by 75% in Spain and Italy (2.1 million people), to determine the actual volume of immigrants from Europe we must add to this number another 25%, meaning 0.7 million people, thus resulting a total of approximately 2.8 million Romanian immigrants left to work in European countries. According to the same CURS polls, the share of Romanian immigrants in other countries than those from the European Union is approximately 14% of the total migrants. Thus, given that 86% of immigrants are in the European Union, shows that approximately 0.45 million of Romanian immigrants are at work in other countries than those from the European Union, so as we can estimate the number of Romanian immigrants to over 3.25 million in 2009, of which over 2.8 million are in the European Union countries.

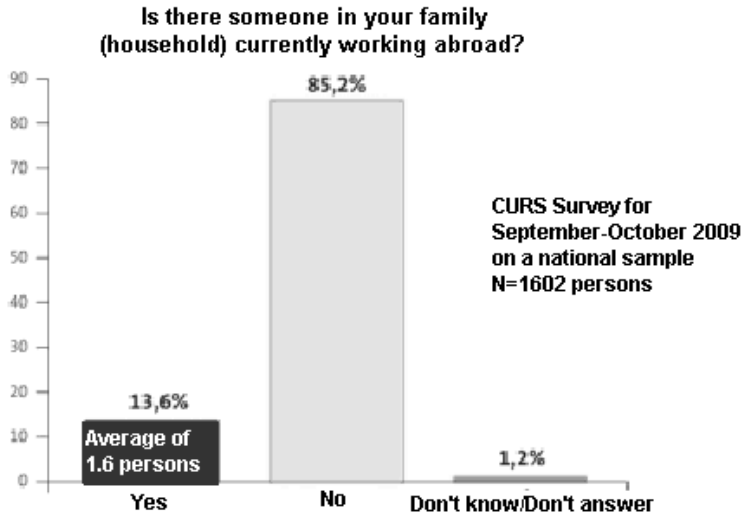
These citizens are temporarily living and working outside Romania. The forecast for the number of migrants abroad based on information provided by various surveys is based on three indicators:

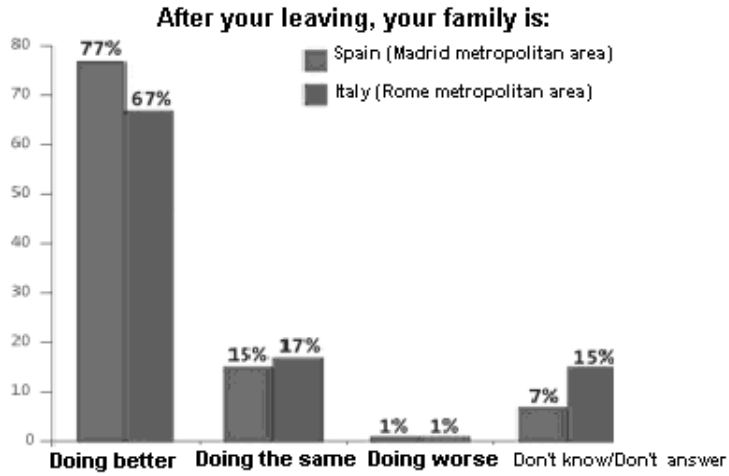
- Volume of individuals and families (households) who have all members gone to work abroad, at least temporarily;
- share of households with people who have currently gone to work abroad, of all existing households in the country;
- Average number of persons per household, gone to work abroad from households that have members left to work abroad.

According to surveys conducted by CURS, in 2008 in Spain and Italy, the volume of people gone to work abroad that no longer have a household in Romania is about 40% of the total migrants. In this category are included the reunited families: husband and wife, husband, wife, plus children, but also single people, especially young people. Believing that in other countries with Romanian immigrants the situation is similar, to an average percentage of minimum 40% compared to the approximately 3 million estimated migrants, the volume of this category of people who have no household in Romania is amounting to 1.2 million. At an average number of persons per household of only 2.5, one can estimate that abroad are approximately 480 thousand households of Romanian immigrants, which were not accessible to the conductors of this study, more precisely they were not in Romania at the time of the CURS survey.

From the survey data conducted by CURS (at the request of the Jurnalul National newspaper) it results that the share of households with at least one member who went to work abroad is of 13.8%. Therefore, 13.8% compared to 6.84 million households currently existing in Romania (7.32 million existing households in Romania, according to the census of 2002, of which we subtract 480 thousand households temporarily moved abroad altogether) results a number of

approximately 943 thousand people (with at least one member of the household left to work abroad). However, as shown in the chart below, the average number of people left to work abroad per household is 1.7. Thus, the number of people who are working abroad, but keep their households in the country, is over 1.6 million. In other words, in this minimal estimation variant (which considers both households that have left the country altogether, as well as the share of the households that remained in Romania and which have at least one family member left), we can say that the number of people going to work abroad is about 1.2 million plus 1.6 million, resulting in a total of 2.8 million people.





According to the data of the National Agency for Employment, the unemployment rate among young university graduates reached at the end of September 2010 to 7.9%. By comparison, in 1991 the unemployment rate was 2.3%, corresponding to 8000 unemployed university graduates. Since late 2008, most private companies have started to reorganize and to recruitment budgets in order to be able to keep business running at a medium level, operating massive costs cuts. This means that in Romania in 2010 there are 53 000 licentiates who do not have a job. And these observations reflect only the data recorded. The actual number of young university graduates without a job is much higher.

Most university graduates have failed to get a job because companies that still had vacancies have had a broader range of experienced candidates, who came from those over 570 thousand people that had been fired since the economic crisis began.

Under these conditions, university graduate receive this year (2010) due to the austerity imposed by the economic crisis an unemployment compensation of 255 lei, 15 percent less than last year for a period of six months if they submit the documents to the agency for employment within 60 days from the date of graduation.

Approximately 20% of the employees with higher education had pay cuts within the company they work for, and for 10% of them working hours have been reduced or are in temporary layoff, according to a survey conducted in March 2009 by Daedalus Millward Brown and Catalyst Solutions, on a sample of nearly 1.160 employees with higher education.

The main specializations for which personnel was still being recruited at the end of 2010 were IT, outsourcing, accountancy, engineering, retail and pharmaceuticals, according to recruitment agencies. If we analyze the ad submitted by Com Invest/Work -Study Abroad which selects university or college graduates for the training program in the U.S., we observe that the main areas of interest are: Hospitality Management, Food and Beverage Management, Information & Communications Technologies, Management/Business/Finance, Business, Sales and Marketing, Engineering. Com Invest/Work - Study Abroad also states methods to access and draw up the appropriate documentation because it considers that on the European level there is a lack of information in regards to writing a resume or a letter of intent.

Following this analysis, there appear contradictory aspects, on one hand young people's discontent with employment conditions, on the other hand their need to attain higher education, regardless of the profile. It is noted, in these circumstances, the absence of vocational schools as an alternative for higher education. At the same time the labour market suffers from the shortage of highly qualified work force and the Romanian secondary and university education produce "experts", however something different from the most important requirements of the labour market: ceramic tile fitters, construction and civil engineering electrical wiring plumbers, installers specialized in heating systems and home networking, etc. Meanwhile, at all job fairs the demand for skilled workers is of 80%.

Conclusions

Creating new jobs represents an European goal of most importance. At European level there has been significant progress: the employment rate, which reached 66% in 2008, had advanced the 70% target set in Lisbon for 2010. However, the spread of financial crisis and the associated

downturn imply that European countries should review their policies and to renew their efforts to return to the path of increasing employment, particularly for youth.

There are currently in Romania many families without children, but also families with three or four children, of whom one is emigrating and another is dropping out of school. Unfortunately this alarming situation is not occurring only in Romania, but, as we tried to demonstrate within this paper, it extends to other European countries. Then a question with disturbing implication rises: is the current global crisis just the precursor of the real social crisis that will trigger due to "aging population"?

This paper is part of a broader study of sociological research[5] conducted in collaboration with a group of teachers led by University Professor Elena Nedelcu, PhD. The average age of those involved within this research project is 40 years. Generation of 40-year-old is the "children of the decree" generation, those with 20 years of service. This is a generation which for 20 years has contributed consistently to the social insurance funds and also a generation that will be close to retirement in 20 years from now.

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THE STANDARDIZATION OF JUDICIAL PRACTICE AND HARMONIZATION WITH THE ECHR, IMPERATIVE OF JUSTICE: LEGISLATIVE PROPOSALS FOR ENSURING UNIFORM JUDICIAL PRACTICE

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The book entitled „The Standardization of Judicial Practice and Harmonization with the ECHR, Imperative of Justice: Legislative Proposals for Ensuring Uniform Judicial Practice" represents the final result of the research activity developed during the implementation of the Project no. PNI-IDEI/2009, cod CNCSIS ID 1094, supported by CNCSIS-UEFISCU.

The authors structured the information in two volumes. First of these volumes is entitled The Role of the Jurisprudence in Judicial System and it contains studies elaborated by all the research team members concerning the main aspects of the investigated domain. As main issues we can indicate: the role of the jurisprudence in common law system and the role of the jurisprudence in Roman-Germanic law systems. In the same volume is included a study focused on the appeal in the interest of the law, as a mechanism to ensure the standardization of the jurisprudence. Regarding the juridical nature of this instrument, the authors observe the controversial approach in the Criminal law doctrine. In one opinion, the appeal in the interest of the law is an exceptional remedy in the court. The other opinion, accepted by the researchers in the project, considers that the appeal in the interest of the law represents only a procedural instrument to unify the jurisprudence.

The first volume of this book has, also, a European dimension as it points the issue of the European courts jurisprudence influence over the national courts decisions. The same importance is awarded to The European Union Court of Justice and to the European Court of Human Rights, and the authors underlines correctly the particularities or each mechanism to influence the Romanian courts activity. The European Union Court of Justice has a very powerful instrument to influence the national jurisprudence and to give it a common line in order to respect the European treaties – the decisions regarding the prejudicial questions addressed by the Member States which accepted the courts jurisdiction. According to the article 267 from The Treaty on the Functioning of the European Union, The European Union Court of Justice has jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. According to the paragraph 3 of the same Treaty, where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. In

this way, the European Union Court has the possibility to unify the jurisprudence in the Member States.

As it regards the European Court of Human Rights, the authors observed that the Romanian legislator operated – in 2006 - a modification of the Criminal Procedural Code and, article 385^{14}, as a result of European court jurisprudence against Romania. In these cases the European Court decided that the right to a fair trial was violated when a person was convicted by the Romanian Supreme Court without being interrogated although he was present in front of the court. As a result, the new paragraph 1^{1} of the article 385^{1} from the Romanian Criminal procedural Code stipulates now that when a court judges the recourse, it is bound to hear the defendant, when he/she has not been audited in the previous stages of the trial, and also when these previous courts have not pronounced a condemnation decision.

The second volume of this book gives more valuable instruments for practitioners in law field, as it concerns the causes of the inconsistency of the jurisprudence. In the beginning of this volume, the authors indicate the causes of the inconsistency: the lack of more effective instruments to ensure the jurisprudence uniformity, frequent modifications of law, law imperfections, reduced number of judges considering the number of cases, the impossibility to have a real-time access to other judges' decisions, weaknesses of the judicial systems organization, inexistence of any continuous training program, and the lack of financial resources for the judicial system.

At the same time, in this volume, the book includes a valuable exam of the decisions in the appeal in the interest of the law Romanian High Court of Justice pronounced. The study is more useful to the practitioners as it awards the same importance to different fields of jurisprudence: criminal law, criminal procedural law, administrative law, fiscal law, labour law, civil law, and so on.

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