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LEGAL FRAMEWORKS ON TRAFFICKING IN PERSONS

Fabio PAOLINI*

Abstract

Always in order to realize the best prevention and contrast of the trafficking of minors, the research underlines the necessity of armonization all the national legislations (up to now well 27 differet approaches pertaining to each EU member states) according the numerous directives formulated and reproposed by the European authorities.

Keywords: *trafficking of minors, necessity of armonization, EU member states*

Introduction

Human trafficking is, in its very nature, a large-scale and complex phenomenon that is very hard to detect. Moreover traffickers are able to profit of any technical innovation (i.e. sexual exploitation over internet) and of every change in the social and political situation, as demonstrated in Europe, first with the collapse of the communist bloc that opened new routes for trafficking, and after with the present-day problems related to the diminished border control within European Union.

Recent and well known data report that the number of countries involved in human trafficking (with a different role: as origin, transit end/or destination) is around 130[1] and that this criminal activity is able to generate an yearly profit of $ 32 billion, $ 10 billion representing the amount derived from the initial sale of the individuals[2].

These are only rough estimates as there aren't accurate data on the extension of this crime.

Numbers not only are unavailable and unreliable[3], but they also vary from organization to organization and there is a lack of standardized methods to collect data both at local and global level.

Among the authoritative sources, the *Trafficking in Persons Report* 2008 published by the US Department of State, mentions a government financed study from 2006 according to which 800.000 people crossed the national border worldwide as victims of trafficking.

The same research states that around 80% are women and girls, and that minors could be up to 50% of the total number: the majority of the victims of this trans-national crime is constituted of women trafficked for sexual purposes, and is also pointed out that these data don't take into account millions of female and male who are trafficked within their national borders, mainly with the purpose of forced labor[4].

The same American source in 2009, recalling an ILO document, reports that the number of trafficked adults and minors reached 12.3, and the percentage of women and children increased up to

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[1] United Nations Office on Drugs and Crime, *Trafficking in Persons Global Patterns*, 2006, p. 17;

more in detail in the report is written 127 countries of origin, 98 transit countries and 137 destination countries, but some countries can appear under more than one category.

[2] ILO, *A Global alliance against forced labour*, 2005, p. 55.

[3] Terre des Hommes, *Lost Kids, lost futures. The European Union's response to child trafficking*, 2004 p. 11.

[4] U.S. Department of State, *Trafficking in persons report*, June 2008, p. 7.

56.5% of the total[5]. It is however important to consider that there is no indication of the fact that this number refers to internal- or external-border trafficking.

An identical number is present in the report of 2010[6].

A key document in the fight against this crime is the *United Nations Convention against Transnational Organized Crime (2000)*, and specifically the *Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)*, whose art. 5 sets out an obligation for the states in order to criminalize human trafficking as defined in art. 3 of the same Protocol.

In this regard it is interesting to notice that in Europe the number of countries with a specific legislation against trafficking in human beings moved from 8 in 2000 to 37 in 2007, with a significant boost in 2004 (33 countries from the 19 of 2002), immediately after the entry into force of the Protocol itself, in December 2003[7].

1.1 Definition of Trafficking in Human Beings

The internationally approved definition of trafficking in human beings is the one of the art. 3 of the *UN Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (2000)*:

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

In the same article, in paragraph (c) and (d), there is also a specific reference to minors:

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) "Child" shall mean any person under eighteen years of age.

An identical definition[8] is also written in the article 4 of the Council of Europe *Convention on Action against Trafficking in Human Beings (2005)* but it is important to point out that this second definition, by virtue of the article 2, has a wider range of application and goes beyond the Protocol of the Palermo Convention, as the text explicitly refers to all forms of trafficking, "whether national or transnational, whether or not connected with organized crime".

[5] U.S. Department of State, *Trafficking in persons report*, June 2009, p. 8.

[6] U.S. Department of State, *Trafficking in persons report*, June 2010, p. 7.

[7] United Nations Office on Drugs and Crime, *Trafficking in persons; Analysis on Europe*, 2009, p. 5.

[8] The only difference is that in the Council of Europe Convention is used the expression "trafficking in human beings" instead of "trafficking in persons".

From the close examination of the art. 3 of the Palermo Protocol, it is evident that three elements are involved: acts (recruitment, transportation, transfer, harbouring or receipt), means (the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person) and the purpose of exploitation.

All elements have to be present in order to realize the offence.

There is an exception for children in the way that to realize the trafficking is necessary to have only the act and the purpose of exploitation, regardless of the means[9].

According to art. 3 (b), the consent to the exploitation of a victim of trafficking, has to be considered irrelevant if one of the means mentioned in the paragraph (a) has been used, and if the victim is a child the consent is always irrelevant.

1.2 Trafficking and Smuggling

An important distinction has to be done between trafficking and smuggling, examined in the *Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention against Transnational Organized Crime (2000)*.

Article art 3 (a) of the Smuggling Protocol states the following:

the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident

Jacqueline Bhabha wrote that the crucial factor of two protocols is the role of consent: "*The Palermo Protocols are framed around a central dichotomy between coerced and consensual irregular migrants"* [10].

What is supposed is that smuggling involves migrants who have consented to the smuggling, on the other hand for the victims of trafficking the consent can be totally absent or extorted by the use of the means set forth in the article 3 (a).

Other two differences are in the structure of the crime itself: smuggling only requires the arrival of the victim at destination, while trafficking needs exploitation in order to realize profit, and by its very nature smuggling is always transnational, not trafficking that can be realized with national borders.

An important consequence of this is that smuggling is characterized by the illegal entrance in another country, this means that the critical point is the violation of the norms related to the migration, so smuggling is a crime against State, whereas trafficking is a crime against the fundamental rights of the person.

Finally, under a practical point of view, has been noticed that the two offences also target different kind of victims, the majority being men for smuggling and women and children for trafficking[11].

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[9] Similar considerations, of course, can be applied to art. 4 (c) of the Council of Europe *Convention on Action against Trafficking in Human Beings (2005)*.

[10] Jacqueline Bhabham *Trafficking, Smuggling and Human Rights*, 2005, http://www.migrationinformation.org/feature/display.cfm?ID=294.

[11] Jacqueline Bhabha, see note n. 10.

The following table summarizes the distinctive aspects of the two phenomena[12]:

Element	Smuggling	Trafficking
Type of crime	Crime against State – no victim by the crime of smuggling as such (violation of immigration laws/public order; the crime of smuggling by definition does not require violations of the rights of the smuggled migrants)	Crime against person – victim; violation of the rights of the victim of trafficking by definition (violation of person's human rights; victim of coercion and exploitation that give rise to duties by the State to treat the individual as a victim of a crime and human rights violation)
Why do we fight it?	To protect sovereignty of the state	To protect a person against human rights violations; obligation of the State to provide adequate protection to its citizens
Nature of crime and duration of customer relationship	Commercial; relationship between smuggler and migrant ends after illegal border crossing achieved and fee paid	Exploitative; relationship between trafficker and victim continues in order to maximise economic and/or other gains from exploitation
Rationale	Organised movement of persons for profit	Organised recruitment/movement and (continuous) exploitation of the victim for profit
Border crossing	Illegal border crossing is a defining element	Purpose of exploitation is the defining element, border crossing is not an element of the crime
Consent	Migrant's consent to illegal border crossing	Either no consent, or initial consent made irrelevant because of use of force, coercion, at any stage of the process

2 International Legal framework

2.1 United Nations Conventions

Over the years United Nations worked on a series of legal texts dealing with the different aspects related to trafficking of children and/or sexual exploitation[13].

[12] The table is taken from: http://www.anti-trafficking.net/differencebetweensmugglingand.html.

[13] In the UNICEF website it is possible to have a list of the relevant documents: 1. concerning trafficking of minors (http://www.unicef.org/protection/index_22130.html): - *Convention on the Rights of the Child (1989) Articles 11 and 35; - Convention on the Elimination of all Forms of Discrimination against Women (1979) Article 6; - Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000); - The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime (2001); - ILO Convention on Worst Forms of Child Labour (1999); - Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956); - Convention on the Civil Aspects of International Child Abduction (1980); -Traffic in Women and Girls. General Assembly Resolution A/RES/55/67 (2001); 2.* concerning sexual exploitation (http://www.unicef.org/protection/index_22417.html): -*Convention on the Rights of the Child (1989) Article 34; -Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000); -ILO Covention 182 on Worst Forms of Child Labour (1999); - Stockholm Declaration and Agenda for Action (1996); -Yokohama Global Commitment (2001); - Traffic in in Women and Girls. UN General Assembly Resolution (2001).*

Concerning these topics, the first relevant documents are the *Slavery Convention (1926)* and the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery (1956)*, and specifically, the article 1(d) of the second convention, while giving a definition of slavery practices of the institutions to be abolish, explicitly refers to minors:

Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

It is already evident the reference to the purpose of exploitation in the provision.

By proceeding in chronological order, the next convention is the *United Nations Convention on the Rights of the Child* (1989)[14], that represent an important moment in the recognition of the humans rights to the minors, defined in art. 1 as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

The central role of the Convention in addressing the children victim of trafficking has been recalled again in 2004 by the Special Rapporteur on Trafficking in Persons, especially Women and Children[15].

The document contains a series of provisions dealing with the transfer abroad, the exploitation and the trafficking of minors, and has been followed by two protocols: the *Optional Protocol on the involvement of children in armed conflict (2000)* e *l'Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitutionand child pornography (2000)*.

The art. 3 of CRC sets out one of the principles of the text, the "best interest of the child", and the novelty is that this principle is also the scope of the convention itself[16]:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

A direct implication is that any decision has to be taken considering the child, not only the ones regarding parental responsibility, deprivation of liberty and juvenile justice, but even if the subject is only marginally affected by the consequences[17].

Later the principle has been recalled in some national legislations as well as in the *Council of Europe Convention on Action against Trafficking in Human Beings*.

Other general principles are in the art. 2, that sets an obligation to the states to guarantee the rights established by the convention to the minors victims of crime within their jurisdiction; in the art. 6 that recognize the right to the life and to a proper development for the child, and in the art. 12, that provides in order to assure to child the right to express his opinion and his views in all the relevant matters.

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[14] The Convention has been signed by all the countries in the world with the exception of USA and Somalia.

[15] ECOSOC, E/CN.4/2005/71, *Integration of the Human Rights of Women and the Gender Perspective – Report of the Special Rapporteur on trafficking in persons, especially women and children, 2004, par. 20*: "The Convention on the Rights of the Child, ratified almost universally, will provide the main reference concerning the situation of trafficked children. The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography will also be particularly relevant, as well as the work done by the present and previous Special Rapporteurs on the sale of children, child prostitution and child pornography".

[16] This principle, in a less important position, is also present in the *Declaration of the Rights of the Child* (1959) and in the UN *Convention on the Elimination of All Forms of Discrimination against Women* (1979).

[17] For more information *General measures of implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5.

Articles 34 and 35 explicitly prohibit the involvement of the children in any sexual activity or practices like prostitution as well as any pornographic exploitation, and stress the sates in order to take all the necessary measures at national and international level to contrast such conducts.

About the two protocols of the convention, not analyzing the first one on the involvement of children in armed conflict, clearly limited application, the scope of the second *Optional Protocol on the sale of children, child prostitution and child pornography (2000)* is to fight against child trafficking, and it is important to notice that the text is focused on the purposes for which this crime is realized[18], asking the states criminalize all the conducts listed in art. 3.

The protocol also establish that such conducts have to be pursued if they are realized within national borders as well as abroad whether or not they are committed by individuals or connected with organized crime (art. 3 and art. 4)

Art. 8 provides for the protection of the children victims of trafficking taking into account their specific needs.

Another relevant convention, ten years later, is the *ILO Convention 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour* (1999)[19].

The document considers children in relation with the trafficking and exploitation with a specific attention to the working condition.

The topic is crucial, considering that the ILO global report said that the number of children labourers is 215 million, even if in the period 2004-2008 there has been a reduction from the previous 222 million[20].

The Convention specifically address the trafficking of children among the definition of the "worst form of labour".

In this regard, art. 3 states that:

For the purposes of this Convention, the term "the worst forms of child labour" comprises:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

It has been written[21] that the definition given in the ILO Convention "contains in itself both the "sale of children" as defined by the Optional Protocol on the Sale of Children and "trafficking in children" as defined by the UN Trafficking Protocol. Therefore, the ILO 182 Convention is the broadest international instrument dealing specifically with child labour exploitation, including - but not limited to - child trafficking and the sale of children for sexual or other forms of exploitation."

This convention, together with CRC and contrary to the Palermo Protocol, more focused on the criminal aspects of the human trafficking than on the social ones, has the purpose to bind State

[18] The word "trafficking" is not explicitly mentioned, only in the preamble of the document.

[19] Also interesting is the *ILO Conventions 138 on the Minimum Age for Admission to Employment (1973).*

[20] Data taken from ILO website:
http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_126840/index.htm

[21] Scarpa Silvia, *Child trafficking: the worst face of the world*, 2005, p. 20

Parties to give assistance to the victims and to ensure that they will receive proper rehabilitation, even by providing a free basic level of education (art 7c).

At the end, connected with the *United Nations Convention against Transnational Organized Crime (2000)*, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime* (2000) according with art. 2, calls for the adoption of all the measures that can be necessary to

(a) to prevent and combat trafficking in persons, paying particular attention to women and children;

(b) to protect and assist the victims and;

(c) to promote cooperation among States Parties.

Before the introduction of this document, the main legal source to deal with trafficking in human beings was the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* (1949), although in this convention there isn't an explicit definition of this phenomenon.

Together with the definition of the human trafficking, another merit of the Palermo Protocol it came into force together with the *Protocol against the Smuggling of Migrants by Land, Sea and Air*, practically offering to the international community also a distinction between trafficking and smuggling.

An important characteristic of the Palermo Protocol that also constitutes a weakness, is that the text, coming together with the Convention against Transnational Organized Crime, can be applied only if the crime has been committed by an organized group and is transnational.

It has been possible to overcome this limitation by considering that States Parties are invited to fight trafficking in human beings even in the domestic legislation and even if is realized by an individual, and the United Nations Special Rapporteur on Trafficking in Persons, especially Women and Children declared his competence not only in cases of transnational trafficking but even for internal trafficking[22].

Close to the provisions for the criminalization of certain conducts, art. 9 of the Protocol ask State Parties to adopt into their legislation effective laws to protect victims from revictimization and in general to prevent trafficking and also measures to reduce the demand of the services that can foster human trafficking.

This is an absolute novelty, because is the first time that the demand side has been taken into account in an UN convention[23].

It is anyway true, as written before, that this document is more focused on the criminal policy, and for this reason the provisions addressing the protection of victims are relatively weak and vague[24].

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[22] ECOSOC, E/CN.4/2005/71, *Integration of the Human Rights of Women and the Gender Perspective – Report of the Special Rapporteur on trafficking in persons, especially women and children*, 2004, par. 2:

"The Special Rapporteur shall also take action on cases of trafficking within the boundaries of a country (internal trafficking)".

[23] Marcovich Malka, *Guide to the UN Convention of 2 December 1949 for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of the Others*, 2002, p.13.

[24] Contrary to the *United Nations Convention on the Rights of the Child*, more oriented to the protection of the human rights, the only provision contained in the Palermo Protocol dealing specifically with the rights of children is art. 6.4: "Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care".

2.2 European Union Conventions

Europen Union and the Council of European Union addressed the matter of the human trafficking and of the exploitation of children in different occasions.

The *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (1999)*, states under the Title *Provisions on Police and Judicial Cooperation in Criminal Matters*, in art. 29 (former K.1), that it is the Union's objective to provide citizens with high level of safety within an area of freedom, security and justice, to "*preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud*".

The more recent Lisbon Treaty (2008) offers a series of measures to contrast human trafficking (art. 79) with a specific attention to women and children (art. 79d).

In this regard it is of a certain interest also art. 83, whose purpose is to promote the cooperation among member states

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

Leaving out a consistent number of Council Directives, Council Framework Decisions[25] e Council Resolutions, the first convention is the *European Convention on Human Rights (1950)* and its five protocols.

It is a generic text that came out in a period when there was a different perception and a different approach to the human trafficking and the sexual exploitation of children, but it can be considered as a good starting point to move inside the EU legislation.

Articles 3, 4 and 5 states the prohibition of torture and forced labour as well as of inhuman or degrading treatment or punishment, of slavery, and they reaffirm the value of the right to freedom and to safety.

It is also true that in the convention there isn't any explicit provision dealing with trafficking or sexual exploitation.

For this reason the first convention that can be considered as a key document in the field is the *Council of Europe Convention on Action against Trafficking in Human Beings (2005)*.

Ratified by 29 states, even with some relevant absences[26], the text binds states to criminalize the voluntary conducts that can be deemed as human trafficking according to art. 4.

[25] Among the documents that dealt with trafficking in human beings and/or sexual exploitation, it is important to recall: *Council Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (2004), Council Framework Decision on combating trafficking in human beings (2002), Council Framework Decision on combating the sexual exploitation of children and child pornography (2003).*

[26] Status of ratifications can be checked at:
http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=8&DF=30/06/2010&CL=ENG.

At the same time it is also considered criminally relevant the use of the services that are object of exploitation knowing that the involved person is a victim of trafficking.

Art. 20 explicitly punishes certain actions related to travel and to the identity documents if committed intentionally or for the purpose of enabling human trafficking.

It is criminalized:

(a) forging a travel or identity document;

(b) procuring or providing such a document;

(c) retaining, removing, concealing, damaging or destroying a travel or identity document of another person.

According to art. 24 (b) the fact that these actions are committed against a child constitutes an aggravating circumstance at the moment to inflict the punishment.

About the punishment itself, art. 23 doesn't provide for any specific sanction, but clarifies that in any case must be involved the deprivation of liberty and, if it is necessary, even the obligation to rise the extradition.

The following *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote, 2007)* is the first International convention to deal specifically with this problem, and from the moment of the opening for signatures (25 October 2007) has been signed by a considerable number of European states, but only few of them ratified[27].

The Convention entered into force on 01 July 2010.

In the words of Maud de Boer-Buquicchio, Deputy Secretary General of the Council of Europe, the Lanzarote Convention covers all forms of sexual violence[28], included, for the first time in an international treaty, the solicitation of children for sexual purposes (grooming).

In this regard in accordance with art. 23

each Party shall take the necessary legislative or other measures to criminalise the intentional proposal, through information and communication technologies, of an adult to meet a child who has not reached the age set in application of Article 18, paragraph 2, for the purpose of committing any of the offences established in accordance with Article 18, paragraph 1.a, or Article 20, paragraph 1.a[29], against him or her, where this proposal has been followed by material acts leading to such a meeting

This is not the only reference to internet in the Convention ("*information and communication technologies*" in the text).

In the area of the preventive measures (Chapter II) Art.6, about the education of children, explicitly asks for an active support and guidance role of the family in all the situations of risk, also included the use of internet and of all the media able to transmit information like mobile phones, and

[27] Status of ratifications can be checked at: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=201&CM=&DF=&CL=ENG; at present (02/11/2010) the following countries ratified the Convention: Albania, Denmark, France, Greece, Malta, Netherlands, San Marino, Serbia, Spain.

[28] *The Development of Child-sensitive counseling, complaint and reporting mechanism – Notes for the speech delivered by Maud de Boer-Buquicchio, Deputy Secretary General of the Council of Europe*, document available online at www.coe.int/t/transversalprojects/**child**ren/speeches/Discours%20SGA.pdf

[29] Under art. 18 1a the offence is engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities, while art. 20 deals with the production of child pornography

art. 9 encourages the private sector[30] to elaborate policies in order to curb sexual exploitation and sexual abuse of children.

Moving to the substantive criminal law (Chapter IV), art. 20 paragraph 1f criminalises the mere intentional access to child pornography[31] even without downloading, and not only child pornography committed by the use of a computer[32].

This attention to the web makes the convention an actual and powerful instrument, especially if we consider that the use of internet for the commission of sexual offences against children is well known and has been addressed by a considerable number of studies conducted by international and national institutions worldwide.

In this field it is also important to read the *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* together with the *Council of Europe Convention on Cybercrime (Budapets 2001)*, whose art. 9 considers the offences related to child pornography.

"Broadly speaking, these two Conventions are designed to prevent and combat respectively pedopornographic material circulating on the Internet and the use of the Internet or other modern technologies to get in touch with children for sexual purposes in the real life"[33].

In general, according to the Lanzarote Convention (art. 19) each state must criminalize:

(a) recruiting a child into prostitution or causing a child to participate in prostitution;

(b) coercing a child into prostitution or profiting from or otherwise exploiting a child for such purposes;

(c) having recourse to child prostitution.

It is also interesting to point out that in the art. 28 the Convention considers aggravating circumstances some specific events, like the fact that the offender is a member of the family or a criminal organization.

In the art. 25 there is the obligation for the states to criminalize the conducts set forth in articles 18, 19, 20 and 21 and to prosecute their citizens even if such conducts are not a crime in the state where they have been realized.

The art. 37 (1) provides for collecting and store personal data and DNA of the persons convicted for the crimes set out in the Convention.

Also this convention does not specify any standard for the sanctions, but they have to be effective, proportionate and dissuasive, taking into account the seriousness of the offence.

3 Some data on Moldova

Traditionally Moldova is a country of origin for trafficking of women and girls for the purpose of sexual exploitation. For the period January 200 – April 2003, IOM reported that the

[30] The article also mentions the tourism and travel industry and the bank and finance sector.

[31] It is the case to note that according to the art. 20 paragraph 4 "each Party may reserve the right not to apply, in whole or in part, paragraph 1f"

[32] See *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse Explanatory Report.*

[33] Speech by Maud de Boer-Buquicchio, the Deputy Secretary General of the Council of Europe International Conference on combating sexual exploitation of children in the Internet *"The protection of girls and boys against sexual violence in the new media",* Berlin, 30 June 2009; document available online at: http://www.coe.int/t/dc/press/news/20090630_DSG_Berlin_en.asp

number of Moldovan victims identified and assisted during their movements mainly in the Balkan area is 1131[34].

Within this group, trafficked for sexual exploitation, the majority of victims, 58%, is between 18 and 24 years old, 10% are minors at the time of the return, and is assessed that the percentage of the children at the beginning of trafficking was 30%, considering that the average time for trafficking is just below 2 years.

Looking to the countries of destination for the victims it is evident that there are some changes in the examined period of time: there is a strong reduction for Albania (from 68 victims in 2000 to 9 in 2002), Kosovo and Macedonia, and a significant increase in the direction of Russia and Turkey.

This trend is still continuing at present day, as it is possible to see in the *Trafficking in persons* (2009) report from UNODC, that refers the impressive number of 278 victims from Moldova assisted in Turkey.

Another interesting information is that the number of children calculated on the total of victims moved from 5% in 2000 to 10% in 2001.

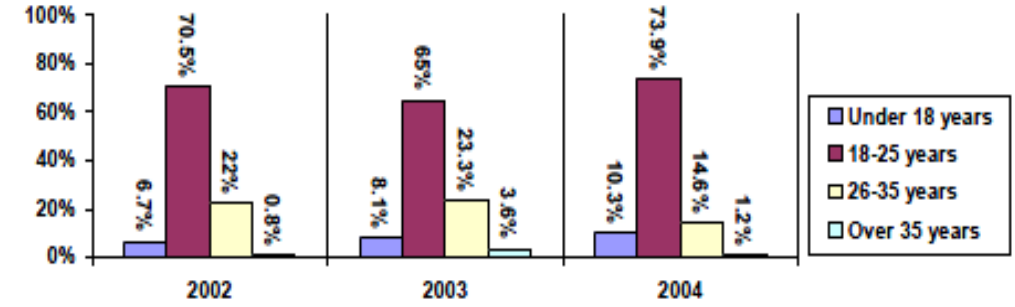
As a confirmation of this, in the next IOM report of 2005 is written that the majority of Moldovan victims, whose number tend to be constant even for the period until 2004[35], has been trafficked in Turkey (44.9%) and Middle East (14.6%), and only the 8.3% in some European country[36].

Therefore it is possible to say that more young girls are becoming victims over the years: while in 2003 65% of trafficked women was aged between 18 and 25 years, in 2004 the values is 73.9%.

The table is taken from the IOM report[37]:

GRAPH 1

AGE OF ASSISTED MOLDOVANS TRAFFICKED FOR SEXUAL EXPLOITATION, 2002 TO 2004[343]



[34] IOM, *First Annual Report on Victims of Trafficking in South Eastern Europe*, 2003, p. 75 ss.

[35] In detail the number of Moldovan victims identified and assisted in SEE area is 319 (2000), 382 (2001), 329 (2002), 314 (2003), 302 (2004); IOM, *Second Annual Report on Victims of Trafficking in South Eastern Europe*, 2005, p. 44

[36] The abolishion of the Schengen visa for the Rumenian citizens could have fostered the entry of Moldovan nationals with forged or stolen Rumanian identity documents.

[37] IOM, *Second Annual Report on Victims of Trafficking in South Eastern Europe*, 2005, p. 342.

For the following period 2003-2008, UNODC[38] reports that the total number Moldovan victims is decreasing at least in two important destination countries like Kosovo and Turkey[39].

At the same time the number of cases investigated by the local authorities increased from 42 in 2000 to 251 in 2007[40].

With a specific attention to children it is also possible to say the number of investigated cases is decreasing and is of 47 for 2007, after moving from 15 in 2003 to 61 in 2006.

Therefore it is evident that while the total number of victims is decreasing, the percentage of children is slowly but constantly increasing each year.

Conclusions

The investigation, realized in order to know and propose the better systems finalized to the prevention and the contrast of the trafficking of minors and of all human beings for sexual exploitation in Europe, has put in great evidence how 2 big problems may hinder these tasks:

the first concerns the lack of armonization among of the well 27 different approaches pertaining to each EU member states about the social assistance and the protection of trafficked persons; the second focuses, also in this case, the lack of implementation of the single European legislations to the numerous directives formulated and reproposed by the European authorities from the first formulation "Council Framework Decision on Combating Trafficking in Human Beings" of 19 February 2002, the following "Council Directive on the Residence Permit issued to Third-Country Nationals Who are Victims of Trafficking in Human Beings or Who Have Been Subject of an Action to Facilitate Illegal Immigration, Who Cooperate with the Competent Authorities" of 29 April 2004 and the "Proposal for a Directive of the European Parliament and of the Council on Prevention and Combating Trafficking in Human Beings and Protecting Victims" of 29 March 2010, approved by the European Paliament on 14 December 2010, in the frame of the Lisbon Treaty entered into force on 1 December 2009.

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[38] United Nations Office on Drugs and Crime, *Trafficking in persons; Analysis on Europe*, 2009, pp. 14-15.

[39] IOM reports the is the Southern Europe (Cyprus, Greece, Italy, Malta, Portugal, Spainn and Turkey) the area from which the biggest number of Moldovan victims returns.

[40] United Nations Office on Drugs and Crime,*Global Report on T rafficking in persons*, 2009, pp. 221-223

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CRIMINAL PROTECTION OF PRIVATE LIFE

Radu SLĂVOIU[*]

Abstract

This study is meant, first of all, to analyze the incriminations that the new Romanian Criminal Code sets for the protection of a person's private life as a social value of maximum significance both for the human being and for any democratic society as a whole.There are two criminal offences treated in this study that are not to be found in the current criminal legislation: violation of private life and criminal trespassing of a legal person's property. Likewise, the study will bring forth the novelties and the differences regarding the offences of criminal trespassing of a natural person's property, disclosure of professional secret, violation of secret correspondence, illegal access to computerized system and illegal interception of electronic data transfer – acts that when, directly or indirectly, committed can cause harm to the intimacy of a person's life.As an expression of the interdisciplinary nature of this subject, the study also sets out, as a subsidiary aspect, an evaluation of the circumstances under which the new criminal proceeding legislation allows public authorities to interfere with an individual's private life. Thus, the emphasis is on the analysis of the circumstances under which special surveillance and investigation techniques can be used as evidence proceedings regulated by the new Romanian Criminal Procedure Code.

Keywords: *New Criminal Code, the protection/violation of private life, harassment, professional office, means of interception of communications*

Introduction

I. General aspects. Modern society includes, among the individual's most important values, his private life, whilst both international and national legislation being more and more preoccupied with the protection of this fundamental right of human being.

The Universal Declaration of Human Rights stipulates under Article 12, that „No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to the attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." Likewise, the International Covenant on Civil and Political Rights provides, in Article 17, „1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, neither to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks." Article 8 of the European Convention of Human Rights shows that "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or offence, for the protection of health or morals, or for the protection of the rights and freedoms of others." The American Convention of Human Rights expresses in a similar manner under Article 11, 2-3: "2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or

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of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks."

Transposing the international regulations onto national level, Article s 26-28 from the Constitution of Romania establish, as fundamental rights, intimate life, family and private life, home inviolability and the secret of correspondence.

As none of these terms enjoy a legal definition, it was the duty of doctrine and jurisprudence to establish their meaning and content.

In Western juridical literature, private life was, practically, understood as a secret sphere of the individual's life, where the access of third parties[1] is not allowed. Respect for private life implies the guarantee of a person's physical and moral integrity, the protection of his personal or social identity, of his sexuality, of private places[2], as well as the protection of reputation and the prevention of disclosure of confidential information[3]. A person can consider as being part of his private life any aspect that may be associated with his health, moral, religious or philosophical believes, his sentimental and family life, his friendships[4]. It was also noted that private life includes the individual's right to intimate, personal life, his right to social private life and the right to a healthy environment[5].

Striving to find meanings as precise as possible for the concept of "private life", it was noticed that, Romanian doctrine[6] makes a distinction between the texts of the European Convention and those of the Romanian Constitution, the latter using a concept that the first is avoiding, namely intimate life. It has been noted that intimate life is only a part of private life, which, first of all, contains the right to solitude, that is the individual's right to be with himself, to seclude from the others, to keep the secret of his own thoughts, plans and desires, to be left alone with his ideas and aspirations, but also with his behavior through which he intends to express his personality, unhindered by any outside interference. Secondly, intimate life also implies contacts with other persons "in the presence of whom the subject feels like being only with himself", to whom he can express his deepest thoughts; the contacts with these persons can be oral, when the interlocutors are present, but also through letters, telegrams, telephone conversations when absent.

On its turn, private life is considered to be made of the right to intimate life, with all the above mentioned elements included to which we also add a sphere of the subject's business and professional contacts are also added. Thus, we consider that private life represents a particular area of personal thoughts and acts, of communications and conversations that are not suppressed, a personal inviolable space where the individual can express his inner personality; but it also includes intimate or professional contacts with the others.

When approaching the issue of the protection of private life from its values' point of view, another author[7] notices that the risks associated to this fundamental right regard the violation of the person's solitude, interference into his personal matters, disclosure of personal information – which

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[1] See J. Carbonnier, *Droit civil*, tome I, *Les personnes. Personnalité, incapacités, personnes morales*, Presses Universitaires de France, Paris, 2000, pg.156.

[2] See R. Clayton, H. Tomlinson, *The Law of Human Rights*, Oxford University Press, 2001, par.12.85-12.94.

[3] See P. van Dijk, F. van Hoof, A. van Rijn, L. Zwack, *Theory and practice of the European Convention on Human Rights*, 4th edition, Intersentia, Antwerpen-Oxford, 2006, pg.665.

[4] See G. Cohen-Jonathan, *Respect for private and family life*, in R.St.J. Macdonald, F. Matscher, H. Petzold, *The European System for the Protection of Human Rights*, Dordrecht: Nijhoff, 1993, pg.405 and the followings.

[5] See Fr. Sudre, *Dreptul european şi internaţional al drepturilor omului*, Polirom PH, 2006, pg.315; C. Bîrsan, *Convenţia europeană a drepturilor omului. Comentariu pe articol*e, vol. I, *Drepturi şi libertăţi*, All Beck PH, Bucureşti, 2005, pg. 600.

[6] See E. Tanislav, *Ocrotirea penală a dreptului la intimitate*, Revista de Drept penal nr.3/1998, pg.42-53.

[7] See V. Stati, *Ocrotirea penală a dreptului la viaţă privată în Republica Moldova*, Revista de Drept penal nr.3/2006, pg.146-157.

entails a harm on the individual's image in society – using the name or image of a person for the benefit of the one who uses them, creating IT systems of personal data.

The jurisprudence of the European Court of Human Rights has proven to be an essential source in establishing the constituent elements of private life, although, several times[8], the European court considered that it is not possible and neither necessary to give an exhaustive definition to the concept, because its content changes according to various factors (for instance: the period of time it refers to, the society in which the individual spends his life). The Court considers that private life can not be limited only to the inner circle where a person lives his life the way he wants and from which he excludes the exterior world, but, to a certain extent, it also includes the individual's right to build relations with his fellow men, thus there is no major reason for eliminating professional or business activities. In other words, there are areas of interaction between a person and the others, even in a public environment, which can be included in the concept of private life[9]; similarly, data of public nature referring to an individual can also be considered as part of private life, in case they are collected and systematically stored in the records of public authorities[10]. Likewise, the right to respect for private life also comprises the right to its confidentiality[11], the right to the individual's physical and moral integrity[12], including sexual life, the right to information regarding his own or his parents' identity[13], the right to rest in his own house[14], the right to one's own image[15], the right to act in a certain manner[16].

There is an interrelation between private life and the inviolability of correspondence, meaning the right of one person to communicate his thoughts using any means[17] – verbal, letters, telegrams, fax, telex, pager, phone, e-mail, SMS, and MMS – without being known by third parties or censored. CEDH jurisprudence presents a wide range of cases on this matter[18]. The protection of the

[8] See: ECHR, judgement of 6 February 2001 case of Bensaid versus The United Kingdom; ECHR, judgement of 29 April 2002 case of Pretty versus The United Kingdom; ECHR, judgement of 20 March 2007, case of Tysiac versus Poland.

[9] See: ECHR, judgement of 25 June 1997 case of Halford versus The United Kingdom; ECHR, judgement of 25 October 2007 case of van Vondel versus Olandei.

[10] See: ECHR, judgement of 27 October 2009 case of Haralambie versus Romania.

[11] See: ECHR, judgement of 29 March 2000 case of Rotaru versus Romania; ECHR, judgement of 6 June 2006 case of Segersted-Wiberg and others versus Suediei.

[12] See: ECHR, judgement of 16 June 2005 case of Storck versus Germany.

[13] See: ECHR, judgement of 13 February 2003 case of Odièvre versus France.

[14] See: ECHR, judgement of 7 August 2003 case of Hatton versus The United Kingdom.

[15] See: ECHR, judgement of 28 January 2003 case of Peck versus The United Kingdom; ECHR, judgement of 17 July 2003 case of Perry versus The United Kingdom; ECHR, judgement of 24 June 2004 case of von Hannover versus Germany; ECHR, judgement of 11 January 2005 case of Sciacca versus Italy; ECHR, judgement of 24 February 2009 case of Toma versus Romania.

[16] See: ECHR, judgement of 18 January 2001, case of Chapman versus The United Kingdom.

[17] See: ECHR, judgement of 22 October 2002 case of Taylor-Sabori versus The United Kingdom.

[18] See: ECHR, judgement of 21 February 1975 case of Golder versus The United Kingdom; ECHR, judgement of 25 March 1983 case of Silver and others versus The United Kingdom; ECHR, judgement of 24 April 1990 case of Huvig versus France; ECHR, judgement of 24 April 1990 case of Kruslin versus France; ECHR, judgement of 30 August 1990 case of Fox, Campbell and Hartley versus The United Kingdom; ECHR, judgement of 25 March 1992 case of Campbell versus The United Kingdom; ECHR, judgement of 25 March 1998 case of Kopp versus Switzerland; ECHR, judgement of 20 June 1998 case of Schönenberger and Durmaz versus Switzerland; ECHR, judgement of 23 September 1998 case of Petra versus Romania; ECHR, judgement of 4 June 2002 case of William Faulkner versus The United Kingdom; ECHR, judgement of 24 October 2002 case of Messina versus Italy; ECHR, judgement of 5 November 2002 case of Allan versus The United Kingdom; ECHR, judgement of 19 December 2002 case of Salapa versus Poland; ECHR, judgement of 29 April 2003 case of Poltoratskiy versus Ukraine; ECHR, judgement of 3 June 2003 case of Cotleț versus Romania; ECHR, judgement of 11 January 2005 case of Musumeci versus Italy; ECHR, judgement of 20 December 2005 case of Wisse versus France; ECHR, judgement of 30 January 2007 case of Ekinci

individual's correspondence is so strong that the Court considered a breach of Article 8 of the Convention when the authorities taped the telephone conversations in which the subject allegedly instigated to murder[19] or the case when the subject admitted he was dealing in drugs[20].

Both private life and the right to privacy of correspondence are strongly connected to a person's home[21]. According to the case-law of the European Commission, home is an autonomous concept, which is not limited to the meaning given by the civil law; in order to consider a certain area as home we have to take into consideration the real circumstances of each cause, and considering a sufficient and continuous connection with a certain place[22]. „Home" is usually the defined physical area where a person can live his private or family life, including secondary residences, vacation houses[23], a parcel of land in a nomad destined area[24], but, through extension, it is also the place where a person's professional activity is conducted. The headquarters and bureaus of a company[25] can also be regarded, within certain limits[26], as home.

II. Penal protection of private life in Romania. The New Criminal Code of Romania (NCC)[27], passed by Law No 286/2009, brings a significant improvement to the area of means of protection of the individual's private life, both by introducing new incriminations (violation of private life, violation of professional office, harassment), as well as by rephrasing some of the already existing incriminations (violation of home, disclosure of professional secrecy, violation of the secret of correspondence, illegal access to IT system, illegal intercepting of a IT transmission of data, unauthorized transfer of IT data). In respect to the formal systematization, yet, we note that, although these actions harm in a certain way a person's intimacy, they are not totally stipulated under the chapter "offences against the inviolability of home and private life" (chapter IX, Title I, Special Book). Thus, we find again "harassment" under the chapter destined to "offences regarding the obligation of helping those endangered", violation of the secret of correspondence is part of the category "offences relating to working", while other offences are grouped under Chapter VI ("violation of the security and integrity of IT systems or data"). We consider that such systematization was chosen because of the complex specialized judicial object of these offences, the social values and relations protected by the law being, at the same time, part of a lot of fields that the legislator had in mind.

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and Akalin versus Turciei; ECHR, judgement of 26 April 2007 case of Dumitru Popescu versus Romania; ECHR, judgement of 4 October 2007 case of Năstase-Silivestru versus Romania; ECHR, judgement of 1 July 2008 case of Calmanovici versus Romania; ECHR, judgement of 21 April 2009 case of Răducu versus Romania.

[19] See: ECHR, judgement of 23 November 1993 case of A. versus France.

[20] See: ECHR, judgement of 12 May 2000 case of Khan versus The United Kingdom.

[21] See: ECHR, judgement of 6 September 1978 case of Klass versus Germany.

[22] See: ECHR, judgement of 25 September 1996 case of Buckley versus The United Kingdom; ECHR, judgement of 24 November 1986 case of Gillow versus The United Kingdom; ECHR, judgement of 18 November 2004 case of Prokopovich versus Rusiei.

[23] See: ECHR, judgement of 31 July 2003 case of Demades versus Turciei.

[24] See: ECHR, judgement of 27 May 2004 case of Connors versus The United Kingdom.

[25] See: ECHR, judgement of 16 December 1992 case of Niemietz versus Germany; ECHR, judgement of 25 March 1998 case of Kopp versus Switzerland; ECHR, judgement of 16 April 2002 case of Société Colas Est and others versus France; ECHR, judgement of 13 November 2003 case of Elci and others versus Turkey; ECHR, judgement of 28 April 2005 case of Buck versus Germany; ECHR, judgement of 27 September 2005 case of Petri Sallinen and others versus Finland; ECHR, judgement of 16 October 2007 case of Wieser and Bicos Beteiligungen Gmbh versus Austria; ECHR, judgement of 7 October 2008 case of Mancevschi versus The Republic of Moldova. Following this case-study, the Western doctrine (See J.F. Renucci, *Traité de Droit Européen des droits de l'homme*, Librairie Générale de Droit et de Jurisprudence, Paris, 2007, pg.264) noted there is a consecration of "commercial private life".

[26] See: ECHR, judgement of 6 September 2005 case of Leveau and Fillon versus France. The European court decided that exploitation specialized in pigs breeding, sheltering several hundreds of animals, is not part of – even by extention – the concept of home.

[27] Hereinafter refered to as NCC.

We shall make a short presentation of the novelties brought by the NCC on this matter, generally, approaching a systematization in respect to that part of private life, which is mainly protected by the criminal rule, as follows: the protection of intimacy, the protection of correspondence, the protection of home.

II. 1. The protection of intimacy. We have grouped here the aspects regarding the offences against privacy, the disclosure of professional secrecy and harassment and illegal access to IT system.

Violation of privacy (Article 226 NCC). This incrimination can not be found in the Criminal Code of 1968. The source of inspiration for the Romanian legislator was the legislations of Western states[28].

The NCC regulates the offence relating to the violation of privacy in a standard, aggravating and absorbed form.

In a standard form, the offence consists in unlawfully harming one person's privacy, by taking, catching or recording the picture of a person, by wiretapping or recording a person who is on a private place, room or one of its auxiliary building or a person's private conversation.

Speaking about the external element (actus reus), the material element for this offence is the act of harming a person's private life, namely to injure, hurt, and prejudice one's own intimacy. From a ruling prospective, the material element can be accomplished by the following means:

a) taking, catching or recording pictures of a person.

Taking pictures refers to the operation through which, using a certain device designed for this purpose or that has a technical function for this purpose (for example, a mobile phone), based on certain procedures specific to optic laws, an image is put on a paper, photographic board, photosensitive tablet or on a photographic film.

To catch pictures means to intercept visual representations, using certain technical means.

Recording pictures means to impress, through electromagnetic methods, visual representations on certain data storage devices (magnetic tape, photosensitive film, etc.). The operation of recording not only implies catching but also saving, storing the pictures. Therefore, recording pictures always implies their catching, but the reciprocal is not valid; we can have an operation of catching a visual representation, but without having it recorded (for example, the subject, unlawfully, acquires and visualizes, with the help of such technical means, pictures of the victim staying in his own home, but he does not saves them by recording).

[28] For example, according to Article 201 of the German Criminal Code, constitutes a crime against a person's confidentiality the act of the offender who unlawfully: (1) records on tape the conversation of another person on a private place; (2) uses or gives to another person such a recording; (3) wiretappings with the help of a device to intercept the discussion of another person on a private place; (4) turns to the public, in order to jeoperdize another's person interests, the text or the content of other people's conversation, that he recorded as above. Article 226-1 of the French criminal code, punishes the person who, willfully, by any mean, harms another the intimacy of a person's private life: (1) by intercepting, recording or transmitting words uttered in confidential or private circumstances, without the consent of their speaker; (2) taking, recording or transmitting the picture of a person who is within a private place, without the consent of the person concerned. Article 226-2, same Code incriminates the act of keeping, bringing or causing to be brought to the knowledge of the public or of a third party, or the use in whatever manner, of any recording or document obtained through any of the actions set outunder Article 226-1. Article 226-8 also sanctions to the publication by any means of any montage made that uses the words or the image of a person without the latter's consent. On its turn, the Spanish criminal Code (Article 197-1) incriminates the act of a person who, in order to find out the secrets or to violate the intimacy of another person, without his consent, intercepts his communications or uses the means of wiretapping, recording or reproducing of sounds or images or any other signal of communication. Also the Italian Criminal Code sanctions, under Article 615 bis. (1) the person who, using the instruments for video or audio recording, illegally procures information and images that harm a person's private life who is on private places or one of its auxiliary buildinges. The law also punishes the person who brings to the knowledge of the public or broadcasts, regardless of the means, the information or images obtained by those means.

The three ruling means of the material element are alternative, thus committing any of them constitutes an offence. If the subject commits the act resorting to two or three means, there shall be one single offence.

The doctrine[29] has, reasonably, noticed that the act of tacking a picture or filming a home or a private room is not an offence, but it is required that the act aims at a person being in one of these spaces. Yet, we ask ourselves if the reason and spirit of this regulation – the protection of the individual's intimacy – should not have needed a wider incrimination, which could cover other hypothesis too, when the right to privacy is violated. For example, we consider that a significant harm to intimacy is also made by the act of recording pictures from inside the victim's house, when he is not present, by filming certain personal use staff, indicating a certain sexual orientation (homosexual relations). Such an offence does not fulfil the constituting elements of the offence in question, although it obviously harms the individual's private life. Or, *ubi ratio este, idem est jus*. One could argue that the perpetrator will be hold responsible for home violation, but we find this argument not functional in all the cases. For example, when, with a telephonic approval of the victim, who is outside the city, a neighbor breaks his door in order to turn off the water, which out of negligence, had been left running and there was a risk of flooding; if the neighbor, out of curiosity, exceeds the approval given by the homeowner and films his bedroom, the offence does not constitute a violation of home and neither of privacy.

Thus, we assess that a form of incrimination that answers adequately to the necessities to protect the individual's intimacy, was postulated under Act No 301/2004, which has not been enforced[30] yet. Thus, Article 209 from this law punishes "the violation of a person's right to private life by using any means of remote interception of data, information, images or sounds from inside the places noted by Article 208 point 1 (*namely a dwelling, room or one of its auxiliary buildings – author's note*, *R.S.*), without the consent of the person that uses them or the law authorization". We consider, *lege ferenda,* that the text of Article 226 NCC should be rethought to cover also the hypothesis of unlawful recording of images from a dwelling, room or one of its auxiliary buildings, even when the person is not at home, if this act harms his private life.

The doctrine[31] also considered that, although the law does not stipulate, the protection is also extended to the enclosed area surrounding the victim's residence and which is enclosed. We are reluctant to this point of view, as – according to our opinion – such a hypothesis is stipulated by the incrimination rule. If the law had intended to mention the enclosed area too, it would have done it explicitly, just as in the case of violation of home. Yet, it is undoubtedly that the legislator's choice is questionable, as, for example, a person's intimacy is harmed in the same way as when he is unlawfully filmed in his courtyard, not only when he is inside the house. An individual's private space does not end at his home door. On the other hand, we do not see the reason for which the act of unlawfully entering an enclosed area of a person's residence, even when he is not at home, constitutes an offence, (the violation of home), and the act of filming[32] a person in his own courtyard does not constitutes an offence. We need to mention that if the acts of taking pictures or filming a person who is on enclosed area representing an auxiliary building do not constitute the of offence of violation of private life, it can still constitute the offence of harassment (they can represent actual

[29] See V. Dobrinoiu, N. Neagu, *Drept penal. Partea specială. Teorie şi practică judiciară*, Universul Juridic PH, Bucureşti, 2011, pg.176.

[30] Law No 301/2004 – The Criminal Code was revoked (before its entrence into force) by Article 446 point 2 NCP. For details, See G. Antoniu, *Noul Cod penal. Codul penal anterior. Studiu comparativ*, All Beck PH, Bucureşti, 2004, pg.77.

[31] See V. Dobrinoiu, N. Neagu, *op. cit.*, pg.176.

[32] The issue is related to the acts of taking, catching or recording images, and not to the acts of audio recording of a private conversation that – as we shall present below – is incrimnated regardless of where it is held.

means through which the action of observing a person occurs, under the provisions of Article 208 NCC), under the condition that this action is repeated and causes the victim to fear.

b) wiretapping or audio recording

Wiretapping means to seize or overhear sounds, and to record means to fix, impress on a data storage devices sound representations.

These acts regard either simple sounds, or private conversations. Yet, the provisions under Article 226 NCC do not protect all types of private communications, but only direct, verbal ones shared by two or more persons (the so-called indoor conversation). Although private, the communications through technical means (for example, using a telephone) enjoy the protection established by the incrimination of violation of the secret of correspondence, and specifically stipulated under the provisions of Article 302 point 2 NCC. Our conclusion is also confirmed by the verb used by the legislator to designate the material element of the external element; Article 226 point 1 NCC refers to "wiretapping", and not "intercepting" (as it is the case of the violation of the secret of correspondence)[33], the latter being specific to technical means of remote communication.

There are several substantial requirements associated to these means of the material element. Firstly, overhearing sounds or conversations is an offence only when is committed through technical means (tape recorder, recorder, etc.). Merely listening to a conversation held inside a dwelling (for example, by keeping the ear close to the separating wall) does not constitute an offence.

Secondly, the act can be associated to either the sounds uttered by the victim or, depending on the situation, the conversations he has inside a dwelling, room or one of its auxiliary building, or private conversations. There are certain differences between the two hypotheses.

Thus, on the one hand, the law protects against the unauthorized interferences all the sounds and conversations that a persons makes within his private space. Taking into consideration the indissoluble connection between a person's private life and home, we can state that the legislator, implicitly, admits a presumption of confidentiality over all that happens inside the individual's private space, a presumption equally originating both in the special nature of this place and in the fundamental principle of the inviolability of home (Article 8 of ECHR and Article 27 of the Constitution). In terms of private space, in the case of the offence relating to the violation of private life, the law has in view the dwelling, room and its auxiliary building, except for the enclosed area around it.

On the other hand, all the other conversations that the individual has outside his home or his room or outside their auxiliary buildings are protected, under the condition of having a private nature. By the following phrasing, in a rather redundant manner, „ wiretapping […] or audio recording of a person who is in a dwelling or room or one of its auxiliary building *or* of a private conversation *(our note – R.S.)*"; the legislator intended only to emphasize that the concept of private conversation is a wider category compared to the conversation held in a private space. It is a part to whole type of relations. Practically, the protection of the criminal rule extends not only to the conversations inside one's own home, room or auxiliary building, but also to the private conversations that the individual has outside these places, regardless of the place, whether in another person's private place, or just in a public place. For example, it shall constitute an offence the act of, unlawfully, audio-recording a private conversation held in the courtyard of the residence (an area, which, under the strict meaning of Article 226 point 1 NCC, is not a private space).

[33] We are reluctant to the author's opinion (Al. Boroi, *Drept penal. Partea specială*, C.H. Beck PH, Bucureşti, 2011, pg.145) who considers that the material element of this crime is rendered by "the use of means of interception", defined as means by which one can "catch and control a *telephonic conversation, a correspondence*" *(author's note – R.S.)* between two persons […] that can be secretly palced in the room where the conversations are to be wiretapped, *either insdide the telephone, or on a telephonic line (author's note – R.S.)*".

The Romanian legislator thought it necessary to resort to this type of phrase construction of text considering that, in absence of a legal definition of the private conversation, doctrine has outlined two theories (criteria) to distinguish the concept[34]. Thus:

- the theory of the privileged place, specific to the British law. According to this theory, the nature of a conversation exclusively depends on the place where it is held. Consequently, we shall have a private conversation only if it is held in a private space;

- the theory relating to the nature of communication, specific to the American and French legislation. According to this theory, in order to classify a conversation as private, the stress does not fall on the place where it is held, but on the corroboration of two elements – the mental element (mens rea) and the external element. The mental element is represented by the subject's expectation that the conversation is known only by his partner, and the external factor consists in the reasonable nature that this expectation must have considering the dominant rules of society.

The Romanian legislator has provided efficiency to both criteria. The theory of the privileged space received an answer through the incrimination of the act of wiretapping and of audio-recording a person being inside a dwelling, room, or one of its auxiliary buildings. Nonetheless, the theory of the nature of communication was enforced by incriminating wiretapping or audio-recording of any other private conversations than those held in one's own private space. For example, the act of someone who, unlawfully, records a private conversation of the victim with a third party in a theatre loge, in a restaurant booth, on a bench in the park, on the street, in a vehicle shall be punished; thus we notice that public places are also taken into consideration, but the accent falls under the confidentiality of the conversation.

The difficulty emerges when trying to establish how the defendant, in a concrete situation, identifies whether a conversation is or is not private. This, because the law has to be predictable so that the subjects to whom it refers can adapt their behavior to the rule stipulated by the incriminating rule. In public places, people behave differently: some whisper, others speak loudly, some hide, others would try to impress even by speech. For example: two young lovers fight, loudly, on a bench in the park; at a family reunion, at a table in the courtyard, some persons talk fiercely about certain events from the lives of the participants. Are the passers-by authorized to record these talks? Or, is the producer of a TV show authorized to record the talks between a cheated wife, the adulterine husband and his mistress, who are observed in public, if only the wife (who had phoned the so-called detective) had consented to that?

The answer to this problem derives from the provisions of Article 226 point 4 letter b) NCC, according to which there is no offence if the victim explicitly acted with the intent to be seen and heard by the offender. The text reveals, *per a contrario,* that an unlawful recording of a private conversation constitutes an offence in all situations when the victim was apart from any intention to be heard by others or, if such an intention existed, but it was not clearly expressed. Analyzing the entire construction of the Article 226 NCC, we assess that the provisions stipulated under point 4 (including those under letter b) have the status of exceptions from the general rule, namely the private nature of any conversation. Consequently, we believe that the legislator implicitly uses a relative presumption of confidentiality of any communication between two or more persons.

Thus, as we mentioned above, Article 226 NCC protects all the conversations of an individual in his private space, namely his home, room or one of its auxiliary buildings, as well as all the confidential conversations made outside this space. We note that the obligation imposed by the criminal law – not to wiretap or record private conversations on tape – has *erga omnes* effects, thus

[34] See, for details, E. Tanislav, *Protecţia penală a dreptului la intimitate în perspectiva noului Cod penal*, pg.123-125; Al. Boroi, M. Popescu, *Dreptul la intimitate şi la viaţă privată. Elemente de drept comparat*, Dreptul nr.5/2003, pg.163-165.

applying not only to third parties, but also to the participants in the conversation. Moreover, the act of the subject who unlawfully records a conversation, to which he is part of, shall constitute an offence. This conclusion is deduced by interpreting the provisions of Article 226 point 4 letter a) NCC, according to which the act of a person who attended a meeting together with the victim when sounds, talks or images, were registered, it shall not be a offence, but not under any circumstances, except the case when the subject justifies a legitimate interest. At first glance, such an area of incrimination is superfluous, because a recording is nothing but an exact fixing of an audio representation on a special device. Whether it is obvious that the recording made by a third party, who was not accepted to take part in the conversation between other two persons, is consider to be a violation of the privacy of those two, it seems more difficult to identify the reason for which the recording made by one of the participants in a conversation, even without the consent of the other, was categorized as an offence, and when the collected information is not further disclosed, disseminated, reported or transmitted to others (the problem, under these circumstances, also refers to taking, catching or recording images). The conversation itself, being a private one, involves sharing certain elements of intimacy that the allegedly victim is willingly and consciously revealing to the allegedly offender. One could claim that recording such a conversation does not harm intimacy anymore than the victim himself through his confessions. However, we believe that the criminal rule is welcomed, the legislator's object being, probably, to provide the individual with a strong form of protection against those who, under a pretense friendship and by taking advantage of what the victims is telling, sometimes in cases of emotional vulnerability, turn the life of the victim into a subject of public controversy, deepening his suffering. For such a "friend", recording the confessions of the victim constitutes "the supreme evidence", an "excitement", it represents the proof that the subject is real; further more, it protects him from the scepticism of the public (what else than the voice of the victim could be more convincing?)

Postulating that this was also the legislator's reasoning, we consider that further on the discussion must concentrate on the fairness of some authors' opinion who state that "if the images are recorded, the taken pictures or the audio or visual recordings are kept only for personal purpose, without being disclosed to somebody else or to the public, the constituent elements of this offence are not accomplished[35]". The law makes a distinction not in respect to the destination of the images, pictures or recordings, but to whether the offender (who took part in the meeting with the victim) justifies or not a legitimate interest. We would rather assess that, if the circumstances of the case do not reveal that the recordings, pictures or images had been destined to disclosure, dissemination, reporting or transmission to others or to the public, it is unlikely to prove whether there was an intention to harm the victim's private life, thus the act shall not be an offence due to the failure of accomplishing the conditions of the mental element.

In respect to the problem of unlawful wiretapping or recording conversations, we note that – according to our opinion – there shall be as many offences as participants in a conversation, even if the action of the offender is single. Thus, if the agent recorded a private conversation in which three persons participated, there are three distinct offences, which constitute an ideal concurrence. This is due to the fact that, on one hand, private life, as a social value, has an absolutely personal nature, even when intimate issues are shared to others, and on the other hand, criminal law protects each person's private life, and not the private life. However, we must notice that these offences can be committed in different ruling means. Thus, if somebody unlawfully records a conversation held by a person with his guest inside his home, the offence is represented by the act of recording a person in his home for the homeowner, and the offence of recording of a private conversation for the partner.

[35] See P. Dungan, T. Medeanu, V. Pașca, *Manual de drept penal. Partea specială*, Universul Juridic PH, București, 2010, vol. I, pg.253

The aggravating form of the offence of violation of private life refers to unlawful disclosure, dissemination, reporting or transmission of sounds, conversations or images to another person or to the public, according to the provisions of point 1.

To disclose means to publicize, to reveal; disseminating signifies the spreading, propagation of sounds, conversations or images; to report means to present, show, expose them; and to transmit signifies to communicate, to let the others know about those sounds, conversations and images. All these acts represent the activity of the subject who divulges issues concerning a person's intimacy to unauthorized persons.

The object of these acts is represented by illegally obtained images, sounds or private conversations. The text of Article 226 point 2 NCC explicitly postulates: unlawful disclosure, dissemination, reporting or transmission must refer to sounds, conversations or images *"provisioned under point 1 (author's note – R.S.)"*, those that were unlawfully taken, caught, wiretapped or recorded. If the images and conversations that were recorded are unlawfully divulged, certain particularities are encountered. Thus:

- if the active subject holds a certain profession or position that allows him to know personal secrets, he has, at the same time, the obligation to preserve the confidentiality of these data, the act constituting disclosure of professional secret. (Article 227 NCC). For example[36], if a private conversation was recorded by the law enforcement agency on the bases of a judicial authorization[37]. We consider such a solution to be correct also considering the modification of the legal content of the offence relating to the disclosure of the professional secret, since the legislator has abandoned the condition according to which the information had to be "entrusted" to the offender;

- if the offender is any other person, who illicitly intercepted or recorded sounds, conversation or images, the act does not constitute an offence, as it is not stipulated under the criminal law. We regret such oblivion of the legislator. We do not consider the arguments to be pertinent when stating that an unlawful recording of indoor images or private conversations harms intimacy, whilst the unlawful disclosure to the public of some illegally obtained images could not render the same effect. What is the difference, for example, between the situation in which a private event (for instance an onomastic celebration) is unlawfully filmed by an intruder, through the window and then disseminated to the public, and the situation in which one of the attendees films the event with his mobile phone, having the others' consent, and then publishes the film on the Internet, although lacking the others' consent? The same problem also rises in the case of unlawful disclosure of indoor conversations legally recorded. We shall demonstrate, when analyzing the offence relating to the violation of the secret of correspondence that the aggravating form of this act (Article 302 point 4) does not refer to this type of conversations. We consider that not incriminating these acts is a significant loophole for the system of protection of the individual's private life, as it is obvious that they can seriously harm private life. Otherwise, we believe that it is hard to explain the reason for

[36] Another example can be identified in a non-penal law containing criminal provisions. Thus, according to Article 21 Law No 51/1991 regarding Romania national security, the information related to the private life, honor or reputation of the persons incidentally met during the course of collection of data for national security, can not be brought to the knowledge of the public, and the, illegal disclosure or use of this information by the employees of secret services is a crime and is punished by imprisonment from 2 to 7 years (the text is written as it was put forward for change by the project of the Law for the enforcement of the Criminal Code, as it can be found on the site: www.just.ro, 29.01.2012). As it is the case of data obtained during the process of collection of information necessary for national security (therefore, including audio recording operations of indoor private conversations), therefore a licit process, it means that the unlawful disclosure of legally collected information related to private life by the employees of the secret services, constitutes a crime.

[37] For this case, the disclosure of the professional secret could form an ideal concurrence with the disclosure of confidential or non-public information (Article 304 point 1 NCC) or compromising justice interests (Article 277 point 2 NCC).

which the NCC incriminates the act of audio-recording of a conversation by one of the participants, without the consent of the other and without a legitimate interest, but it does not incriminate the unlawful disclosure of the content of such a conversation, if it was legally recorded.

For these arguments, to which we add those to be discussed under the section of offence relating to the violation of the secret of correspondence, we propose that the rule provided by Article 226 point 2 NCC is completed, as follows: "unlawful disclosure, dissemination, reporting or transmission to another person or to the public, of sounds, conversations or images stipulated under point 1, *legally or illegally collected,* is punished […]".

According to the law, the disclosure, dissemination, reporting or transmission must be communicated either to the public, or to "another person", namely to a third party. If the perpetrator reports the recording exactly to the persons that had the conversation, the act does not constitute the content of the aggravating form, and there shall be a concurrence of the offence regarding the violation of private life in its standard form and another offence (for example, assault – Article 206 NCC; extortion – Article 207 NCC).

The actions of taking, catching or recording images, wiretapping, audio-recording, and also the actions of disclosing, disseminating, reporting or transmitting sounds, conversations or images have to be made unlawfully, in other words illegally. Therefore, the actions of video, audio or photographic surveillance do not constitute an offence if made by the law enforcement agencies, as a special technique of surveillance or investigation authorized by the judge for rights and freedoms (Articles 138-139 of the New Code of Criminal Procedure) or in case of a house search (Article 159 point 12 of the New Code of Criminal Procedure).

The absorbed form of the offence regarding the violation of private life is represented by the act of unlawfully placing technical devices of audio or visual surveillance in order to commit the acts pursuant to point 1 and point 2. Placing technical devices for audio or visual recording represents the action of laying, putting, fixing, and installing together with its result. We consider that this equipment must be functional, able to capture sounds or images, regardless of the fact it actually functions or not.

In this case, there are certain preparatory acts necessary to commit the offences pursuant to the standard or aggravating form of the offence, which however, according to the legislator's will, were incriminated as independent and were more seriously punished than the scope-acts themselves. The problem rising is whether there is only one offence or one concurrence, in case a scope-offence was committed. The doctrine[38] stated that only the absorbed form of the offence is to be considered. One can argue this by postulating that if the legislator had intended that the acts constituted a concurrence, he would have explicitly mentioned it, as he had done it in other cases[39].

We consider that one can postulate a separate opinion. We find the uncommon punishing regime for the preparatory acts (even more sever than the one stipulated for the scope-act) reveals the legislator's will that, when the scope-act are committed, the acts shall constitute a concurrence of the offence stipulated by Article 226 point 1 or, depending on the situation, point 2, and the offence under Article 226 point 5 NCC. If only the absorbed form stipulated by Article 226 point 5 is reckoned, the result would be that the preparatory acts absorb the full offence. If the doctrine generally adopts the idea that the full offence naturally absorbs the intended offence and the preparatory acts (the so-called natural complexity[40]), in fact the validity of the mutual thesis has

[38] See V. Dobrinoiu, N. Neagu, *op. cit.*, pg.178.

[39] For example, for the crime of establishing an organized criminal group (Article 367 point 3 NCC)

[40] Specifically see V. Dongoroz, *Curs de drept penal*, Cursuri Litografiate PH, Bucureşti, 1942, pg.307; I. Fodor în V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, *Explicaţii teoretice ale Codului penal român (citat în continuare Explicaţii)*, Romanian Academy PH şi All Beck PH, Bucureşti, 2003, ediţia a II-a, vol. I, pag.262; C. Mitrache, Cr. Mitrache, *Drept penal român. Partea generală*, Universul juridic PH, Bucureşti, 2006,

never been reckoned. However, it is hard to admit that the offence, which from an objective point of view is less harmful for the society and individual, could comprise the most severe one.

Admitting this opinion could also raise some inequities; for example, the person who placed technical means of audio-recording of a private conversation, but he failed to commit the actual recording, he would be subjected to a sanction that has the same limits as for the person who succeeded to wiretap the conversation. However, an actual harming of the victim's private life, namely what the criminal law intends to prevent, was done in the second case, and not in the first.

Likewise, if we admit this point of view, it would mean that we encourage the person to use the technical devices for audio-recording he had placed, as he is aware that his situation can no longer be aggravated. Or, the distinct incrimination of these preparatory acts has the nature of an obstacle-offence, meaning an act that – as it renders a social peril by the fact that its own commission allows the commission of another, which is more serious – is specifically incriminated to prevent the commission of the latter.

We believe, on the basis of these arguments, that the act of unlawful placing of technical devices to audio or video record, with the scope of violating private life, has the nature of an autonomous offence in relation to the scope-offence. It would have definitely been desirable that, from the point of view of the legislative technique, this offence had a distinct article, and not a point of the Article 226 NCC, but we consider that this legislator's "negligence" does not impede us to consider a concurrence including the instrument-offence and the scope-offence. It is in fact the solution admitted in the case of other similar situations[41].

Regardless we refer to the standard, aggravating or absorbed form of the offence, the resulting effect is a harm of the person's private life.

In respect to the mental element, the act is committed with intention, most of the time direct intention, and the oblique one can also be encountered. In the absorbed form, the culpability is only direct intention based on its scope.

The active subject of this offence can be any person who fulfils the conditions for the mental element, and penal concurrence is possible in all its three forms.

Article 226 point 4 stipulates four justifiable special causes. Thus, the act constitutes an offence under the following circumstances:

a) when the offence was committed by the one who participated in the meeting with the victim, whereat sounds, conversations and images were wiretapped, under the condition to justify a legitimate interest. The legitimate interest refers to the protection of certain important social values (for example, the offender audio records the conversation with his wife – who is confessing that she is having sexual relations with another man – can be justified by the interest to sustain the reasons for divorce);

b) if the victim explicitly acted with the intention of being seen or heard by the offender. As a premise, this justifiable cause implies that there was no meeting between the victim and the offender, as otherwise it would be confounded with the previous hypothesis. For example, this

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ediția a V-a, pg.265-266; C. Duvac în G. Antoniu, C. Bulai, C. Duvac, I. Griga, Gh. Ivan, C. Mitrache, I. Molnar, I. Pascu, V. Paşca, O. Predescu, *Explicații preliminare ale noului Cod penal*, Universul juridic PH, București, 2010, vol. I, pg.361-362. To the contrary, see N.T. Buzea, *Principii de drept penal. Infracțiunea penală*, vol. I, Iași, 1937, pg.138; M. Basarab, *Drept penal. Partea generală*, Fundația Chemarea PH, Iași, 1992, vol. II, pag.348; C. Butiuc, *Infracțiunea complexă*, All Beck PH, Bucuresti, 1999, pg.21.

[41] For example, for the crime relating to the possession of instruments for the purpose of forging of values and the offence relating to forgery of coinage. Specifically see V. Dongoroz în *Explicații*, vol. IV, pag.351 şi pag.356; V. Papadopol în T. Vasiliu. D. Pavel, G. Antoniu, Şt. Daneş, Gh. Dărîngă, D. Lucinescu, V. Papadopol, D.C. Popescu, V. Rămureanu, *Codul penal comentat şi adnotat. Partea specială*, Ştiințifică şi Enciclopedică PH, Bucureşti, 1977, vol. II, pg. 230-231.

special justifiable cause can function when several high school students, seeing that on the corridor of their school, a TV coverage is shot, they start talking loudly, due to their specific rebellious behavior, about what they did in a school trip, being aware and with the intent that these conversations are caught and recorded by the technical device used by the reporter; thus they can not complain later about violation of their intimacy.

This situation excludes the offence, on grounds that the victim himself gave up the right to protection of the intimacy, thus one can not ask for more diligence from the third party. The law stipulates that the intention of the victim to be seen or heard is explicit, meaning an obvious, clear and evident behavior. The intention is explicit if any other person in the offender's place had understood the same think from the victim's behavior: that the latter intends to be seen or heard.

Another issue rises, related to this justifiable special cause, whether it functions in the form pursuant to Article 226 point 1 as well as in that under point 2. Still, we find that such a conclusion must be detailed. The content of the text implies that the victim has to behave with the purpose of being seen or heard by the offender, and not by a third party or by the public. If, on the bases of this consent, there is a justification for the act of taking pictures, filming, audio recording, one can not always claim the same in respect to the disclosure, dissemination, reporting or transmission to other persons the information obtain as such. The doctrine[42] presented the example of a woman who widely opened the window and took off her clothes looking in a provocative manner to the offender, who was her neighbor, and it was reasonably demonstrated that taking pictures of that woman was not an offence. We do not consider that the same conclusion can be drawn in regards to the reproduction and display of the picture in the corridor of the condominium where the victim dwells. One can but reluctantly state that, if the victim acted with the intent to be seen by the offender, who is her neighbor, she also acted with the intent to be seen by all the neighbors and that the offender has the right to show the picture he took to the neigbors. Despite this conclusion, the act of disseminating the picture shall remain unpunished (even if the special justifiable cause does not operate) because, as we previously mentioned, the NCC incriminates nothing else but the disclosure, dissemination, reporting or transmission to third parties or to the public, of the indoor images and conversations that were unlawfully recorded; or, for this example, taking pictures is not forbidden by the law, meaning it is licit. It is our opinion that this is another loophole in the protection system of the individual's intimacy stipulated by the NCC;

c) if the offender observes the commission of an offence or he supports to establish the commission of an offence. This special justifiable cause can be explained by the public interest that the protection of the criminal law over the individual's private life is not debauched into an umbrella for criminality;

d) if the agent notices acts of public interest, which are important for the life of the community and the disclosure of which brings public advantages that are more significant than the prejudice they cause to the victim. The justifiable nature of such circumstances can be explained by the necessity to keep a balance in the interaction between private and public interest, being a specific stipulation of the provisions under Article 26 point 2 from the Constitutional Law, according to which "natural person has the right to decide about himself, if he does not breach […] public order […]".

In the case of the offence relating to violation of private life in its standard and aggravating forms, the prosecution is initiated upon the complaint of the victim. This stipulation does not apply to the absorbed form, which is initiated ex officio.

Disclosure of professional secret (Article 227 NCC). The offence consists of the unlawful disclosure of data or information regarding a person's private life, which can cause harm to a person,

[42] See V. Dobrinoiu, N. Neagu, *op. cit.*, pg.179.

by the one who obtained them due to his profession or position and who has the obligation not to disclose these confidential data.

In the Criminal Code of 1968, this offence was incriminated by Article 196. The NCC does not bring significant changes to the legal content of the offence, but it presents certain elements more accurately.

Thus, the generic phrase "the disclosure of certain data", which had an indefinite aspect and thus relatively uncertain, in favor of the one relating to "data or information regarding a person's private life" (for example, those regarding the individual's health, sexual orientation, etc.).

Likewise, the NCC specifies more adequately the active subject, meaning a person who accumulates two conditions: he knows the respective information due to his profession or position and has the obligation not to disclose those confidential data. In the system of the Criminal Code of 1968, the offender could also be a person to whom the information had been entrusted. Article 227 NCC does not maintain this condition, which makes us assess that the offence is committed whatsoever the active subject had known those data with the victim's consent or not[43].

For this offence, the NCC decided for a harsher punishing system than the one under the Criminal Code of 1968.

Harassment (Article 208 NCC). This offence is not included in the Criminal Code of 1968. Similar incriminations can be encountered in foreign legislations[44].

Harassment is regulated in a standard and a mitigating form.

The standard form is the act of a person who systematically and unlawfully or without legitimate interest, observes a person or monitors his residence, professional office or other places that the victim usually attends, thus causing him to fear.

The mitigating form is the act of making phone calls or communicating through electronic devices, which due to frequency or content, causes a person to fear.

The standard form, the material element of the offence is, alternatively, represented by the action of observing a person or monitoring his residence, office or other places he usually attends.

To observe a persons – as postulated under Article 208 NCC – means to keep under observation, to lurk, monitor his behavior, programme, and life, such a manner that the victim becomes anxious and worried. We do not believe that *verbum regens* is limited only to the strict meaning of the verb "to observe", meaning only the action of walking or running after someone; in fact, the incrimination refers to keeping a person under observation, in any way. We base our opinion on the meaning of the term "to harass", meaning not leaving alone, bother, causing all sorts of displeasures.

Consequently, we consider that the material element of the external element is render not only by the offender's action of taking the same road as the victim (although they do not know each other), walking close behind him every morning, despite the fact that the victim – who notices this – changes his schedule or itinerary; or waiting and observing the victim by car, every evening when the latter leaves his working place for home; but also when, for example, the boss repeatedly gives tasks to a subordinate, forcing him to stay over, just in those days when the latter must be, due to family reasons, at a certain hour in a certain place (for example, the school where his child studies), or repeatedly and temporarily hiding objects that are indispensable (for instance, the mouse of the computer) for the victim to urgently write a paper; or ostentatiously displaying food products in the office where a certain person works, each day when the latter, due to religious conviction, fasts (for example, on Fridays), thus being the subject of his colleagues' amusement. For this reason, we

[43] On the contrary, related to the compulsion that the offenders had known the data with the consent of the victim, SeeV. Dobrinoiu, N. Neagu, *op. cit.*, pg.181.

[44] For example, Article 222-16 of the French Criminal Law sanctions the malicious and repeted telephonic calls or the sounds that troubles the others' rest.

consider that, unlike other authors[45], the legislator did not excluded *ab initio* the teasing gestures of the neighbors from the incrimination sphere of harassment; one must investigate, from case to case, whether such actions are the expression of a control that the offender has over the victim's regular programme. For instance, the fact that every time the victim gets ready to leave home by car, he finds the access area to the parking place blocked by one of his neighbors' car may be considered observation as stipulated under Article 208 NCC.

To monitor a certain place means to lurk, keep under control, under attention. The act of monitoring must refer to the dwelling, working place or other places usually visited by the victim. "Usually visited places" must be understood as those places where the victim regularly goes (for example, a medical office where a pregnant woman systematically goes, the faculty where a student goes almost every day, the bar where the victim meets with his friends every weekend). All theses places mentioned by the legislator – home, working place, usually visited places – define the constancies of a person's behavior, so that their observance indicate the action of keeping under observation the victim's everyday programme. We note that the law does not require that the victim is in those places at the moment when the offender commits the act of observation, this fact being irrelevant.

Both ruling means express actions through which the offender has a certain control, even temporarily, over the victim's regular life. According to our opinion, this is the substance of the offence of harassment.

Three fundamental conditions are necessary to be fulfilled. First of all, both observing and monitoring must be repeated, which makes harassment a habitual offence. An isolated act of observation or monitoring does not constitute the content of this offence. The law claims for multiple actions (in the case of habitual offences, our judicial practice usually stops at three), made at certain time periods, thus rendering the offender's habit. A thorough investigation of the period of time between actions, but corroboration with the victim's schedule, is extremely significant in the process of establishing whether the offender has or not the victim's schedule under observation. According to our opinion, the key is not the objective period of time between the offender's actions, but whether they are regular in respect to the victim's schedule. For instance, if the victim takes the same route to his working place everyday, the offender's presence on the same route every time, can constitute harassment; likewise, the offender's appearance in front of the victim's house whenever he celebrates his marriage day. For both examples, even if the elapsed time between the material acts is obviously different (a day – a year), there is a correspondence between the offender's and the victim's behavior, thus we can talk about harassment. On the other hand, the sporadic, irregular appearance, endows a rather occasional nature to the offender's action, questioning the existence of the offence.

A second fundamental condition is that the observation or monitoring is unlawful or without a legitimate interest. The act of observing a person's moves and activities, as a special technical of surveillance or investigation used by the law enforcement agencies (Article 138 point 6 New Code of Criminal Procedure), does not constitute the offence of harassment, when it is authorized by the competent judge. Likewise, we assess as legitimate a husband's monitoring of his wife's lover, while the latter is inside, or a journalist's monitoring a dignitary about whom he possesses information of being involved in an illegal activity.

A third fundamental condition is implicit, derived from the resulting effect of the offence, which is the victim's state of fear. The actions of observation or monitoring must be known, observed by the victim[46], even if he does not know who the offender is; otherwise, they could not induce him a state of fear. Such acts do not constitute the offence of harassment, but they can

[45] See V. Dobrinoiu, N. Neagu, *op. cit.*, pg. 105.
[46] See also P. Dungan, T. Medeanu, V. Pașca, *op. cit.*, pg.158.

obviously have criminal relevance under different circumstances (for example, repeated covert observation of the victim's everyday schedule can constitute a preparatory act for an offence of theft or robbery).

For the mitigating form, the material element is given by the action of making calls or communications through means of remote communication. The telephone call implies the action that produces a signal, usually an audio one, which indicates the intent of initiating a telephonic connection. To communicate means to reveal, transmit information; in order accomplish the content of this form of harassment, the communication must be made through means of remote communication (telephone, telegraph, mail), and not directly.

The telephonic calls or communications must be made in such a way that, due to frequency, or content, they cause a person to fear.

We agree to the opinion expressed by the doctrine[47] according to which, also in the case of the mitigating form, the offence is still a habitual one, as the law uses the plural (telephonic calls or communications). If there is only one communication that, through its content, causes the person to fear, the action does not constitute harassment, but can constitute an offence of threatening (Article 206 NCC).

We consider it useful, hereby, to stress an essential difference between the offences of harassment and of threatening. The two acts are similar in respect to the resulting effect (state of fear), but are different in respect to the material element of the external element. In the case of threatening, the action is to cause the passive subject a state of fear that harm will be done to him due to an offence or a another damaging act against him or another, whereas in the case of harassment, the state of fear is induced by the circumstances that the victim's life is the object of the offender's observation. In the first situation, the cause of fear is the direct threat coming from the offender; while in the second, there is an indirect cause derived from what might happen if the offender has the control over the victim's regular schedule. In the case of threatening, the peril for the passive subject is known (he is to suffer the offence or the damaging act that he is threatened with), in the case of harassment, the fear comes from an infinite of eventual perils due to the circumstances that the offender has his behavior under control and observation. Hence, we believe that this is also the reason for the subsidiary nature of harassment in respect to the act of threatening, thus, every time, the repeated observation of the victim is doubled by threats of committing offences, and the act shall constitute a continuous offence of threatening and not harassment. For example, when, every evening, on his way from the office back to home, the victim is observed by the offender who threatens to kill him.

The criminal punishment for the offence of harassment is different in regards to the forms postulated under Article 208 NCC. Thus, for the standard form, the penalty is 3 to 6 months imprisonment or a fine. In the case of mitigating form, the offender is liable to imprisonment from one to 3 months or a fine, if the act does not constitute a more serious offence. Such a case could be encountered when, due to the offender's repeated telephonic calls, the victim panics and thereafter commits suicide; if the offender had a clear foresight and accepts the attendant consequence, the offence is of determining or facilitating suicide (Article 191 NCC), and the law stipulates a harsher punishment.

The prosecution for the offence of harassment is initiated upon the complaint of the victim.

II.2. The protection of home. We shall refer, for this matter, to the offences relating to the violation of home and the violation of professional office.

The violation of home (Article 224 NCC). The standard form of this offence is identical to the one in the Criminal code of 1968.

[47] See Al. Boroi, *op. cit.*, pg.108.

The NCC has introduced a modification in respect to the aggravating form, abandoning the hypothesis in which violation of home is committed by two or more persons together. When the offence is committed by three or more persons together, this shall determine the legal aggravating circumstances under Article 77 letter a) NCC to be considered.

Another modification was also made in respect to procedural issues, thus the prosecution is initiated upon the complaint of the victim for both the forms of the offence relating to the violation of home.

Likewise, the legislator opted for a milder punishing regime, in respect to the Criminal Code of 1968, in the case of this offence.

The violation of professional office (Article 225 NCC). This offence was not incriminated by the Criminal Code of 1968; but it was stipulated under the Law No 301/2004, which did not come into force, under a similar regulation as the offence of violation of home[48].

This new incrimination is intended to protect intimacy in a working place, the commercial private life, closely tied to the professional premises – the Romanian legislator's source of inspiration being ECHR jurisprudence.

The act is incriminated in a standard and an aggravating form. The standard one constitutes of unlawful entering, by any means, in any of the offices where a legal or natural person conducts its professional activity or the denial to leave it when the entitled persons asks so. The aggravating form can be encountered when the act is committed by an armed person, during the night or by fraudulent capacities.

As to the legal content, the violation of professional office is significantly similar to the violation of home. For example, the material element is represented by the same actions (the act of entering a certain place or the denial to leave it), there is the same essential condition (unlawfully), the aggravating form is similar, and the punishing regime is identical.

Several comments are necessary regarding the material object of the offence. It is the case for any of the premises where the natural or legal person conducts his professional activity.

Office generally means the place where a public institution, organization or company has its administration and conducts its activity. It is the attribute meant to place an agency within space. From a criminal point of view, the concept of office is not limited only to legal persons, and it also extends to natural persons who conduct a professional activity. It can be a place where central or local authorities, public authorities, companies, familial organizations, authorized natural persons; privateers[49] (lawyers, doctors) conduct their activities.

It is essential that the incriminated activity refers to a place where a professional activity is conducted. As long as this condition is fulfilled, it does no longer matter whether the office is a partially or totally opened space (for example, an enclosed construction site or a land demarcated by signs, from which agricultural workers harvest), if it is immobile or can be divided and moved (for example, a tent where circus rehearsals are conducted). Otherwise, the act of entering a place called office, but where no activity is conducted, does not constitute an offence: for instance, the office of the so-called "shell-companies".

We consider compulsory that the professional activity, related to the office, is a legal one. We do not consider that criminal law intended to provide protection to the spaces where, constantly, illicit activities are carried out, as the legislator can not protect what himself prohibits. Consequently, the protection stipulated under Article 225 NCC does not operate, for example, in the case of the office of an unauthorized cigarettes or fuel factory, brothels, clandestine casinos. On the other hand,

[48] For details, see G. Antoniu, *op. cit.*, pg.73-77.

[49] The protection of liberal professions is also regulated by certain specialized laws (see, as an example, Article 35 of the Law No 51/1995 on the organization and conduct of lawyer profession).

we can discuss he problem of committing, associated to these places, the offence of violation of home, under the circumstances those spaces are used at the same time also as home by those involved in such activities (for example, a prostitute who lives in the same building where she receives her clients).

We agree with the opinion that the passive subject of this offence is but a natural person using the office being violated[50], even if the office is owned by a legal person[51]. The offence of violation of professional office is part of the crimes against private life, therefore it can not be otherwise analyzed but in connection with the natural persons. The incriminating form protects the individual's intimacy at his working place, and not the authority of the natural or legal person that conducts the activity inside that office, as the doctrine has stated[52].

II.3. The protection of correspondence. We consider this category includes the offences relating to the violation of the secret of correspondence, illegal surveillance of a transmission of IT data and the unauthorized transfer of IT data.

Violation of the secret of correspondence (Article 302 NCC). The act is incriminated in a standard, three aggravating and an absorbed form.

A first comment over this offence is related to the fact it was included in the chapter relating to professional offences. We find the legislator's motivation criticisable. It is undeniably that violation of the secret of correspondence, if committed by a public servant, also harms the social relations associated to the well-development of the activities and the reputation that public authorities and institutions ought to receive, but we consider that the key social value that is therefore harmed by this offence, especially when the offender is a public servant, continues to be the individual private life[53]. Moreover, this thesis is also valid if the offence is committed by a non-special subject. As if to deepen more the confusion, the Law of enforcement of the criminal Code (Article 245)[54] stipulates that "the provisions under Article 302 of the Criminal Code apply *regardless of them having been committed* within professional relationships or *outside of them (author's note – R.S.)*".

For the standard form, the offence is committed by unlawfully opening, taking, destroying or retaining a correspondence that is addressed to another person, as well as the unlawful disclosure of the content of a correspondence, even when this was sent opened or was accidently opened.

The offence is more serious when it is committed by unlawful interception of a conversation or communication made by telephone or by any other electronic means of communication.

In principle, these two forms of the offence have a content similar to the one in the Criminal Code of 1968, but it has been adopted a more correct systematization of the rules. Thus, the standard form of the NCC includes the ruling means related to the so-called classic correspondence (for example, letters), whilst the form under Article 302 point 2 refers to telephonic correspondence or by other electronic means of communication.

In regards to the second form, we notice – on the one hand – that the legislator refers to the communications made by any electronic means of communication, thus including by e-mail. It would have been better to avoid such a concurrence of rules, especially in the case of a comprehensive law as the Criminal Code. We consider that the offence under Article 361 NCC absorbs the offence of violation of the secret of correspondence, thus it being obvious that its special judicial object is

[50] V. Dobrinoiu, N. Neagu, *op. cit.*, pg.173

[51] Other authors (P. Dungan, T. Medeanu, V. Paşca, *op. cit.*, pg.243) consider that the passive subject can also be a legal person.

[52] Idem.

[53] See V. Dobrinoiu, N. Neagu, *op. cit.*, pg.512. By comparison, the authors properly note that the unit of offence related to profession, it would have been more appropriate to include the offence related to the disclosure of professional secret, and not the one related to the violation of the secret of correspondence.

[54] We envisage the form existing on the site: www.just.ro, on 29.01.2012.

represented not only by the social values and relations associated with the security and integrity of IT systems and data, but also with the individual private life. Likewise, even the punishing system, which is harsher than in the case of illegal interception of a transmission of IT data leads to this conclusion.

On the other hand, direct private conversations and communications between individuals shall not constitute the object of protection stipulated by Article 302 point 2 NCC. Unlawful wiretapping constitutes the offence of violation of private life (Article 226 NCC).

For the second aggravating form, the acts stipulated under point 1 and point 2 are committed by a public servant who has the legal obligation to respect the professional secret and confidentiality of the information he has access to. We notice that the NCC has limited the sphere of the active subject for this form of violation of the secret of correspondence, mentioning only the public servant[55] (as it is defined under Article 175 NCC), and not any other servants.

A third aggravating form consists of unlawful disclosure, dissemination, reporting and transmission to another person or to the public of the content of an intercepted conversation or communication, also when the offender knew about it by mistake or accidently.

We can make some interesting comments in respect to this form of the offence.

Firstly, the way the legislator conceived the Article 302 point 4 NCC reveals that the law penalizes the disclosure, dissemination, reporting and transmission to another person or to the public of the content of any conversation or communication made by telephone or electronic devices, regardless of it having been legally or illegally intercepted. The content of the Article 302 point 4 makes no reference to the hypothesis under point 2, thus unlawful interceptions have not been taken into consideration. If the NCC would have intended to exclusively refer to illegal interceptions, it would have explicitly mentioned them, as it is the situation, for example, of violation of private life (Article 226 point 2 NCC incriminates disclosure, dissemination, reporting and transmission of "sounds, conversations or images *stipulated by point 1 (author's note – R.S.)*", thus of those unlawfully recorded). Consequently, the act of unlawful disclosure of a legally intercepted conversation or communication shall constitute an offence, as well as the unlawful disclosure of an illegally intercepted conversation.

Secondly, if the content of an e-mail correspondence is disclosed, we shall have the aggravating form of violation of the secret of correspondence if that specific communication was legally intercepted, and if not, we shall have a concurrence of offences (violation of the secret of correspondence in its aggravating form and the illegal interception of IT data). This is due to the fact that the chapter relating to the offences against the security and integrity of IT systems and data does not incriminate the act of unlawful disclosure of illegally intercepted IT data[56].

Thirdly, the offence of Article 302 point 4 NCC does not envisage the content of direct communications between two persons. Their unlawful disclosure can constitute violation of private life, in its aggravating form, if the conditions under Article 226 point 2 NCC are accomplished.

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[55] Under the particular situation in which the active subject is an employee of an intelligence service, the right judicial regulation for this act is under Article 20 din Legea nr.51/1991, which postulates: "running, without a warrant, the activities subject to the authorization under Article 13 *(it is also the case of interception of conversations and communications– author's note, R.S.)*, except for those carried out under the situations postulated under Article 15, or exceeding the authorized warrant is punished by imprisonment from 1 to 5 years, if the act is a more serious cime". Thus because, although the offender is a public servant who has the legal obligation to respect the professional secret and the confidentiality of the information to which he has access, Article 20 of Law No 51/1991 has a the nature of a specialized rule compared to the general rule of Article 302 NCC.

[56] According to Article 181 point 2 NCC, IT data means any representation of facts, information or concepts in a form that can be processed in an IT system.

This issue needs a more comprehensive analysis. By analyzing the incrimination manner of illegal interception of personal conversations helps us notice that the Romanian legislator has somehow distanced from the meaning that ECHR jurisprudence consecrates to the concept of correspondence: the communication of thoughts and information by any means (verbally, by letters, telegrams, fax, telex, pager, telephone, e-mail, SMS, MMS). Inside the NCC, correspondence by means of remote communication (letters, telegrams, telephonic conversations, etc.), the elementary rule that penalizes the interception is Article 302 – the violation of the secret of correspondence; otherwise, for direct private communications or conversations, the basic text is Article 226 – the violation of private life.

We shall analyze the way the legislator regulates the issue of disclosing someone else's correspondence. As we have mentioned above, the unlawful disclosure, dissemination, reporting and transmission of the conversations and communications made by telephone or electronic means of communication, regardless of being legally or illegally intercepted, constitutes violation of the secret of correspondence (Article 302 point 4). The unlawful disclosure of the content of the recorded indoor conversations constitutes violation of private life, but only when the recording was illegally made (Article 226 point 2).

Otherwise, the new criminal law does not stipulate – in principle – that the act of unlawful disclosure of the content of an indoor conversation that was legally recorded[57]. For example, when handwriting a testament, the testator admits him being the father of a child outside marriage, in order to dissolute any eventual doubts, and he asks a friend to assist him and audio-video record him while reading the testament. He also asks him to give the tape to the legal inheritances only after his death. Not happy with his share of the fortune, the friend, before the subject's death, shows this tape to the wife of the testator, thus finding out about her husband's past extramarital affair. The act obviously harms the testator's intimacy. However, it is not stipulated as so by the penal law; the communications of the victim were recorded with his consent, thus their unlawful disclosure does not constitute violation of private life and neither the violation of the secret of correspondence, as they were not made by means of remote communication.

The above mentioned hypothesis could be considered as included under the provisions of Article 302 point 4 NCC, which refers to conversations or communications, but it does not include also the rest of the phrase in point 2 ("made by phone or any other means of electronic communication"), thus not being detailed. *Ubi lex non distinguit, nec nos distinguere debemus.*

We are reluctant to this argument. The etymology of the terms used by the legislator show that Article 302 NCC has never taken into consideration the indoor conversations, and only those made by means of remote communication. In the case of violation of the secret of correspondence the adjective "intercepted" was used, being derived from the verb "to intercept", which means to detect and control a telephonic conversation, a correspondence between two persons[58]. The new criminal legislation uses the concept of "interception" only when it refers to the conversations and

[57] Some exceptions were mentioned for the analysis of the crime relating to violation of private life.

[58] See Dicționarul Explicativ al Limbii Române, Romanian Academy PH, București, 1975, pg.434. The doctrine did not give a very accurate definition of this term. Sometimes (See: V. Dobrinoiu, N. Neagu, *op. cit.*, pg.514; Gr. Theodoru, *Tratat de drept procesual penal*, Hamangiu PH, București, 2008, ed. a II-a, pg. 414), the concept of interception was connected exclusivelly to conversations or communications made by telephone or by electronic means of communication, whilst audio recording aimed at all the conversations or communications, thus including the indoor ones. Other authors (See D.I. Cristescu, *Investigarea criminalistică a infracțiunilor contra securității naționale și de terorism*, Solness PH, Timișoara, 2004, pg.195-197) gave a definition to the operation of interception by refering to any confidential communications made directly or indirectly by a person. Personally, we noted that this latter opinion that we adopt (See M. Udroiu, R. Slăvoiu, O. Predescu, *Tehnici speciale de investigare în justiția penală*, C.H. Beck PH, București, 2009, pg.17-18).

communications made by means of remote communication (in the case of violation of the secret of correspondence, of illegal interception of IT data transfer), whilst in the case of direct conversations between two or more persons, face to face, only the terms "wiretapping" and "recording" are used (as in the case of violation of private life). The criminal proceeding legislation adheres to the same semantics. The Criminal Proceedings Code of 1968 refers, in Article 91^1, to the "interception and recording of conversations and communications *made by telephone or by any other electronic means of communication (author's note – R.S.)*", whilst Article 91^4, refers to indoor conversations, the legislator uses only the term of recording, avoiding interception. The New Criminal Proceeding Code stipulates it more clearly: according to Article 138, not only interceptions of conversations and communications, but also video, audio or photographic surveillance are considered special techniques of surveillance or investigation. The phrase interception of conversations and communications is defined under Article 13 point 2, by referring to conversations or communications "*made by telephone, IT system or any other means of communication (author's note – R.S.)*", excluding direct (indoor) conversations, as the latter are associated to video, audio or photographic surveillance, which also means "recording the *conversations" (author's note – R.S.)*" of persons.

On the basis of these arguments, we reiterate the proposal – already postulated under the analysis of the violation of private life – that the text of Article 226 point 2 NCC is properly completed.

The absorbed form of the offence was introduced by the draft of the Law for the enforcement of the Criminal Code (Article 246 point 10)[59] and consists of unlawful possession or manufacturing of special means of intercepting and recording communications. The act is currently incriminated in a similar manner under Article 19 thesis II Law no15/1991[60].

This form is nothing but the incrimination, as a stand-alone offence, for the preparatory acts of violation of the secret of correspondence.

Several comments ought to be made regarding the absorbed form of the offence.

Firstly, we notice that the legislator atypically uses the term "communications" and not "conversations" or "communications". By communication we understand the action to communicate and its result, meaning to bring something to knowledge, inform, notify, and conversation means a talk, a discussion. Yet, the concept of communications defines the means of communication between different points or technical systems used to accomplish the action of communicating. Thus, communications represent the means through which individuals communicate (telephone, telegraph, mail, radio, electronic mail, etc.) as this is the accurate meaning of the terms, we consider it obvious that it is not the "communications" that can be intercepted or recorded (for example, it is not the telephone that is wiretapped – as we often encounter in everyday speech), but "the communications" or, depending on the situation, "the conversations", namely the communicated information (for instance, by telephonic communications). Therefore, we consider that the legislator misused the word "communications", the syntagma of "special means of intercepting or recording of communications", hereinafter referred to as conversations and communications.

Secondly, as the law does not mention the type of conversations or communications, we assess that unlawful possession or manufacturing constitutes an offence when the special means is destined to intercept or record telephonic conversations or by any electronic means of communication and also when it is destined to wiretap or record private indoor conversations. The exception is for IT devices and recordings designed and adapted to commit the offence of illegal

[59] We envisage the form on the site: www.just.ro on 29.01.2012.

[60] According to the text, which is to be abolished by the enforcement of the NCC, it shall be a crime and therefore punished by imprisonment from 2 to 7 years, if the offence constitutes a more serious crime, "illegal possession, manufacturing or use of specialized means for the interception of communications".

interception of a transmission of IT data, and whose unlawful possession or manufacturing is separately incriminated (illegal operations using illegal IT devices or programmes – Article 365 NCC).

Thirdly, as the absorbed form of the violation of the secret of correspondence postulated under Article 302 point 6 NCC, has the nature of a habitual-offence (it is incriminated in order to prevent the commission of more sever offences, the unlawful interception of a conversation), we consider that it is not absorbed by the aggravating form postulated under point 2, and therefore they shall form a concurrence of offences. Certainly, we envisage the situation in which the possession and interception have the nature of relatively autonomous activities in respect to their frame time, and not the situation when, absolutely naturally, the first is comprised by the second; it is obvious that the operation of interception inherently implies the possession of special means, thus, it can not be the case of concurrence. However, it shall be concurrence when, for example, a private detective possesses such means, in his office, for a long time, using them only on certain occasions, when a client asks him so.

A particular situation is met when the unlawful possession or manufacturing regards the special means for recording the indoor conversations. Thus, if they are placed and later used, we consider it shall be no concurrence of three offences: violation of private life in its standard form (Article 226 point 1), violation of private life in the absorbed form (Article 226 point 5), and violation of the secret of correspondence in the absorbed form (Article 302 point 6).

In respect to the criminal punishment of the violation of the secret of correspondence, we note that unlawful disclosure of the content of an intercepted conversation or communication is punished more sever that the disclosure of the content of a classic communication. The situation is justified due to the ampleness of the interpersonal communication by technical means in modern society. We find it hard to understand the legislator's choice to stipulate a milder penalty for the disclosure of the content of the intercepted communication (imprisonment from 3 months to 2 years or a fine) compared to the offence relating to the unlawful interception of a conversation or communication made by telephone or by any other means of communication (the penalty being imprisonment from 6 months to 3 years or a fine). We find it very important the harm brought to private life, for example, when certain intimate information are disclosed to the public by the offender, thus the person's intimacy becoming a general subject of gossip, compared to the situation in which the offender is the only one to find about that information, when he intercepts a victim's telephonic conversation. Likewise, it is difficult understand why the legislator opted a such a penalty system for the violation of the secret of correspondence, whilst in the case of violation of private life by audio recording of a private conversation and, respectively, by disclosing such a conversation to a third party or to the public, the penalties stipulated by the law are increasing: imprisonment from one month to 6 months or a fine relating to recording, respectively, imprisonment from 3 months to 2 years or a fine relating to disclosure.

Such an inconsistency allows us to conclude that it is a concurrence of the offence provided by point 2 and the one provided by point 4, at least for the case of violation of the secret of correspondence, if the offender discloses the content of a telephonic conversation that was unlawfully intercepted. The situation is relatively unusual as the disclosure is not possible without a prior interception, whereas the penalty requires it; thus being hard to accept that an offence stipulating a milder sanction (the disclosure) could absorb the one stipulating a more severe one (the interception).

The legislator devoted only two of the justifiable special causes specific to the violation of private life, for the violation of the secret of correspondence (if the offender notices the commission of an offence or contributes by evidence that an offence was committed or if he notices acts of public interest, which are significant to the life of the community and whose disclosure has public

advantages that are more important than the prejudice caused to the victim); the other two not being compatible with the acts of interception of correspondence or of the conversations or communications made by telephone or electronic means.

From the proceeding point of view, the offence of violation of the secret of correspondence, the prosecution is initiated upon the complaint of the victim, only for the standard form; the initial text of Article 302, which excludes ex officio investigation for any form of the offence, being advanced for a modification under the Law for the enforcement of the Criminal Code.

Illegal Interception of a transmission of IT information (Article 361 NCC). The NCC copied this offence, without any modification in respect to the constituent elements, form the Article 43 of the Law no161/2003. The only distinction refers to the penalty regime, which became milder.

Unauthorized transfer of IT data (Article 364 NCC). The offence of unauthorized transfer of IT data is encountered, in an identical form, under the provisions of Article 44 point 2-3 of the Law no161/2003. Likewise, for this offence, the legislator opted for a milder punishment.

IV. Legal interference with private life. If it is compelling that the law assures a complete and adequate system of protection of the individual's intimacy, making also appeal to the coercion specific to the criminal law, nonetheless we must admit that private life is not an absolute right. Every society admits, for the general interest of its members, the legal possibility of certain public authorities to interfere in a person's intimacy, home or correspondence, related to, for example, the prevention and combat of the criminal phenomenon.

Considering the provisions of the New Criminal Proceedings Code[61], enacted by the Law No 135/2010, we further propose certain comments regarding the methods and proceedings, which are used by the judicial agencies, implying interference with the individuals' private life.

Thus, Article 138 NCPC also regulates, under the phrase of special techniques for surveillance and investigation, the following proceedings:

- interception of conversations and communications – meaning the interception, access, monitoring, collection or recording of conversations or communications made by telephone, IT system or any other means of communication, as well as the recording of trafficking data that indicate the source, destination, data, hour, dimension, duration or the type of communication made by telephone, IT system or any other means of communication;

- access to an IT system – means entering an IT system or IT data storage device, either directly, or remotely, by the use of specialized programmes or of a network, in order to look for evidence;

- video, audio or photographic surveillance – means to photograph persons, to observe or register their conversations, moves or any other activities;

- to locate or survey by technical means – the procedure implies the use of certain devices that determine the place where a person is at;

- to withhold, release or search mail communication – means checking, through physical or technical means, the letters, other mail communications or the objects sent or received by any means, made by the offender, suspect, defendant or any other person suspected of receiving or sending those goods from or to the offender, suspect or defendant.

These measures are taken by the judge for laws and freedoms, if three conditions are accomplished at the same time: *(i)* there is a reasonable suspicion regarding the preparation or commission of a serious crime (for example, those against national security, acts of terrorism, arms trafficking, drugs trafficking, human being trafficking, corruption[62]); *(ii)* the measure is proportional

[61] Herinafter refered to as NCPC.

[62] With exception, withholding, release and search of mail communications can be instituted in case of reasonable suspicions regarding the preparation or commission of any crime.

with the restraint of fundamental rights and freedoms, considering the particularities of the cause, the importance of the information or evidences to be collected or the seriousness of the crime; *(iii)* the evidences could not be collected in any other means or their collection may imply great difficulties that could jeopardize the investigation or there is a peril for the safety of people or certain valuable goods.

The measures are mandated during the course of investigation, for a period of maximum 30 days, and can be prolonged, for justifiable reasons; every prolongation must not be longer than 30 days. The total period for these specific surveillance or investigation techniques, related to the same person and the same offence, is of maximum 1 year; the exception being video, audio or photographic surveillance that, when made in private places, can not exceed 120 days.

By derogation from the above mentioned procedure, Article 141 NCPC allows the prosecutor to authorize these proceedings, if the three conditions previously mentioned are accomplished, and also in case of emergency when the time to obtain a warrant from the competent judge could lead to a significant delay of the investigation, or to a loss, impairment, annihilation of evidences, or it could jeopardize the safety of the victim, witness or members of their families. The prosecutor can institute those measures for a period of maximum 48 hours, having the obligation to inform the judge in order to obtain their validation, in a 24 hours timeframe.

Considering the intrusive conspicuous nature of such measures, the law compels the prosecutor to immediately stop the surveillance if the bases on which it was started are no longer justifiable and to inform the person in writing, in maximum 10 tens, regarding the measure taken against him. If the subject, who has been under surveillance, asks for, he has the right to listen to the conversations, communications or discussions and to see the images.

Another specific surveillance technique that implies interferences with the person's intimacy is that of obtaining the list of telephonic conversations. The measure is instituted by the prosecutor, with the previous consent of the judge for rights and freedoms.

Likewise, house search implies interference in the individual's private life. This measure can be instituted if there is a reasonable suspicion regarding the commission of an offence by a person and it is expected that the search leads to the detection and collection of evidences regarding this offence, to the preservation of the traces of the offence or to the catching of the suspect or offender. House searching is instituted by the judge for rights and freedoms, during investigations, and by the institution invested to take it to court, during the course of a trial.

The law explicitly stipulates that house search must not constitute a disproportionate interference in the private life (Article 156 point 2 NCPC). The judicial agencies that perform the search can adequately and proportionately use of force, in order to enter a house, in two situations: *(i)* for reliable reasons to anticipate armed defence or other types of violence or in case of risk of destroying the evidences; *(ii)* in case of denial or if no answer was given to the judicial agencies' requests to enter the house (Article 159 point 17 NCPC). Likewise, the judicial agency has the right to open, by force, and avoiding unjustified damages, the rooms, spaces, furniture items and other items that might store objects, documents, evidences of the offence or of the searched persons, if the possessor is absent or does not wilfully want to open them (Article 159 point 12 NCPC).

The law allows that the place and the persons or objects found during the search to be photographed or recorded on tape or film (Article 159 point 12 NCPC).

Conclusions.

A complete analysis of the provisions of the NCC allows us to assess that the system for the protection of the individual's private life has substantially improved. This is welcomed both from the point of view of the practice requirements and also in order to provide the Romanian legislation with

the compatibility with the European standards in this matter, and the decision to incriminate certain acts evidently representing attacks on a person's intimacy and that happen more and more often in every day life (the violation of private life or the violation of the professional office). We shall see, in the following years after the NCC enters into force, to what extent the legislation will ensure the prevention function of the criminal law and how it will contribute to the civilizing function that any legal system ought to have for the society to which it addresses.

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IMPLEMENTING A NATIONAL PREVENTIVE MECHANISM FOR THE PREVENTION OF TORTURE AND OTHER FORMS OF CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN PLACES OF DETENTION IN ROMANIA

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Abstract

With the ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) by Law no. 109/2009, Romania has taken a further step in strengthening the preventive monitoring of places of detention by an independent body as a form of preventing and combating torture and other forms of ill-treatment in different places of detention. Consequently, Romania is to establish a National Preventive Mechanism (NPM) for the prevention of torture and other forms of cruel, inhuman or degrading treatment or punishment in places of detention.

The paper will focus on the study of the OPCAT provisions regarding the NPM, aimed at establishing a system of regular visits undertaken by an independent national body to places where people are deprived of their liberty. Due attention will be granted to the existing domestic mechanisms and to the analysis of the legislation of certain European states that already implemented OPCAT.Furthermore, this article will assess the difficulties which the implementation of a NPM in Romania poses, the shortcomings of such an endeavour, with a view to the understanding of the minimum pre-requisites for an effective functioning of such a national body and taking also into consideration the Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights (Paris Principles).To close with, the study will attempt to present some recommendations meant to ensure a firm and efficient implementation of the NPM in Romania.

Keywords: *Places of detention, United Nations, Optional Protocol to the Convention against Torture (OPCAT), National Preventive Mechanism (NPM), Romanian legislation, torture and other forms of cruel, inhuman or degrading treatment or punishment.*

Introduction

Acknowledging the fact that the persons deprived of their liberty are in a fragile position, it is the duty of the states and of the international community to ensure the full respect of their fundamental rights. This was the reason for the United Nations to come with the adoption of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)[1], being convinced, according to the Preamble, that further measures are necessary to achieve the purposes of the Convention against Torture and Other Cruel,

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[1] The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment was adopted on 18 December 2002, entered into force on 22 June 2006 and was ratified by Romania through Law no. 109/2009, published in the *Official Journal of Romania*, Part I, no. 300 of May 7, 2009. For the full text of the OPCAT, see http://www2.ohchr.org/english/law/cat-one.htm, accessed on January 25, 2012.

Inhuman or Degrading Treatment or Punishment (CAT)[2], strengthening the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

The efforts of the United Nations in ensuring protection for the persons deprived of their liberty are continous, just to mention the recent discussions within an open-ended intergovernmental expert group in order to exchange information on best practices, as well as national legislation and existing international law, and on the revision of the existing United Nations standard minimum rules for the treatment of prisoners so that they reflect recent advances in correctional science and best practices, with a view to making recommendations to the Commission on possible next steps.[3]

A presentation of the existing control mechanisms in Romania and a brief analyse of the legislation of certain European states will help us to assess more accurately the current situation in Romania and to observe different models of already implemented national prevention mechanisms, consequently allowing us to look at the whole picture, having all the elements, thus drawing the best fitting solutions in implementing a solid and functional national preventive mechanism in Romania, in full respect with OPCAT requirements.

CONTENT

I. The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

1. General presentation. Observing that the protection of human rights is of paramount importance and is subject to continous evolution, the United Nations adopted the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* stressing out that further measures are necessary to achieve the purposes of the CAT and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

Although Romania ratified the OPCAT in 2009, based on the declaration made in accordance with article 24, paragraph 1, the implementation of the obligations under Part IV, concerning national preventive mechanisms[4] was postponed for three years, thus no NPM was designated in Romania up to this point. The three year period of postponement will expire on 1 August 2012, leaving a tight timeframe to the relevant national stakeholders in order to designate a NPM within the assumed term.[5]

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[2] ***Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted on 10 December 1984, entered into force 26 June 1987 and was ratified by Romania through Law no. 19/1990, published in the*** **Official Journal of Romania*****, Part I, no. 112 of October 10, 1990.***

[3] ***See the open-ended intergovernmental expert group meeting on the United Nations standard minimum rules for the treatment of prisoners, 31 January - 2 February 2012, Vienna, Austria, as requested by the General Assembly, in operative paragraph 10 of its Resolution 65/230 of 21 December 2010, entitled "*****Twelfth United Nations Congress on Crime Prevention and Criminal Justice*****", accessed on February 2, 2012,*** http://www.unodc.org/documents/justice-and-prison-reform/AGMs/General_Assembly_resolution_65-230_E.pdf.

[4] ***According to article 17 of the OPCAT, each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level.***

[5] ***According to article 2 of the Order no. 47/2010 of the minister of foreign affairs, published in the*** **Official Journal of Romania*****, Part I, no. 100 of February 15, 2010, the OPCAT entered into force for Romania on August 1, 2009, so the three year period of postponement will expire on August 1, 2012.***

Unlike other optional protocols to human rights treaties, the OPCAT is viewed as an operational treaty rather than a standard-setting instrument.[6] In this sense, it was stated that the OPCAT breaks new ground within the UN human rights system for four main reasons[7], namely: it emphasises prevention; it combines complementary international and national efforts; it emphasises cooperation, not condemnation and it establishes a triangular relationship (between the States Parties, the Subcommittee on Prevention and NPMs). In this respect it makes more sense to expose places of detention to public scrutiny and to make the entire system in which police, security and intelligence officials operate more transparent and accountable to external monitoring.[8] More specifically, the fact that detainees are locked away from society also means that society is prevented from knowing the truth about life behind bars. Many detainees feel that society has forgotten them and that nobody is interested in their fate. In fact, most people have never seen a place of detention from inside and are not really interested to know what is going on in closed institutions.[9]

The Optional Protocol aims to protect persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment by preventive non-judicial means, approaching the problem from two sides, as it establishes a system of regular visits undertaken to places where people are deprived of their liberty by an independent international body – the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture and by national preventive mechanisms for the prevention of torture at the domestic level, due to be created by each Member State.

The main mandate of the *Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture* shall consist of visits in the places of detention and in making recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment. In order to give assistance to the States and NPMs in fulfilling their obligations under the Optional Protocol, bearing in mind the provisions set out in the OPCAT, the Subcommittee on Prevention issued the Guidelines on national preventive mechanisms[10] aiming to add further clarity as to the expectations of the Subcommittee on Prevention regarding the establishment and operation of NPMs.

The *National Preventive Mechanisms* shall have both functional and personnel independence and shall visit the national places of detention in order to examine regularly the treatment of the persons deprived of their liberty, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment.

Also, they shall have the right to make contacts with the Subcommittee on Prevention, to send it information and to meet with it. It should be stressed out that the Guidelines of the Subcommittee on Prevention emphasize the fact that the NPM should complement rather than replace existing systems of monitoring and its establishment should not preclude the creation or operation of other such complementary systems.

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[6] Association for the Prevention of Torture (APT) and the Inter-American Institute for Human Rights (IIHR), *Optional Protocol to the UN Convention against Torture: Implementation Manual*, revised edition, 2010, p.11, accessed January 31, 2012, http://www.apt.ch/index.php?option=com_docman&task=doc_download&gid=784&Itemid=256&lang=en.

[7] For an in-depth analysis of these reasons, see APT and IIHR, *op. cit.*, p.12 - 14.

[8] See Manfred Nowak, *Interim report of the UN Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment*, A/61/259, 14 August 2006, para.67, accessed January 25, 2012, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/468/15/PDF/N0646815.pdf?OpenElement.

[9] See Manfred Nowak, op. cit., para. 46.

[10] The *Guidelines on national preventive mechanisms* were adopted by the United Nations' Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 15–19 November 2010, accessed January 29, 2012, www2.ohchr.org/english/bodies/cat/opcat/docs/SPT_Guidelines_NPM_en.doc.

When analysing the implementation of OPCAT, one should observe with particular attention the content of the notions of "*places of detention*" and "*deprivation of liberty*" explained in article 4, since the meaning of them is different from the commom understanding. *Place of detention* shall mean any place under the jurisdiction and control of the member states where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.

Deprivation of liberty shall mean any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

So, it can be clearly outlined that places of detention falling under the provisions of OPCAT are broader, as they include not only the "*classical*" places of detention (penitentiaries, places of arrest, detention centers), but any place where a person is or may be deprived of his or her liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or approval, in this category being included, for exemple, psychiatric institutions, centers for the refugees, orphanages and homes for the elderly. Thus the NPMs' visiting mandate has a very wide range, as it comprises the right to visit all places where people are or may be deprived of their liberty. It was however emphasized that the aim of the OPCAT is the prevention and visits are only part of that preventive mandate. It is very important that any NPM looks to the broader picture of prevention under the OPCAT.[11]

2. National Prevention Mechanisms. Further, the paper will focus on analysing the provisions contained in the Optional Protocol regarding the National Prevention Mechanisms. Although the OPCAT does not prescribe a particular structure for the NPMs' it does set out several paraghraphs (articles 17-23) about the mandate and minimum powers the NPMs' must be given by States Parties. In accordance with article 19, NPMs shall be granted minimum the following powers:

"(a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture, cruel, inhuman or degrading treatment or punishment;

(b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture, cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;

(c) To submit proposals and observations concerning existing or draft legislation."

The NPM should have a functional independence and an independence of its personnel, which has to have such capabilities and professional knowledge[12] necessary to achieve the scope of the mechanism.

In fulfilling the requirements of OPCAT, besides the pre-existence of the human resources requirements, the functional and budgetary independence, the experts within the NPM should have, in accordance to the provisions of article 20 of the OPCAT, access to all information concerning the number of persons deprived of their liberty in places of detention, the number of places and their location; access to all information referring to the treatment of those persons as well as their conditions of detention; access to all places of detention and their installations and facilities. Also,

[11] Rachel Murray, Malcolm Evans, Elina Steinerte, Antenor Hallo de Wolf, *Summary and Recommendations* from the Conference *OPCAT in the OSCE region: What it means and how to make it work?,* held on 25-26 November 2008 in Prague, University of Bristol, 2009, p.5*,* accessed February 1, 2012, http://www.bris.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/proceedingspraguenovember2008.pdf.

[12] *E.g.:* prior experience in visiting places of detention, membership in certain professions relevant to the scope of the mechanism (lawyers, doctors, psychologists, psychiatrists, social workers etc.), moral authority and respect within the society.

they must have the opportunity to interview, in private, the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who can supply relevant information.[13]

3. The notion of "torture". As to the notion of *torture* in the sense of the United Nations' Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[14], the accepted approach under international law has been to avoid drawing up an exhaustive list of acts that could be considered to amount to torture because of concerns that such a list may prove too limited in its scope and, thus, may fail to adequately respond to developments in technology and values within societies.[15] Also, the lack of a definition of "*other forms of ill-treatment*" from the text of the Convention is useful as it ensures that other types of abuse that may fail to meet the strict definition of torture as a crime, but that nevertheless cause suffering to individuals, are also absolutely prohibited.[16]

It can be observed that this definition has a four-part test: the intentional infliction; of severe pain or suffering weather physical or mental; for any purpose including, for example, to obtain information, inflict punishement or intimidate him or a third person; by a public official or person acting in an official capacity.[17] To strengthen the prohibition of torture, article 2 from the CAT[18] states the absolute prohibition of torture. Thus it can not be subject of defences, statute of limitations or amnesty and efforts by some States to justify torture and ill-treatment as measures to protect public safety or avert emergencies can not be recognized.

Evaluating the distinction made between torture and other cruel, inhuman or degrading treatment or punishment, the thorough analysis of the *travaux préparatoires* of articles 1 and 16 of CAT as well as a systematic interpretation of both provisions in light of the practice of the Committee against Torture leads one to conclude that the decisive criteria for distinguishing torture from *[cruel, inhuman or degrading treatment]* may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted, as argued by the European Court of Human Rights and many scholars.[19]

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[13] As a consequence of this provision, article 21 of OPCAT underlines the fact that no authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false and no such person or organization shall be otherwise prejudiced in any way.

[14] According to article 1 para.1 from the CAT, the term *"torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions*.

[15] APT and IIHR, *op. cit.*, p.27.

[16] APT and IIHR, *op. cit.*, p.28.

[17] Jim Murdoch, *The treatment of prisoners. European standards*, Council of Europe Publishing, Strasbourg, 2004, p.118.

[18] According to article 2 para.2 from the CAT, *no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.* Moreover, according to article 16 from the CAT, *each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*.

[19] Manfred Nowak, *Civil and political rights, including the questions of torture and detention. Torture and other cruel, inhuman or degrading treatment. Report of the Special Rapporteur on the question of torture, Manfred Nowak*, E/CN.4/2006/6, 23 December 2005, p.13, para.39, accessed February 1, 2012, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/168/09/PDF/G0516809.pdf?OpenElement.

One common element of the definitions of torture and other forms of ill-treatment under the Convention against Torture is that all must involve a public official or someone acting in an official capacity. However, for the purposes of the CAT, cruel, inhuman or degrading treatment may "*not amount to torture*" either because it does not have the same purposes as torture, or because it is not intentional, or perhaps because the pain and suffering is not "*severe*" within the meaning of article 1.[20]

Indeed, the definition of torture in the United Nations' Convention is reflected also to the purpose of the actions, which is in opposition to the provisions of the article 3 from the European Convention for the Protection of Human Rights and Fundamental Freedoms[21], refined through the European Court of Human Rights case-law, stating that "*no one shall be subjected to torture or to inhuman or degrading treatment or punishment*", as the European aproach proceeds upon degrees of severity of the suffering caused in setting up a distinction between torture and inhuman or degrading treatment or punishment.

II. Presentation of the national legislation regarding the current Inspection Mechanisms in Romania

1. Mechanisms of inspection under the authority of the Minister of Justice and the National Administration of Penitentiaries. According to the provisions of articles 21 and 33 from the Government Decision no. 652/2009[22], the control competences of the Ministry of Justice are exercised by the Directorate of Internal Control[23] placed under the direct coordination of the minister of justice. The Directorate can carry out preventive and reactive visits, *ex officio* or as a reaction to a direct complaint and, while not having a special focus, it includes the analysis of torture or ill treatment of the persons deprived of their liberty placed in the penitentiaries under the authority of the National Administration of Penitentiaries. The recommendations given by the Directorate as a result to such visits are binding to all penitentiaries throughout the country.

The internal inspection mechanism within the National Administration of Penitentiaries is the Directorate for the Inspection of Penitentiaries[24], placed directly under the General Director. The Directorate has competence to control all 45 penitentiaries with a total number of approximately 30,600 inmates and its main tasks are: conducting general inspections, which have various purposes such as inspecting safety, health and financial aspects as well as the rights of the detainees, *ad hoc* controls, as a reaction to a complaint, usually to inspect only on a particular aspect, concerning the complaint received and exercising thematic controls concerning an aspect decided upon by the National Administration of Penitentiaries.

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[20] Association for the Prevention of Torture (APT) and the Center for Justice and International Law (CEJIL), *Torture in International Law. A guide to jurisprudence*, 2008, p.12, accessed February 1, 2012, http://www.apt.ch/index.php?option=com_docman&task=doc_download&gid=326&Itemid=260&lang=en.

[21] Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on November 4, 1950, as amended by Protocol no. 11, together with Protocols no. 1, 4, 6, 7, 12 and 13 were ratified by Romania through Law no. 30/1994, published in the *Official Journal of Romania*, Part I, no. 135 of May 31, 1994.

[22] Government Decision no. 652/2009 regarding the organisation and functioning of the Ministry of Justice was published in the *Official Journal of Romania*, Part I, no. 443 of June 29, 2009. Consolidated text as of December 8, 2011.

[23] See articles 74 – 76 from the Order no. 120/C/2011 of the minister of justice on approving the Regulation for organization of the Ministry of Justice, published in the *Official Journal of Romania*, Part I, no. 116 of February 16, 2011. Consolidated text as of October 6, 2011.

[24] See articles 46 – 54 from the Order no. 2003/C/2008 of the minister of justice on approving the Regulation for organization of the National Administration of Penitentiaries, published in the *Official Journal of Romania*, Part I, no. 603 of August 13, 2004. Consolidated text as of January 5, 2009.

The personnel of the Directorate for the Inspection of Penitentiaries has access to all facilities, information and documents regarding the place of inspection, it can hold interviews with the detainees in private and is not subject to restrictions from the administration of the penitentiaries. After each visit the Directorate issues a note with its findings, recommendations and a deadline for the penitentiary to implement the recommendations.

2. Mechanisms of inspection under the authority of the Ministry of Administration and Interior and the General Inspectorate of the Police. The internal control mechanism within the Ministry of Administration and Interior is the Directorate of Internal Control[25], directly subordinated to the minister of administration and interior, having competence to all the structures within or subordinated to the Ministry.

The Directorate for Internal Control within the General Inspectorate of Romanian Police has the competence to visit and control all 54 police detention facilities. It specializes in organizing and carrying out inspections, checking petitions, preventing and countering infringement of law within the personnel of the General Inspectorate of Romanian Police and subordinated units.

3. Mechanisms of inspection under the authority of the Ministry of Labour, Family and Social Protection and under the public local administration. The internal control mechanism within the Ministry of Labour, Family and Social Protection is the Directorate of Internal Control.[26]

The protection of children that are placed in institution where they are not allowed to leave at will is ensured both on a central and local level. The main institution of the central public administration having competences in the protection of the children rights is the National Authority for the Protection of the Rights of the Child, subordinated to the Ministry of Labour, Family and Social Protection. It is the responsibility of the public local administration authorities to guarantee the rights of children within their territorial range.

4. Mechanisms of inspection under the authority of the Ministry of Health. In Romania there are approximately 37 psychiatric hospitals, 4 of which being psychiatric hospitals for safety measures, where patients are not free to leave at will due to the danger state they may pose to themselves or to others.

According to the provisions of the Government Decision no. 144/2010[27], the Directorate for Control functioning within the ministry inspects the hospitals in order to renew their licensing. If deficits are found, binding recommendations are made and a time frame for improvements is given.

Also, regarding the mental health institutions, according to the provisions of the Government Decision no. 1424/2009[28], the National Centre for Mental Health, a subordinated structure to the Minister of Health, deals with various issues regarding the management of mental health institutions and the medical treatment of the patients, carrying out preventive and reactive inspections, as it monitorises and evaluates the mental health services.

The preventive visits of these 2 mechanisms usually have the purpose of inspecting a broad range of issues and specifically to check the compliance with the medical and professional standards.

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[25] Order no. 118/2011 of the minister of administration and interior regarding the organization and execution of internal controls within the Ministry of Administration and Interior, published in the *Official Journal of Romania*, Part I, no. 443 of June 24, 2011.

[26] Government Decision no. 11/2009 regarding the organisation and functioning of the Ministry of Labour, Family and Social Protection was published in the Official Journal of Romania, Part I, no. 41 of January 23, 2009. Consolidated text as of August 23, 2011.

[27] Government Decision no. 144/2010 regarding the organisation and functioning of the Ministry of Health was published in the *Official Journal of Romania*, Part I, no. 139 of March 2, 2010. Consolidated text as of January 11, 2012.

[28] Government Decision no. 1424/2009 regarding the organisation and functioning of the National Centre for Mental Health was published in the *Official Journal of Romania*, Part I, no. 842 of December 7, 2009.

5. Conclusions on the existing mechanisms under the executive branch.

Despite the fact that all the above presented mechanisms functioning under the executive branch can carry out reactive or even preventive visits and can hold interviews in private with the persons deprived of their liberty, having access to all facilities and relevant persons and documents when visiting a place of detention, they lack the human and logistic resources in order to visit a relevant number of places of detention falling under their competence and, being subordinated to the executive branch, they lack functional and budgetary independence. Consequently, the relevant conditions needed to effectively and objectively examine the treatment of detainees and the conditions of detention, as required by OPCAT, are not present. Nevertheless, the executive mechanisms can function as useful partners for the future NPM, as they have a broad expertise regarding the administration and management of places of detention and could be able to implement recommendations of the NPM in an appropriate manner.[29]

6. Delegated Judges. The new legal framework in the field of execution of criminal penalties, namely Law no. 275/2006[30], envisages a modern development of the Romanian prison system, as a delegated judge on the execution of prison penalties was introduced, thus the execution of these penalties being carried out under the surveillance, control and authority of this judge, ensuring the lawfulness of the execution.

Delegated judges are not part of the penitentiary administration, as they mentained their status of judge of the Romanian court system. Thus, they are independent from the executive branch and only subordinated to the judicial branch. According to article 15 para.(2) from the Government Decision no. 1897/2006[31], they are competent to carry out current, occasional, unexpected, thematic and specialised inspections and controls *ex officio* or based complaints. The delegated judges have the right to access all relevant facilities within the penitentiary and hold interviews in private with any detainee or staff member.

In conclusion, the delegated judges, although independent in exercising their competences, do not carry out preventive visits, but only react to the complaints filed by inmates and aiming to prevent ill-treatment of these persons, do not have the necessary expertise, logistics or budgetary independence to realise a full evaluation of a place of detention in order to prevent torture and other ill-treatements, not to mention the fact that their offices are placed on the premises of the penitentiary, thus their independence and credibility can be undermined.

7. Ombudsman. *Avocatul Poporului* (the Romanian Ombudsman) was established in 1991 through the Constitution, as an independent and autonomous public authority, with its own budget and having the purpose of defending the individuals' rights and freedoms in their relationship with the public authorities. The Ombudsman tries to unblock the conflicts between citizens and public administration, conflicts emerging, especially, from bureaucracy, as this was and still is a heavy disease of the state administration.[32] It shall exercise his powers *ex officio* or at the request of persons

[29] Moritz Birk, Ulrike Kirchgaesser, Julia Kozma, *Final Report on the possible solutions for the establishment of a National Preventive Mechanism in Romania,* p.8**,** accessed January 31, 2012, http://www.just.ro/LinkClick.aspx?fileticket=M%2B4HHbNMs10%3D&tabid=690.

[30] Law no. 275/2006 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings was published in the *Official Journal of Romania*, Part I, no. 627 of July 20, 2006. Consolidated text as of May 22, 2010.

[31] Government Decision no. 1897/2006 for the approval of the Regulation of application of the Law no. 275/2006 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings was published in the *Official Journal of Romania*, Part I, no. 24 of January 16, 2007. Consolidated text as of December 4, 2010.

[32] Ioan Muraru in Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituția României revizuită – comentarii și explicații (Romanian Constitution revized – comments and explanations)*, All Beck Publishing House, Bucharest, 2004, p.116.

infringed in their rights and freedoms, within the limits established by law, including the possibility to visit public places of detention, but not private ones.

Avocatul Poporului is organised by Law no. 35/1997[33], has its headquarters in Bucharest and 14 regional offices. According to these legal provisions, the domain of justice, police and penitentiaries falls under its competence. Consequently, the authorities of places of detention must provide anyone who is under arrest or detention, the right to address the Ombudsman concerning a violation of his/her rights and freedoms, except for the legal restraints.

Although he is empowered to deploy preventive visits, from the public reports it can be seen that it rarely does so; of two surveys in 2009, one focused on the rights of detainees in a penitentiary and the other on child and youth protection and the right to health care according to human rights standards in a children placement centre.

The Advocate of the People shall report before the two Parliament Chambers, annually or at the request thereof. The reports may contain recommendations on legislation or measures of any other nature for the defence of the citizens' rights and freedoms. The recommendations cannot be subject to parliamentary or judicial control.

Sumarising, the Ombudsman usually visits places of detention upon a complaint and it does not have the necessary human or financial resources to systematically carry out preventive visits as required by OPCAT. In spite of these shortcomings, the Ombudsman is, unlike the other mechanisms analysed, a truly independent institution.

8. Non-Governmental Organisations. In Romania there are several non-governmental organizations which carry out an intensive activity in monitoring places of detention (*e.g.* Association for the Defense of Human Rights in Romania - the Helsinki Committee, Romanian Group for the Defence of Human Rights, Centre for Legal Resources).

According to the provisions of the Law no. 275/2006, the representatives of the non-governmental organisations that carry out activities in the field of protection of human rights may visit the penitentiaries in the subordination of the National Administration of Penitentiaries or places of arrest in the subordination of the General Inspectorate of the Police and may contact the inmates, with the agreement of the general director of the National Administration of Penitentiaries or of the warden of the place of arrest. The meetings among the representatives of the non-governmental organisations and the persons deprived of their liberty are confidential, with visual surveillance.

The representatives of the non-governmental organisations performing visits need an annual general approval by the Romanian authorities for the visits. In addition, the approval is verified by the respective prison or police unit before each visit.

Regarding the psychiatric hospitals, the non-governmental organisations have an annual protocol signed with the Ministry of Health, by which representatives of these organisations can visit such hospitals, having access to all the facilities within the institution. Also, interviews with the patients are conducted in private.

Although non-governmental organisations are fully independent from the State, not receving any funding of any sorts for the monitoring visits and carry out preventive visits in the "*classical*" places of detention, they do not have the capacity neither the resources necessary to carry out systematic visits to all places of detention throughout the country, lacking, also the multidisciplinary expertise and the legal provisions to ensure that they can issue recommendations to the visited institutions.

[33] Law no. 35/1997 on the organisation and functioning of the Institution of the Advocate of the People was re-published in the *Official Journal of Romania*, Part I, no. 844 of September 15, 2004. Consolidated text as of January 16, 2011.

In conclusion, while in Romania a comprehensive system of monitoring of places of detention already exists, the current inspection mechanisms display significant shortcomings in view of independent preventive monitoring[34], none of these mechanisms being in compliance with the Paris Principles[35] and with the minimum requirements of OPCAT in order to be appointed as the National Prevention Mechanism.

III. Short analyse of the implementation of the National Preventive Mechanism in certain European Union states.

1. The Czech Republic ratified the Optional Protocol in 2006 and, subsequently, the Act on the Public Defender of Rights (Ombudsman) was ammended in order to implement the OPCAT. The law came into effect as of 1 January 2006. From this date on, the Public Defender of Rights (*Veřejný ochránce práv*) acts as a NPM, as it has independence both functionally and institutionally.

Being appointed as a NPM, the Defender was obligated to undertake systematic, comprehensive and preventive visits in places of detention, with the objective of strengthening the protection of these persons against torture or cruel, inhuman and degrading treatment or punishment and other maltreatment.[36] Places of detention falling under the mandate of the Defender are: facilities performing custody, imprisonment, protective or institutional education, or protective treatment or preventive detention; other places where persons restricted in their freedom by public authority are or may be confined, especially police cells, facilities for the detention of foreigners and asylum facilities and places where persons restricted in their freedom are or may be confined as a result of dependence on the care provided, especially social service facilities and other facilities providing similar care, healthcare facilities and facilities providing social/legal protection of children[37], regardless if they are state or private. Thus the Defender's competence is not limited to the places of detention where persons are deprived of their liberty *de jure,* as a result of a direct interference of a public authority, being included, also, places of detention where the freedom of a person is restricted *de facto,* giving the dependance of that particular person on institutional care.

Ombudsman´s staff empowered to carry out visits consists of a special department of 12 lawyers and other *ad hoc* experts, such as doctors, psychologists, psychiatrists. Visits of one to three days are carried out according to a prepared plan for a specific period, each visit being finalized with a report. If it considers necessary, the team can make recommendations or proposals for remedial measures, adressed to the director of the visited place of detention.[38] Recommendations following the visits may vary, in the case of remand prisons, from the necessity to give a preventive inspection to people taken into custody by a doctor on the same day they are admitted, to the possibility for the inmates to combine their own underwear with prison-issue clothing or, in the absence of work opportunities, to the recommendation that prison administration should offer defendants as wide a range of leisure-time activities as possible.[39]

[34] Moritz Birk, Ulrike Kirchgaesser, Julia Kozma, *op. cit.*, p.7.

[35] The Principles relating to the Status of National Institutions (*The Paris Principles*) were adopted on 20 December 1993*,* accessed January 26, 2012, http://www2.ohchr.org/english/law/parisprinciples.htm.

[36] Section 1 para.3 from the *Act no. 349/1999 on the Public Defender of Rights*.

[37] Section 1 para.4 from the *Act no. 349/1999 on the Public Defender of Rights.*

[38] See Filip Glotzmann and Petra Zdrazilova – *Presentation on the National Preventive Mechanism in the Czech Republic*, Conference *OPCAT in the OSCE region: What it means and how to make it work?,* held on 25-26 November 2008 in Prague, accessed January 25, 2012, http://www.bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/presentationglotzmann.pdf.

[39] For an in-depth analisys, see Public Defender of Rights Report on Visits to Remand Prisons, 2010, p.2*,* accessed January 25, 2012, http://www.ochrance.cz/fileadmin/user_upload/ENGLISH/2010_vazebni_veznice_ENG.pdf.

2. In ***France*** the General Inspector of Places of Deprivation of Liberty (*Contrôleur général des lieux de privation de liberté*) was set up as the NPM, through Law no. 2007-1545 of 30 October.

The General Inspector in charge to control all the places where people are deprived of liberty is independent, cannot receive instructions from any authority and cannot be prosecuted for his opinions or for the actions he carries out in his functions, and has the power to check that all the fundamental rights of people in the places of detention are respected. So, the aim of the institution is not only to prevent torture and any other inhuman and degrading treatment in custodial establishments but rather to ensure the full respect of all the fundamental rights of persons deprived of liberty. Consequently, the *Contrôleur général* has three main tasks: to make sure that rights which are inherent in human dignity are enforced; to make sure that a good balance is established between fundamental rights enforcement of people who are deprived of freedom and observations on public order and security and to prevent any violation of their fundamental rights.[40]

The core of the NPM in France is formed of 12 full time appointed "*contrôleurs*" and 9 part time "*contrôleurs*". In the performance of their tasks, the inspectors are under the exclusive authority of the General Inspector.[41] Also, the *Contrôleur général* and all his team are compelled to professional secrecy, ensurying that no information allowing persons subject to the inspection to be identified is included in the documents published under the authority of the *Contrôleur général* or in his public statements.[42]

Based on article 8 from Law no. 2007-1545, the *Contrôleur général* can visit more than 5,000 custodial establishments, such as: prisons, psychiatric hospitals, hospitals where people stay without their consent, police custody cells, places of custody or customs detention, centers for detention of foreigners, court cells, administrative detention centres and facilities, waiting zones, secure educational centres and vehicles which are used to transport people deprived of freedom, where people are kept in custody.

There is an exception provided by the law regarding the visiting powers of the NPM: the authorities responsible for a place of detention may, for serious, compelling reasons connected with national defence, public security, natural catastrophes or serious disturbance within the visited facility, object to the visit, with a due justification for the objection and with the information of the NPM when the exceptional circumstances come to an end.

In the specialist literature it was said that, according to a model of classical action for the control of independent places of deprivation of liberty, the *Contrôleur général* may issue opinions and recommendations.[43]

The broad activity of this institution aims to highlight the good practices, on the one hand and to make recommendations when the fundamental rights of the persons deprived of their liberty are not fully respected, on the other hand.

Although an activity report in 2011 was not yet published, the opinions and recommendations given by the General Inspector are available. For example, the General Inspector issued an opinion on telephone usage in the places of detention, specifically prisons and detention centers[44], as the right

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[40] Central tasks of the *Contrôleur général des lieux de privation de liberté*: taking care of the respect of fundamental rights, accessed January 29, 2012, http://www.cglpl.fr/en/the-tasks-of-the-controleur-general-des-lieux-de-privation-de-liberte/.

[41] Article 4 para.(3) from Law no. 2007-1545 of 30 October establishing a *Contrôleur général des lieux de privation de liberté*. Consolidated text as of 31 March 2011*,* accessed January 25, 2012, http://www.cglpl.fr/wp-content/uploads/2009/04/Loi_CGLPL_EUK-v.pdf.

[42] Article 5 from Law no. 2007-1545.

[43] Jean-Paul Céré, *Le système pénitentiaire français* in *Les systèmes pénitentiaires dans le monde*, sous la direction de Jean-Paul Céré, Carlos Eduardo A. Japiassù, 2nd edition, Dalloz Publishing House, Paris, 2011, p. 183.

[44] Opinion of of the *Contrôleur général des lieux de privation de liberté* from 10 January 2011, regarding the telephone use in places of detention, published in the *Official Journal* of 23 January 2011, accessed February 1, 2012,http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20110123&numTexte=25&pageDebut=&pageFin=.

for such a person to use the telephone is one of the ways to recognize his or her right to family life and to defend itself. The opinion tells, amongst other problems, about the respect of private and family life, in this sense, the abandonment of the installation of telephones in activity rooms or collective rooms being required. Also, it is desired to install telephone boots in order to protect the privacy of the inmates' conversations from the other inmates, several reccomendations already being made by the General Inspector in this sense. Further, it states that there is no possibility for the spouses or parteners, both of them being deprived of their liberty, to contact one another via telephone, despite the fact that they have the right to maintain the bonds of the family life.

3. The Federal Republic of Germany signed OPCAT on 20 September 2006 and it entered into force for Germany on 3 January 2009. The rights and responsibilities of the German NPM are defined in the Law of 26 August 2008 as well as in the Administrative Order of 20 November 2008, for the federal component and the State Treaty of 25 June 2009, for the Länder component.

Because of the Germany's federal structure, the NPM comprises two institutions: a Federal Agency for the Prevention of Torture for the Federation's jurisdiction, with competences over detention facilities operated by the Federal Armed Forces, Federal Police and the German Customs Administration and a Joint Länder Commission for the jurisdiction of the Länder with competences over the majority of the places of detention, namely: police, judicial, detention facilities in psychiatric clinics, establishments of custody pending deportation, nursing homes, youth welfare establishments.

The Agency and the Commission work together, they have the same material and personnel resources, and, most importantly, they are independent, not being subordinated to any federal or state ministry.[45] They both have to report annually to the federal and state governments and to the federal and state parliaments.

Regarding the Composition of the German NPM, both components of the German NPM are headed by honorary members.[46] In consequence, no salary or professional fee is allocated to them. Only travel expenses and daily allowances are paid.

There is no explicit selection procedure prescribed, the candidates being selected and proposed by the Federal Ministry of Justice and the Länder ministries of justice.

The NPM may be complemented by experts who could accompany the team during inspection visits. These experts might as well belong to a non-guvernmental organisation, but then they would act in their function as associated experts to the Mechanism.

The role of the Federal Agency's and of the Joint Commission of the Länder is to carry out regular or *ad hoc* visits to places of detention, identify problems and make recommendations to the relevant authorities. The German law has not reiterated the OPCAT provisions regarding the NPM right to submit proposals and observations to existing or draft legislation.

The Administrative Order and the State Treaty explicitly offer the Mechanism the right to enter any place of detention, with or without notification, access to any kind of information and the right to conduct confidential interviews with any person in the detention facility, but there is no special procedure provided to enforce access to places of detention. Regarding the places of detention, the German legislation does not explicitly name all relevant institutions that fall under the application of OPCAT. But the commentary to the Federal Law of 26 August 2008 mentions the following places as encompassed by article 4 of OPCAT: police stations, prisons (including remand prisons), closed units of psychiatric hospitals, centres for asylum seekers and persons awaiting

[45] According to article 4 of the Administrative Order of 20 November 2008 and article 4, para.1 of the State Treaty of 25 June 2009, accessed February 2, 2012, http://www.antifolterstelle.de/fileadmin/dateiablage/Dokumente/Presse/Organisationserlass_OPCAT_01.pdf.
http://www.antifolterstelle.de/fileadmin/dateiablage/Dokumente/Presse/Staatsvertrag_Laenderkommission.pdf.

[46] According to article 4 of the Administrative Order of 20 November 2008 and article 4, para.1 of the State Treaty of 25 June 2009.

deportation, international airport transit zones, police stations, youth welfare centres, secluded juvenile shelters, geriatric and nursing homes[47].

As to the NPM created in Germany, there can be raised serious suspicions about the efficiency and the conformity of this mechanism with the OPCAT. In this sense, the Committee against Torture is concerned about the lack of sufficient staff and financial and technical resources provided to the National Agency for the Prevention of Torture, comprised of the Federal Agency for the Prevention of Torture and the Joint Commission of the Länder, owing to which places of detention can be currently visited only once in four years, preventing the adequate fulfilment of the Agency's monitoring mandate and about the fact that the Joint Commission of the Länder had to announce, in some instances, its intention to visit the places of detention to the respective authorities in advance in order to gain access.[48]

4. Slovenia ratified the Optional Protocol in 2007 and, subsequently designated the Ombudsman as National Preventive Mechanism, which can give its agreement for the participation at the visits to the representatives of the non-guvernmental organizations registered in Slovenia or of organizations that have obtained the status of humanitarian organizations in Slovenia (the so-called Ombudsman plus' model).

As set out by the OPCAT and taken over by the Slovenian law, the scope of the visits and of the Mechanism itself is not to criticize, but to assist. A visit by an NPM should be based on cooperation rather than on confrontation. The Ombudsman visited the first place of detention as a NPM on 19 March 2008[49].

The Slovenian law recognizes the importance of the financial independence of the mechanism, which is indispensable in order to achieve its functional independence as required by the OPCAT. The source and nature of funding is specified in the law and the budget for the Ombudsman and the NPM is based on the proposal of the Ombudsman. The staff and premises are shared by the Ombudsman and its NPM unit.

The mandate of NPM is mainly to carry out visits[50] (programmed, *ad hoc* or follow-up visits) at the detention places in order to examine the situation of persons deprived of their liberty, both in relation to the treatment of detainees and the conditions of detention. Its mandate and recommendations cover very different aspects of factual and legal nature such as living and material conditions, health-care services, social conditions, procedural guaranties, behavior and training of the staff etc. According to the Slovenian law, within the meaning of place of detention can fall police detention units, prisons for remand and sentenced prisoners, means of transport for the transfer of prisoners, re-education centers for juveniles or young offenders centers for illegal immigrants, homes for asylum seekers with closed units, border police facilities and transit zones at international ports and airports, psychiatric hospitals where patients in the criminal or civil context are hospitalized against their will, closed wards of social care institutions, including homes for the elderly, special social care institutions where residents with learning difficulties, physically or mentally retarded

[47] See the Printed paper of the Bundestag no. 16/8249, commentary to Article 4 OPCAT, 2008, p. 27, accessed February 2, 2012, http://dip21.bundestag.de/dip21/btd/16/082/1608249.pdf.

[48] See the Committee against Torture, the Forty-seventh session, *Consideration of reports submitted by States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Germany*, 2011, p.3-4, para.13, accessed February 1, 2012, http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.DEU.5_en.pdf.

[49] *About the National Preventive Mechanism of the Republic of Slovenia*, p.2, accessed February 1, http://www.varuh-rs.si/fileadmin/user_upload/pdf/DPM/ABOUT-NPM-SLO.pdf.

[50] In 2010, the Mechanism performed 44 visits in prisons, remand centers, police stations, asylumsm aliens centers, psychiatric institutions, special social care institutions, retirement homes and juvenile facilities, as mentioned in the *Report on the National Preventive Mechanism under the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on the year 2010*, p.7, accessed February 2, 2012, http://www.varuh-rs.si/fileadmin/user_upload/pdf/DPM/DrzavniPreventivniM-2010-web2.pdf.

residents are accommodated. Members of a delegation can move inside the place of detention without any restriction and they have access to any facility or space within the premises of a place of detention.

The visits result in a report containing an assessment of the facts found and, if necessary, some concrete recommendations to improve the situation, which are not obligatory neither legally binding. If there is an urgent need to improve the treatment of persons deprived of their liberty, the delegation can make immediate observations

5. In ***Poland,*** the competences of the National Preventive Mechanism are entrusted to the Ombudsman (Commissioner for Civil Rights Protection), an independent body established since 1987. The Constitution ensures the independence of the Commissioner from the executive branch and the Ombudsman Act provides that the right to appoint the Commissioner belongs to the Lower House of the Parliament (*Sejm*). The Parliament also holds the right to dismiss the Commissioner, only in the event of the Commissioner resignation, permanent inability to fulfill his or her duties or betrayal of the oath of the office.[51]

At present, the tasks of the NPM are carried out by four dedicated teams in the Office of the Commissioner for Civil Rights Protection: Team for Penal Executive Law; Team for Public Administration Issues, Healthcare, Protection of Aliens Rights; Team for Rights of Soldiers and Public Officers; Team for Labour Law and Social Insurance. Also, two staff members in each of the Commissioner offices in the country were assigned to permanent cooperation with the Mechanism.

Depending on the type of place of detention visited, the visiting groups may be completed with external professionals, such as physicians, psychologists, psychiatrists or addiction treatment specialists.

The objectives of the NPM are: to regularly examine the treatment of the persons deprived of their liberty in places of detention, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment; to make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment taking into consideration the relevant norms of the United Nations; to submit proposals and observations concerning existing or draft legislation and to raise awareness of the society on the issues of preventing torture and on the relevant norms concerning the treatment of people deprived of their liberty.[52]

The NPM carries out visits in institutions such as: prisons, custody suits, juvenile detention centers, juvenile refugees, juvenile reform schools, youth sociotherapy centers, spaces within Police organizational units designed for persons apprehended or brought in to sober, emergency centers for children, detoxification centers, social care facilities, psychiatric institutions, guarded facilities for foreigners, deportation custody facilities, and military disciplinary custodies. There are about 1826 institutions in Poland that can be identified as places of detention, according to the definition provided by. In 2010 the National Preventive Mechanism carried out 80 visits to 79 to such places of detention.[53]

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[51] Articles 3.1 and 7.1 of the Act of 15 July 1987 on the Human Rights Defender (Ombudsman Act) accessed February 2, 2012, http://www.rpo.gov.pl/index.php?md=7512&s=3.

[52] See *The role of the National Preventive Mechanism and its activities in practice* in Report of the Human Rights Defender on the activities of the National Preventive Mechanism in Poland in 2009. Bulletin of the Human Rights Defender No.5, Sources, Warsaw, 2010, p.98, accessed February 2, 2012, http://www.rpo.gov.pl/pliki/12821222200.pdf.

[53] *Report of the Human Rights Defender on the activities of the National Preventive Mechanism in Poland in 2010,* Warsaw, 2011, p.13, accessed February 2, 2012, http://www.rpo.gov.pl/pliki/13125459170.pdf.

After each visit a report is prepared within two – three weeks, with an attached opinion by a psychologist, psychiatrist or other external expert. Annual reports are also published and disseminated, in conformity to the requirements of the OPCAT.

IV. Implementing a National Preventive Mechanism for the prevention of torture and other forms of cruel, inhuman or degrading treatment or punishment in places of detention in Romania. Challenges regarding the implementation.

1. ***When evaluating the shortcomings regarding the implementing the National Preventive Mechanism in Romania***, it should be emphasized that this mechanism must not replace the national monitoring systems already in place. Moreover, the OPCAT does not interdict the States to designate an existing institution as a NPM, if this institution fulfills both the requirements set out in OPCAT and in the *Paris Principles*.

It should be stressed out that no specific form is prescribed in the Optional Protocol as to the implementation of a NPM in domestic legislation. When analysing the different European NMPs already in place, some models can be outlined:

- designating one of the existing monitoring bodies (e.g. Ombudsman in Czech Republic or Poland)

- Ombudsman plus' models (e.g. Slovenia), where the NPM mandate is carried out by the Ombudsman office and non-guvernmental organisations. Involving civil society organisations may also help to legitimise both an NPM mandate and its credibility as an institution, not least because civil society organisations are often structurally independent of the government.[54]

- new visiting body (e.g. France and Germany).

In order to reach a conclusion regarding the designation of a NPM, several aspects must be taken into consideration:

a) *The institutional framework*, namely: the necessary number of members and employees of the mechanism; how can one become a member, the minimum professional requirements and what are the neccesary professions that have to be present in the mechanism; costs needed to set up the mechanism; the necessary budget as to ensure its proper functioning.

b) *Jurisdiction*: what types of institutions will be controlled; how is regulated the access to all facilities subject to inspection; access to classified information; what is the subject of the controlling visits; the procedure to be followed when acess is prohibited for the experts.

c) *Composition of the visiting team*: the criteria needed to choose the members for the visiting team; the number of persons taking part in a visit; the participation of other experts to the visits, together with the permanent members of the NPM.

d) *Working method*: announced and unannounced visits; planned or *ad hoc* visits; the estimated number of controls per year, duration, frequency and the criteria needed to select the places of detention that will be visited; the right to obtain information and conduct interviews in private with the persons deprived of their liberty.

e) *Consequences of the visits*: best practices; the possibility to make recommendations; whether or not subsequent visits can or must be carried out in order to verify whether or not the recommendations were implemented; the documents prepared as a result of the visit and publication of such documents; the publishing of an annual report toghether with the communicated position of the authorities and with the recommendations issued as a result of the visits.

In evaluating the conditions needed to be respected when implementing the provisions of Part IV of the Optional Protocol, one has to look at the Guidelines on national preventive mechanisms

[54] APT and IIHR, *op. cit.*, p.215.

issued by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In the area of basic principles[55], it must be noted that the future NPM should be established at constitutional or legislative level, fully respecting the provisions of the OPCAT as to the mandate and powers of the mechanism. Also, the future mechanism must have complete financial and operational autonomy when carrying out its functions, thus permitting the effective operation of the institution.

The NPM should have the right to visit all places of detention as analysed above in Section I of the paper and the state authorities should cooperate with the Mechanism in order to ensure the proper implementation of the recommendations issued, as mentioned in article 22 of OPCAT, with a view to strengthening the protection of the persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

In the Guidelines, the Subcommittee on Prevention stressed out the possibility for the experts within the NMP to conduct private interviews with those deprived of liberty, the right to carry out visits in the manner and with the frequency that the NPM itself decides, including unannounced visits at all times to all places of deprivation of liberty. Also, the NPM must be able to make proposals or observations on any existing or draft policy or legislation relevant to its mandate.[56]

In accordance to article 23 of OPCAT, the State should publish and widely disseminate the Annual Reports of the NPM.

When pursuing a functional and independent national mechanism, some principles must be observed as to the NPM itself and its members. Firstly, the NPM should carry out all aspects of its mandate in a manner which avoids actual or perceived conflicts of interest and any confidential information acquired in the course of its work should be protected and, in accordance with the proivisions of article 21 of OPCAT, no personal data shall be published without the express consent of the person concerned. Moreover, the NPM should plan its work and its use of resources in such a way as to ensure that places of deprivation of liberty are visited in a manner and with sufficient frequency to make an effective contribution to the prevention torture and other cruel, inhuman or degrading treatment or punishment. When appropriate, the visit reports or the annual reports should contain recommendations addressed to the relevant authorities.

The liason with other NPMs and with the Subcommittee on Prevention is of great importance in ensuring a proper functioning of the Mechanism, by sharing the experience in reaching the aim set out in the Optional Protocol, eventually, with the adoption of a set of good practices available to all national mechanisms.

It should be stressed out that all the aspects mentioned above must be fulfilled by the NPM, disregarding if it will be a new institution or the competences of an already existing institution will be enlarged (the Ombudsman in the case of Romania).

In the process of designating an institution as NPM, due attention must be given to the background, capabilities and professional knowledge of the personnel, necessary to enable it to properly fulfill its mandate. This should include, *inter alia*, relevant legal and health-care expertise. In other words, members of the NPM should collectively have the expertise and experience necessary for its effective functioning.[57]

Today, when evaluating the implementation of a NPM in Romania, one should bear in mind the economic resources as well as the human resources needed to achieve a functional

[55] *Guidelines on national preventive mechanisms*, *op. cit.*, para.5-15.

[56] See Basic issues regarding the operation of an NPM in *Guidelines on national preventive mechanisms*, *op. cit.*, para.24-40.

[57] *Guidelines on national preventive mechanisms*, *op. cit.*, para.17-20.

implementation from the two possible solutions: new body or enlarging the competences of the Ombudsman. In this sense, it goes without saying that the designation of an existing body is the most economic solution, both as to the budgetary impact and as to the human resources and logistic effort.

In establishing a proper support for setting up an efficient National Preventive Mechanism, the Ministry of Justice of Romania coordinated a twinning project[58], in which were involved all the stakeholders from Romania, representatives of the non-guvernmental organisations and experts from Austria, Czech Republic, France, Germany, Poland and Slovenia, with the sole purpose of assisting the Romanian Government in implementing its obligations under the Optional Protocol and establishing a National Preventive Mechanism for the prevention of torture and other forms of cruel, inhuman or degrading treatment or punishment in places of detention.

In evaluating the possibilities mentioned above (designation of an existing visiting body or creating a new visiting body), there can be found both advantages and disadvantages on the part of either one of these solutions[59]:

a. Establishment of a new body as a NPM in Romania. *Arguments and criticism.* In the current economic circumstances, not only in Romania, but in all Europe, a new institution will be met with great reluctance especially when the national policy regarding the budgetary expenses is aiming to reduce bureaucratic structures and public expenses. Also, this new established NPM would have to be granted legal guarantees of independence at legislative level. Establishing a new body is not however without its own particular challenges. A new body will need time to demonstrate its independence and establish its legitimacy and credibility.[60] Also, it will have to ensure a tight trusty relation with all the public authorities in order to provide the NPM with the support necessary to exercise its powers, as it is the case with the Ombudsman.

On the other hand, it was said that the establishment of a new body presents the opportunity to properly implement all requirements of OPCAT learning form the potential shortcomings of the existing institutions such as the Ombudsman office.

b. Designation of the Ombudsman office as NPM in Romania. Arguments and criticism. The Ombudsman, under the current conditions mentioned above in Romania, is most suitable to be the proper institution for taking over monitoring of human rights due to its previous expertise and experience in dealing with complaints of human rights violations. Moreover, the designation of the Ombudsman as NPM will ensure the much needed speediness and cost effectiveness of the implementation process, bearing in mind the fact that it will be able to use the existing structures. Also, the cut-costing policy will be evidentiated as the 14 regional offices of the Ombudsman can be used for the infrastructure and logistic support for the mechanism.

This institution has a strong legal basis in the Romanian Constitution and is explicitly provided with autonomy and independence from any public authority, with a separate budget at its disposal, thus complying with the criteria of independence purported by OPCAT and *the Paris Principles*.

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[58] For the findings in this Twinning project, see Moritz Birk, Ulrike Kirchgaesser, Julia Kozma, *Final Report on the possible solutions for the establishment of a National Preventive Mechanism in Romania*.

[59] For an in-depth analisys of these solutions, see Moritz Birk, Ulrike Kirchgaesser, Julia Kozma, *op. cit.*, p.36–40.

[60] Debra Long, *Report on the current state of play and possible solutions to assist the process of designating or establishing a National Preventive Mechanism in Romania*, Human Rights Implementation Centre, University of Bristol, August 2011, p.19, accessed February 1, 2012, http://www.bristol.ac.uk/law/research/centres-themes/hric/hricdocs/romaniavist.doc.

The designation of the Ombudsman as a NPM must be substantiated by enlarging its structure with an additional number of positions in order to recrute experts in this field and its budget will be supplemented, thus ensuaring its proper functioning.[61]

It cannot be disputed that valuable *synergies* between the current functions of the Ombudsman and the preventive mandate of a NPM could develop if the NPM was installed within the existing Ombudsman's structures.

Of course, one could argue that when integrating the NPM into the Ombudsman, it risks taking over any of its potential problems and shortcomings in terms of competences, independence, composition and overall effectiveness.

2. As to ***the possible solutions***, after analysing all the requirements of the OPCAT, the Guidelines set out by the Subcommittee on Prevention and the advantages and disadvantages when designating a NPM in Romania, the optimal solution in implementing the OPCAT in the national legislation could be the designation of the Ombudsman office as NPM, in opposition to the creation of a new body. In this sense, it is necessary to ammend the Law no. 35/1997 on the organisation and functioning of the Institution of the Advocate of the People. Of course, the designation of the NPM has to be endorsed by an open and transparent process that involves besides the Ombudsman itself, all the stakeholders and the representatives of the civil society.

This designation is likely to strengthen the role of Ombudsman in defending rights and freedoms of individuals in their relations with public authorities in the context of a very broad definition of places of detention, which includes not only traditional detention centers (penitentiaries, hospital-penitentieries, penitentiaries for the minors, detention centers), but also other places that require careful consideration of the rights of persons deprived of their liberty *de jure* or *de facto* (e.g. psychiatric hospitals, elderly homes, children's homes, refugee centers, centers for foreigners etc.).

The designation of Ombudsman offices as NPM (as it was done in countries like the Czech Republic, Slovenia or Poland) is understandable as it has been observed that Ombudsman offices normally enjoy considerable guarantees of independence and their mandate is often grounded in the national constitution.[62]

In ensuring its financial independence, the NPM must have its budgetary independence. Of course, the experts should recive an adequate honorarium and training on human rights monitoring in places of detention, possibly with the consultation of international experts, ensuring a highly qualified personnel for the visits.

When designating the Ombudsman as NPM, a different structure within the Ombudsman institution must be created, comprising in a Pool of Experts (acting as the core of the NPM) and administrative staff, in full respect to the Subcommittee on Prevention Guidelines stating that where the body designated as the NPM performs other functions in addition to those under the Optional Protocol, its NPM functions should be located within a separate unit or department, with its own staff and budget. The Commission of Experts will have a tripartite composition:

- experts working within the NPM (weather they are currently working with the Ombudsman office or they will be recruted in the future)
- representatives of non-guvernmental organizations with relevant experience in this area;
- representatives of institutions involved.

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[61] According to the Government Decision no. 5/2002 regarding the organisation and functioning of the Ombudsman office, republished in the *Official Journal of Romania*, Part I, no. 758 of October 27, 2011, the maximum numbers of the persons working within the Ombudsman can not excede 99.

[62] Elina Steinerte, Institutions of Ombudspersons as National Preventive Mechanisms: Some Preliminary Observations, presentation at the Opening Plenary of the Conference OPCAT in the OSCE region: What it means and how to make it work?, held on 25-26 November 2008 in Prague, University of Bristol, 2009, p.1, accessed February 1, 2012, http://www.bris.ac.uk/law/research/centres-themes/opcat/opcatdocs/prague2008/presentationsteinerte1.pdf.

This solution will ensure a balance of the NPM core, as the representatives of the institutions involved and of the non-guvernmental organizations will bring the much needed know-how both from the point of view of the state authorities and of the civil society.

Also, the law on implementing the national mechanism should specify in what manner the experts are choosen (an objective, open competition, announced in the media and over the internet, organized through a highly transparent process by a selection commission, the minimum requirements regarding the necessary qualification, the professional expertise in one of the required disciplines, the minimum working years of experience, the experience in human rights, the prior experience in monitoring places of detention, the good reputation, the absence of a criminal record, being desirable). The experts will have different backgrounds necessary to fulfill the NPM mandate: lawyers, medical doctors, psychologists, psychiatrists, social workers and others.

The NPM personnel shall have such privileges and immunities as they are necessary for the independent exercise of their functions. Also, the State should not order, apply, permit or tolerate any sanction, reprisal or other disability to be suffered by any person or organisation for having communicated with the NPM or for having provided the NPM with any information, irrespective of its accuracy, and no such person or organisation should be prejudiced in any way.[63]

The experts will have to be independent in exercising their competences, appointed in office by the Ombudsman for a determinated mandate. Also, besides the permanent experts, short-term experts should be incorporated in the mechanism, which will participate to the visits when the permanent experts do not posess the necessary qualification, are not able to participate themselves or when it is more economical to engage in the visiting team a local short-term expert.

The experts will have the right to visit all places of detention as defined by OPCAT, will have access to all the buldings, facilities and installations of such venues. They will have the right to enter such place immediately. If they are prevented from entering the premises, the law must provide for a speedy procedure, permitting the experts to address to the superior authority and to inform the Subcommittee on Prevention. If the denial still persists, the NPM can take an action in court against the act of the authority by which the access of the visiting team is denied. The denial of acces can arise only in strictly limited situations, when there is a clear and immediate danger for the national safety, public health or there is a disaster risk.

The experts will have the right to make both announced and unannounced visits, planned or *ad hoc*. In planning the visits, experts will analyse the types of places of detention falling under its competence of the NPM, their number, the geographical disposal, the complaints received from the persons deprived of their liberty, prior reports of the mechanism, a certain vulnerability of some venues etc. The visiting team can, if the situation arises, take along interpreters, payed from its own budget.

The visiting team will have the right to conduct private interviews with all persons, in particular with inmates. Also, the visited institutions are obliged to forward to the experts all the information or data requested.

The experts will draw up a report in short time, preferably 30 days or, as soon as possible, for urgent matters, when the situation requires immediate remedy, describing the visit and underlining any recommendations needed to be made. Of course, the administration responsible for the visited place can respond to the content of the report, stating their opinion. The state institution will have to respect and implement the reccommendations, the NPM having to engage in a close dialog with the stakeholders in order to ensure the proper implementation of these acts. A procedure is to be set up if a certain institution refuses to comply with the recommendations. If this situation arises, the NPM should have the possibility to address to the superior authorities, to inform about this fact the Subcommittee on Prevention and to make public the refusal.

[63] *Guidelines on national preventive mechanisms*, *op. cit.*, para.27.

Given the nature of its work, it is almost inevitable that a NPM will face challenges such as a reluctance within bureaucracies to change structures and practices, a lack of resources to implement recommendations etc., and sometimes negative public opinion.[64] In this sense, it is of paramount importance for the functioning of the NPM that its members will engage, open and sustain all channels of communication with the places of detention, superior authorities, non-guvernmental organizations and civil society as a whole, thus ensuring a permanent dialogue which will facilitate a rapid implementation of the recommendations.

Also, the NPM will adopt an annual activity report which will be published on the internet page of the institution and will be disseminated to all the stakeholders. The annual report will be communicated to the Subcommittee on Prevention as well.

Conclusions

With the implementation of Part IV of the Optional Protocol concerning the establishement of national preventive mechanisms a step forward will be taken in preserving the rights of the persons deprived of their liberty in order to prevent torture and other cruel, inhuman and degrading treatment or punishment.

The creation of national preventive mechanisms will aim to ensure a strong bond with all the relevant stakeholders, with the places of detention and with the civil society, as the mechanism has a preventive purpose.

As to the implementation of the OPCAT provisions in Romania, the optimal solution could be the enlargement of the competences of the Ombudsman, endorsed by open and extensive consultation with all the actors involved in order to assess the difficulties which the implementation poses, the shortcomings of such an endeavour, with a view to the understanding of the minimum pre-requisites for an effective functioning of such a national body, thus reaching a common position and ensuring the full respect of the Optional Protocol requirements, the *Paris Principles* and the Guidelines elaborated by the Subcommittee on Prevention.

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THE "*NE BIS IN IDEM*" PRINCIPLE IN THE CASE-LAW OF THE EUROPEAN COURT OF JUSTICE (II). THE 'FINAL JUDGMENT' AND 'ENFORCEMENT' ISSUES

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 this second study on the 'ne bis in idem principle' we will deal with the notion of 'final judgment' and 'enforcement' issues.

Keywords:.*European Court of Justice, ne bis in idem, final judgment, enforcement, case law*

1. Introduction

The European Court of Justice, dealing with cases in the field of the 'ne bis in idem' principle, has established an autonomous interpretation of the notion of the 'same acts', a very important component of the principle.

In the following cases the focus shall be on what constitutes final judgment according to the opinion of the Court. However, in this area the Court parted slightly from the autonomous concept, towards a case by case interpretation, ending with a national interpretation of the 'final judgment'.

2. Transaction between the Prosecutor and the Defendant in Judgment from 11 February 2003 in Joined Cases C-187/01 and C-385/01 *Hüseyin Gözütok and Klaus Brügge*

The facts underlying the preliminary reference are based on two disputes involving, on the one hand, Mr. Gözütok (of Turkish origin, residing in the Netherlands) and, on the other, Mr. Brügge (a German resident). These disputes arise from two criminal proceedings brought against the accused: in the former case, in Germany, concerning an offence committed in the Netherlands and, in the latter, in Belgium, concerning an offence committed on Belgian soil. They were combined by the Court because of links between the facts and the questions raised by national jurisdictions.[1]

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[1] For an anaysis of this case, see **Nadine Thwaites**, *Mutual Trust in Criminal Matters: the ECJ gives a first interpretation of a provision of the Convention implementing the Schengen Agreement. Judgment of 11 February 2003*

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*."[2]

Article 55 provides that:

1. A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases:

(a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered;

(b) where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party;

(c) where the acts to which the foreign judgment relates were committed by officials of that Contracting Party in violation of the duties of their office.

2. A Contracting Party which has made a declaration regarding the exception referred to in paragraph 1(b) shall specify the categories of offences to which this exception may apply.

3. A Contracting Party may at any time withdraw a declaration relating to one or more of the exceptions referred to in paragraph 1.

4. The exceptions which were the subject of a declaration under paragraph 1 shall not apply where the Contracting Party concerned has, in connection with the same acts, requested the other Contracting Party to bring the prosecution or has granted extradition of the person concerned.

...

Article 58 provides:

"The above provisions shall not preclude the application of broader national provisions on the *ne bis in idem* principle with regard to judicial decisions taken abroad."

2.2. Facts

Mr Gözütok is a Turkish national who has lived for some time in the Netherlands where he ran a coffee-shop in the town of Heerlen without the mandatory administrative authorisation. On 12 January and 11 February 1996 the Netherlands police searched the premises and seized certain quantities of hashish and marijuana.[3]

The criminal investigations instigated following the above events ended on 28 May and 18 June 1996, after Mr Gözütok accepted the offer of settlement made by the Netherlands Public Prosecutor's Office and paid the sums of three thousand Dutch guilders (NLG) and of seven hundred and fifty (NLG).

On 31 January 1996 a German bank, at which Mr Gözütok held an account, had alerted the criminal prosecution authorities in the Federal Republic of Germany to the fact that he was handling large sums of money.

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in Joined Cases C-187/01 a. C-385/01 Hüseyin Gözütok and Klaus Brügge, 4 German Law Journal No. 3 (1 March 2003), 253-262; **Maria Fletcher**, *Some Developments to the ne bis in idem Principle in the European Union: Criminal Proceedings Against Hüseyin Gözütok and Klaus Brügge,* The Modern Law Review 2003, v.66, n.5, 769-780.

[2] 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.

[3] 1 kg of hashish, 41 hashish cigarettes (*joints*) and 1.5 kg of marijuana in the first search, and 56 grammes of hashish, 10 *joints* and 200 grammes of marijuana in the second.

On 1 July 1996 the Aachen public prosecutor brought charges against Mr Gözütok accusing him of dealing, in the Netherlands, in significant quantities of narcotics on at least two occasions during the period from 12 January to 11 February 1996.

On 13 January 1997 the Amtsgericht (District Court), Aachen, convicted the defendant of dealing in significant quantities of narcotics and sentenced him to a period of one year and five months' imprisonment, suspended on probation.

Mr Gözütok and the Public Prosecutor appealed against the judgment. By decision of 27 August 1997, the Landgericht (Regional Court), Aachen, discontinued proceedings on the ground that, under Article 54 of the Convention, the decision taken by the Netherlands authorities to discontinue the case had the force of *res judicata* and, in accordance with that provision and with Article 103(3) of the *Grundgesetz* (Basic Law), constituted a bar to prosecution of the acts in the Federal Republic.

The above decision was contested by the Public Prosecutor's Office before the Oberlandesgericht Köln (Higher Regional Court, Cologne), on the ground *inter alia* that Article 54 of the Convention, in establishing the bar to a second prosecution, referred only to final judgments given by one of the Contracting Parties.

Mr Brügge, a German national, caused Mrs Leliaert bodily injury which rendered her unfit for work. The Bonn Public Prosecutor conducted an investigation in respect of those facts against Mr Brügge, in which he offered him an amicable settlement under which the case would not be proceeded with following payment of DEM 1 000.[4] On 13 August 1998 the defendant paid the fine and the Public Prosecutor ordered the discontinuance of the case.

Mr Brügge has been charged in respect of the same facts before the Rechtbank van Eerste Aanleg te Veurne, where the victim has entered an appearance claiming damages for the mental distress caused to her by the assault.[5]

2.3. Questions

1. The first question is whether the *ne bis in idem* principle stated in Article 54 of the Convention also applies when in one of the signatory States a criminal action is extinguished as the result of a decision to discontinue proceedings, taken by the Public Prosecutor's Office once the defendant has fulfilled the conditions imposed on him.

2. If the reply to the above question is positive, the German court wonders whether it is necessary for the decision taken by the Public Prosecutor's Office to be approved by a court.

2.4. Findings[6]

The Court stated that by the Treaty of Amsterdam the European Union set itself the objective of maintaining and developing the Union as an area of freedom, security and justice in which the free movement of persons is assured. Also the integration of the Schengen *acquis* (which includes Article 54 of the CISA) into the framework of the European Union is aimed at enhancing European integration and, in particular, at enabling the Union to become more rapidly the area of freedom, security and justice which it is its objective to maintain and develop.[7]

Article 54 of the CISA, the objective of which is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of

[4] The legislative basis for that offer is found in Article 153a of the *Strafprozeßordnung* (German Code of Criminal Procedure).

[5] Advocate General's Opinion in Joined Cases C-187/01 and C-385/01 *Hüseyn Gözütok and Klaus Brügge*, delivered on 19 September 2002, paragraphs 15-25.

[6] I will expose the most important Paragraphs of the Court's preliminary ruling.

[7] As it is shown in the first paragraph of the preamble to the Protocol.

movement, cannot play a useful role in bringing about the full attainment of that objective unless it also applies to decisions definitively discontinuing prosecutions in a Member State, even where such decisions are adopted without the involvement of a court and do not take the form of a judicial decision.[8]

It is clear from the wording of Article 54 of the CISA that a person may not be prosecuted in a Member State for the same acts as those in respect of which his case has been 'finally disposed of' in another Member State. A procedure whereby further prosecution is barred is a procedure by which the prosecuting authority, on which national law confers power for that purpose, decides to discontinue criminal proceedings against an accused once he has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the prosecuting authority. In such procedures, the prosecution is discontinued by the decision of an authority required to play a part in the administration of criminal justice in the national legal system concerned. Also, a procedure of this kind, whose effects as laid down by the applicable national law are dependent upon the accused's undertaking to perform certain obligations prescribed by the Public Prosecutor, penalises the unlawful conduct which the accused is alleged to have committed.

The Court concluded that following such a procedure, further prosecution is definitively barred and the person concerned must be regarded as someone whose case has been 'finally disposed of' for the purposes of Article 54 of the CISA in relation to the acts which he is alleged to have committed. In addition, once the accused has complied with his obligations, the penalty entailed in the procedure whereby further prosecution is barred must be regarded as having been 'enforced' for the purposes of Article 54.

The Court rejected the argumentation of the parties that no court is involved in such a procedure and that the decision in which the procedure culminates does not take the form of a judicial decision, saying that in the absence of an express indication to the contrary in Article 54 of the CISA, the procedure must be regarded as sufficient to allow the *ne bis in idem* principle laid down by that provision to apply.

Furthermore, nowhere in Title VI of the Treaty on European Union relating to police and judicial cooperation in criminal matters (Articles 34 and 31 of which were stated to be the legal basis for Articles 54 to 58 of the CISA), or in the Schengen Agreement or the CISA itself, is the application of Article 54 of the CISA made conditional upon harmonisation, or at the least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred.[9]

In those circumstances, whether the *ne bis in idem* principle enshrined in Article 54 of the CISA is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, there is a necessary implication that the Member States have ***mutual trust*** in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.

For the same reasons, the application by one Member State of the *ne bis in idem* principle, as set out in Article 54 of the CISA, to procedures whereby further prosecution is barred, which have taken place in another Member State without a court being involved, cannot be made subject to a condition that the first State's legal system does not require such judicial involvement either.

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[8] Joined Cases C-187/01 and C-385/01 *Hüseyn Gözütok and Klaus Brügge,* [2003] ECR I-1345, paragraphs 36-38 (hereforth, *Gözütok and Brügge)*.

[9] See also for an analysis of the Court ruling **Francois Julien-Laferriere**, *Les effets de la communautarisation de l"aquis de Schengen" sur la regle "non bis in idem"*, Le Dalloz 2003, annee 179, 1er cahier (rouge), n.22/7119, 1458-1460.

The aptness of that interpretation of Article 54 of the CISA is borne out by the fact that it is the only interpretation to give precedence to the object and purpose of the provision rather than to procedural or purely formal matters, which, after all, vary as between the Member States concerned, and to ensure that the principle has proper effect.[10]

In conclusion, the *ne bis in idem* principle also applies to procedures whereby further prosecution is barred, by which the Public Prosecutor of a Member State discontinues criminal proceedings brought in that State, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor.

3. Parallel Proceedings as a Further Bar to Prosecution in Judgement from 10 March 2005 in Case C-469/03 *Filomeno Mario Miraglia*

The reference was made in the course of criminal proceedings against Mr Miraglia, who was charged with having organised, with others, the transport to Bologna of heroin-type narcotics.[11]

3.1. Legal Framework

The provisions of Netherlands law

In accordance with Article 36 of the Netherlands Code of Criminal Procedure:

'1. Where the criminal proceedings are not pursued, the trial court before which the case was last prosecuted may declare, at the defendant's request, that the case is closed.

2. The court may reserve its decision on the request at any time for a certain period if the prosecuting authorities adduce evidence demonstrating that the matter will still be prosecuted.

3. Before the court gives its decision, it shall summon the person directly concerned of whom it is aware in order to hear his views on the defendant's request.

4. The order shall be notified to the defendant forthwith.'

Article 255 of that Code provides:

'1. Where a case does not proceed to judgment, after the order declaring the case closed has been notified to the defendant, or after he has been notified that no further action is to be taken, without prejudice in the latter case to Article 12i or 246, no further proceedings may be taken against the defendant in respect of the same acts, unless new evidence is brought forward.

2. Only statements made by witnesses or the defendant or documents, acts or official records which have subsequently come to light and have not been examined can constitute new evidence.

3. In such a case, the defendant can be summoned before the Rechtbank only after a preliminary judicial inquiry into that new evidence …'.

Finally, with regard to requests for mutual assistance in criminal matters, Article 552-l of the Netherlands Code of Criminal Procedure provides:

'1. The request shall not be granted:

…

(b) in so far as to grant it would serve to collaborate in proceedings or an action incompatible with the principle underlying Article 68 of the Criminal Code and Article 255(1) of this Code;

(c) in so far as it is made for the purposes of an inquiry concerning facts in respect of which the defendant is prosecuted in the Netherlands …'.

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[10] *Gözütok and Brügge,* paragraphs 26-35.

[11] For an analysis of this case see **Lionel Rinuy**, *Cour de Justice, 10 mars 2005, Filomeno Maria Miraglia*, Revue des affaires europeenes v.14, n.2, 327-331.

3.2. Facts

The reference was made in the course of criminal proceedings against Mr Miraglia, who was charged with having organised, with others, the transport to Bologna of heroin-type narcotics. In connection with an investigation conducted by the Italian and Netherlands authorities in cooperation, Mr Miraglia was arrested in Italy on 1 February 2001 under an order for his pre-trial detention issued by the examining magistrate of the Tribunale di Bologna. Mr. Miraglia was charged with having organised, with others, the transport to Bologna of 20.16 kg of heroin, an offence laid down by and punishable under Articles 110 of the Italian Criminal Code and 80 of Presidential Decree No 309/90.

On 22 January 2002 the examining magistrate of the Tribunale di Bologna committed Mr Miraglia to be tried for that offence and decided to replace his detention in prison by house arrest. The Tribunale di Bologna later replaced house arrest by an obligation to reside in Mondragone (Italy), and then revoked all detention measures, so that at present the defendant is at liberty.

Criminal proceedings in respect of the same criminal acts were instituted concurrently before the Netherlands judicial authorities, Mr Miraglia being charged with having transported about 30 kg of heroin from the Netherlands to Italy. The defendant was arrested on that charge by the Netherlands authorities on 18 December 2000 and released on 28 December 2000. On 17 January 2001 the Gerechtshof te Amsterdam (Netherlands) rejected the appeal brought by the prosecuting authorities against the order of the Rechtbank te Amsterdam (Netherlands) dismissing their application for the defendant to be kept in custody.

The criminal proceedings against Mr Miraglia were closed on 13 February 2001 without any penalty or other sanction's being imposed on him. In those proceedings the Netherlands public prosecutor did not initiate a criminal prosecution of the defendant. It is apparent from the file before the Court that that decision was taken on the ground that a prosecution in respect of the same facts had been brought in Italy. By order of 9 November 2001 the Rechtbank te Amsterdam awarded the defendant compensation for the damage suffered through his having been remanded in custody and also the costs of the lawyers instructed.

By letter of 7 November 2002 the Public Prosecutor's Office of the Rechtbank te Amsterdam refused the request for judicial assistance made by the Public Prosecutor's Office of the Tribunale di Bologna, taking as its ground the reservation formulated by the Kingdom of the Netherlands with regard to Article 2(b) of the European Convention on Mutual Assistance in Criminal Matters, given that the Rechtbank had 'closed the case without imposing any penalty'.

On 10 April 2003 the Italian Public Prosecutor requested the Netherlands judicial authorities to provide information about the outcome of the criminal proceedings against Mr Miraglia and the way in which the proceedings had been settled in order to assess their significance for the purposes of Article 54 of the CISA. By note of 18 April 2003 the Netherlands Public Prosecutor informed his Italian counterpart that the criminal proceedings against Mr Miraglia had been stayed, but did not supply information considered sufficient by the Italian court about the order made and its content. The Netherlands Public Prosecutor stated that it was 'a final decision of a court' precluding, pursuant to Article 225 of the Netherlands Code of Criminal Procedure, any prosecution in respect of the same criminal acts and any judicial cooperation with foreign authorities, unless new evidence should be produced against Mr Miraglia. The Netherlands judicial authorities added that any request for assistance made by the Italian State would run foul of Article 54 of the CISA.

According to the Italian court, the Netherlands authorities decided not to prosecute Mr Miraglia on the ground that criminal proceedings against the defendant had in the meantime been instituted in Italy for the same criminal acts. That assessment is ascribable to the 'preventive' application of the principle *ne bis in idem*.[12]

[12] Case C-469/03 *Filomeno Mario Miraglia,* [2005] ECR I-2009, paragraphs 13-23 (hereforth, *Miraglia*).

3.3. Questions

Those were the circumstances in which the Tribunale di Bologna decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 54 of the [CISA] apply when the decision of a court in the first State consists of discontinuing the prosecution without any adjudication on the merits of the case and on the sole ground that proceedings have already been initiated in another State?'

3.4. Findings[13]

The aptness of that interpretation of Article 54 of the CISA is borne out by the fact that it is the only interpretation to give precedence to the object and purpose of the provision rather than to procedural or purely formal matters, which, after all, vary as between the Member States concerned, and to ensure that that article has proper effect.

The decision to close proceedings was adopted by the judicial authorities of a Member State when there had been no assessment whatsoever of the unlawful conduct with which the defendant was charged. The bringing of criminal proceedings in another Member State in respect of the same facts would be jeopardised especially when it was the very bringing of those proceedings that justified the discontinuance of the prosecution by the Public Prosecutor in the first Member State. Such a consequence would clearly run counter to the very purpose of the provisions of Title VI of the Treaty on European Union, as set out in the fourth indent of the first subparagraph of Article 2 EU, namely: 'to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to … prevention and combating of crime'.

That is why the Court concluded that:

The principle *ne bis in idem* does not fall to be applied to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.

4. Time Barring and "Finnaly Disposed of" in Judgement from 28 September 2006 in Case C-467/04 Giuseppe Francesco Gasparini

The reference was made in the course of criminal proceedings brought against Mr G.F. Gasparini, Mr J. M[a] L.A. Gasparini, Mr Costa Bozzo, Mr de Lucchi Calcagno, Mr F.M. Gasparini, Mr Hormiga Marrero and the Sindicatura Quiebra, who are suspected of having put smuggled olive oil on the Spanish market.

4.1. Legal Framework

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) provides in Article 3, headed 'Grounds for mandatory non-execution of the European arrest warrant':

'The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:

…

(2) 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 provided that, where there has been sentence,

[13] I will expose the most important paragraphs of the Court's preliminary ruling.

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 of the framework decision, headed 'Grounds for optional non-execution of the European arrest warrant', is worded as follows:

'The executing judicial authority may refuse to execute the European arrest warrant:

…

(4) where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;

…'

Article 24 EC provides:

'Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.'

4.2. Facts

According to the Audiencia Provincial de Málaga (Provincial Court, Málaga), at some unspecified time in 1993, the shareholders and directors of the company Minerva agreed to import through the port of Setúbal (Portugal) refined olive oil from Tunisia and Turkey, which was not declared to the customs authorities. The goods were then transported in lorries from Setúbal to Málaga (Spain). The defendants devised a system of false invoicing to create the impression that the oil came from Switzerland.

The Supremo Tribunal de Justiça (Supreme Court of Justice, Portugal), in a decision on an appeal against a judgment of the Tribunal de Setúbal, found that the refined olive oil imported into Portugal originated on ten occasions in Tunisia and on one occasion in Turkey and that a lesser quantity than was actually imported was declared to the Portuguese customs authorities.

The Supremo Tribunal de Justiça acquitted two of the defendants in the case before it, on the ground that their prosecution was time-barred. They are both also being prosecuted in the main proceedings.

The Audiencia Provincial de Málaga explains that it has to rule on whether an offence of smuggling can be found or whether, on the contrary, no such offence can be found having regard to the binding force of the judgment of the Supremo Tribunal de Justiça or to the fact that the goods were in free circulation in the Community.[14]

4.3. Questions

It was in those circumstances that the Audiencia Provincial de Málaga decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is a finding by the courts of one Member State that prosecution of an offence is time-barred binding on the courts of the other Member States?

2. Does the acquittal of a defendant on account of the fact that prosecution of the offence is time-barred benefit, by extension, persons being prosecuted in another Member State where the facts are identical? In other words, can persons being prosecuted in another Member State on the basis of the same facts also benefit from a limitation period?

[14] Case C-467/04 *Gasparini and Others* [2006] ECR I-9199, paragraphs 16-19 (hereforth, *Gasparini*).

3. If the criminal courts of one Member State declare that the extra-Community nature of goods has not been established for the purposes of an offence of smuggling and acquit the defendant, may the courts of another Member State broaden the investigation in order to prove that the introduction of goods without payment of customs duties was from a non-member State?

4. Where a criminal court in a Member State has declared either that it is not established that goods have been unlawfully introduced into the Community or that prosecution of the offence of smuggling is time-barred:

a) can the goods be regarded as being in free circulation in the rest of the Community?

b) can the sale of the goods in another Member State following their importation into the Member State where the acquittal was given be regarded as independent conduct which may therefore be punished or, instead, as conduct forming an integral part of the importation?'

4.4. Findings

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.[15] It ensures that persons who, when prosecuted, have their cases finally disposed of are left undisturbed. They must be able to move freely without having to fear a fresh prosecution for the same acts in another Contracting State.

The laws of the Contracting States on limitation periods have not been harmonised. However, nowhere in Title VI of the EU Treaty, relating to police and judicial cooperation in criminal matters (Articles 34 and 31 of which were selected as the legal basis for Articles 54 to 58 of the CISA), or in the Schengen Agreement or the CISA itself is the application of Article 54 of the CISA made conditional upon harmonisation or approximation of the criminal laws of the Member States relating to procedures whereby further prosecution is barred[16] or, more generally, upon harmonisation or approximation of their criminal laws.[17]

There is a necessary implication in the *ne bis in idem* principle, that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied.[18]

Framework Decision 2002/584 does not preclude the *ne bis in idem* principle from applying in the case of a final acquittal because prosecution of the offence is time-barred. Article 4(4) of the framework decision, relied upon by the Netherlands Government in the observations which it submitted to the Court, permits the executing judicial authority to refuse to execute a European arrest warrant inter alia where the criminal prosecution of the requested person is time-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that State under its own criminal law. In order for that power to be exercised, a judgment whose basis is that a prosecution is time-barred does not have to exist. The situation where the requested person has been finally judged by a Member State in respect of the same acts is governed by Article 3(2) of the framework decision, a provision which lays down a mandatory ground for non-execution of a European arrest warrant.

The Court concluded that the answer to the first question must be that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, applies in respect of a decision of a court of a Contracting State, made after criminal proceedings have been brought, by which the accused is acquitted finally because prosecution of the offence is time-barred.

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[15] See *Gözütok and Brügge*, paragraph 38, and Case C-150/05 *Van Straaten* [2006] ECR I-9327, paragraph 57.
[16] *Gözütok and Brügge*, paragraph 32.
[17] See Case C-436/04 *Leopold Henri Van Esbroeck* [2006] ECR I-2333, paragraph 29.
[18] *Van Esbroeck*, paragraph 30.

By its second question, the national court essentially asks who is capable of benefiting from the *ne bis in idem* principle. It is clear from the wording of Article 54 of the CISA that only persons who have already had a trial finally disposed of once may derive advantage from the *ne bis in idem* principle. Consequently, the answer to the second question must be that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, does not apply to persons other than those whose trial has been finally disposed of in a Contracting State.[19]

The Court refused to answer the third question, considering it a hypothetical question not supported by the evidence submitted to the Court.[20]

For these reasons, the fourth question is inadmissible in so far as it is founded on the premises of acquittal of the defendants because there was no, or insufficient, evidence. On the other hand, it is admissible in so far as it relates to the situation where a court of a Member State has declared that prosecution of the offence of smuggling is time-barred.

By Question 4(a), the national court essentially asks whether it may be inferred from the decision of a court of a Contracting State which has become final finding that a prosecution for the offence of smuggling is time-barred that the goods in question are in free circulation in the other Member States.

Under Article 24 EC, three conditions must be met in order for products coming from a third country to be considered to be in free circulation in a Member State. Products are regarded as so being if the import formalities have been complied with, if any customs duties or charges having equivalent effect which are payable have been levied in that Member State and if the products have not benefited from a total or partial drawback of such duties or charges.

A finding by a court of a Member State that prosecution of a defendant for the offence of smuggling is time-barred does not alter the legal classification of the products in question. Also, the *ne bis in idem* principle binds the courts of a Contracting State only in so far as it precludes a defendant who has already had his case finally disposed of in another Contracting State from being prosecuted a second time for the same acts.

The answer to Question 4(a) must therefore be that a criminal court of a Contracting State cannot hold goods to be in free circulation in national territory solely because a criminal court of another Contracting State has found, in relation to the same goods, that prosecution for the offence of smuggling is time-barred.

By Question 4(b), the national court essentially asks whether the marketing of goods in another Member State, after their importation into the Member State where the accused was acquitted because the prosecution was time-barred, forms part of the same acts or constitutes conduct independent of importation into the latter Member State. The only relevant criterion for applying the concept of 'the same acts' within the meaning of Article 54 of the CISA is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together.[21]

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[19] *Gasparini*, paragraphs 27-37.

[20] According to the Court's settled case-law, while the Court is in principle bound to give a ruling where the questions submitted concern the interpretation of Community law, it can in exceptional circumstances examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. See, inter alia, Case C-13/05 *Chacón Navas* [2006] ECR I-0000, paragraphs 32 and 33, and the case-law cited there.

[21] See *Van Esbroeck*, paragraph 36.

As a conclusion, the marketing of goods in another Member State, after their importation into the Member State where the accused was acquitted, constitutes conduct which may form part of the 'same acts' within the meaning of Article 54 of the CISA.[22]

The Court concluded that:

1. **The *ne bis in idem principle* applies in respect of a decision of a court of a Contracting State, made after criminal proceedings have been brought, by which the accused is acquitted finally because prosecution of the offence is time-barred.**

2. **That principle does not apply to persons other than those whose trial has been finally disposed of in a Contracting State.**

3. **A criminal court of a Contracting State cannot hold goods to be in free circulation in national territory solely because a criminal court of another Contracting State has found, in relation to the same goods, that prosecution for the offence of smuggling is time-barred.**

4. **The marketing of goods in another Member State, after their importation into the Member State where the accused was acquitted, constitutes conduct which may form part of the 'same acts' within the meaning of Article 54 of the Convention.**

5. Trial in Absentia and "Finally disposed" of in Judgement from December 11, 2008 in Case C-297/07 Klaus Bourquain

The reference was made in criminal proceedings instituted in Germany on 11 December 2002 against Mr Bourquain, a German national, for murder, although criminal proceedings instituted in respect of the same acts against him by a prosecuting authority of another Contracting State had already led on 26 January 1961 to his conviction in absentia.

5.1. Legal Framework

National law

The seventh to the ninth paragraphs of Article 120 of the Code of Military Justice for the French Army (*Journaux Officiels de la République Française* – 'JORF' – of 15 March 1928), in the version in force on 26 January 1961, provides:

'Judgment given against a person in absentia, in the normal form, shall ... be notified to the person convicted in absentia personally or at his place of residence.

In the five days following such notification, the person convicted in absentia may appeal. Should that period expire without an appeal having been lodged, the judgment shall be deemed to have been given in adversarial proceedings.

However, if that notification has not been served personally or if it does not derive from measures taken to enforce the judgment which were known to the person convicted, the appeal shall be admissible until the date on which enforcement of the sentence becomes time-barred.'

Article 121 of that code, as amended at the time of the facts in the main proceedings, lays down, with reference to Article 639 of the French Code of Criminal Procedure, that, if the person convicted in his absence reappears before enforcement of the sentence has become time-barred, the sentence is not to be enforced but new proceedings instituted, this time in the presence of the accused.

5.2. Facts

On 26 January 1961 in Bône (Algeria), Mr Bourquain, who was serving in the French Foreign Legion, was sentenced to death in absentia by the permanent military tribunal for the eastern zone of Constantine, having been found guilty of desertion and intentional homicide.

[22] *Gasparini*, paragraphs 47-57.

That tribunal, applying the Code of Military Justice for the French Army, held it proved that, on 4 May 1960, Mr Bourquain, while making efforts to desert on the Algerian-Tunisian border, shot dead another legionnaire, also of German nationality, who attempted to prevent him from deserting.

Having taken refuge in the German Democratic Republic, Mr Bourquain had not learnt of the notification of the judgment delivered in absentia and it was not possible to enforce the sentence imposed by the judgment deemed to have been given in adversarial proceedings.

There were no subsequent criminal proceedings against Mr Bourquain in either Algeria or France. Moreover, in France, all offences committed in connection with the war in Algeria were subject to the amnesty granted under the laws referred to above. By contrast, in the Federal Republic of Germany, an investigation was opened in relation to Mr Bourquain in respect of the same acts and, in 1962, an arrest warrant was sent to the authorities of the former German Democratic Republic, which rejected it.

At the end of 2001, it was discovered that Mr Bourquain was living in the area of Regensburg (Germany). On 11 December 2002, the Staatsanwaltschaft Regensburg (Regensburg Pubic Prosecutor's Office) charged him before the referring court with murder, in respect of the same acts, under Article 211 of the German Criminal Code.

In those circumstances the referring court, by letter of 17 July 2003, requested information from the French Ministry of Justice under Article 57(1) of the CISA in order to establish whether the judgment of the permanent military tribunal for the eastern zone of Constantine of 26 March 1961 precluded the opening of criminal proceedings in Germany in respect of the same acts, as a result of the prohibition of double jeopardy contained in Article 54 of the CISA.

The Public Prosecutor at the Tribunal aux Armées de Paris (Military Tribunal of Paris) replied to that request for information by pointing out in particular as follows:

'The judgment in absentia delivered on 26 January 1961 against [Mr Bourquain] has become final. In 1981, the period allowed for challenging the decision imposing the death sentence having expired, it was no longer possible to lodge an appeal against that judgment. Penalties in criminal cases being time-barred after 20 years under French law, the judgment can no longer be enforced in France.'

In addition, the referring court sought an opinion from the Max-Planck-Institut für ausländisches und internationales Strafrecht (Max Planck Institute for Foreign and International Criminal Law) on the interpretation of Article 54 of the CISA concerning the facts of the case in the main proceedings. In its opinion of 9 May 2006, that institute came to the conclusion that, even if the direct enforcement of the conviction in absentia was excluded on account of the specific features of the French system of criminal procedure, the conditions for application of Article 54 of the CISA were satisfied in the main proceedings, with the result that no new criminal proceedings could be brought against Mr Bourquain. The institute, in response to a request for further observations, reiterated its view by letter of 14 February 2007.[23]

5.3. Questions

The Landgericht (Regional Court) Regensburg, being of the view that Article 54 of the CISA could be interpreted as meaning that the first conviction by a Contracting State must have been capable of being enforced at some time in the past in order to operate as a bar on new proceedings in a second Contracting State, decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

[23] Case C-297/07 *Bourquain* [2008] ECR I-2245, paragraphs 18-25 (hereforth, *Bourquain*).

'May a person whose trial has been finally disposed of in one Contracting Party be prosecuted in another Contracting Party for the same act when, under the laws of the sentencing Contracting Party, the sentence imposed on him could never have been enforced?'

5.4. Findings

The Court stated that by its question, the referring court wishes to know, essentially, whether the *ne bis in idem* principle enshrined in Article 54 of the CISA can apply to criminal proceedings instituted in a Contracting State against an accused whose trial for the same acts as those for which he faces prosecution was finally disposed of in another Contracting State, even though, under the law of the State in which he was convicted, the sentence which was imposed on him could never have been enforced.

In principle a conviction in absentia is also covered by the scope of Article 54 of the CISA and can therefore constitute a procedural bar to the opening of new proceedings. According to the actual wording of Article 54 of the CISA, judgments rendered in absentia are not excluded from its scope of application, the sole condition being that there has been a final disposal of the trial by a Contracting Party. Having in mind the lack of obligation for harmonisation or approximation of the criminal laws of the Member States concerning in absentia judgments[24] and the principle of mutual trust,[25] the problem to answer remains whether the conviction in absentia by the permanent military tribunal for the eastern zone of Constantine is 'final' within the meaning of Article 54 of the CISA, taking into account the impossibility of direct enforcement of the penalty as a result of the obligation imposed by French law to hold a new trial if the person convicted in absentia should reappear, this time in his presence.

In that regard, the Czech and Hungarian Governments doubt whether the judgment of that permanent tribunal constitutes a final bar to continuation of the criminal proceedings, precisely on account of that obligation to institute new proceedings if the person convicted in absentia is arrested.

However, the sole fact that the proceedings in absentia would, under French law, have necessitated the reopening of the proceedings if Mr Bourquain had been arrested while time was running in the limitation period applicable to the penalty, and before he benefited from the amnesty, that is, between 26 January 1961 and 31 July 1968, does not, in itself, mean that the conviction in absentia cannot be regarded as a final decision within the meaning of Article 54 of the CISA. Thus, in order to observe 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,[26] it is necessary to comply within the European Union with a judgment such as that delivered on 26 January 1961 by the permanent military tribunal for the eastern zone of Constantine, ruling finally on the acts of which the person concerned was accused under the legislation of the Contracting State which instituted the first criminal proceedings.

The achievement of that objective would be jeopardised if the specific features of national proceedings, such as those which appear in the provisions of Articles 120 and 121 of the Code of Military Justice for the French Army, did not permit an interpretation of the concept of a trial being finally disposed of within the meaning of Article 54 of the CISA which includes judgments delivered in absentia in accordance with national legislation.

Also the Prosecutor at the Tribunal aux Armées of Paris, without referring at all to the fact that the offences committed by Mr Bourquain were subject to an amnesty granted in 1968, points out

[24] See, to that effect, concerning procedures whereby further prosecution is barred, *Gözütok and Brügge*, paragraph 32.

[25] See, to that effect, *Gözütok and Brügge*, paragraph 33.

[26] *Gözütok and Brügge*, paragraph 38.

that all challenges to the sentence were time-barred in 1981, that is to say, before the second criminal proceedings were instituted in Germany in 2002.

While Law No 68-697 on the grant of amnesty has the consequence that, since its entry into force, the offences committed by Mr Bourquain are no longer subject to any penalty, the effects of that law, as laid down in particular in Articles 9 and 15 of Law No 66-396, cannot be understood as meaning that there is no first judgment for the purposes of Article 54 of the CISA.

Since the judgment delivered in the absence of Mr Bourquain must, in the circumstances of the case, be regarded as final for the purposes of the application of Article 54 of the CISA, it should be determined whether the condition relating to enforcement referred to in that article, that is the fact that the penalty can no longer be enforced, is also satisfied when, at no time in the past, even before the amnesty or the expiry of the limitation period, could the penalty imposed pursuant to the first conviction have been directly enforced.

In that regard, the Hungarian Government submitted that the expression in Article 54 of the CISA, relating to the fact that the penalty 'can no longer be enforced' according to the laws of the sentencing Contracting Party, must be interpreted to mean that it must have been capable of being enforced under the rules of the sentencing Contracting State at least on the date when it was imposed.

However, that condition regarding enforcement does not require the penalty, under the law of that sentencing State, to have been capable of being enforced directly, but requires only that the penalty imposed by a final decision 'can no longer be enforced'. The words 'no … longer' refer to the time when the new proceedings begin, in relation to which the court with jurisdiction in the second Contracting State must therefore ascertain whether the conditions referred to in Article 54 of the CISA are satisfied.

It follows that the condition regarding enforcement referred to in that article is satisfied when it is established that, at the time when the second criminal proceedings were instituted against the same person in respect of the same acts as those which led to a conviction in the first Contracting State, the penalty imposed in that first State can no longer be enforced according to the laws of that State.

That interpretation is 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.

That right to freedom of movement is effectively guaranteed only if, in a situation such as that at issue in the main proceedings, the person can be sure that, once he has been convicted and when the penalty imposed on him can no longer be enforced under the laws of the sentencing Contracting State, he may travel within the Schengen area without fear of prosecution in another Contracting State on the ground that the penalty could not, on account of the specific features of the national legal procedures of the first Contracting State, have been directly enforced.

In the case in the main proceedings, in which it is agreed that the penalty imposed was no longer capable of being enforced in 2002 when the second criminal proceedings were instituted in Germany, it would be contrary to the effective application of Article 54 of the CISA to rule out its application solely on the ground of the specific features of the French criminal proceedings which made enforcement of the penalty conditional on a further conviction pronounced in the presence of the accused.

The Court concluded that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, is applicable to criminal proceedings instituted in a Contracting State against an accused whose trial for the same acts as those for which he faces prosecution was finally disposed of in another Contracting

State, even though, under the law of the State in which he was convicted, the sentence which was imposed on him could never, on account of specific features of procedure such as those referred to in the main proceedings, have been directly enforced.[27]

6. "Finally Disposed of" in Judgement from December 22, 2008 in Case C- 491/07 Vladimir Turanský

The reference was made in criminal proceedings instituted in Austria on 23 November 2000 against Mr Turanský, a Slovak national suspected of having carried out, along with others, a serious robbery on an Austrian national in the territory of the Republic of Austria.

6.1. Legal Framework

Slovak law

Under Article 9(1)(e) of the Code of Criminal Procedure, in the version in force on the date on which the Slovak police authority adopted the decision to suspend the criminal proceedings in question in the main proceedings, such proceedings are not to be instituted or, where already instituted, continued 'if the matter concerns a person against whom previous criminal proceedings instituted in respect of the same act terminated in a judgment which has become final or if those proceedings were definitively suspended …'.

That provision transposes Article 50(5) of the Constitution of the Slovak Republic, according to which a person cannot be prosecuted for an act for which he was already finally convicted or acquitted.

Article 215(1) and (4) of the Code of Criminal Procedure provide:

'1. The Public Prosecutor shall suspend the criminal proceedings:

a) if there is no doubt that the act in respect of which criminal proceedings were instituted did not occur;

b) if that act is not a crime and there is no reason to investigate the case …

…

4. The suspension of the proceedings under paragraph 1 can also be ordered by the police, if no charge has been brought. …'

It is clear from the case-law of the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) and in particular from the judgment of 10 July 1980 in Case Tz 64/80, that Article 9(1)(e) of the Code of Criminal Procedure does not preclude proceedings which had been suspended under Article 215(1)(b) of that Code from being subsequently reopened in respect of the same acts, where the earlier proceedings were not terminated by a judgment which has become final.

6.2. Facts

Mr Turanský is suspected of having – on 5 October 2000, in the company of two Polish nationals who are being prosecuted separately – robbed a person of a sum of money belonging to him at his home in Vienna (Austria), and of thereafter seriously injuring him.

On 23 November 2000, the Staatsanwaltschaft Wien (Public Prosecutor in Vienna) therefore requested the investigating judge attached to the referring court to open a preliminary investigation concerning Mr Turanský, who was strongly suspected of serious robbery under the Austrian Criminal Code, and to issue an arrest warrant and an alert for his arrest.

[27] *Bourquain*, paragraphs 34-52.

On 15 April 2003, having been informed that Mr Turanský could be found in his country of origin, the Republic of Austria, in accordance with Article 21 of the European Convention on Mutual Assistance in Criminal Matters, requested the Slovak Republic to reopen proceedings against him.

Since the Slovak authorities approved that request, the investigating judge attached to the referring court stayed the criminal proceedings pending the final decision of those authorities.

On 26 July 2004, the police officer in Prievidza (Slovakia) in charge of the investigation opened criminal proceedings into the reported acts without however at the same time charging a specific person. In the course of that investigation, Mr Turanský was heard as a witness.

By letter of 20 December 2006, the Prosecutor General of the Slovak Republic notified the Austrian authorities of a decision of the Prievidza District Police Headquarters of 14 September 2006, ordering the suspension under Article 215(1)(b) of the Code of Criminal Procedure of the criminal proceedings relating to the alleged robbery. In that decision, the Prievidza police officer in charge of the investigation wrote:

'Under Article 215(1)(b) [of the Code of Criminal Procedure], I order, with regard to the criminal proceedings concerning the case of robbery in concert with others,

the suspension of the proceedings

since the act does not constitute a crime and there is no reason to continue the case.

Explanation of the grounds

… That has also been proved by the statements of the victim … and the statements of the witness [Turanský]. This means that Mr Turanský's act did not constitute the crime of robbery …

Even if one had to take into account the act of not preventing the crime …, it would likewise no longer be possible to continue the proceedings … with the objective of issuing formal charges, since prosecution would not be permitted in the present case, owing to expiry of the limitation period …'

A complaint, having suspensive effect, could be brought against that decision within a period of three days following the date on which it was pronounced. No such complaint was however made.

The Landesgericht für Strafsachen in Vienna has doubts whether the decision to suspend the criminal proceedings, taken by a Slovak police authority in an investigation into the same acts as those on which the proceedings pending before it are based, can give rise to the application of Article 54 of the CISA and, therefore, preclude the continuation of the pending proceedings.[28]

6.3. Questions

Since it has to rule on the question whether the decision of the Slovak police authority of 14 September 2006 precludes the investigating judge from continuing the preliminary proceedings which were stayed in the Republic of Austria, the referring court decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must the bar on a second prosecution for the same acts (*ne bis in idem* principle) contained in [the CISA] be interpreted as precluding the prosecution of a suspect in the Republic of Austria when criminal proceedings instituted in the Slovak Republic in respect of the same acts, after its accession to the European Union, were discontinued after a police authority, following an examination of the merits of the case and without further sanction, terminated them with immediate effect by ordering their suspension?'

6.4. Findings

The referring court asked, essentially, whether the *ne bis in idem* principle enshrined in Article 54 of the CISA applies to a decision, whereby a police authority, after examining the merits

[28] Case C-491/07 *Turansky* [2008] ECR I-11039, paragraphs 18-24 (hereforth, *Turansky*).

of the case brought before it, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings which had been instituted.

Article 54 of the CISA precludes the prosecution of a person in a Contracting State for the same acts as those in respect of which his trial has been 'finally disposed of' in another Contracting State.

With regard to the concept of 'finally disposed of', the Court has already declared that when, following criminal proceedings, further prosecution is definitively barred, the person concerned must be regarded as someone whose trial has been 'finally disposed of' for the purposes of Article 54 of the CISA in relation to the acts which he is alleged to have committed.[29] The Court has also held that Article 54 of the CISA applies to a decision of the judicial authorities of a Contracting State by which the accused is finally acquitted for lack of evidence.[30]

It follows that, in principle, a decision must, in order to be considered as a final disposal for the purposes of Article 54 of the CISA, bring the criminal proceedings to an end and definitively bar further prosecution.

In order to assess whether a decision is 'final' for the purposes of Article 54 of the CISA, it is necessary first of all to ascertain that the decision in question is considered under the law of the Contracting State which adopted it to be final and binding, and to verify that it leads, in that State, to the protection granted by the *ne bis in idem* principle.

A decision which does not, under the law of the first Contracting State which instituted criminal proceedings against a person, definitively bar further prosecution at national level cannot, in principle, constitute a procedural obstacle to the opening or continuation of criminal proceedings in respect of the same acts against that person in another Contracting State.

In that regard, it emerges clearly from the written observations of the Slovak Government in the present case that a decision ordering the suspension of the criminal proceedings at a stage before a particular person is charged, taken under Article 215(1)(b) of the Slovak Code of Criminal Procedure, does not, under national law, preclude the institution of new criminal proceedings in respect of the same acts in the territory of the Slovak Republic.

Therefore, a decision of a police authority which, while suspending the criminal proceedings, does not under the national law concerned definitively bring the prosecution to an end, cannot constitute a decision which would make it possible to conclude that the trial of that person has been 'finally disposed of' within the meaning of Article 54 of the CISA.

That interpretation of Article 54 of the CISA is compatible with the objective of the article, which is to ensure that a person whose trial has been finally disposed of is not prosecuted for the same acts in the territory of several Contracting States on account of his having exercised his right to freedom of movement.[31]

The application of that article to a decision to suspend criminal proceedings would have the effect of precluding, in another Contracting State, in which more evidence may be available, any possibility of prosecuting and perhaps punishing a person on account of his unlawful conduct, even though such a possibility is not ruled out in the first Contracting State, in which the trial of the person is not considered to have been finally disposed of under national law.

Such an outcome would be contrary to the very purpose of the provisions of Title VI of the Treaty on European Union as stated in the fourth indent of the first paragraph of Article 2 thereof, that is, to take 'appropriate measures with respect to … prevention and combating of crime' while developing the Union as an area of freedom, security and justice in which the free movement of persons is assured.

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[29] *Gözütok and Brügge*, paragraph 30.
[30] *Van Straaten*, paragraph 61.
[31] See, to that effect, *Gözütok and Brügge*, paragraph 38.

While the goal of Article 54 of the CISA is to ensure that a person, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, may travel within the Schengen territory without fear of being prosecuted for the same acts in another contracting State,[32] it is not intended to protect the suspect from having to submit to possible subsequent investigations, in respect of the same acts, in several Contracting States.

The Court concluded that the *ne bis in idem* principle enshrined in Article 54 of the CISA does not fall to be applied to a decision by which an authority of a Contracting State, after examining the merits of the case brought before it, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings, where the suspension decision does not, under the national law of that State, definitively bar further prosecution and therefore does not preclude new criminal proceedings, in respect of the same acts, in that State.[33]

7. Conclusions

The *ne bis in idem* principle raises a lot of questions. What is a final judgement? Does it include acquittal or a dismissal of the charges? Does it also concern final settlements by prosecuting or other judicial authorities out of court?

I will try to answer 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 concept of 'finally disposed of' and 'enforced penalty'.

7.1. Arguments used

The Court emphasised the principle of 'mutual trust' underlying Article 54 of the CISA and treated the absence of harmonisation of national criminal codes and procedures as no obstacle to applying the *ne bis in idem* principle. In consequence, in *Gözütok and Brügge* it applied that principle to a specific procedure resulting in the barring of further prosecution in the 'first' Member State. In *Miraglia*, however, the Court held that a decision on the merits was a precondition for the principle in Article 54 of the CISA to apply. *Miraglia* therefore suggests that discontinuance of a case on mere procedural grounds in the first Member State is normally insufficient to trigger Article 54 of the CISA. This view is not confirmed in *Gasparini*, where the Court confirmed that a trial is finally disposed of if proceedings are discontinued in a Member State because of the limitation period, proceedings clearly discontinued without any assessment of the merits of the case.

What the Court tried in its rulings was to give precedence to the object and purpose of the ne bis in idem rule rather than to procedural or purely formal matters, which, after all, vary as between the Member States concerned, and to ensure that the principle has proper effect.[34]

From all cases analysed above results the inclination of the Court towards the free movement of persons, extending the scope of the *ne bis in idem* principle and denying its application only as an exception, when the conditions of the article have not been met.[35]

7.2. 'Finally Disposed of'

It is essential for the interpretation of the ne bis in idem principle to have an extended view over the Court's findings as regards the concept of 'finally disposed of'.

The Court held in *Gozutok and Brugge* that the condition of the case being 'finally disposed of' for the purpose of Article 54 CISA is met if proceedings are discontinued by the Public

[32] See, to that effect, *Van Esbroeck*, paragraph 34.
[33] *Turansky*, paragraphs 30-45.
[34] *Gözütok and Brügge,* paragraph 35.
[35] For example, if the judgement was not finally disposed of or not enforced – see Cases *Miraglia* and *Turansky*.

Prosecutor without involvement of the Court following a settlement with the accused. This constitutes an extension of the strict interpretation of the principle from decisions taken by a court to all forms of judicial decisions taken by an authority required to play a part in the administration of criminal justice in the national legal system concerned.

On the contrary, in *Miraglia* the Court stated that this condition is not fulfilled when proceedings are discontinued because of parallel proceedings instituted in another Member State.

The Court ruled in favour of the extension of the *ne bis in idem* principle in *Gasparini*, stating that the *ne bis in idem* principle applies in the case of a final acquittal because prosecution of the offence is time-barred. The Court avoided by this provision the danger of forum shopping for the conviction of the defendants and applied for the first time the principle even if there was no assessment of the merits of the case.

Also, in *Gasparini,* the Court ruled that the *ne bis in idem* principle 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. The Court argued that 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.[36]

The scope of this decision is somewhat limited in *Turansky*. The Court held that a decision must, in order to be considered as a final disposal for the purposes of Article 54 of the CISA, bring the criminal proceedings to an end and definitively bar further prosecution. A decision which does not, under the law of the first Contracting State which instituted criminal proceedings against a person, definitively bar further prosecution at national level cannot, in principle, constitute a procedural obstacle to the opening or continuation of criminal proceedings in respect of the same acts against that person in another Contracting State. As a conclusion, if the national legislation provides that a case can be reopened after the acquittal of the accused for lack of evidence if new evidence is found, this decision is not 'final'.

The Court took an interesting decision in *Bourquain*. Even if it had the choice of the smooth path already used in *Gasparini* regarding the limitation period, the Court chose to address another problem, that of a conviction *in absentia*. The Court stated that the conviction *in absentia* is 'final' even considering the impossibility of direct enforcement of the penalty as a result of the obligation to hold a new trial if the person convicted in absentia should reappear, this time in his presence.

There is a contradiction in Court's rulings in cases *Bourquain* and *Turansky*. In *Bourquain*, the Court ruled that a conviction is 'final' even if the prosecution is not definitively barred because of the obligation to hold a new trial if the person convicted in absentia should reappear. In *Turansky*, delivered 11 days after Bourquain, the Court stated that a decision is 'final' when it brings the criminal proceedings to an end and definitively bar further prosecution.

I am of the opinion that the decision taken in *Turansky* is the right one and the solution in *Bourquain*[37] should have been based on the amnesty or the expiry of the limitation period to fulfil the condition of 'finally disposed of' enshrined in Article 54 CISA.

Another problem addressed in *Gasparini* is whether the ne bis in idem principle also applies to persons other than those whose trial has been finally disposed of in a Contracting State (accessories to the crime).[38] The Court's answer was negative, stating that in this case the condition of the case being 'finally disposed of' for these persons is not met. Even if the accused invoked the principle of more favourable law (*mitior lex*), this principle would not apply in comparing legislation in force at the same time in different member states.

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

[37] Even if the solution in *Bourquain* is correct in respect of the application of principle neb is in idem, I consider the motivation less satisfactorily.

[38] *Gasparini*, paragraphs 27-37.

7.3. 'Enforced penalty'

The Court analysed the meaning of 'enforcement' in several of its decisions.

The Court held that once the accused has complied with his obligations, the penalty entailed in the procedure whereby further prosecution is barred must be regarded as having been 'enforced' for the purposes of Article 54. This decision was taken by the Court in Case *Gözütok and Brügge*, following a discontinuance of criminal proceedings brought in a Member State by the Public Prosecutor, without the involvement of a court.[39]

Further clarification upon the concept of 'enforcement' was given by the Court in *Kretzinger.*[40]

The Court stated that the penalty has been 'enforced' or 'is actually in the process of being enforced' when the defendant was, in accordance with the law of that Contracting State, sentenced to a term of imprisonment the execution of which has been accompanied by a suspension.[41] ***However, this condition is not fulfilled if the accused was briefly taken into custody and / or remand and when, according to the law of the state of conviction, that deprivation of liberty shall be charged against subsequent enforcement of imprisonment.***[42]

Also in* Kretzinger*, the Court answered to the referring court essentially asking 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 Court concluded that the fact that a Member State in which a person has been convicted of a final judgement of conviction in domestic law can issue a European arrest warrant designed to arrest that person to carry out this trial under the Framework Decision should not affect the interpretation of the concept of "enforcement"[43]***. In the same spirit, the option open to a Member State to issue a European arrest warrant does not affect the interpretation of the concept of 'enforcement', even if the judgement relied upon in support of a possible European arrest warrant has been given* in absentia***.***[44]

The actual wording of the* ne bis in idem *principle, 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 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. 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. The Court's conclusion is, in other words, that an option of a Member State to enforce a penalty by issuing a European arrest warrant[45] ***cannot affect the meaning of 'enforcement'. That is, if a European arrest warrant has not been issued, the penalty is not 'enforced', 'in the process of being enforced' or 'can no longer be enforced' within the meaning of Article 54 of the CISA.***

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[39] *Gözütok and Brügge*, paragraph 48.

[40] Case C-288/05 *Kretzinger* [2007] ECR **I-06441**.

[41] *Kretzinger*, **paragraph 44.**

[42] *Kretzinger*, **paragraph 52.**

[43] *Kretzinger*, **paragraph 64.**

[44] *Kretzinger*, **paragraph 66.**

[45] The State may decide to issue an EAW for the enforcement of the penalty or may renounce to the enforcement of the penalty.

The Court stated in *Bourquain* that the condition regarding enforcement is satisfied when, at the time when the second criminal proceedings were instituted, the penalty imposed in that first State can no longer be enforced even if enforcement of the penalty given *in absentia* is conditional on a further conviction pronounced in the presence of the accused.[46]

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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- Case C-288/05 *Kretzinger* [2007] ECR I-06441

[46] *Bourquain*, paragraph 48.

NEW CONCEPTS IN ROMANIAN PRIVATE LAW: THE ENTERPRISE

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Abstract

The new concept of enterprise is laid down in new Civil Code in connection with another new concept: the professional (entrepreneur). The old commercial terms, commercial acts and deeds and merchant, have been well represented in legal texts in comparison with present concepts. Our new code imported these concepts together with their weaknesses from the Italian and Quebec Codes. The short references within the Code to enterprise and professional put again the burden of clarification on the scholars' shoulders.The law defines the professionals as the persons who carry on an enterprise and therefore the legislator pursues to the 'carrying on an enterprise" definition. Doing so, in fact the legislator leaves the enterprise concept undefined. The carrying on by one or more persons of an organised economic activity, whether or not it is "commercial" in nature, consisting of producing, administering or alienating property or providing a service, constitutes the carrying on of an enterprise. The enterprise is a term long time connected with commercial and private law. All past decades, beginning with the old Commercial code, then socialist economy and post-communist era used intensively the concept of enterprise. The meaning of this term differed substantially in every decade. Present notion need scientific scrutiny in order to crystallize a convergent approach. In our paper we will consider the notion of enterprise starting from the past perception of this concept then we will try to observe the variety of enterprises under present law.

Keywords: *enterprise, professionals, new Civil Code, carrying on an enterprise, commercial law.*

Introduction

Our research intends to observe the institutions of the New Civil Code, in force from 2011, in the commercial field. The new approach of the Romanian law, the unity of the private law, has a direct impact on the commercial law science. Scholars working in commercial field need to explain and apply the new regulation of the Civil Code.

The prominent concepts of the new code in commercial field are the enterprise and the professional (entrepreneur). New commercial law science has to assimilate and construe these concepts and to start building a new commercial doctrine.

The enterprise, as a concept, is connected in the new Civil Code with the concept of professional (entrepreneur). The legal definition of the terms is rather unclear for the enterprise. It is stated that the professional is the person/persons who exploit an enterprise.

The enterprise itself is not defined but the "exploitation of an enterprise" has a legal definition. This indirect approach makes more difficult to explain the enterprise as a concept. Simplifying the terms, the concept of professional doesn't need the enterprise concept in order to be fully determined. Professional means the person or persons who exercise in a systematic manner organised activities (economic ones, as the legal text renders).

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Still, the notion of enterprise need scrutiny from scholars as an important concept directly linked with the new commercial law.

The enterprise before the Civil Code

The concept of enterprise was used intensively by the old commercial doctrine. Scholars from commercial science focused on three major types of objective commercial acts and deed: i) intercession in goods supply chains type, ii) enterprise type and iii) auxiliary type. Such distinction applied to commercial acts was well known and well accepted. Even so, the legal term of enterprise lacked of an explicit definition.

The enterprise knew a wide recognition as economic concept. Usually the enterprise is defined as a social body, an autonomous organisation of an activity using production factors (forces of nature, capital and labour) by the entrepreneur for the purpose of accomplishing economic activities. Economic dimension is stressed by the theory of production factors. The juridical dimension should be extracted from organised social group perspective. The old Commercial Code used intensely the concept of enterprise in order to define the commercial acts and deeds. Such specific organisations were translated entirely in commercial law field, without additional tests for particular circumstances. The concept of enterprise was used by the old Commercial Code in connection with two major types of activities, according to their subject: the manufacturing (industrial) enterprises which comprised of construction and manufacturing undertakings and service enterprises which included insurance and commissions, agencies and business offices, publishing companies, printing, library and art, insurance companies, businesses and warehouses docks deposit.

The enterprise was the core part of commercial acts that ensured the accession to merchant legal status.

Communist epoch, which was interposed between the two periods of application of the Commercial Code (1864-1948 and 1990-2011), used intensively the concept of undertaking (socialist) in order to explain economic operators based on state property that existed in the economy at that time.

Economic Law science that emerged at that time was dominated by principles of "state owned economy" totally obsolete in present. Ironically, the present voices advocating the disappearance of commercial law find perfect counterpart in those voices supporting in the past Economic Law instead of old, forgotten Commercial Law.

The enterprise knew a new recent legal recognition. The enterprise is an organised economic activity combining financial resources, workforce, raw materials, logistics and information resources, on entrepreneur's risk, in cases and condition laid down by the law[1]. This ordinance defines the term "entrepreneur" too, concept ignored by the new Civil Code, as "the individual who holds an economic enterprise." From the perspective of the new Civil Code the entrepreneur is professional in an individual form.

Given to the vocation of general applicable law of the Civil Code (true "civil constitution") we cannot support a definition of a general concept from the point of a special law, external to the

[1] EGO (Emergency Government Ordinance) no 44/2008, regarding economic activities pursued by authorized natural persons, individual enterprises and family enterprises, amended by EGO no 38/2009 and EGO no 46/2011 published in Official Journal no 350 from 19.05.2011 (Art. 2 lit. f): "economic enterprise means economic activity pursued in an organised, permanent and systematic manner using financial resources, employees, raw materials, logistics and information technology on enterpriser's risk according with the law."

code. As this ordinance is earlier and particular than present Code, the general vocation of the Civil Code requires the interpretation of its own concepts in accordance with its substance, without external support. It is up to implementing rules of the Civil Code to deal with accommodation of the new code with the body of existing legal system.

Starting from the legal term "exploitation of an enterprise"[2], we underline that *the enterprise is an organised activity aiming to produce or trade (administration or sale) goods or services (regardless of the final purpose of profit or non-profit).*

From this perspective the enterprise is a form of business organisation operated by a professional. Legal text reveals that the professional is the subject of law, the part of the legal relations governed by civil law (in the form of natural or legal person).

Subsequently the enterprise is not itself the subject of law but a type of business organisation. The professional exploits the enterprise established in a particular form of organisation he has chosen. In this context we can distinguish between individual and collective enterprises, including companies. The company is "the professional", in the language of the code, who operates a business that takes the form of a particular organisation (the enterprise). We can therefore talk about a company as a kind of enterprise, as an organisation, without referring to the legal entity itself (as subject) that have to be equated with the professional.

The features of the enterprise in Romanian Law

Despite the fact the concept of enterprise doesn't have a clear explanation in Romanian Law we can extract the principal features of the concept according to the new code and the past doctrine the code based on.

Organising of the activity is the essential characteristic of the concept of enterprise. This concept accepts a multidisciplinary approach: economic, juridical and even technical. The organising of the activity feature has a predominantly economic background. Financial resources, work force, raw material, logistic information are features used to render a particular conformation to the enterprise.

The enterprise is a complex system with multidisciplinary dimensions that realizes a balance between internal and external factors in order to assure an optimal position in economic environment and a competition advantage for entrepreneur.

Particular activities are involved in the enterprise's goals. Therefore the enterprise intends to produce or trade (administration or sale) goods or services. The enterprise's goals are specific although the reserved activities are broadly enough to cover a large area of particular performances[3].

Dichotomy profit/non/profit. The concept of enterprise is a larger one than the previous approaches. The extension to the non-profit activities asks for a distinction between profit oriented enterprises and enterprises with non-profit goals. The first category covers the economic enterprises[4], commercial ones, and stays for the Commercial Law basis.

Individual and collective enterprises. An enterprise can be operated by a physical person as well as a legal person. Using this feature we can distinguish between i*ndividual and collective enterprises.*

[2] Civil Code, Art. 3.

[3] Italian Civil Code (Art. 2195) retains as commercial activities, those activities requiring registration in companies register: 1. industrial activities aiming goods production and services, 2. trading activities (intercession in provider – beneficiary of goods, 3. transportation on ground, water or air, 4. banking and insurance activities, 5. other auxiliary activities.

[4] Concept already in place in EGO no 44/2008.

Individual enterprises

GEO no 44/2008 has already dealt with concepts like entrepreneur, enterprise, division of patrimony, etc. These concepts are used in a related form by the new Civil Code.

Authorized natural person (AFP) and sole member enterprise. Under abovementioned ordinance the authorized natural person is the person empowered to conduct any form of economic activity permitted by law, mainly using his workforce. APF regime governs this person's interaction with other types of undertakings as well as the registration and cancellation of this type of activity. According to updated regulation of AFP this entity may employ, as an employer, third party, based on individual employment contract concluded according to law[5].

AFP is responsible for his obligations up to his assigned patrimony, whether it was formed, and, in addition, with all his assets. The law used to distinguish by the status of merchant or the absence of such quality in the person authorized thereby, subsequently setting the occurrence of simplified procedure provided for in Law no. 85/2006 regarding the insolvency procedure. Currently this distinction by merchant status disappeared, AFP being subject of insolvency proceedings in any cases. Such enterprise wasn't awarded legal person status at the time it registers with the trade register.

Sole person enterprise, through its holding person, may employ third party based on individual employment contract, can work with other freelancers, entrepreneurs, individuals with other holders of individual enterprises or representatives of family businesses or other legal entity for performing economic activities. The natural person holding the individual enterprise is responsible for its obligations with assigned patrimony, whether it was formed, and, in addition, with the entire patrimony. In case of insolvency the individual enterprise will be subject to simplified procedure provided for in Law no. 85/2006, as amended[6].

Family undertaking. Although this enterprise is a collective one in logical view, given to the mandatory links between its members and the identical legal regulation source, it is natural to study this kind of enterprise along with the above types.

Family undertaking consists of two or more members of a family and is prohibited to it to employ third parties with employment contract. Family undertaking is established by concluding an agreement by writing, providing members full name, representative, date of preparation, participation of each member of the enterprise, conditions of participation, etc.

Like other forms of individual enterprise the family enterprise has not acquired the legal person status. Therefore the members of such enterprise can be hold responsible for the debts of enterprise. The law provide conditions and procedures applying when the family enterprises seize their operations and they are erased from trade registrar. Their winding-up (regarding assigned patrimony) is prescribed by law[7].

Collective enterprises

Collective enterprises represent forms of economic organisation comprising of at least two members. This time the legal person status can be awarded to collective enterprises. Following such award the enterprise holds a separate patrimony. Lack of legal person status means an assigned patrimony only.

[5] EGO no 44/2008 as amended.
[6] EGO no 44/2008, Art. 26.
[7] EGO no 44/2008, Art. 33, 34.

Even so, the legal regulations for juridical person are different in new Civil Code. Under past regulations the legal person status was awarded by authority only (by rendering a judgment or an administrative document). Nowadays the Code stipulates the essential elements for a legal person: distinct organization, assigned patrimony and legal purpose. Any entities which are complying with all these requirements are declared by law legal person.

Obviously all types of enterprises (individual and collective) satisfy these essential elements laid down for legal person. Nevertheless the law explicitly declare the individual enterprise lacks the legal person status. In these circumstances we can distinguish between legal person enterprise and non-legal person enterprise.

Simple association ("society"). Legal forms of association ("societies") are declared by law: simple society (venture), general partnership, limited partnership, limited partnership by share, limited liability company, joint-stock company, cooperative society and other types of companies that are regulated by law[8].

Among such forms simple society is basically an agreement, a joint-venture concluded by two or more associates. The lack of legal person status is an essential characteristic of this society because in the presence of that status the simple society evolved in a compulsory manner to other form of society.

Companies. Profit aimed activities are commonly subject to business in the form of a company. Setting up a company has a declared commercial purpose (for profit). In the view of the Civil Code companies are professionals and the organised form of activities (enterprise form) is chosen from the companies form prescribed by the law.

Companies remain the main part of the commercial law and the most advanced form of economic enterprises. Their regulation remains outside the Civil Code, being a special law, in fact the core of the new Commercial Law science.

Company types are fixed by Civil Code in line with the existed regulation of companies: general partnership, limited partnerships, limited partnership by share, limited liability company, and joint - stock company. The code forgets the limited liability company with sole associate, as the special Company Law Act does. Therefore this company will remain a subtype of limited liability company irrespective of its special characteristics. First of all this company doesn't employ an agreement of society (articles of association) due to the fact of sole associate involved in such undertaking. This situation means that the professional (the company as legal person) exploit in fact an undertaking with a sole associate, an individual undertaking, not a collective one. Still, the legal status of the company and the provisions placed in a special law (Company Law Act) determined us to keep this particular company (limited liability company with sole associate) among other companies and collective enterprises.

Cooperative society. Civil Code exposes among the types of „society" the cooperative society. In national law regulation of cooperative societies[9] replaced, in line with European regulations[10], the old form "cooperative organizations". Old dispute about merchant status of cooperative organizations now ceases to interest. Corporate form and character of collective

[8] Civil Code, Art. 1888.

[9] Law no 1/2005, regarding settlement and operations of a cooperative society, amended, published in OJ 285 from 22.04.2011.

[10] Regulation of the Council no 1435/2003, published in OJ of EU no L 207 from 18.08.2003, p. 1-24.

economic enterprise are now specifically legal established[11]. Antithesis with companies shows that cooperative society is not a legal person with the exclusive purpose of self-profit. Specific to cooperative society is a broader scope that includes non-profit purposes - to promote members' interests, economic interests but social and cultural rights too - and adherence to democratic principles applied to decision making process. Cooperative society is subject to registration with trade register.

Other regulated legal person. The collective enterprises are not limited to legal types already exposed. Civil Code tries to maintain the list open so it declares the vocation of the law to add new type of society to the list. Already there are two types of different collective enterprises: *Economic Interest Group* (EIG*)* [12] and *Societas Europaea* (SE) [13]. Both types have an extensive European background fixed in specific Regulations of the European Council.

These types of companies, based on European regulations, have the same juridical form and implementation in all European states due to direct effect of a European regulation in internal law of a member state of the European Union. Still, Company Law Act (Romanian) adopted rules supporting direct effect of European regulation in our national law system[14].

Societas Europaea (SE) is a uniform company type designed for internal European market. From the perspective of our Civil Code SE is a collective economic enterprise

Collective enterprises types can be modified or supplemented by the parliament with new corporate creations.

More types of enterprises can be accounted even now but we try to remain behind the line drawn by profit purpose types. Passing this line we encounter many non-profit enterprises, usually situated outside the commercial law border. A new law branch, as "Law of the professionals" could account for a lot more enterprises.

Conclusions

The short references within the Civil Code to enterprise (and professional) ask for scientific scrutiny in order to crystallize a convergent approach.

First we observe de notion of "carrying of an enterprise" as carrying of an organised economic activity, whether or not it is "commercial" in nature, consisting of producing, administering or alienating property, or providing a service. These activities can be done by a sole person or by more persons.

We already have had a notion, enterprise, with some evident characteristic: involves one or more person, requests an organised activity, asks for specific activities to be done, and distinguishes between profit and non-profit end. All these are characteristics of the new notion of enterprise.

The differences between new and old concept (of enterprise) are significant. All past decades, beginning with the old Commercial Code, then socialist economy and post communist period used intensively the concept of enterprise. The meaning of this term differed substantially in every decade.

Present notion need scientific scrutiny under the present regulation, new Civil Code, in order to crystallize a convergent approach in the future.

[11] Civil Code, Art. 1888.

[12] Regulation of the Council no 2137/1985, published in OJ of EU no L 199from din 31.07.1985.

[13] Regulation of the Council no 2.157/2001, regarding the Statue of Societas Europaea.

[14] Law no 31/1990, revised and amended, Title VII (1), Societas Europaea; Cristian Gheorghe, European Commercial Law, Publishing House CH Beck, 2009.

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THE PROCEDURE REGARDING THE ADMISSION OF GUILT

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Abstract

Considering the present normative framework, even if in criminal matters the transactions between the judicial organs, which exercise the procedural function of indictment, and the defendant are not permitted, the admission of guilt appears as an incipient form of negotiation of penalty. In anticipation of a future special procedure regarding the accord of admission of guilt, the present institution has generated a great amount of controversy which has, inevitably, caused a matchlessly practice to appear. The purpose of this study is to identify the primary consequences of the norms which now regulate the judgment regarding the admission of guilt and to offer concrete and punctual solutions to the grave problems generated by a defective normative framework. The article has as basic study a documentary material which is comprised not only of normative guidelines, but also of a judicial practice generated by the application of these norms for almost a year. Last, but not least, the actual dimension of the admission of guilt procedure is also underlined by the dealing of the legal issues introduced by the Constitutional Court's recently handed down decisions in these matters.

Keywords : *admission of guilt, special procedure, guilt acknowledgment, penalty, judgment.*

Introduction

The Constitutional Court in its attempt to eliminate the contradictions generated by the appearance of a deficiently regulated institution, has pronounced two important decisions in the matter of admission of guilt.

Being only a supervisory organism with jurisdictional attributions, the Constitutional Court, through the two decisions mentioned above, has determined a legislative intervention which would transpose, on a normative level, the findings of the constitutional litigation court.

By adopting the Government's Emergency Ordinance no. 121/2011, the content of the institution of judgment in case of admission of guilt has gained new dimensions, whose judicial consequences will manifest in the cases of trials started before the coming into force of this procedural institution.

The goal of the present article is to identify the procedural impediments generated by the introduction in Romanian Criminal Procedure of the judgment in case of admission of guilt.

The study also proposes appropriate solutions for the problems which appeared as a consequence of the intervention of the Constitutional Court.

The purpose of Law No. 202/2010, at both declarative and institutional levels, was the simplification and acceleration of the judicial activity criminal in nature.

With respect to the settlement of criminal causes in the first court of law, the lawmaker's intervention materialized into the introduction (regulation) of a new special procedure for judging the causes in case guilt is acknowledged.

Anticipating the new similar institutions regulated by the future Criminal Procedure Code, *i.e.* judgment in case guilt is acknowledged (the new Criminal Procedure Code, Art. 374) and the settlement of causes under the acknowledgement agreement (the new Criminal Procedure Code,

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Arts. 478-488), the current institution generated, as a result of a deficient regulation, a non-unitary judicial practice and doctrine-related controversies.

Although institutions with a similar content are recognized in normative terms also in the legislation of other European states (Germany, France, Greece, Belgium), the settlement of criminal causes in the first court of law through a simplified procedure, even based on guilt acknowledgement, should present serious guarantees for the person who is to be convicted.

It is precisely the absence of sufficient guarantees, complying with both the exigencies related to the protection of the trial-related rights of the accused, and with the purpose of the criminal lawsuit, as foreshadowed in Art. 1 of the current Criminal Procedure Code, the fact that led to the dispute of this institution.

The juridical consequences of introducing this new institution claimed the intervention of specialized organisms meant to rectify the emerging deficiencies.

Therefore, before establishing the current juridical nature and the finality of judgment in case of guilt acknowledgement, the interventions of the Constitutional Court and of the Government foreshadowing the current content of this institution need to be analyzed.

In this way, the Constitutional Court was notified of the exception referring to the unconstitutionality of the provisions of Art. 320^1 of the Criminal Procedure Code, which exception was raised in files regarding criminal causes which are in different times of the lawsuit (judgment on the merits, appeal, second appeal and challenge to enforcement).

To motivate this exception, authors stated that the provisions of Art. 320^1 of the Criminal Procedure Code breach the constitutional provisions of Art. 15 regarding the Universality of law, of Art. 16 regarding Equality in rights and of Art. 21 regarding the free Access to justice, of Art. 23 para. (11) regarding the presumption of innocence, of Art. 24 para. (1) regarding the right to defense, of Art. 53 regarding the Restriction of the exercise of certain rights or freedoms, and of Art. 124, para. (2) regarding the uniqueness, impartiality and equality of justice, and of Art. 6, paragraph 1 of the Convention for the protection of human rights and fundamental freedoms regarding the Right to a fair trial.

The authors of the exception also stated that the provisions of Art. 320^1 para. (1) of the Criminal Procedure Code breach the application of the most favorable law principle, equality in front of the law and public authorities and the right to a fair trial, since it creates the possibility that, in the event that two co-perpetrators are referred to judgment in different files, the judicial inquiry starting for one of them and not for the other one, only the latter should benefit, in case of guilt acknowledgment, from a reduction of the penalty limits provided under the law.

Examining the exception raised in the files which are in the merits, in the appeal and second appeal stages, for which no final rulings were issued, the Court ascertained that the disputed provisions do not order *in terminis* with regard to a different penalization of those persons who are in the same juridical situation.

Being a newly introduced institution, its implementation into the criminal lawsuit system may generate, due to differing interpretations, consequences related to the annihilation of the retroactive application of the more favorable criminal law, for discriminating considerations which do not pertain to a certain attitude assumed by the defendants or to any other objective and reasonable reasons.

The Court also emphasized that such drawbacks could have been removed by introducing transitory norms in the body of Law No. 202/2010.

In this sense, the Court referred to the jurisprudence of ECHR (Ruling of September 17, 2009, issued in the Scoppola versus Italy cause), specifying that although the lawmaker did not provide *in terminis* the way to be followed in case of guilt acknowledgement by the defendants who were referred to judgment under the former law, but who, overrunning the trial-related time for the

beginning of judicial inquiry and until the final settlement of the cause, are to be judged according to the new law, the Court established that the more favorable law application principle is applicable in such a case.

In this way, in the case of such transitory situations, consideration should be given to the mixed nature of the provisions of Art. 320^1 of the Criminal Procedure Code, which consecrate a kinder character by reducing penalty limits.

In conclusion, the Court ascertained that the provisions of Art. 320^1 of the Criminal Procedure Code are not constitutional to the extent that they do not permit the application of the more favorable criminal law to all the juridical situations born under the former law, which continue to be judged under the new law until the conviction order remains final.

With respect to the exception raised in the files which are in the challenge to enforcement stage, for which final rulings were issued, the Court ascertained that the exception related to the unconstitutionality of the provisions of Art. 320^1 of the Criminal Procedure Code referring to the judgment under guilt acknowledgment is not connected to the settlement of the causes in which it was invoked, because –as revealed by its marginal name- the wording contemplated a judgment, belonging, with the exception of transitory situations, only to the merits and which must be also applicable only until a final ruling is issued.

Consequently, it is not susceptible of the applicability of the more favorable criminal law retroactivity principle.

With regard to the provisions of Art. 320^1 para. (8), providing a judge's possibility to reject the request for the defendant's guilt acknowledgement and to proceed with judgment according to the common law procedure, the Court ascertained that –due to its equivocal meaning- the article wording does not meet the clarity and predictability requirements which should have been contained by any normative provision. Thus, in the absence of certain objective criteria, the possibility granted to a judge may turn into an abuse that cannot be censored.

The Court established that the prevailing issue is not the establishment of the defendant's deeds or of the data regarding his/her person (the meanings of these criteria do not have univocal correspondents as compared to the ownership of other terms from the criminal law or criminal lawsuit fields), but the determination of the circumstances that a deed exists and that, according to the evidence produced, it was perpetrated by the defendant, and not by any other person.

Therefore, not the mere acknowledgment of guilt is decisive for rendering efficient a lawsuit performed within the limits of lawfulness and impartiality, as they constitute only a procedural condition, but the establishment of guilt [*is decisive*].

Any eventual criteria instituted by Art. 320^1 para.4 of the Criminal Procedure Code are insufficient for characterizing Art. 320^8 as a clear and predictable norm.

Consequently, the Court ascertained that the provisions of Art. 320^1 para. (8) fail to offer the persons brought to justice the trial-related rights and guarantees sufficient to defend the interests related to their trial position.

For these considerations, the Constitutional Court, by its Decisions Nos. 1470 and 1483 of November 8, 2011 admitted the unconstitutionality exception and established that the provisions of Art. 320^1 of the Criminal Procedure Code are unconstitutional to the extent that they remove the application of the more favorable criminal; the Court also admitted the unconstitutionality exception of the final paragraph of Art. 320^1, ascertaining that it is unconstitutional, and it rejected as inadmissible the unconstitutionality exception of the provisions of Art. 320^1 raised within the challenge to enforcement.

In order to harmonize the provisions of Art. 320^1 of the Criminal Procedure Code with the Decisions issued by the Constitutional Court and in order to avoid a non-unitary judicial practice, Emergency Government Ordinance No. 121 was enacted on December 22, 2011 for the amendment

and supplement of certain regulatory acts. This Ordinance amended Art. 320[1] of the Civil Procedure Code, in the sense that para. (4) of the articles currently has the following wording: *"The court of law shall settle the criminal side when the evidence produced within the criminal prosecution indicates that the deed exists, it can be construed as a crime and it was perpetrated by the defendant", while para. (8) provides that "the court of law shall reject the request when it finds that the evidence produced within the criminal prosecution are not sufficient to establish that the deed exists, it can be construed as a crime and it was perpetrated by the defendant. In this case, the court shall proceed with the judgment of the cause according to the common law procedure".*

In conclusion, further to the matters stated by the constitutional control court, the lawmaker complied, and established clear and precisely formulated criteria, according to which, in each and every case, the competent courts of law shall deem whether the admission or the rejection of the request for judgment is required in case of guilt acknowledgment.

Although they have a special character by comparison to their application field, the provisions consecrating such criteria are coming under the general conditions according to which the criminal side is settled in the first of law. Thus, according to Art. 345 para. 2, a defendant shall be convicted if the court of law finds that a deed exists, it can be construed as a crime and it was perpetrated by the defendant.

In spite of this new legislative intervention, the logical and juridical connection between the settlement of the request for judgment in case of guilt acknowledgment and the settlement of the criminal side on the merits, in the first court of law, shall be consolidated, in the sense that the admission of the request for judgment according to this special procedure is also foreshadowing the merits solution.

As we shall show hereinbelow, the conviction solution is the only solution possible in case of guilt acknowledgment, so that the report on the admission of the request to apply such procedure shall have an interlocutory nature.

Moreover, when they verify the fulfillment of the conditions necessary to apply this procedure, in fact they appreciate in advance also the evidencing material relevant for the merits of the cause, since the same conditions are necessary both for the admission of the request for judgment in case of guilt acknowledgment and for the ruling of the conviction solution: *that the deed exists, that it can be construed as a crime and that it is perpetrated by the defendant.*

Since it involves essential elements of the conflict relation, the analysis of these conditions prior to the judicial inquiry and the debate stage seems a risky operation, which may be sometimes equated to a form of prior ruling.

In order to be able to judiciously identify the consequences of any interventions occurring in this field, a careful, institutional and functional analysis of the judgment in case of guilt acknowledgment is required for the beginning.

Even if it is not legally qualified in this respect, the judgment procedure in case of guilt acknowledgment has the nature of a proper special procedure, since its object is represented by the clarification of the content of the juridical conflict relation and, implicitly, by the entailment of the criminal liability of the perpetrators of crimes.

In this way, it becomes the fourth proper special procedure known in our judicial system, after the procedure for the prosecution and judgment of certain flagrant crimes, the procedure in the causes with underage criminals and the procedure for entailing the criminal liability of a legal person, all of these procedures implying the settlement of the merits.

The analysis of the content of Art. 320[1] indicates that the procedure in case of guilt acknowledgment is primarily composed of the norms of a regular procedure, supplemented by complementary and mandatory provisions; an express mention in this regard would have been useful, according to the model of the regulation of the special procedure applicable to underage individuals.

Unlike the other proper special procedures, this procedure contains norms derogatory only with reference to the judgment in the first court of the causes in which guilt acknowledgment occurs.

This special procedure essentially implies a simplified judicial inquiry, which takes place during a single hearing; in the essence of express provisions, the performance of the criminal prosecution, of the preliminary stage, of the debate, deliberation, ruling and drafting of the decision related to the judgment in the first court, as well as the performance of judgment in the challenge means shall be done according to the regular procedure of common law.

The procedure in case of guilt acknowledgment shall apply in every criminal cause except for those causes regarding crimes punished by life imprisonment.

The exception shall operate regardless of the provision of life imprisonment as an alternative punishment by imprisonment or as an autonomous punishment. We believe that the interdiction shall apply even if the crime retained as incumbent on the defendant remained an attempt, because the text refers to the punishment provided by law for the crime contemplated by the criminal action exerted in the cause, regardless whether, in fact, the crime was perpetrated in its standard form or it remained an attempt.

The procedure shall be initiated further to the defendant's personal statement, made verbally in front of the court of law or made under an authenticated writ.

This expression of will must occur until the commencement of the judicial inquiry, so until the reading of the notification act.

The lapse of this lawsuit term shall lead to the rejection of the request as filed late; a solution should be ordered under a separate court report as provided by Art. 320^1 para. 8, and not simultaneously with the merits settlement sentence.

In case the re-judgment of the cause was ordered further to the admission of the appeal or of the second appeal, the court that would proceed to the re-judgment of the cause might theoretically apply this special procedure, if the decision to admit the appeal or the second appeal cancels all the procedural acts performed in front of the first court, while the re-judgment limits do not explicitly or implicitly prevent guilt acknowledgement.

This solution results from the fact that the law does not make any distinction in such a situation, and the provisions of Arts. 384 and Art. 385^{19} establishing the procedure of re-judgment in case of admission of the appeal or second appeal provide that such procedure shall be performed according to the rules of judgment in the first court (Special Part, Title II, Chapters I and II, therefore and Art. 320^1), which shall apply accordingly.

In case guilt is acknowledged during the criminal prosecution, the judicial activity shall be carried out according to the usual procedure, as long as there are no derogations in this respect, and – according to Art. 202, para. 2- the duties of the criminal prosecution body related to the collection of the evidence necessary for a just and complete settlement of the cause need to be fulfilled even if the accused person or the defendant acknowledges his/her deed.

The statement made by the defendant during the guilt acknowledgment procedure must contain two ordering acts: an act for the acknowledgment of the deeds retained in the court notification act, and an act requesting that the judgment should be made on the basis of the evidence produced in the criminal prosecution stage.

In consideration of this aspect, guilt acknowledgment should not apply to those defendants who were underage at the crime perpetration time, even if their ordering acts were approved by their legal representatives.

This solution results, in the absence of an express provision, from the manner in which the law regulated this procedure, and it is confirmed by the fact that another special procedure for prosecution and judgment shall be applied to those underage persons who perpetrated crimes; these

persons shall automatically benefit from a cause for reducing the punishment limits by half, according to the substantive provisions of Art. 109 of the Criminal Code.

Also, at the level of principles, the special procedures pre-judging the merits cannot be applied concomitantly, due to the legal treatment related to derogatory norms, which solution results also from the interpretation of the provisions of Art. 479 para.1.

The essential premise for the special procedure in case of guilt acknowledgment is the existence of a criminal prosecution stage in which the evidence would have been duly produced and sufficient for the entailment of criminal liability.

The partial acknowledgment of the deeds retained in the notification act is not sufficient for the procedure application, as in civil law. Such an incomplete acknowledgment may be, however, appreciated as a judicial mitigating circumstance.

Even if the defendant acknowledges his/her guilt, his/her statement cannot have an absolute character.

In this way, if the evidence were unduly produced in the criminal prosecution stage, the defendant's acknowledgment statement made under the conditions of Art. 320^1 cannot cover the produced illegality.

The court of law, in virtue of its active role and of its obligations deriving from the regulation manner of the proof burden in the criminal lawsuit, does not have any possibility, according to Art. 64 para. 2, to use this proof, not even to apply the special procedure for guilt acknowledgment.

This solution is the consequence of the fact that the sanction which occurs, under Art. 64 para. 2, in the case of the means of evidence illegally obtained, has a *sui generis* character, and it consists in a general impossibility to use the unlawfully obtained information in evidence; this sanction of "dismissal" shall not be confounded with nullity, which knows, at least as far as relative nullity is concerned, the confirmation possibility.

If the special procedure is applied, the judicial inquiry shall be simplified and shall imply the performance of only two acts with a probating character: a mandatory act, hearing the defendant, and an eventual act, the production of evidence by writs as mitigating circumstances.

The drafting manner of Art. 320^1 reveals the following intention of the lawmaker: this simplified judicial procedure, just like the proper judgment, in fact, should be performed during a single court hearing.

As a result, if the production of evidence by writs as mitigating circumstances requires another court hearing, the court shall either reject the evidence and shall settle the cause according to the special procedure, or they shall continue judging the cause according to the common law procedure.

Also, if the settlement of the civil action at law requires the production of evidence, the severance of such action is imposed.

In such a hypothesis, even if the solution to be issued in the civil action at law depends on the evidence to be produced, yet such solution shall be largely subordinated to the conviction solution (the only possible one) issued in the special procedure, due to the *res judicata* authority of the decision settling the criminal action with respect to the existence of the deed, of the person who committed it and of the guilt of such person (Art. 22).

To be able to settle the criminal side based on the special procedure, the court must analyze the evidence produced in the criminal prosecution stage and must deem it as sufficient, so that it should lead to the result that the deed exists it is a crime and it was committed by the defendant.

The law permits a change of the juridical classification of the deeds retained as incumbent on the defendant within this procedure; however, the new classification needs to be covered as far as its constitutive content is concerned by the already produced evidence; if the new classification is not

supported by the probating evidence, the judgment shall continue according to the usual procedure with the production of the evidence necessary to clarify the cause in all respects.

As we have shown, the special procedure in the case of guilt acknowledgment shall be initiated by the defendant's verbal statement, made in front of the court of law, or by his/her written statement, made in the form of an authenticated writ.

Failing an express provision, in case there is a crime-related complex formed of several defendants in a criminal cause, and only some of such defendants request to be judged on the basis of guilt acknowledgment, then, if the court admits their request, the court should severe the cause, under the same report, forming a new file regarding the deeds of those defendants who requested the application of such procedure; this file shall be settled according to the special provisions applicable in this field.

The initial file, in which the application of the special procedure was not requested, shall be judged according to the norms of common law.

The procedure *per se* implies the succession of the following acts: interrogating the defendant in order to confirm his/her request and in order to make sure that such defendant is aware of the implications of his/her acknowledgment (Art. 320^1 para.3), hearing the defendant, the eventual production of writs for mitigating circumstances (320^1 para. 2), as well as raising for the contradictory discussion by the parties and the prosecutor of the defendant's request to apply the special procedure.

Concerning the first aspect, the law indicates that the court of law is bound to ask the defendant whether s/he requests that judgment should take place on the basis of the evidence produced in the criminal prosecution, known and recognized by him/her.

This last hearing does not have any legal coverage since, in the Romanian criminal procedure, no evidentiary means, not even the statement made by the defendant to acknowledge his/her deed, has a character binding on the court of law only through the fact of confirmation, appropriation or failure to challenge by the party to which such means relates.

As a consequence of the binding nature of the criminal action at law, as well as in consideration of the principles of truth discovery, official nature and active role, the court of law has the duty to appreciate the evidence under the imperative conditions of Arts. 62 and 68, inclusively from the perspective of their production by another judicial body.

If the evidence was obtained by violence, threats or by any other means of constraint or through the failure to comply with the procedure for producing evidence in the criminal prosecution stage, as we have shown, they cannot be used (*or are dismissed*) even in the special procedure for guilt acknowledgment and even if the defendant shows that s/he recognizes them.

The evidence by writs as mitigating circumstances can be approved only for the defendant and only if such evidence can be produced at the hearing in which the procedure is performed.

For the other parties, the law does not permit the approval of evidence by writs or of any other evidence, unless such is necessary for the settlement of the civil action at law and this action was severed.

Art. 320^1 para. 3 provides that, after hearing the defendant, the court of law shall allow the prosecutor and the other parties to plead. The analysis of the content of the entire article reveals that, at this time of the lawsuit, the prosecutor and the parties shall not be allowed to plead <u>on the merits</u>, but with respect to the defendant's request to be applied the special procedure.

Thus, after disputing the defendant's request, the court of law may ascertain the failure to meet the conditions provided by law.

In this situation, the request shall be rejected under a report, while the court shall continue to judge the cause according to the common law procedure.

If the court finds that the conditions for acknowledgment are met, the court shall admit the request and shall allow the prosecutor and parties to plead on the merits, since this procedure also implies a distinct stage of the debates, according to Art. 320[1], para. 6.

After the admission of the request for the application of the special procedure, the only solution through which a cause can be settled is the conviction solution; as a result, the admission of the request under a report has an interlocutory nature.

The punishment limits shall be reduced, however, by one third, in case of punishment by imprisonment, or by one fourth, in case of punishment by fine.

This special procedure implies, therefore, a distinct cause for reducing the punishment, a procedure which is unknown in case of the other proper special provisions. At the same time, the cause for reduction implied by the guilt acknowledgment procedure is the only such cause regulated by the procedural and substantive law.

Since the law does not contain any express interdictions, in the special procedure for guilt acknowledgment, other causes for mitigating or reducing the punishment, provided in the general or special part of the Criminal Code may be simultaneously applied, if their applicability is ascertained by means of the evidence produced in the criminal prosecution stage or by means of the writs produced as mitigating circumstances directly in front of the court of law.

The lawmaker unfortunately omitted to regulate the manner in which the punishment should be established in case of a competition between the reduction cause provided by this procedure and the causes provided by the general or special part of the Criminal Code.

The conviction solution shall be ordered under a sentence, this being the only type of Court ruling by mean the cause is settled on the merits in the first court, regardless whether such settlement occurs by way of the common law procedure, or by way of the special procedure.

Failing a contrary provision, the conviction sentence in case of guilt acknowledgment shall be subject to appeal or only to a second appeal, under the conditions of the common law.

In consideration of the purpose of this procedure, good use could have been made of a provision which should either regulate the final character of the sentence ruled in this field, or which should limit the reasons for appeal or second appeal only to issues pertaining to a re-consideration of the conditions under which the procedure can be applied, to any eventual consent flaws; or to the defendant's error related to the object or person, according to the model of other decisions ruled in case of acknowledgment, but in the civil field.

In conclusion, after we established the nature and functionality specific to this institution with a hybrid character in the criminal field, which involves substantial consequences in procedural norms, we have to point out the limits or the material applicability of the procedure, by comparison to the issues consecrated by the Constitutional Court with respect to the more favorable criminal law application principle.

In this sense, the transitory provisions regulated under Art. XI of Emergency Ordinance No. 121/2011 are extremely important; the said ordinance becomes thus *lex generalia* in this field.

In order to establish the application in time of the norms composing the judgment procedure in case of guilt acknowledgment and to settle the potential conflict of applicable regulatory acts, the Constitutional Court identified 3 analysis hypotheses.

1. A first situation envisages the hypothesis in which defendants were referred to judgment after the enforcement of Law No. 202/2010. With regard to such defendants, the text allows no discussion whatsoever, being applicable in its entirety. Since the procedural norms have an immediate application, guilt acknowledgment may also be pleaded in the causes in which criminal prosecution was carried out under the former law, as long as –at the time when the request was filed- the maximum term established in this respect, *i.e.* the reading of the notification act in the first court of law, was not overrun.

2. A second situation is that in which defendants, although having been referred to judgment prior to the issue of Law No 202/2010, the lawsuit term for initiating the judicial inquiry was not overrun. The text is applicable without any differentiation whatsoever also in this case.

3. A third situation envisages the case of those defendants who were referred to judgment under the former law, but who overran the term for the initiation of the judicial inquiry. For this last category, two sub/groups may exist; these two sub-groups have a differing legal treatment.

In this way, if the defendants have already been finally judged under the former law, the entry into force of Law No. 202/2010 cannot affect the positive and negative effects generated by the fact that a court order remained final. Consequently, it is not susceptible of the applicability of the retroactivity principle of the more favorable law.

Also, a contrary thesis cannot be admitted, since the stability of juridical relations would be impaired; in the absence of such stability, we cannot speak about the rule of law.

As a result, if the provisions of Art.320^1 of the criminal Procedure Code are invoked in causes that are finally settled by way of reviews, challenges pending cancellation, challenges to enforcement, etc., such request must be rejected as inadmissible.

In the case of the second sub-group, envisaging the defendants referred to judgment under the former law who overran the initiation time of the judicial inquiry, but who have not been finally judged yet, the provisions of Art. 320^1 of the Criminal Procedure Code shall be applied according to the transitory provisions of EGO No. 121/2011.

According to Art. XI of this regulatory act, in the causes pending for judgment in which the judicial inquiry in the first court had started prior to the enforcement of Law No. 202/2010, the provisions regarding judgment in case of guilt acknowledgment shall accordingly apply at the first hearing with the complete procedure that immediately follows the entry into force of this emergency ordinance.

Therefore, even if the special provisions for reducing punishment may be applied also to these defendants, such provisions should be invoked in consideration of certain procedural conditions which are just as precise (the first hearing with the complete procedure that immediately follows the entry into force).

Also, the provisions of Art. 320^1 of the Criminal Procedure Code may be invoked in compliance with this procedural term, even if the respective criminal cause is judged in the first court or in appeal or second appeal. The interpretation derives from the wording, which refers to causes that are generally pending for judgment, without distinguishing the type of judgment (in the first court, in challenge means or in re-judgment after cancelation or cassation), therefore prior to the remaining final of court ruling for merits settlement.

Conclusions

Ever since it appeared the institution of judgment in the case of admission of guilt has generated doctrinal controversy and an uneven judicial practice.

The intervention of the supervisory constitutional court has determined, after only one year of existence, the normative content of this institution.

Despite the double intervention, jurisdictional as well as legislative, the procedure of judgment in case of admission of guilt further presents numerous controversial aspects.

This institution represents a form of transition of the regulations in the new Criminal Procedure Code, expected to come into force in the near future..

The evolution of the changes of the present institution will offer the legislative bodies the solution for a supple and coherent normative framework in the matter of the admission of guilt agreement.

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THE EU DIRECTIVE ON MEDIATION IN CIVIL AND COMMERCIAL MATTERS AND THE PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION

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Abstract

The essay concerns the implications of EU Directive 2008/52/EC regarding mediation in civil and commercial matters on the right of effective judicial protection. After having underlined the importance assumed in the European Union by alternative dispute resolution, the essay examines the stages that led European institutions to the adoption of the Directive on mediation in civil and commercial matters. The article addresses the aims and the scope of the Directive and subsequently focuses its attention on Directive dispositions regulating the "key aspects" of civil procedure. The essay emphasizes that the Directive, in substance, allows both optional mediation and compulsory mediation. However, compulsory mediation can contrast with the principle of effective judicial protection. Furthermore, the essay deals with the relationship between compulsory mediation and the principle of effective judicial protection, and identifies, examining a recent pronouncement of the EU Court of Justice, the needed requisites to be respected in order that such contrast does not occur.

Keywords: *ADR; mediation; judicial proceedings; access to justice; compulsory mediation; principle of effective judicial protection*

1. Introduction

By means of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, the European Union (EU) has provided the criteria for the regulation of mediation in civil and commercial matters in EU Member States. This important intervention has the aim to improve access to justice and to "facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings".[1] Therefore, the present essay deals with the issue of the relationship between mediation and judicial proceedings. In particular, it concerns the respect to be afforded to the principle of effective judicial protection. In the first part (Sections 2-5, *infra*), the essay reconstructs the road that led the European Union to adopt Directive 2008/52, classifies mediation as an alternative extrajudicial method of dispute settlement,[2] underlines the aims pursued

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[1] Art. 1(1), Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, p. 3.

[2] See Sections 2, 3, 3.1, *infra*.

by and the scope of the Directive[3] and identifies its principal dispositions governing the relationship between mediation and judicial proceedings.[4] As to the regulation of such relationship, the Directive does not exclude the possibility for an individual State to provide cases in which the mediation attempt is compulsory (compulsory mediation).[5] In the second part of the essay (Sections 6-9, *infra*), the authors examine the relationship between mediation and the right to access to justice.[6] The regulation of such relationship falls within the scope of procedural matters. For this reason, reference is made to the principle of "procedural autonomy" of the individual States,[7] which is subject to certain limits, amongst which the principle of effective judicial protection assumes a priority role.[8] Thus, the question that arises is whether compulsory mediation always contrasts with the principle of effective judicial protection.[9] To answer to this question, it is necessary to take into account, on the one hand, the non-absolute nature of the above-mentioned principle[10] and, on the other hand, some requisites that the EU Court of Justice in the 2010 *Alassini* judgment has indicated are necessary in order that a compulsory attempt to reach an out-of-court dispute settlement does not violate the principle of effective judicial protection.[11]

2. The path of European institutions towards the promotion and development of alternative dispute resolution in the European Union

Following the entry into force of the Treaty of Amsterdam, the necessity to assure the proper functioning of civil proceedings in the area of judicial cooperation in civil matters having a cross-border nature has become a priority under European Union law.[12] According to *ex* Article 65 of the Treaty establishing the European Community, as introduced by the Treaty of Amsterdam, this aim was to be pursued through the improvement and the simplification of the recognition and enforcement of decisions in civil and commercial cases, as well as decisions in extrajudicial cases, and through the elimination of "obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States".[13] It is, however, following the entry into force of the Treaty of Lisbon[14] that the importance of alternative dispute resolution has been for the first time affirmed by a primary source of European Union law. In particular, Article 81 of the Treaty of the Functioning of the European Union -which has replaced Article 65 of Treaty establishing the European Community- provides that, in the context of judicial cooperation in civil matters, the European Parliament and the Council, according to the ordinary

[3] See Sections 4, 4.1, *infra*.
[4] See Section 5, *infra*.
[5] *Ibid*.
[6] See Section 6, *infra*.
[7] See Section 7, *infra*.
[8] See Section 7.1, *infra*.
[9] See Section 8, *infra*.
[10] *Ibid*.
[11] See Sections 8.1, 8.2, *infra*.
[12] 1997 Treaty of Amsterdam, **OJ C 340, 10.11.1997.**
[13] Art. 65, Treaty Establishing the European Community, **OJ C 325, 24.12.2002; see also *ibid.*,** art. 61(c).
[14] 2007 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, **OJ C 306, 17.12.2007, which entered into force on December 1, 2009. As noted by an eminent scholar, the** Treaty of Lisbon extends the European Union's capacity to act ("amplia la capacità di azione dell'Unione") in a number of areas such as public health, energy, **civil protection, environment and climate changes: G. Ziccardi Capaldo, *Diritto Globale. Il Nuovo Diritto Internazionale* (2010), p. 18.**

legislative procedure, can adopt measures necessary for the proper functioning of the internal market aimed at assuring "the development of alternative methods of dispute settlement".[15]

The gradual recognition by EU Treaties of the significance of judicial cooperation in civil matters, of the access to justice and of alternative dispute resolution, represents the important goal pursued over a lengthy period of time by European institutions, which began in 1993, when the European Commission adopted the Green Paper on access of consumers to justice and the settlement of consumer disputes in the single market.[16] Following the Green Paper, EU institutions adopted some important directives concerning consumer protection, which made express reference to the need and importance of alternative dispute resolution.[17]

In the sector of consumer law, methods of alternative dispute resolution have been considered in depth and especially in the electronic commerce field. In this regard, it is of fundamental importance to recall the Directive 2000/31/EC on electronic commerce, whose Article 17 provides that in case an information society service provider and the recipient of the service are in disagreement, Member States have to adopt measures formulated so that "their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means",[18] and that encourages "bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned".[19]

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[15] Art. 81 of The Treaty on the Functioning of the European Union (TFEU), **OJ C 83, 30.3.2010, in particular provides that: "1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.** 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: … (e) effective access to justice; …. (g) the development of alternative methods of dispute settlement".

[16] Commission Green Paper of 16 November 1993 on access of consumers to justice and the settlement of consumer disputes in the single market, COM(93) 576 final, November 16, 1993; see also S. Sticchi Damiani, "Le Forme di Risoluzione delle Controversie Alternative alla Giurisdizione - Disciplina Vigente e Prospettive di Misurazione Statistica", (2003) 13, nos. 3-4, *Rivista Italiana di Diritto Pubblico Comunitario*, pp. 743-774.

[17] See Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, OJ L 43, 14.2.1997, p. 25, art. 10; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997, p. 19, art. 10(4); on consumer protection, see also: Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51. Furthermore, in the transport field, the Commission adopted a range of measures aimed at protecting consumers, making reference to the importance of alternative dispute resolution mechanisms: Communication from the Commission to the European Parliament and the Council - Protection of air passengers in the European Union, COM(2000) 365 final, June 21, 2000; White Paper on "European transport policy for 2010: Time to decide", COM(2001) 370 final, September 12, 2001; Communication from the Commission to the European Parliament and the Council "Towards an integrated European railway area", COM(2002) 18 final, January 23, 2002. Furthermore the Commission adopted two Recommendations that stated important principles applicable to out-of-court proceedings for the resolution of consumer disputes, which had significant importance in EU member States legal systems (Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, **OJ L 115, 17.4.1998, p. 31;** Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, **OJ L 109, 19.4.2001, p. 56).**

[18] Art. 17(1), Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), OJ L 178, 17.7.2000, p. 1.

[19] *Ibid.*, art. 17(2).

3. The various EU stages towards the regulation of mediation in civil and commercial matters

It is evident that the initial attention of the European Union towards alternative dispute resolution systems was primarily limited to the sector of consumer protection.[20] However, subsequently, the European Union focused its attention towards other forms of alternative methods of dispute settlement in different sectors, such as family mediation and, next, civil and commercial mediation. In reality, the beginning of the slow road of the European Union towards the establishment of rules adequately regulating the various forms of mediation (*i.e.*, family mediation, mediation in the field of labor law and consumer law, and mediation in civil and commercial matters), intended to ensure an area of freedom, security and justice where the free movement of persons is protected, and at the same time the respect of the right to access to justice, dates back to the 1999 Tampere European Council.[21] On this occasion, for the first time, the EU Council was asked to identify common substantial and procedural rules capable of guaranteeing an adequate level of legal assistance in cross-border litigation throughout the European Union and to accelerate the resolution of cross-border disputes "on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims".[22] In order to allow the achievement of these objectives in a uniform way in the national legal systems, the Member States were asked to adopt alternative out-of-court procedures.[23] Subsequently, others European Councils underlined the necessity to create alternative dispute resolution methods in the European Union.[24]

This orientation has consequently led European institutions to adopt specific measures in definite sectors. As to the family field, Regulation No. 2201/2003 has established an important system of cooperation between central authorities in the context of disputes concerning matters of parental responsibility by assigning an important role to the mediation.[25] Indeed, Article 55 of that Regulation provides that central authorities, directly or through public authorities or other bodies, must adopt measures in order to "facilitate agreement between holders of parental responsibility

[20] For a detailed overview of the evolution of consumer protection in the European Union in relation to the topic of mediation, see G. Rossolillo, "I Mezzi Alternativi di Risoluzione delle Controversie (ADR) tra Diritto Comunitario e Diritto Internazionale", in N. Boschiero and P. Bertoli (eds.), *Verso un "Ordine Comunitario" del Processo Civile: Pluralità di Modelli e Tecniche Processuali nello Spazio Europeo di Giustizia: Convegno Interinale SIDI, Como, 23 Novembre 2007* (2008), pp. 167-183, especially pp. 170-171.

[21] Tampere European Council, October 15 and 16, 1999, Presidency Conclusions, available online at *http://www.europarl.europa.eu/summits/tam_en.htm* [Accessed February 9, 2012].

[22] *Ibid*., para. 30.

[23] *Ibid*.

[24] Lisbon European Council, March 23 and 24, 2000, Presidency Conclusions, available online at *http://www.europarl.europa.eu/summits/lis1_en.htm* [Accessed February 9, 2012], para. 11; Santa Maria Da Feira European Council, June 19 and 20, 2000, Presidency Conclusions, available online at *http://www.europarl.europa.eu/summits/fei1_en.htm* [Accessed February 9, 2012]; Laeken European Council, December 14 and 15, 2001, Presidency Conclusions, available online at *http://ec.europa.eu/governance/impact/background/docs/laeken_concl_en.pdf* [Accessed February 9, 2012], para. 25.

The attempt to establish alternative dispute resolution mechanisms in the EU Member States' legal systems proposed in the various European Councils exemplifies the Council of Europe's aims at identifying common principles and standards concerning family mediation and mediation in civil and commercial matters (see also Recommendation No. R (98) 1 on family mediation, adopted by the Council of Europe Committee of Ministers on January 21, 1998; Recommendation (2002)10 on mediation in civil matters adopted by the Council of Europe Committee of Ministers on September 18, 2002).

[25] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ L 338, 23.12.2003, p. 1.

through mediation or other means, and facilitate cross-border cooperation to this end".[26] As far as the civil and commercial context is concerned, the necessity to identify common criteria regulating mediation in Europe affirmed in the several European Councils has induced the Commission to adopt in 2002 the Green Paper on alternative dispute resolution in civil and commercial law[27] -which is inspired by the regulation of mediation in consumer and family sectors- and, in 2004, the European Code of Conduct for Mediators.[28] These two documents constitute the basis for the adoption in 2008 of the EU Directive concerning mediation in civil and commercial matters.[29]

3.1. The 2002 Green Paper of the Commission concerning alternative dispute resolution in civil and commercial law, and the 2004 European Code of Conduct for Mediators

The need to provide a general overview of the situation regarding alternative dispute resolution systems in the European Union originated from the existence of problems concerning the procedures before the EU Member States' judicial authorities, such as the excessive increase of the volume of disputes brought before national judicial organs, the consequent length and prolongation of these proceedings, as well as the rise of the costs incurred by the parties. This particular situation was also aggravated by the complexity and technicality of national norms of several internal legal systems which, by regulating the matters in different ways, were unable to assure adequate access to justice.[30]

In April 2002, the European Commission presented the Green Paper relating to alternative dispute resolution in civil and commercial matters. The Green Paper represented the first real attempt of European institutions to identify common criteria and principles concerning alternative dispute resolution mechanisms applicable in the EU Member States' legal systems.[31] The Green Paper constituted a significant impulse for European institutions to establish a definite EU legal context concerning alternative dispute resolution in civil and commercial matters: indeed, as it will be seen below, several principles expressed by the Green Paper have been reproduced by the 2008 Directive on mediation.

The Green Paper defined alternative dispute resolution systems as "out-of-court dispute resolution processes conducted by a neutral third party".[32] This concept covers alternative dispute resolutions in the context of judicial proceedings, *i.e.* procedures conducted by a judicial authority or assigned by a judge to a third party.[33] However, arbitration proper does not fall into this category, since it has been considered very similar to a quasi-judicial procedure more than to an alternative dispute resolution mechanism.[34] According to the Commission, alternative means of settling cross-border disputes are to be regarded as mechanisms able to fill the gap of national judicial proceedings and to assure better access to justice, as protected by Article 6 of the European Convention on

[26] *Ibid.*, art. 55(e).

[27] Green Paper on alternative dispute resolution in civil and commercial law, COM(2002) 196 final, April 19, 2002.

[28] European Code of Conduct for Mediators, available online at *http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf* [Accessed February 9, 2011].

[29] See Sections 4, 4.1, 5, *infra*.

[30] COM(2002) 196 final, *supra* note 27, p. 7, para. 5.

[31] For some considerations concerning the Green Paper, see A. Brady, "Alternative Dispute Resolution (ADR) Developments Within the European Union", (2005) 71, no. 4, *Arbitration: The Journal of the Chartered Institute of Arbitrators*, pp. 318-327, especially pp. 321-322.

[32] *Ibid.*, p. 6, para. 2.

[33] *Ibid.*, p. 7, para. 3. It should, however, be underlined that Directive 2008/52/EC expressly excludes from its scope "attempts made by the court or judge seised to settle a dispute in the context of judicial proceedings concerning the dispute in question" (see art. 3(a) and 12th Whereas, Directive 2008/52/EC, *supra* note 1).

[34] *Ibid.*, p. 6, para. 2.

Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union;[35] indeed, they are often to be considered as more adequate in order to resolve disputes because they allow parties to confront each other on the basis of a dialogue and to eventually decide whether or not to sue using judicial mechanisms.[36]

The Green Paper deals with a series of legal issues that have been regulated by the 2008 Directive with regard the mediation in civil and commercial matters,[37] such as questions regarding the alternative dispute resolution clauses in contracts, the effects of ADR on limitation and prescription periods, the necessity of confidentiality, the validity and the effectiveness of the agreements resulting from ADR processes, the training of third parties, and the rules regulating their responsibility.

The importance of the Green Paper is undeniable because it has identified alternative dispute resolution mechanisms not just as an alternative, but, in some cases, as a better means to guarantee to parties in a dispute the effective protection of their right to access to justice. The change of perception generated by this Green Paper has inevitably produced positive effects because it has allowed European institutions to attribute to alternative dispute resolution mechanisms a fundamental role in the legal context of the European Union and of the Member States.

Subsequently, in July 2004, the Commission adopted the European Code of Conduct for Mediators, which formulated several principles to which individual mediators and mediation organizations can voluntarily adhere and that are applicable to all types of mediation in civil and commercial matters.[38] It deals with all areas concerning civil and commercial matters, in particular: the competence, the appointment and fees of mediators and promotion of their services, the independence and impartiality of mediators, the structure and fairness of mediation procedures, and the confidentiality of mediators. The definition of the principles and of the structure of the mediation process contained in the Code has influenced the EU rules regulating civil and commercial mediation because it has represented a guide for the reconstruction of all aspects relating to mediation in civil and commercial area. Indeed, the 2008 Directive on civil and commercial mediation, which will be examined in the next paragraph, has acknowledged many principles affirmed in the Code just examined.

4. Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters, and its aims

In 2008, the European Union adopted Directive 2008/52 regulating mediation in civil and commercial matters.[39] The directive contains norms intended not only to regulate the mediation

[35] *Ibid.*, pp. 7-8, paras 5-13; see, however, *ibid*., p. 25, para. 62. See art. 6, 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950; art. 47, Charter of Fundamental Rights of the European Union, OJ C 83, 30.3.2010. On this topic, see Sections 6 *et seq*., *infra.*

[36] COM(2002) 196 final, *supra* note 27, p. 8, para. 9.

[37] See Section 5, *infra*.

[38] European Code of Conduct for Mediators, *supra* note 28; on this point, see E. Birch, "The Historical Background to the EU Directive on Mediation", (2006) 72, no. 1, *Arbitration: The Journal of the Chartered Institute of Arbitrators*, pp. 57-61, especially p. 59; B. Hess, *Europäisches Zivilprozessrecht* (2010), pp. 601-602.

[39] Directive 2008/52/EC, *supra* note 1. On the Directive at issue, see Association for International Arbitration (ed.), *The New EU Directive on Mediation. First Insights* (2008); G. Blanke, "The Mediation Directive: What Will It Mean for Us?", (2008) 74, no. 4, *Arbitration: The Journal of the Chartered Institute of Arbitrators* pp. 441-443; R. Bleemer, "The Directive Is in: European Union Strongly Backs Cross-Border Mediation", (2008) 26, no. 6, *Alternatives to the High Cost of Litigation*, pp 119-126; E. Minervini, "La Direttiva Europea sulla Conciliazione in Materia Civile e Commerciale", (2009) 14, no. 1, *Contratto e Impresa/Europa*, pp. 41-58, V. Vigoriti, "La Direttiva Europea sulla Mediation: Quale Attuazione", (2009) 19, no. 1, *Rivista dell'Arbitrato*, pp. 1-18; D. H. Sharma, "Europarechtliche

process and its effects, as well as to guarantee the proper balance between mediation and judicial proceedings, but also to intensify the recourse to mediation in EU Member States. To this end, it contains provisions aimed at encouraging the promotion and the diffusion of mediation processes,[40] as well as at stirring the improvement of the professionalism and technicality of mediators.

The Directive enhances the advantages of mediation compared to ordinary judicial proceedings. In particular, mediation, based on the will of the parties, enables the expeditious resolution of the disputes arisen in civil and commercial matters, especially of cross-border disputes.[41] On top of that, agreements resulting from mediation, as the result of the will of the parties, can be more easily executed and respected, contributing to maintaining an amicable and sustainable relationship between the parties.[42] Mediation is, thus, considered by the Directive not as just an alternative procedure to be initiated in case the judicial proceedings fail, but as a potentially superior means to resolve civil and commercial disputes. Mediation is aimed not only at entrusting a third party with the role of mediator in order to reach an amicable solution of the dispute but also at "restoring or re-defining the parties' relationship".[43]

In this context, as a consequence, it is to be understood that the aim of the Directive is to favor the access to alternative disputes resolution systems and to promote the amicable agreement on the settlement of disputes "by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings".[44] To this end, the Directive provides a broad definition of mediation, which means "a structured process" where two or more parties to a dispute try, on a voluntary basis, to achieve an agreement on the resolution of their dispute with the help of a mediator;[45] mediator means any third person having the task "to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation".[46] This definition, although it is quite elaborate such as to include a broad category of persons, presents a gap: indeed, it would have been appropriate that it would have referred to some fundamental characteristics of the activity of mediator, as already identified by the European Code of Conduct for Mediators,[47] such as neutrality and independence.[48] The necessity that the mediator exercises his activity in full autonomy and independence, without being influenced by persons external to the dispute and being involved in a conflict of interest, is a fundamental element in order to guarantee the success of the mediation. It is, however, to be mentioned that Article 4 of

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Impulse", in F. Haft and K. Gräfin von Schlieffen (eds.), *Handbuch Mediation*, 2nd edn. (2009), pp. 1233-1245, especially pp. 1239 *et seq*.; Hess, *supra* note 38, pp. 597 *et seq*.; I. Blackshaw, "Mediating Business and Sports Disputes in Europe", available online at *http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume6/number2/blackshaw_int/* [Accessed February 9, 2012]; S. Friel and C. Toms, "The European Mediation Directive - Legal and Political Support for Alternative Dispute Resolution in Europe", available online at *http://www.brownrudnick.com/nr/pdf/articles/Brown_Rudnick_Litigation_European_Mediation_Directive_Friel_Toms_1-2011.pdf* [Accessed February 9, 2012]; F. P. Phillips, "The European Directive on Commercial Mediation: What It Provides and What It Doesn't", available online at *www.businessconflictmanagement.com/pdf/BCMpress_EUDirective.pdf* [Accessed February 9, 2012].

[40] Art. 9, Directive 2008/52/EC, *supra* note 1.

[41] *Ibid*., 6th Whereas.

[42] *Ibid*., 19th Whereas.

[43] See in this sense H. André-Dumont, "European Union: The New European Directive on Mediation: Its Impact on Construction Disputes", (2009) 26, no. 1, *International Construction Law Review* , pp. 117-124, especially p. 118.

[44] Art. 1, Directive 2008/52/EC, *supra* note 1.

[45] *Ibid.*, art. 3(a).

[46] *Ibid.*, art. 3(b).

[47] See Section 3.1, *infra*.

[48] André-Dumont, *supra* note 43, p. 118.

the Directive, which is expressly dedicated to the quality of mediation, confers on Member States the responsibility of encouraging "the development of … voluntary codes of conduct by mediators and organizations providing mediation services".[49]

The Directive also deals with the training and preparation of the mediator, in the light of the fact that the high quality and professionalism of the mediator, as well as the proper knowledge of the methods of behavior to be taken into account in the context of the mediation process, contribute to the success of the mediation and, as a result, to an easy and quick resolution of the disputes in civil and commercial matters. Indeed, Article 4(1) of the Directive also requests States to encourage the arrangement of effective quality control mechanisms regarding the provision of mediation services; furthermore, Paragraph 2 entrusts States with the task of promoting the initial and further training of mediators in order to guarantee that mediation is conducted in an effective, impartial and competent manner.[50] These provisions, which are intended to improve the quality of mediation, are to be connected to the cited disposition (Article 9), which is aimed at developing and promoting mediation in Europe, through the distribution to the general public, in particular on the Internet, of information in order to contact mediators and organisations providing mediation services.[51]

By the provisions yet indicated, the Directive aims at providing a legal context that, in addition to harmonizing the mediation processes and judicial proceedings, attempts to propose mediation as a quick, sure and effective legal tool for the resolution of the disputes in civil and commercial matters. The norms, which have the objective of improving the professionalism of mediators and of intensifying the exchange of information concerning mediators, fit into the view of an effective and genuine attempt to affirm mediation in the EU and Member States national legal systems.

4.1. The scope of the Directive

The scope *rationae materiae* of the Directive is restricted to disputes in civil and commercial matters.[52] As a consequence, disputes pertaining to revenue, customs or administrative matters or implying the responsibility of the State for activities and omissions in the exercise of its authority are excluded from the scope of the Directive.[53] However, there exists a general limit to the application of the Directive even in disputes in civil and commercial matters: it can never be applied to legal situations in which rights and obligations are not at the parties' disposal.[54] The circumstance where the parties cannot easily dispose of their rights and duties occurs very often in disputes concerning family and employment matters, which, as a result, are generally excluded from the ambit of the application of the directive at issue.[55] The *ratio* of these exclusions is to be found in the fact that it would not be possible to establish mediation processes for the resolution of disputes in relation to which the parties do not have the power to decide on their own and to totally dispose of the legal situations arising in the context of those disputes.

The scope of the directive seems to be apparently restricted to cross-border disputes, *i.e.* disputes "in which at least one of the parties is domiciled or habitually resident in a Member State

[49] Art. 4(1), Directive 2008/52/EC, *supra* note 1.
[50] *Ibid.*, art. 4(1)(2).
[51] *Ibid.*, art. 9(1).
[52] *Ibid.*, art. 1(2).
[53] *Ibid.*.
[54] *Ibid.*. According to 10th Whereas of Directive 2008/52/EC, *supra* note 1, "it should apply in civil and commercial matters. However, it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law".
[55] 10th Whereas, Directive 2008/52/EC, *supra* note 1.

other than that of any other party".[56] The formulation of Article 1(2) could reasonably be construed to exclude from the scope of the norms provided by the Directive disputes arising at the national level.[57] However, the 8th Whereas clause of the Directive is without prejudice to the application of the directive to internal disputes because, as a rule, the fact that the Directive is to be applied to cross-border disputes does not preclude Member States from applying the provisions of the Directive to internal mediation processes.[58]

5. Directive dispositions regulating the "key aspects" of civil procedure

In compliance with the 7th Whereas clause, according to which "it is necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure",[59] the Directive provides a series of dispositions regarding, in particular: the relationship between judicial proceedings and mediation, the possibility to provide -within certain limits- compulsory mediation,[60] the enforceability of agreements resulting from mediation, the confidentiality of mediators, and finally the effects of mediation on limitation and prescription periods. These dispositions are intended to guarantee the balanced relationship between mediation and ordinary judicial proceedings, and to encourage parties to have recourse to the mediation in the EU Member States.

Article 5 of the Directive gives to the judicial authority before which an action is brought the power to invite parties of the dispute to resort to mediation, whereas, evaluating all the circumstances of the case, it considers that recourse as appropriate (the so-called mediation delegated by the judge).[61] Furthermore, although under the provisions of the directive mediation is as a rule optional, the same Directive does not exclude that EU Member State national legislation could provide for recourse to compulsory mediation, provided that such legislation does not preclude the parties "from exercising their right of access to the judicial system".[62]

Then, in order to ensure the enforceability of the agreements resulting from mediation,[63] and thus to guarantee that they would be effectively respected by the parties, the Directive provides that the content of the agreements can be made enforceable "by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made."[64] Thus, under the Directive, parties must have the possibility to request that the content of an agreement reached following the success of the mediation process could be made enforceable.[65] Otherwise, the principal aim of the mediation process would risk being thwarted, because if one party does not respect the agreement resulting from mediation and this agreement cannot be enforced, the other party shall certainly initiate a judicial proceeding.[66]

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[56] *Ibid.*, art. 1(2), 2(1).

[57] See also, in this sense, F. P. Phillips, "European Directive on Commercial Mediation: What It Provides and What It Doesn't", in A. W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2008), pp. 311-318, especially p. 313.

[58] 10th Whereas, Directive 2008/52/EC, *supra* note 1.

[59] *Ibid.*, 7th Whereas.

[60] See Sections 6 *et seq.*, especially 8, *infra*.

[61] Art. 5(1), Directive 2008/52/EC, *supra* note 1.

[62] *Ibid.*, art. 5(2).

[63] On this topic, see Hess, *supra* note 38, p. 599.

[64] *Ibid.*, art. 6(2).

[65] The attribution of the enforceability to the agreement resulting from mediation is essential in order that mediation "should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties" (19th Whereas, Directive 2008/52/EC, *supra* note 1).

[66] This particular risk is underlined, in particular with reference to cross-border disputes, by M. Roth, "The Proposal for an EU Directive on Certain Aspects of Mediation in Comparison with Austrian Mediation Law", (2005) 1, no. 1, *London Law Review* pp. 5-25, especially p. 16.

With Directive 2008/52, the principle of confidentiality has become one of the cornerstone principles of mediation, since it imposes upon mediators or persons administrating the mediation a bar upon testifying in the possible judicial proceedings or arbitration as regards to "information arising out of or in connection with a mediation process".[67] The guarantee that the information resulting from a mediation process be, as a rule, reserved and not released during a subsequent ordinary judicial proceeding constitutes an essential principle of the mediation mechanism because mutual trust contributes to the correct execution and realization of a mediation process.[68] Indeed, the success of a mediation process depends upon the guarantee of confidentiality because the parties must be assured that the declarations made during a mediation process cannot be used in subsequent judicial proceedings should the mediation process fail. The rule of confidentiality can not only be derogated from by the parties, but it is also subject to some exceptions, *viz.* where the testimony of the mediator or the disclosure of information relating to a mediation process is necessary "for overriding considerations of public policy of the Member State concerned", such as the protection of the "best interests of children" or the prevention of the damage to the "physical or psychological integrity of a person", or for implementing or executing the content of the agreement resulting from the mediation process.[69] However, the Directive should have specified what evidence is covered by the principle of confidentiality and clarified what "overriding considerations of public policy" means.[70] The vagueness of the Directive on these topics does not contribute to the certainty of law and to legislative harmonization in the European Union.[71]

Article 8 of the directive contains a very important principle concerning the effects produced by the mediation on limitation and prescription periods for submitting an application in front of ordinary judicial authorities or for initiating an arbitration procedure. In order to preserve the opportunity for parties who decide to use mediation for settling their dispute, which mediation later proves to be unsuccessful, to subsequently initiate a judicial proceeding or an arbitration procedure regarding such dispute, the Directive provides, in substance, that a mediation request determines the interruption and the suspension of the prescription periods and the impediment of limitation.[72] The aim of this disposition is not as such to harmonize the EU Member States' legal systems in relation to the limitation and prescription periods, but it is principally to avoid that the Member States' national legislation regulating limitation and prescription periods from precluding the parties involved in a dispute from having recourse to a national court or to the arbitration process, if the mediation process fails.[73] The effects produced on prescription and limitation periods represent a relevant legal tool, since they are intended to encourage the use of mediation in the European Union: indeed, if the recourse to mediation would not produce such an effect, the use of mediation would not be very frequent because the parties, out of fear of the possibility of a future failure of the mediation process and in order to avoid the expiry of the limitation and prescription periods, could decide to initiate judicial proceedings rather than to have recourse to mediation.

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[67] Art. 7(1), Directive 2008/52/EC, *supra* note 1.

[68] Birch, *supra* note 38, p. 60.

[69] Art. 7(1)(a), Directive 2008/52/EC, *supra* note 1.

[70] See also in this sense, D. Cornes, "Mediation Privilege and the EU Mediation Directive: An Opportunity?", (2008) 74, no. 4, *Arbitration: The Journal of the Chartered Institute of Arbitrators*, pp. 395-405, especially pp. 403-404.

[71] For a criticism concerning the confidentiality principle in mediation, as elaborated by the Directive, see A. Colvin, "The New Mediation in Italy", (2010) 76, no. 4, *Arbitration: The Journal of the Chartered Institute of Arbitrators*, pp. 739-756, especially p. 744.

[72] Art. 8(1), Directive 2008/52/EC, *supra* note 1.

[73] See A. Brady, "Mediation Developments in Civil and Commercial Matters Within the European Union", (2009) 75, no. 3, *Arbitration: The Journal of the Chartered Institute of Arbitrators* pp. 390-399, especially p. 396.

6. The relationship between mediation and the access to justice

The problem of the relationship between mediation and the access to justice arises just from the examination of some of the aforementioned norms that are aimed at coordinating mediation with judicial proceedings.

Mediation represents an alternative to judicial proceedings,[74] but at the same time it constitutes a legal tool for promoting better access to justice because the correct functioning of the mediation process should result in the decrease of new disputes being brought before judicial authorities[75] and, as a consequence, even in a reduction of the duration of judicial proceedings.[76] Therefore, it can be affirmed that the Directive on mediation falls into those interventions intended to realize far better access to justice. Besides, this is the orientation welcomed by the European Council from its Tampere meeting on 15 and 16 October 1999, where the Council, in order to facilitate a better access to justice, invited Member States to create alternative and extra-judicial procedures.[77] Although mediation is to be considered as a tool aimed at improving the access to justice,[78] it also presents an important limitation because, at the same time, it cannot constitute an obstacle to the right of access to the judicial system.[79] That is the real and unique general prohibition that the Directive provides for in the mediation process (in addition to the general limitation concerning the rights not at disposal of the parties[80]).

The law regulating the relationship between mediation, as an extra-judicial instrument for resolving disputes, and judicial proceedings, *i.e.* the recourse to a judge, is a topic that forms part of procedural law. Indeed, a State could establish that the implementation of a mediation attempt constitutes a condition for proposing judicial action (a condition for the admissibility of an action before the courts), or even a necessary condition in order that the proceeding can proceed (a condition to proceeding in court). In this way, the individual State attributes to the mediation attempt

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[74] The 19th Whereas of the Directive 2008/52/EC, *supra* note 1, underlines that, even with reference to the enforceability of the agreement resulting from mediation, "Mediation should not be regarded as a poorer alternative to judicial proceedings".

[75] Furthermore art. 5(1) of the Directive 2008/52/EC, *supra* note 1, also provides for the possibility of a mediation delegated by the judge (see Section 5, *supra*).

[76] It is, however, to be considered that the Explanatory Memorandum of the Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters of October 22, 2004 (COM(2004) 718 final, available on line at <http://eurlex.europa.eu/LexUriServ/site/en/com/2004/com2004_0718en01.pdf> [Accessed February 9, 2012]), from which Directive 2008/52/EC, *supra* note 1, has originated, stated that "the concept of access to justice should include promoting access to adequate dispute resolution processes". Thus, mediation could also directly realize a better access to justice. Indeed, according to the Proposal: "Better access to justice is one of the key objectives of the EU's policy to establish an area of freedom, security and justice, where individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States. The concept of access to justice should, in this context, include promoting access to adequate dispute resolution processes for individuals and business, and *not just access* to the judicial system." (Paragraph 1.1.1, p. 2). On the proposal of the Directive at issue, see M. F. Ghirga, "Conciliazione e Mediazione alla Luce della Proposta di Direttiva Europea", (2006) 61, no. 2, *Rivista di Diritto Processuale*, pp. 463-498; E. Minervini, "La Proposta di Direttiva Comunitaria sulla Conciliazione in Materia Civile e Commerciale", (2005) 10, no. 1, *Contratto e Impresa/Europa*, pp. 427-438.

[77] See 2nd Whereas, Directive 2008/52/EC, *supra* note 1, and in detail, Sections 3, 3.1, *supra.* Furthermore, it is to be remembered that art. 81(2)(g), TFEU, *supra* note 15, indicates that included amongst the measures to be taken by the European Union in order to develop judicial cooperation in civil matters is "the development of alternative methods of dispute settlement": see P. Biavati, "Il Futuro del Diritto Processuale di Origine Europea", (2010) 64, no. 3, *Rivista Trimestrale di Diritto e Procedura Civile,* pp. 859-873, especially p. 865.

[78] See also Section 4, *supra*.

[79] See, especially, art. 5(2), Directive 2008/52/EC, *supra* note 1, and, in detail, this Section, *infra*.

[80] See Section 4.1, *supra*.

a compulsory nature under its scheme as a condition for the admissibility of the action or as a condition precedent to proceeding in court. The Directive does not seem to place any obstacles in the way of this discretional choice of the individual State.

Indeed, the Directive emphasizes the necessity that the "key aspects of civil procedure" be regulated. To this end it addresses: the effects of mediation on limitation and prescription periods, in order to avoid that judicial action be precluded in case mediation fails, as well as the enforceability of the agreement resulting from mediation that, once recognized as a binding instrument, can be enforced.[81] Yet, the Directive does not contain any precise choice concerning the relationship between mediation and access to judicial proceedings, although such relationship certainly represents a "key aspect" of civil procedure. The Directive has chosen to not intervene on this topic and to leave the State free to configure the mediation attempt as a duty or as a free option. Both choices are allowed. In fact, Article 5(2) of the Directive states: "This Directive *is without prejudice to national legislation making the use of mediation compulsory*[82] or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system"; furthermore, Article 3, by defining the concept of mediation, provides for the possibility that the mediation process can be "prescribed" by the law of a Member State.[83]

Besides, it is not to be excluded that cases of compulsory mediation and optional mediation can coexist: the single State could prescribe the compulsoriness of the mediation attempt only for certain disputes in the context of civil and commercial matters; as to the other remaining disputes, the mediation process would be considered optional (it being understood that the above-mentioned general limitation relating to the rights not at the disposal of the parties applies).[84]

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[81] See, for even further "key aspects" of civil procedure provided for by Directive 2008/52/EC, Section 5, *supra.*

[82] This provision has been recently recalled by the European Parliament resolution of September 13, 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts (2011/2026(INI)), which expressely recognizes that art. 5(2) of Directive 2008/52/EC allows to make as compulsory the recourse to mediation (lett. K.5). Art. 5(2) of the directive has been criticized by André-Dumont, *supra* note 43, p. 122, who considers it "inconsistent with the *voluntary* nature of mediation".

[83] The broad formulation of art. 5(2), Directive 2008/52/EC, *supra* note 1, allows EU Member States to make various and different choices in the regulation of mediation. On this point, Brady, *supra* note 73, p. 394, after having affirmed that "[t]he Directive is designed to facilitate the *voluntary* use of mediation", correctly underlines that, however, "variations in domestic practice are inevitable but the Directive will doubtless serve as a minimum standard for mediation processes involving both cross-border and domestic disputes".

[84] That is the choice made by the Italian legislator in the regulation of mediation (Legislative Decree No. 28 of March 4, 2010). Art. 5(1) of this Legislative Decree identifies, in the ambit of civil and commercial matters, the disputes in relation to which the mediation attempt is compulsory and, as such, is regulated according to the scheme of the condition to proceeding in court (see Section 7, *infra*); while, as to the remaining disputes in civil and commercial matters, optional mediation is operational (art. 2(1) of the Legislative Decree).

On mediation in the Italian legal system, see, in particular, G. P. Califano, *Procedura della Mediazione per la Conciliazione delle Controversie Civili e Commerciali* (2011); M. Bove (ed.), *La Mediazione per la Composizione delle Controversie Civili e Commerciali* (2011). See also G. Canale, "Il Decreto Legislativo in Materia di Mediazione", (2010) 65, no. 3, *Rivista di Diritto Processuale* pp. 616-630. R. Caponi, "La Giustizia Civile alla Prova della Mediazione (a Proposito del D.leg. 4 Marzo 2010 n. 28) - Quadro Generale", (2010) 135, no. 4, Part V, *Foro Italiano,* pp. 89-95; D. Dalfino, "Mediazione, Conciliazione e Rapporti con il Processo", (2010) 135, no. 4, Part V, *Foro Italiano*, pp. 101 *et seq*.; L. Dittrich, "Il Procedimento di Mediazione nel D.lgs. n. 28 del 4 Marzo 2010", (2010) 65, no. 3, *Rivista di Diritto Processuale* pp. 575-594; I. Pagni, "Mediazione e Processo nelle Controversie Civili e Commerciali: Risoluzione Negoziale delle Liti e Tutela Giudiziale dei Diritti - Introduzione", (2010) 29, no. 5, *Le Società* pp. 619-625; R. Tiscini, "Il Procedimento di Mediazione per la Conciliazione delle Controversie Civili e Commerciali", (2010) 20, no. 4, *Rivista dell'Arbitrato*, pp. 585-610; E. Zucconi Galli Fonseca, "La Nuova Mediazione nella Prospettiva Europea: Note a Prima Lettura", (2010) 64, no. 2, *Rivista Trimestrale di Diritto e Procedura Civile*, pp. 653-673.

If, on the one hand, it cannot be denied that Article 5(2) of the Directive, whereas it is without prejudice to legislation providing for the compulsoriness of the mediation attempt, has a clear *ratio*, because the imposition of a compulsory attempt at mediation can facilitate the concrete success of mediation and the achievement of its objectives;[85] on the other hand, it cannot be denied that, although optional mediation does not create an obstacle to access to judicial proceedings, the imposition of a compulsory attempt at mediation clearly restricts free access to justice. Now, it is necessary to draw attention to this particular issue.

7. The "procedural autonomy" of individual States in regulating the relationship between compulsory mediation and judicial proceedings

It has already been observed that, where a single State provides as compulsory the mediation attempt, it can choose to regulate the relationship between mediation and access to judicial proceedings according to the scheme of a condition for the admissibility of the action or of a condition precedent to proceeding in court. In the first case, the judicial action, which is proposed by a party without attempting to resolve the dispute using the mediation process,[86] shall be declared as inadmissible by the judge. In the second case, the judge shall declare that the process cannot proceed, shall suspend it[87] and fix a deadline by which the party must initiate the mediation process. If the mediation attempt fails, then the process can be resumed.

In both cases, there exists a restriction of the right to access to justice. It is, however, to be pointed out that the scheme of the condition to proceeding in court causes a lesser obstacle to the right to access to justice: the judicial action can produce its effects, but the process cannot proceed; it can proceed only after the mediation attempt has terminated (and failed).

The choice left to the individual State to prescribe the compulsoriness of the mediation attempt, and to reconstruct this attempt as a condition for the admissibility of action or a condition to proceeding in court, is a choice that implicates procedural matters. In particular, it concerns procedural rules that have to be respected to propose a judicial action. As is well known, a single State is competent to regulate and to define its own procedural rules. Indeed, there exists settled EU case-law according to which, as a rule, it is for the national legal system of each Member State to designate the courts and tribunals having jurisdiction, as well as the administrative authorities, and to establish - as far as the topic of this essay is concerned - *the procedural rules regulating actions* for protecting rights that individuals derive from EU law. This is the "procedural autonomy" of the EU Member States.[88]

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[85] The EU Court of Justice itself in Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini and Others*, [2010] ECR I-2213, recognized compulsory out-of-court dispute settlement as more efficient than optional out-of-court dispute settlement. Indeed, according to para. 65 of *Alassini* judgment: "In the first place, as the Advocate General stated in point 47 of her Opinion, no less restrictive alternative to the implementation *of a mandatory procedure exists*, since the introduction of an out-of-court settlement procedure *which is merely optional is not as efficient* a means of achieving those objectives".

[86] Or proposed before that the time limit for the mediation attempt fixed by an individual State has expired.

[87] Or, if law permits it, the judge can also simply fix a new hearing to a date subsequent to the expiry of the time limit provided by law for the completion of the mediation process.

[88] Amongst several decisions, see: Case 45/76, *Comet*, [1976] ECR 2043, para. 13; Case 33/76, *Rewe*, [1976] ECR 1989, para. 5; Case C-312/93, *Peterbroeck*, [1995] ECR I-4599, para. 12; Case C-228/96, *Aprile*, [1998] ECR I-7141, para. 18; Case C-453/99, *Courage e Crehan*, [2001] ECR I-6297, para. 29; Case C-62/00, *Marks & Spencer*, [2002] ECR I-6325, para. 34; Case C-13/01, *Safalero*, [2003] ECR I-8679, para. 49; Joined Cases C-222/05 to C-225/05, *van der Weerd and Others,* [2007] ECR I-4233, para. 28; Case C-432/05, *Unibet*, [2007] ECR I-2271, para. 39; Case C-268/06, *Impact*, [2008] ECR I-2483, para. 44; Case C-12/08, *Mono Car Styling* [2009] ECR I-6653, para. 48; Case C-472/08, *Alstom Power Hydro*, [2010] ECR I-623, para. 17; Case C-240/09, *Lesoochranárske zoskupenie*, not yet reprinted in [2011] ECR, para. 47. The topic of procedural autonomy has been examined, under several profiles and as to different sectors, by D. U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the "Functionalized Procedural Competence" of EU Member States* (2010).

7.1. The limits of "procedural autonomy" of the individual State: the principle of effective judicial protection

The procedural autonomy of the States is subject to two limitations: the first is represented by the principle of equivalence, according to which procedural rules governing actions cannot be less favourable than those regulating similar domestic actions; the second is constituted by the principle of effectiveness,[89] which provides that such rules must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law.[90]

In reality, there also exists a third limitation, which is represented by a general principle of EU law, *i.e.* the principle of effective judicial protection[91] (which is also related to the just above-

[89] As far as the principle of effectiveness is concerned, it is to be recalled that according to the EU Court of Justice "cases which raise the question whether a national procedural provision renders the exercise of an individual's rights under the Community legal order practically impossible or excessively difficult must similarly be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national instances. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings": see Joined Cases C-222/05 to C-225/05, *van der Weerd and Others, supra* note 88, para. 33; Case C-312/93, *Peterbroeck, supra* note 88, para. 14; Case C-426/05, *Tele2 Telecommunication,* [2008] ECR I-685, para. 55; Case C-63/08, *Pontin*, [2009] ECR I-10467, para. 47.

[90] On these two limits, see, amongst more-recent decisions: Case C-312/93, *Peterbroeck, supra* note 88, para. 12; Case C-298/96, *Oelmühle Hamburg and Schmidt Söhne*, [1998] ECR I-4767, para. 24; Case C-228/96, *Aprile*, *supra* note 88, para. 18; Case C-453/99, *Courage e Crehan*, *supra* note 88, para. 29; Case C-62/00, *Marks & Spencer*, *supra* note 88, para. 34; Case C-255/00, *Grundig Italiana*, [2002] ECR I-8003, para. 33; Case C-13/01, *Safalero*, *supra* note 88, para. 49; Case C-467/01, *Eribrand*, [2003] ECR I-6471, para. 62; Case C-147/01*, Weber's Wine World and Others,* [2003] ECR I-11365, para. 103; Case C-201/02, *Wells*, [2004] ECR I-723, para. 67; Case C-268/06, *Impact*, *supra* note 88, paras 45-46; Case C-63/08, *Pontin*, *supra* note 89, paras 43-47; *Alstom Power Hydro, supra* note 88, para. 17; Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini and Others*, *supra* note 85, para. 48; Case C-240/09, *Lesoochranárske zoskupenie, supra* note 88, para. 48; see, amongst more dated decisions: Case 45/76, *Comet*, *supra* note 88, paras 13-16; Case 33/76, *Rewe, supra* note 88, para. 5; Joined Cases 205 to 215/82, *Deutsche Milchkontor GmbH and Others*, [1983] ECR 2633, para. 19; Case 199/82, *San Giorgio*, [1983] ECR 3593, para. 12. For a systematic analysis of the EU Court of Justice case-law on this topic, see Galetta, *supra* note 88, pp. 33 *et seq*.

Some recent EU Court of Justice pronouncements, which seem to affect the authority of *res judicata*, could be considered as manifestations of a further restriction of the procedural autonomy of the individual State, but, in reality, they have to be otherwise interpreted. The reference is, in particular, to Case C-119/05, *Lucchini*, [2007] ECR I-6199 (on which, see E. Cannizzaro, "Sui Rapporti fra Sistemi Processuali Nazionali e Diritto dell'Unione Europea", (2008) 13, no. 3, *Il Diritto dell'Unione Europea*, pp. 447-468; C. Consolo, "La Sentenza "Lucchini" della Corte di Giustizia: Quale Possibile Adattamento degli Ordinamenti Processuali Interni ed in Specie del Nostro?", (2008) 63, no. 1, *Rivista di Diritto Processuale*, pp. 225-238; P. Biavati, "La Sentenza Lucchini: Il Giudicato Nazionale Cede al Diritto Comunitario", (2007) 50, no. 5, *Rassegna Tributaria*, pp. 1591-1603); and furthermore, but in a minor way, to Case C-2/08*, Fallimento Olimpiclub*, [2009] ECR I-7501 (on which see G. Raiti, "Le Pronunce Olimpiclub ed Asturcom Telecomunicaciones: Verso un Ridimensionamento della Paventata 'Crisi del Giudicato Civile Nazionale'"', (2010) 65, no. 3, *Rivista di Diritto Processuale*, pp. 677-689) and Case C-40/08, *Asturcom Telecomunicaciones*, [2009] ECR I-9579 (on which see E. D'Alessandro, "La Corte di Giustizia Sancisce il Dovere, per il Giudice Nazionale, di Rilevare D'ufficio l'Invalidità della Clausola Compromissoria Stipulata tra il Professionista ed il Consumatore Rimasto Contumace nel Processo Arbitrale", (2009) 19, no. 4, *Rivista dell'Arbitrato* pp. 667-684; and Raiti, *supra*). For a proper interpretation of all these EU Court interventions, even in the broad context of the relationships between European courts and national judges, see the important contributions of: R. Caponi, "Corti Europee e Giudicati Nazionali", in *Corti Europee e Giudici Nazionali – Atti del XXVII Convegno Nazionale (Quaderni della Associazione Italiana fra gli Studiosi del Processo Civile)* (2011), pp. 239-390, especially pp. 273 *et seq*., 360 *et seq*.; and C. Consolo, "Il Flessibile Rapporto dei Diritti Processuali Civili Nazionali Rispetto al Primato Integratore del Diritto Comunitario (Integrato dalla CEDU a sua Volta)", *ibidem*, pp. 49-237, especially pp. 177 *et seq*.

[91] See, in particular, Joined Cases C-87/90, C-88/90 and C-89/90, *Verholen and Others*, [1991] ECR I-3757, para. 24; Case C-13/01, *Safalero*, *supra* note 88, para. 50; Case C-432/05, *Unibet*, *supra* note 88, para. 42; and, more recently, Case C-12/08, *Mono Car Styling, supra* note 88, para. 49.

mentioned principle of effectiveness[92]). The principle of effective judicial protection constitutes a general principle of EU law deriving from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.[93] Furthermore, this principle has been reasserted in Article 47 of the Charter of Fundamental Rights of the European Union,[94] proclaimed on 7 December 2000 in Nice, which, according to Article 6(1) of the Treaty on the European Union, has the same legal value as the EU Treaties.[95] According to this basic principle, which during the years has been applied in diverse matters -from interim legal protection[96] to terrorism[97] to mediation matters-[98] individuals must enjoy an effective judicial protection of the rights conferred upon them by the EU legal system.[99]

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[92] See, in this sense, Opinion of Advocate General Kokott delivered on November 19, 2009, Joined Cases C-317/08 to C-320/08, Alassini and Others, para. 42.

[93] The principle at issue has been affirmed by the EU Court of Justice, since the well-known Judgment of May 15, 1986 in Case C-222/84, *Johnston*, [1986] ECR 1651, paras 18-19. In this judgment, the EU Court of Justice, at para. 18, made reference to a "general principle of law which underlies the constitutional traditions common to the member states. That principle is also laid down in articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 november 1950". According with the *Johnston* decision, see subsequently: Case 222/86, *Heylens and Others*, [1987] ECR 4097, para. 14; Case C-97/91, *Oleificio Borelli SpA v Commission of the European Communities*, [1992] ECR I-6313, para. 14; Case C-1/99, *Kofisa Italia*, [2001] ECR I-207, para. 46; Case C-226/99, *Siples,* [2001] ECR I-277, para. 17; Case C-424/99, *Commission of the European Communities v Republic of Austria,* [2001] ECR I-9285, para. 45; C-50/00 P, *Unión de Pequeños Agricultores v Council of the European Union*, [2002] ECR I-6677, para. 39; Case C-467/01, *Eribrand*, *supra* note 90, para. 61; Case C-268/06, *Impact*, *supra* note 88, para. 43; Case C-432/05, *Unibet, supra* note 88, para. 37; Case C-12/08, *Mono Car Styling, supra* note 88, para. 47. On the stages of the affirmation of the principle of effective judicial protection in the European Union, see N. Trocker, "'Civil Law' e 'Common Law' nella Formazione del Diritto Processuale Europeo", (2007) 17, no. 2, *Rivista Italiana di Diritto Pubblico*, pp. 421-465, especially pp. 437 *et seq*.; *Id*., "Il Diritto Processuale Civile Europeo e le "Tecniche" della sua Formazione: L'Opera della Corte di Giustizia", (2010) 2 *Europa e Diritto Privato*, pp. 366-412, especially pp. 384 *et seq*.

As to the affirmation of the principle at issue by the European Court of Human Rights, see: Application No. 30210/96, *Kudła v Poland,* [2000-XI] ECHR, para. 157; Application No. 61444/00, *Krasuski v Poland,* [2005-V] ECHR, para. 66; Application No. 36813/97, *Scordino v Italy (No. 1),* [2006-V] ECHR, para. 142; Application No. 16528/05, *Hajibeyli v Azerbaijan*, para. 39; Application No. 18274/04*, Borzhonov v Russia*, paras 32-34; Application No. 33509/04*, Burdov v Russia (No. 2)*, para. 97; Application No. 40450/04, *Yuriy Nikolayevich Ivanov v Ukraine*, para. 64; Application No. 16530/06*, Eltari v Albania*, para. 81. On the interpretation of arts 6(1) and 13 of European Convention on Human Rights by the Strasbourg Court, see Trocker, "Civil Law" e "Common Law", *supra*, especially pp. 453 *et seq*.

[94] See Case C-432/05, *Unibet*, *supra* note 88, para. 37; Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft,* not yet reprinted in [2010] ECR, paras 30-33; Case C-457/09, *Chartry*, not yet reprinted in [2011] ECR, para. 25; Case C-69/10, *Samba Diouf*, not yet reprinted in [2011] ECR, para. 49.

[95] According to art. 6(1), Treaty on European Union, OJ C 83, 30.3.2010: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

[96] As to the legal interim protection, see the well-known judgments: Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen*, [1991] ECR I-415, especially paras 16-20; and Case C-465/93, *Atlanta Fruchthandelsgesellschaft and Others,* [1995] ECR I-3761, para. 20.

[97] See Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, [2008] ECR I-6351, para. 335. On this point, and in particular on the necessity to assure the principle of effective judicial protection of persons included in the EU antiterrorism lists without adequate judicial guarantees, see the proper considerations of G. Ziccardi Capaldo, *The Pillars of Global Law* (2008), pp. 294-296.

[98] See Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini and Others*, *supra* note 85, paras. 46 *et seq*.

[99] Trocker (Il Diritto Processuale Civile Europeo, *supra* note 93, especially pp. 385 *et seq*.) observes that, by affirming the principle of effective judicial protection and by classifying it amongst the general principles of European

This principle, like every general principle of EU law, must be respected by each national legislator regulating matters falling within the scope of application of EU law.[100] Obviously, the disputes to which the Directive refers, *i.e.* the disputes in civil and commercial matters, are often regulated by EU law.

8. Compulsory mediation and observance of the principle of effective judicial protection

The question that will now be addressed is whether the choice made by an individual State, as allowed by the Directive, to impose a compulsory mediation attempt -regulated or as a condition for the admissibility of an action or as a condition to proceeding in court-[101] always contrasts with the principle of effective judicial protection. In fact, it is possible to identify a trace of this concern in Article 5(2) of the Directive. This article, on the one hand, is without prejudice to national legislation "making the use of mediation compulsory"; on the other hand, it underlines the necessity that "such legislation does not prevent the parties from exercising their right of access to the judicial system".[102]

In order to properly face this topic, first of all, it is necessary to underline that the principle of effective judicial protection is not absolute. It can be subject to restrictions in order to achieve objectives of general interest, provided that such restrictions "do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed".[103] Such restrictions can be made even through the provision for a

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Union law, the EU Court of Justice devised a way in which to intervene in the procedural rules of the national legal systems and to identify the kind of protection that judges of each Member State must confer to rights provided for by EU law.

Furthermore Trocker ("Civil Law" e "Common Law", *supra* note 93, especially p. 437) notes that, before the recognition of this principle, the EU Court of Justice was used only to define in negative terms the conditions that the individual State must ensure for the protection of the rights recognized by EU law. Indeed, the Court identified only the two limits represented by the principle of equivalence and the principle of effectiveness that, according to the definitions just indicated in this section, only identify what the individual State cannot do (i.e., negative limit). Instead, the principle of effective judicial protection indicates in positive terms what the single State must guarantee (i.e., positive limit).

[100] Indeed, art. 19(1), first period, Treaty on European Union, *supra* note 95, expressly states: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". See also Case 12/86, *Demirel,* [1987] ECR 3719, para. 28; Case C-299/95 *Kremzow* [1997] ECR I-2629, para. 15; Case C-309/96, *Annibaldi,* [1997] ECR I-7493, para. 13; Case C-112/00 *Schmidberger* [2003] ECR I-5659, para. 75.

[101] See Section 6, *supra*.

[102] In the same way, the 14th Whereas clause, first period, of the Directive 2008/52/EC, *supra* note 1, provides that: "Nothing in this Directive should prejudice national legislation making the use of mediation compulsory … provided that such legislation does not prevent parties from exercising their right of access to the judicial system".

[103] For this statement, even if made with reference to various general principles, see: Case C-28/05, *Dokter and Others*, [2006] ECR I-5431, para. 75; Case C-394/07, *Gambazzi*, [2009] ECR I-2563, paras 29-32, especially para. 29. In the same way, as to more dated decisions, see: Case C-62/90, Commission of the European Communities v Federal Republic of Germany, [1992] ECR I-2575, para. 23; Case C-44/94, *Fishermen's Organisations and Others,* [1995] ECR I-3115, para. 5.

This limit has also been clearly stated by the European Court of Human Rights in *Fogarty* case (Application No. 37112/97, *Fogarty v The United Kingdom*, [2001-XI] ECHR). In this judgment, the ECHR held at para. 33 that: "The right of access to court is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I, § 59)".

compulsory mediation attempt, regulated or as a condition for the admissibility of an action or as a condition to proceeding in court.

The non-absolute nature of the principle of effective judicial protection allows it to affirm *in abstracto* that the imposition of a compulsory mediation attempt does not necessarily contrast with the principle itself. Thus, it is now necessary to identify the necessary conditions in order that that contrast does not occur in practice.

To this end, it is possible to draw useful indications from the 2010 *Alassini* judgment of the EU Court of Justice,[104] which dealt with the compulsory attempt to pursue out-of-court dispute settlement provided by Italian legislation in disputes between end-users and electronic communication providers. These disputes must be preliminarily subject to a compulsory attempt to settle the dispute out-of-court, which is considered as a condition precedent to proceeding in court.[105]

As to this form of compulsory out-of-court settlement, the EU Court of Justice has excluded a violation of the principle of effective judicial protection because it has ascertained its compliance with some requirements that every form of mandatory out-of-court settlement must satisfy. These requirements can be divided into: 1. a general requirement, which concerns the identification of the objectives pursued by a mandatory out-of-court settlement; and 2. some special requirements, which concern, instead, the specific characteristics that an out-of-court settlement procedure must respect in order to not violate the principle at issue.

Now, it is necessary to examine whether the rules concerning mediation contained in the Directive, and the margins that the Directive itself leaves to the appreciation of a single State, are able to satisfy the general requirement and the special requirements established by the EU Court of Justice in the *Alassini* judgment. In this way, it is possible to define the needed conditions in order that compulsory mediation does not violate the principle of effective judicial protection.

8.1. The general requirement: the achievement of objectives of general interest

The general requirement that arises from the *Alassini* judgment consists in the necessity that the compulsory attempt to settle the dispute out-of-court pursues objectives of general interest. In this way, the EU Court of Justice reaffirmed that the observance of the principle of effective judicial protection is not always absolute.[106]

This general requirement is certainly satisfied by the Directive on mediation. The objectives of this Directive have already been examined where the relationship between mediation and access to justice has been evaluated.[107]

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[104] Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini and Others*, *supra* note 85. On this issue, see H. R. Dundas, "Court-Compelled Mediation and the European Convention on Human Rights Article 6", (2010) 76, no. 2, *Arbitration: The Journal of the Chartered Institute of Arbitrators*, pp. 343-348; G. Fiengo, "Principio della Tutela Giurisdizionale Effettiva e Previo Esperimento di Procedura di Conciliazione Extragiudiziale in Materia di Servizi di Comunicazione Elettronica", (2010) 3 *Diritto Pubblico Comparato ed Europeo*, pp. 1238-1241.

[105] On this legislation and on the *Alassini* judgment, *supra* note 85, see G. Armone and P. Porreca, "La Mediazione Civile nel Sistema Costituzional-comunitario", (2010) 135, no. 8, Part IV, *Foro Italiano,* pp. 372 *et seq*.; C. Besso, "Obbligatorietà del Tentativo di Conciliazione e Diritto all'Effettività della Tutela Giurisdizionale", (2010) 12 *Giurisprudenza Italiana*, pp. 2585-2589; G. Rizzo, "L'Obbligatorietà del Tentativo di Conciliazione Extragiudiziale in Ambito di Servizi di Comunicazioni Elettroniche tra Operatori di Telecomunicazione e Utenti Finali", (2010) 27, no. 10, *Corriere Giuridico*, pp. 1292-1304.

[106] See Section 8, *supra*.

[107] See Sections 6 and especially 4, *supra*.

Therefore, it is sufficient to recall: Article 1(1), which provides that the Directive pursues the objective to "facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings"; the 5th Whereas clause, according to which: "The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services"; and the 6th Whereas clause, which states: "Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements".[108]

Once it is recognized that the Directive pursues objectives of general interest that can justify a restriction of the principle of effective judicial protection, the question is raised as to whether such restriction, when it consists of a compulsory mediation attempt -regulated or as a condition for the admissibility of an action or as a condition to proceeding in court- constitutes a disproportionate and intolerable interference with regard to the objectives pursued.[109] To this end, it is necessary to examine whether the Directive already contains dispositions complying with the special requirements that, according to the EU Court of Justice, an out-of-court settlement procedure must be respected.

8.2. The special requirements concerning the regulation of the mediation process

The conditions that the EU Court of Justice in the *Alassini* judgment indicated are necessary in order that a compulsory out-of-court settlement procedure does not violate the principle of effective judicial protection are the following: *a)* the "procedure does not result in a decision which is binding on the parties"; *b)* "it does not cause a substantial delay for the purposes of bringing legal proceedings"; *c)* "it suspends the period for the time-barring of claims"; *d)* "it does not give rise to costs – or gives rise to very low costs – for the parties"; *e)* "electronic means is not the only means by which the settlement procedure may be accessed"; *f)* "interim measures are possible in exceptional cases where the urgency of the situation so requires".[110]

Now, it is necessary to verify whether Directive 2008/52/EC already contains provisions complying with these prescriptions; otherwise, it is necessary to identify the characteristics that a national legislation governing mediation must have in order to avoid the violation of the principle of effective judicial protection.

a) The prescription that the procedure does not result in a decision that is binding on the parties can certainly be respected through the facilitative mediation scheme, where the mediator is not expected to make suggestions or to propose a solution (as in the case of an evaluative

[108] The importance of such benefits of mediation indicated by the 6th Whereas clause of Directive 2008/52/EC, *supra* note 1, in particular, the capacity of mediation to preserve the future contractual relationships of the parties, have been underlined since the proposal of the Directive was presented (see Roth, *supra* note 66, p. 5). Such advantages have also been emphasized after the Directive was adopted (see André-Dumont, *supra* note 43, p. 124; Brady, *supra* note 73, p. 390).

[109] See Section 8, *supra*, and the case-law cited in note 103.

[110] Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini and Others*, *supra* note 85, para. 67.

mediation[111]), but he operates only in order to facilitate a voluntary agreement between the parties.[112] Such scheme seems to be the more appropriate to comply with the EU Court prescription.[113]

b) The prescription requiring that the procedure does not cause a substantial delay for the purposes of bringing legal proceedings mandates that an individual State fix strict time limits for the completion of a mediation attempt. In order to identify such time limits there are no certain criteria: for example, the compulsory attempt to settle the disputes out-of-court in the telecommunications sector, examined in the *Alassini* judgment, must be completed –or in any case is considered as completed- once 30 days from the date of the beginning of the out-of-court settlement procedure have expired; instead, the Italian legislation on mediation fixes a four-month time limit for completing the mediation attempt.[114] Generally speaking, in order to establish whether the time limit fixed for the completion of the compulsory mediation attempt causes a substantial delay, one can consider the average duration of the process in the individual State, taking into account the criteria elaborated by the European Court on Human Rights relating to the reasonable length of the proceedings.[115]

c) As to the effects of mediation on limitation and prescription periods, the Directive devotes to this topic a proper disposition (Article 8), although it does not deal with the harmonization of EU Member States in this matter.[116] That norm provides, in substance, that the request of mediation determines the interruption and suspension of the prescription period, as well as the impediment of limitation. As a consequence, the new prescription and limitation periods should run from the date when the mediator announces the negative result of the mediation, through the deposit of the negative report.[117]

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[111] According to André-Dumont, *supra* note 43, p. 124, "because of the active role played by the mediator, [the] so-called evaluative mediation is closer to conciliation than to mediation".

[112] As to Directive 2008/52/EC, Hess, *supra* note 38, p. 599, arguing from art. 3(b) of the Directive (where it affirms "regardless … of the way in which the third person has been appointed or requested to conduct the mediation"), correctly observes: "Des Weiteren hat der Gemeinschaftsgesetzgeber sich auch nicht auf ein bestimmtes Modell der Mediation (moderierende oder evaluierende Mediation) festgelegt".

[113] In favor of the facilitative mediation scheme, it could be eventually recalled the wording of the 10th Whereas clause, first period, of the Directive 2008/52/EC, *supra* note 1, according to which: "This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute *with the assistance of* a mediator". See also art. 3(a), Directive 2008/52/EC, *supra* note 1.

[114] Art. 6(1), Legislative Decree No. 28/2010, *supra* note 84.

[115] As to the reasonableness of the length of the proceedings, ECHR settled case-law provides that "the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant": see Application No. 31333/06, *McFarlane v Ireland*, para. 140; see also Application No. 1602/62, *Stögmüller v Austria*, [1969] ECHR (Ser. A.), p. 9, para. 5; Application No. 49017/99*, Pedersen and Baadsgaard v Denmark*, [2004-XI] ECHR, para. 45; Application No. 54071/00, *Rokhlina v Russia*, para. 86; Application No. 75529/01, *Sürmeli v Germany* [2006-VII] ECHR, para. 128; Application No. 49163/99, *Kalpachka v Bulgaria*, paras 65, 68; Application No. 18274/04*, Borzhonov v Russia, supra* note 93, para. 39.

[116] See 24th, Directive 2008/52/EC, *supra* note 1, according to which: "In order to encourage the parties to use mediation, Member States should ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails. Member States should make sure that this result is achieved *even though this Directive does not harmonise national rules on limitation and prescription periods*. Provisions on limitation and prescription periods in international agreements as implemented in the Member States, for instance in the area of transport law, should not be affected by this Directive". See Section 5, *supra*.

[117] As to the negative result of the mediation attempt, art. 7(2) of the Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters {SEC(2004) 1314} (presented by the Commission) provides that: "Where the mediation has ended without a settlement agreement, the period resumes running from the time the mediation ended without a settlement agreement, counting from the date

d) As far as the costs of mediation are concerned, it is clear that the gratuitousness of the procedure – as it is provided for by the out-of-court settlement procedure examined in the *Alassini* judgment – would be the *optimum*. However, the same EU Court of Justice, being aware of the costs required by the out-of-court settlement procedure, requests that such procedure "does not give rise to costs – or gives rise to very low costs – for the parties".[118] Thus, the question consists in evaluating how it can be possible to identify the "very low" nature of the costs eventually established for the mediation process. In this regard, first of all, a so-called "objective" criterion could be used, which takes into account the amount involved in the dispute and the costs to be incurred by the parties during the mediation process; then, this objective criterion could be applied together with a "subjective" criterion, which takes into account the economic difficulties of the parties. Indeed, a cost that objectively is not very low can be, however, subjectively high for a party. Therefore, in the case that the mediation process is onerous, the protection of the individuals having scarce or non-existent resources can be realized by providing the gratuitousness of the mediation process for the parties, who, during a judicial proceeding, would have the requisites to grant the legal aid.

e) With respect to the restriction that electronic means not constitute the only manner in which a settlement procedure may be accessed, the Directive provides that: "This Directive should not in any way prevent the use of modern communication technologies in the mediation process".[119] Thus, the Directive urges the adoption of those means but does not consider them as exclusive. However, it is not to be forgotten that electronic means can guarantee facilitations in disputes involving companies and undertakings providing services widely along the national territory and in the European Union (it is indeed to be recalled that the Directive makes reference to cross-border disputes).[120]

f) Lastly, interim measures cannot be subject to a compulsory mediation attempt, even in the case that such attempt is regulated as a condition for the admissibility of an action.[121] The free access to interim protection is imposed by the same principle of effective judicial protection. The urgency that justifies the request of an interim measure contrasts, due the inherent function of the interim measure itself, with the necessity to wait through the duration of the mediation process.[122] Furthermore, in some cases, the interim measures, in order to be effective, have to be adopted *inaudita altera parte*, while the mediation process, due to its nature, always requires that the parties be notified about the process.

Conclusions

As a result of this research, it can be affirmed that the mediation process, even if it is regulated by a single State as a compulsory attempt - according to the schemes of the condition for the admissibility of an action or, preferably, of the condition to proceed to court - does not necessarily violate the principle of effective judicial protection. In order to avoid this violation, individual States must respect the requirements clearly prescribed by the EU Court of Justice in the

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when one or both of the parties or the mediator declares that the mediation is terminated or effectively withdraws from it. The period shall in any event extend for at least one month from the date when it resumes running, except when it concerns a period within which an action must be brought to prevent that a provisional or similar measure ceases to have effect or is revoked". This disposition has not been reproduced in the final text of the Directive 2008/52/EC (see Article 8).

[118] Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini and Others*, *supra* note 85, para. 67.

[119] 9th Whereas, Directive 2008/52/EC, *supra* note 1.

[120] See Section 4.1, *supra.*

[121] See Section 6, *supra*.

[122] See also the case-law cited in note 96.

Alassini judgment. As we have seen, some of these requirements are already satisfied by the provisions of the Directive; instead, as to the special requirements not expressly regulated by the Directive, it is for the Member States to adopt appropriate measures. In particular, it is necessary that they ensure that the mediation process, as such, will not substantially delay the eventuality of a judicial action and that the mediation is without costs or gives rise to very low costs for the parties.

Thus, if the regulation of the mediation process respects the requirements delineated by the EU Court of Justice, there is no violation of the principle of judicial protection, which can certainly be subject to limited restrictions aimed at pursuing objectives of general interest. Such objectives, which consist of the improvement of access to justice and the achievement of a reasonable length to the proceedings, are without doubt favored by the diffusion of the culture of mediation, which reduces the number of actions before the judicial authorities.

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BANK GUARANTEES

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Abstract

The present study propose the analyse of the irrevocable commitment of a bank entity towards a determined person, through which guarantees a certain legal conduct of its client, and, in case of breach, assumes the payment obligation of a determined amount of money. This kind of legal technique it is called bank guarantee and in the usual business language it is called "Letter of Bank Guarantee". The determined reason to choose this scientific initiative it is the frequency of this kind of financial - banking commitments with various practical issues which are occurred by the use of those.

From the legal point of view, the bank guarantees are not under an own legal regulation and are based on the common law, used in the guarantees domain. Through the new aspects of the actual Civil Code it are the legal regulation of the letter of bank guarantee and of the comfort letter, which shall constitute the main regulation in the negotiation and conclusion of a letter of bank guarantee or a bank comfort letter. For the legal reports with foreign elements, the parties can also use the Uniform Rules regarding the Guarantees at Request (URGR) Publish no.758/2010.

Keywords: *guarantee, letter of guarantee, comfort letter, obligation, issuant, beneficiary, debtor.*

1. Introductory notions

By adopting the new civil code, several institutions of private law have been redefined and others were first introduced in the Romanian legal regulation. They also include the institution of guarantees.

The participants in relationships involving obligations specific to guarantees may be the natural persons and legal entities and, according to this criterion, the guarantees may be real, when these relate to movable or immovable property and personal guarantees, when the guarantor is liable with all the present and future assets to guarantee his obligations.

2. The concept of bank guarantee

In the practice of commercial activities are more frequent the situations where the obligations undertaken by different subjects of legal relationships are guaranteed by the banking entities or by non-banking financial institutions[1].

The bank guarantees are preferred to other categories of guarantees due to the financial credibility enjoyed by the banking companies in the relevant market, as well as due to easiness to capitalize them.

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[1] The non-banking financial institutions are regulated by the Law no. 93/2009 regarding the non-banking financial institutions, published in the Official Gazette no. 259 of April 21, 2009.

It is necessary to note that not all the guarantees in which is involved a banking entity fall into the category of the bank guarantees.

In the carried on crediting activity, a banking company is required to comply with the financial prudence regulations which, among others, imply the procurement of some guarantees from the debtors credited by it. According to quality of the debtors and the purpose of the credit, the banking entities request the establishment of some real or personal guarantees. It is understood that, in case of failure to reimburse the granted credit, the lending bank will pursue either the assets assigned to guarantee, or the persons who have undertaken the obligation to make the payment instead of the debtor, if he fails to fulfill it. Not such relationships involving obligations form the content of the bank obligations. In order to be in the presence of a bank guarantee is required the bank to take the legal position of debtor of the payment obligation. It is noted that, in case of the lending operations for which the debtor brings real or personal guarantees, the bank has the status of creditor of the guarantees, meaning that it is the beneficiary of the guarantee, a quality that allows it to pursue them in order to satisfy its debts to the guaranteed debtor. Or, the bank guarantees are those where the bank has the capacity of debtor, meaning that it undertakes the obligation to pay a sum of money or to indemnify if the debtor guaranteed by it does not fulfil or fulfil improperly the guaranteed obligations.

Therefore, in the crediting relationships, the bank has the capacity of creditor of the real or personal guarantee set up in its favour and, as concerns the bank guarantees, the issuing bank has the capacity of debtor of the guarantee. It means that, if the customer guaranteed by it will not fulfil the obligation to reimburse the credit, the lending bank will satisfy its debt by pursuing the assets assigned to guarantee or the persons who have undertaken to make the payment instead of the debtor. The guarantees accompanying the credit have nothing particularly compared to the civil legal guarantees, meaning that they may be real or personal, that is the debtor may set up an immovable or movable property or he may guarantee with his entire patrimony. The only difference is that the beneficiary of the guarantees of the credit is the lending bank entity.

On the other hand, the bank guarantees are different from the ordinary guarantees in that they are intended only to pay a sum of money or to give some compensation. Unlike the guarantees of common law that may have as object both movable and immovable property, as well as the personal guarantees, the bank guarantees are set up exclusively on some amounts. In other words, the bank issuing the guarantee is committed to its beneficiary, not with an immovable property or determined movable property, but with its entire patrimony. This is because, according to the financial-bank prudence rules, the acquisition and the ownership of movable and immovable property, it has a legal system very different from the other legal entities and natural persons.

3. Concept and regulation

As shown above, the new Civil Code has defined the field of guarantees and, as a novelty, introduced the so-called category of *autonomous guarantees*. Under the heading *autonomous guarantees*, the Civil Code regulates the letter of guarantee in article 2321 and the letter of comfort within the content of article 2322.

We notice, therefore, that the legislator does not use the term of bank guarantee, but, in practice, both the letter of guarantee and the letter of comfort are issued by a banking entity. Hence the usual expression *letter of guarantee*. Certainly, as the two categories of guarantees are regulated, they may be used and issued by any participant in the legal relationships, but, as we mentioned, they are especially used by the issuers of the banking companies. Hence the consequence according to which, if they are issued by other entities, they shall have the character of ordinary guarantees and only if they are undertaken by a banking entity or non-banking financial institution, they will acquire the legal status of bank guarantees.

4. Letter of bank guarantee

According to the provisions of article 2321 of Civil Code, the letter of guarantee is the irrevocable and unconditional commitment by which a person, called issuer, undertakes, at the request of a person called authorizing officer, in consideration of a preexisting report involving obligations, but independently, to pay a sum of money to a third party called beneficiary, under the terms of the undertaken commitment.

The definition given by the legislator shows the main characters of the letter of bank guarantee.

Thus, although the legislator uses the notion of *guarantee*, actually, this is an authentic contract between the issuer and the beneficiary of the guarantee. It follows that this category of obligations has as source the parties' agreement and, at least in principle, it cannot be set up by a judicial process or by any legal norm.

Then, the letter of guarantee has an irrevocable character, resembling with the irrevocable documentary letter of credit[2]. The irrevocable character of the letter of bank guarantee consists in the fact that, once undertaken the payment committed, it cannot be unilaterally revoked, denounced or modified by the issuing bank.

The commitment made by the issuing bank is also unconditional, meaning that the bank will pay, without being able to invoke the exceptions resulting from the relationships involving obligations which are guaranteed by it. Hence the autonomous character of the letter of guarantee materialized by the payment of money, independently of the pre-existing legal relationships guaranteed by it.

The letter of bank guarantee has a trilateral character, expressed by the fact that in the conduct of the relationships of guarantee participate at least three entities: the issuing bank, the authorizing officer and the beneficiary.

This type of guarantee requires a relationship involving obligations, pre-existing and independently of it. In other words, as a technique of drawing up and issuing the guarantee, the bank will undertake the irrevocable payment commitment only after the obligations intended to be guaranteed have been executed.

The letter of guarantee aims to pay a sum of money, which means that will not be brought as a guarantee any movable or immovable property. Since is not specified a property or a category of assets as a guarantee, it means that the issuing bank exhibits its entire patrimony on the occasion of issuing the letter of guarantee, meaning that its status is very similar to the personal guarantor' status from the relationships involving obligations specific to the common law.

5. The participants in the legal relationships specific to the letter of guarantee

As shown in the definition given by article 1321 of Civil Code, in the conduct of the relationships of a letter of guarantee take part the issuer, the authorizing officer and the beneficiary.

Under the silence of law, in capacity of issuer may be any natural person or legal entity and the undertaken commitment will have the legal nature of the letter of bank guarantee only in case it was undertaken by a banking entity or non-banking financial institution.

[2] The main regulation of the documentary letter of credit is the Publication no. 600 regarding the uniform rules and the practice on the letters of credit of the Chamber of International Commerce - Paris (UCP - 600); for further details concerning the documentary letters of credits, see V. Nemes, Banking Law. Academic course, "Juridic Universul" Publishing, Bucharest 2011, page 184 et seq.

The issuing bank has the capacity of debtor of the guarantee, meaning that if its customer, that is the authorizing officer guaranteed by it does not fulfil his obligations or fulfill them improperly, the issuing bank will pay a sum of money to the third-party beneficiary.

The authorizing officer of the bank is a customer who, in the preexisting relationships involving obligations, acts as a debtor, meaning that he has to execute certain actions, to perform works, to provide services or to deliver certain goods to the beneficiary, pursuant to some arrangements made with him. Thus, the letter of guarantee requires the existence of at least two conventions. The first consists of the agreement between the authorizing officer and the beneficiary to deliver certain assets, to perform works or to provide services and the second is the convention that materializes the proper letter of guarantee by which the issuing bank undertakes to pay a sum of money to the beneficiary.

The position of the participants in the relationships specific to the letter of guarantee is different. In the convention generating the preexistent relationship involving obligations, the parties are the authorizing officer and the beneficiary and their capacity varies according to the nature of the convention. This may be a sale-purchase contract by which the authorizing officer, in capacity of seller, undertakes to deliver certain goods to the beneficiary, in capacity of buyer, or may be an agreement, an enterprise contract by which the authorizing officer, in capacity of entrepreneur, undertakes to perform a work for the beneficiary.

The mechanism of the bank guarantee arises from the protection ensured by the beneficiary. Keeping on the above examples, the beneficiary, in capacity of buyer or, where appropriate, consignee of the works, requires the authorizing officer, namely the seller, respectively the entrepreneur, to bring as a guarantee the obligation of a bank to compensate him by paying a sum of money, if the authorizing officer, in capacity of seller or, where appropriate, entrepreneur, will not fulfill his obligations or will fulfill them improperly. Definitely, he will not deliver the goods at the deadline agreed in the contract, he will not deliver the goods as determined by the parties, he will not complete the works within the agreed period etc.

From the technique of regulation and operation of the letter of guarantee is understood that the parties of a bank guarantee are the issuing bank and the beneficiary of the guarantee. This is because the issuing bank undertakes to make the payment to the beneficiary. We notice, therefore, that the authorizing officer is not a party of the letter of guarantee, as the issuing bank is not a party of the contract which generated the preexisting relationship involving obligations.

Definitely, under the principle of relativity of legal documents, the letter of guarantee will cause legal effects between the issuing bank and the beneficiary, the authorizing officer being a third party of it and the contract which generated the preexisting relationship involving obligations will cause legal effects exclusively between the authorizing officer and the beneficiary and the third party of the contract being, this time, the issuing bank.

6. The purpose of the bank guarantees

As we mentioned above, according to the provisions of article 2321 of Civil Code, the letter of guarantee is the commitment by which the issuer undertakes, at the request of the authorizing officer, to pay a sum of money to the beneficiary for the event that the authorizing officer will not fulfill his obligations arising from the preexisting legal relationships or will fulfill them improperly.

As we can see in the content of article 1321 of Civil Code, the obligation of the issuing bank consists of the payment of an amount. Therefore, the purpose of the letter of bank guarantee will consist of sums of money, excepting other movable or immovable property.

Definitely, the purpose of the letter of bank guarantee is the irrevocable and unconditional obligation of the issuing bank to pay a sum of money to the third party, called the beneficiary, in the event that the authorizing officer fails to perform his obligations or perform them improperly.

7. The effects of the letter of bank guarantee

As the relationships specific to the letter of bank guarantee have a trilateral character, meaning that in such relationships participate the issuer, the authorizing officer and the beneficiary, we will consider the effects generated by it, distinctly, between the issuer and the authorizing officer, the effects between the issuer and the beneficiary, as well as the legal effects between the authorizing officer and the beneficiary.

7.1. The effects of the bank guarantee between the issuer and the authorizing officer

As shown by the norm, the article 1321 of Civil Code, the letter of guarantee is issued upon the request of the authorizing officer. Usually, the authorizing officer is a customer of the issuing bank, who needs its commitment towards the beneficiary.

We mentioned that the authorizing officer is not a party in the letter of guarantee; under the principle of relativity of legal documents, the authorizing officer is a third party. This feature is materialized by the fact that is generated the relationship involving obligations of the bank guarantee and it will be carried out exclusively between the issuing bank and the beneficiary of the guarantee. The issuing bank undertakes the payment commitment, based on the legal relationships with the authorizing officer. Please note that the bank warrants the obligation of the authorizing officer towards the beneficiary of the preexisting relationships involving obligations and, in order to undertake the commitment, the authorizing officer, in his turn, must provide the guarantees required by the bank. Once the bank compensates the beneficiary, it will return against the authorizing officer in order to recover the amounts paid pursuant to the letter of bank guarantee.

According to the financial-bank prudence rules, the issuing bank may require guarantees to the authorizing officer, such as: mortgages on movable goods or mortgages on real estates, pledge on accounts or certain personal guarantees in order to protect its right to recover the amounts paid to the beneficiary. The right of the bank to recover the amounts paid as a guarantee is stipulated in the article 1321, paragraph 4, of Civil Code which states that: *"The issuer who made the payment has the right of recourse against the authorizing officer of the letter of guarantee"*.

Since the right of recourse is provided by law, the issuing bank will recover the amounts paid as a guarantee, even if this issue is not expressly stipulated in the contract.

7.2. The legal effects between the issuer and the beneficiary

Whereas the parties of the letter of bank guarantee are the issuing bank and the beneficiary, it causes legal effects between the two parties. Definitely, if the authorizing officer does not fulfill his obligations of the preexisting legal relationships (he does not deliver the goods, does not perform the works, does not provide services etc.) or fulfill them improperly, the beneficiary will activate the letter of guarantee and, pursuant to the undertaken obligation, the bank which makes the guarantee will pay the amount stipulated in the contract.

The letter of guarantee may be executed at the first and simple request of the beneficiary, meaning unconditionally, or it may be subject to the occurrence of certain circumstances that might cause the non-fulfillment or improper fulfillment of the guaranteed obligations.

Article 2321, paragraph 2, of Civil Code provides that the undertaken commitment is executed at the first and simple request of the beneficiary, if not otherwise provided in the letter of guarantee. It follows that the method to activate the letter of guarantee depends on the parties'

agreement and, definitely, it may be submitted in two forms: one form is that the amount will be paid at the first and simple request of the beneficiary and the second, where the letter of guarantee is conditional, the sums of money will be paid only after the beneficiary will demonstrate the conditions which generated the non-fulfilment of the obligations by the debtor.

For example, in the letter of guarantee may be stipulated that the payment of the amounts will be made only if the authorizing officer did not fulfil his obligation due to the fact that he became insolvent or he started the insolvency proceeding. The differences between the letter of guarantee at the first and simple request (unconditional) and the conditional letter of guarantee are substantial and consist in the manner and terms of payment of the amounts by the bank which makes the guarantee.

If the guarantee is at the first and simple request, is sufficient the beneficiary to prove that the authorizing officer did not fulfil his obligations of the pre-existing legal relationship or fulfilled them improperly and, therefore, the bank which makes the guarantee will be required to pay the amount indicated in the letter of guarantee. On the other hand, if the bank guarantee is conditional, for example by the debtor's insolvency or other circumstances, the beneficiary may not claim the payment from the issuing bank before proving the conditions for the non-fulfilment of the obligations by the authorizing officer. In this example, the beneficiary of the letter of guarantee must prove to the bank which makes the guarantee that the authorizing officer did not fulfil his obligations due to the insolvency proceeding. Therefore, in the relationships involving obligations, from the beneficiary's view, the greatest protection is offered by the letter of bank guarantee executed at the first and simple request.

We mentioned in the above lines that the relationships specific to the bank guarantees are independent of the pre-existing relationships involving obligations guaranteed by them. The autonomous character of the two categories of relationships involving obligations is expressly provided by the article 1321, paragraph 3, of Civil Code.

In this respect, the said legal text provides that the issuer cannot oppose to the beneficiary the exceptions based on the relationship involving obligations existing before the commitment undertaken by the letter of guarantee and he shall not be held to pay in case of abuse or obvious fraud.

The beneficiary of the bank guarantee may assign the right to request the payment within the letter of guarantee if its text expressly provided it; therefore, the letter of bank guarantee is transferable but only if the parties have conferred such character.

In terms of the period in which the letter of guarantee covers the payment of the amounts for the obligations undertaken in the preexisting legal relationships, the Civil Code allows the parties to agree in such matter. Specifically, we have in view the provisions of the article 2321, paragraph 7, of Civil Code, providing that, if not otherwise stipulated in the letter of guarantee, it shall take effect from the issuing date and the validity shall cease by law at the specified deadline, independently of the delivery of the original letter of guarantee. In practice, the validity period of the letter of guarantee exceeds the execution time of the obligations undertaken in the preexisting legal relationships. This is because, even if the letter of bank guarantee is autonomous, independent and unconditional, it cannot be activated before the expiration of the execution period of the obligations undertaken in the preexisting, main legal relationships guaranteed by it. In other words, the beneficiary cannot capitalize the bank guarantee before the maturity of the main obligations, meaning before the term for the delivery of the goods, providing services, execution of works etc. A contrary attitude of the beneficiary would lead to the refusal of the request regarding the payment as prematurely submitted.

It should be noted that is important the non-fulfillment of the obligations of the guaranteed preexisting legal relationships or improper performance by the authorizing officer to take place and to be observed within the validity period of the letter of bank guarantee because, by hypothesis, if the

guaranteed events occur after the expiry of the letter of guarantee, undoubtedly the bank which makes the guarantee is exempted from liability. In the practice of the guaranteed legal relationships often happens the parties extend the terms for the execution of the obligations by omitting, many times, to also extend the validity of the letter of bank guarantee. In such cases where the maturity of the obligations is extended and falls outside the validity period of the letter of guarantee, the bank which makes the guarantee cannot be required to pay pursuant to the letter of guarantee.

Therefore, in order the bank guarantee may be capitalized, it is important that the non-fulfillment of the guaranteed obligations or improper fulfillment take place during the validity of the letter of bank guarantee and the capitalization of rights will be done thereafter, amicably or by judicial process.

7.3. The legal effects between the authorizing officer and the beneficiary

The authorizing officer, not being a party in the letter of bank guarantee, causes legal effects between the issuing bank and the beneficiary of the guarantee. Do not forget that the letter of bank guarantee comes into being at the request of the beneficiary. The request is submitted to the authorizing officer and he, finally, requires the bank to issue a letter of guarantee. Therefore, although the letter of bank guarantee causes legal effects directly between the issuing bank and the beneficiary, the guarantee is not generated at the direct request submitted to the beneficiary by the bank, but upon the request submitted to the authorizing officer.

Due to the independent and autonomous character of the letter of guarantee, the authorizing officer will not be responsible for the non-fulfillment of the payment obligation undertaken by the bank which makes the guarantee. This is because, as we mentioned above, according to the applicable legal norms, the payment of the amount is the responsibility of the bank which makes the guarantee. For this reason, if the bank which makes the guarantee refuses to pay, the beneficiary cannot claim damages from the authorizing officer, but only for the capitalization of his rights pursuant to the letter of guarantee, by judicial process.

8. Letter of comfort

8.1. Concept and regulation

The regulation of the letter of comfort is foreseen in the provisions of the article 2322 of Civil Code. According to the said text, the letter of comfort is the irrevocable and autonomous commitment by which the issuer undertakes an obligation to do or not do, in order to support another person, called debtor, for the execution of its obligations towards a creditor.

Even here the law does not condition the capacity of the issuer, meaning that the letter of comfort may be undertaken by any natural person or legal entity. It will be deemed a bank letter of comfort if the payment commitment is undertaken by a banking entity or non-banking financial institution. In the regulation of Civil Code are also foreseen the main characters of the letter of comfort. Therefore, as the letter of guarantee, the letter of comfort generates an obligation to guarantee the execution of certain services by the debtor for his creditor.

The letter of comfort is also submitted as an authentic contract between the issuer and the creditor of the main obligations, who will receive the legal status of beneficiary of the letter. The commitment undertaken by the letter of comfort has an irrevocable character, expressed on the fact that, as in case of the letter of guarantee, the issuer cannot unilaterally cancel, withdraw or modify the payment obligation.

The purpose of the letter of comfort consists in the obligation of the issuer to do or not do, in order to support another person. Thus, unlike the letter of guarantee whose purpose consists in the payment of an amount, the letter of comfort has as subject the obligation to do or not do. This is

clearly shown in the definition of the letter of comfort contained in the article 2322, paragraph 1, of Civil Code, according to which the letter of comfort is an irrevocable and autonomous commitment where the issuer undertakes an obligation to do or not do, in order to support another person, called debtor.

The payment of an amount is the secondary purpose of the letter of comfort and an accessory, meaning that it is conditioned by the non-fulfillment of the obligation to do or not do, undertaken by the issuer of the letter of comfort. This feature arises from the content of the article 2322, paragraph 2, of Civil Code, according to which the issuer of the letter of comfort may be required only to pay damages to the creditor.

The letter of comfort has a trilateral character, the participants in the legal relationships specific thereof are: the issuer, the debtor and the creditor of the guarantee obligation.

The letter of guarantee is independent and autonomous of the main obligations guaranteed by it. This feature is foreseen in the content of the article 2322, paragraph 1, of Civil Code prohibiting the creditor to assert any defense or exception arising from the relationship involving obligations guaranteed by the letter of comfort.

8.2. The legal effects of the letter of comfort

As the letter of guarantee, the letter of comfort causes three categories of legal effects, namely: legal effects between the issuer and the debtor, legal effects between the issuer and the creditor or the beneficiary of the letter and legal effects between the debtor and the creditor.

As concerns the legal effects specific to the relationships between the debtor and the issuer of the letter, it should be noted that the letter of comfort is issued at the request of the debtor, submitted to the issuer. As in case of the letter of guarantee, the issuing of the letter of comfort is based on the creditor's initiative, but he does not apply for it directly to the issuing bank, but to his debtor and, finally, the debtor applies to the issuer in order to make a guarantee for him.

If the debtor fails to fulfill his guaranteed obligations or fulfill them improperly, the issuer is liable for damages to the creditor. After he compensates the creditor, the issuer of the letter of comfort shall recourse against the debtor in order to recover the paid amounts. The issuer's right of recourse is foreseen in the article 2322, paragraph 3, of Civil Code providing that the issuer of the letter of comfort, who is required to compensate the creditor, has the right of recourse against the debtor.

As the issuer of the letter of guarantee, the issuer of the letter of comfort may condition the issuing thereof by certain real or personal guarantees from the debtor who asked him to make a guarantee, on his behalf, towards the creditor. It is understood that, if the debtor does not make the payment, the issuer of the letter of comfort may capitalize his right of recourse by pursuing the movable or immovable assets or the persons who have guaranteed the debtor's obligation.

As concerns the legal relationships between the issuer of the letter and the creditor, they are governed by the principle of independence and autonomy of the undertaken guarantee obligation.

The article 2322, paragraph 2, of Civil Code provides that, if the debtor fails to fulfill his obligation, the issuer of the letter of comfort may be required only to pay damages to the creditor and only if the latter proves that the issuer of the letter of comfort did not fulfill his obligation undertaken by the letter of comfort. The payment of damages may be performed amicably and, in case of refusal from the issuer of the letter of comfort, by judicial process.

However, it should be noted that, according to the article 2322, paragraph 1, final thesis of Civil Code, the issuer may not oppose the creditor any defense or exception arising from the relationship involving obligations between the creditor and the debtor. This is the consequence of the independent and autonomous character of the guarantee obligation undertaken by the letter of comfort towards the obligations arising from the main legal relationships guaranteed by it.

Finally, the legal effects between the debtor and the creditor are those arising from the main relationship involving obligations, in relation to which the letter of comfort was issued. Indirectly, the letter of comfort takes effect also regarding the legal relationships between the creditor and the debtor by the fact that, as stated in the foregoing, according to the legal norms, the issuer of the letter may be required to pay damages only if the creditor proves that he did not properly fulfil his obligations.

Conclusions

As it relates from the present study, the New Civil Code has the merit of institutionalising the rules that are the embedment necessary for the making and use of the bank guaranties, which are so used in the commercial activity nowadays.

The Civil Code legislates only the general principals regarding bank guaranties wich means that the parties to the obligation must see to the details and must adapt these guaranties in accordance to their personal interests.

None the less, apart from the dispositions of the Civil Code regarding the guaranties, the rules regarding the financial prudence towards the credit institutions and nonbanking financial institutions exposure must be kept in sight.

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THE INFLUENCE OF THE CONSTITUTIONAL JURISDICTIONS ON THE BASIC LAWS

Valentina BĂRBĂȚEANU[*]

Abstract

This paper intends to reveal the role played by the constitutional courts or other bodies entitled to perform the constitutional review of normative acts in enhancing the significance of the National Basic Laws and in developing their content. The research will try to show that the case-law created by the constitutional jurisdictions can shape the perception of the society on the Basic Law, offering a different perspective over its meaning. This is the effect of the interpretation of the Basic Law provisions, which is an inherent part of the constitutional jurisdictions' activity.

Keywords: *basic Law, supremacy, constitutional review, constitutional courts, amending of the Constitution*

1. Introduction

Constitutional jurisdictions are entitled to perform the constitutional review of normative acts. In order to do that, the constitutional judge has to evaluate the wording of the contested legal provision and, in the same time, the significance of the constitutional rules comprised in the Basic Laws which serve as benchmarks for the comparison. So, the interpretation of the Constitution is an inherent operation of the constitutional review. It has the potential to enhance its significance and to offer the efficiency required by the supreme character of the Basic Law. Due to the legal binding force of this interpretation, the content of the Basic Law is sometimes expanded and magnified. The constitutional jurisdictions case-law is taken into consideration especially by the legislative bodies that have the legitimacy to amend the Constitutions. The paper will study how different constitutional jurisdictions are involved in the process of supplementing the provisions of the national Basic Laws, with a special look to France, Germany, Italy and Spain. The comparative study includes Romania, as well, and analyzes to what extent the Constitutional Court has the possibility to improve the Romanian Basic Law and to make its provisions more protective for the citizens, for their fundamental rights and liberties.

The present study has been inspired by the recent idea that the traditional concept of "negative legislator" established by Hans Kelsen regarding the impossibility of constitutional jurisdictions to modify the reviewed normative act has to be reconsidered. This affirmation is proved by the increasing activism of various Constitutional courts. One of the most incisive study has been accomplished by Christian Behrendt[1]. It has been drafted from the point of view of the reviewed normative acts which can be supplemented this way. The present study tries to highlight the influence of the constitutional case-law on the Basic Law itself.

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[1] Christian Behrendt, *Le juge constitutionnel, un legislateur-cadre positif – Une analyse comparative en droit francais, belge et allemand*, (Bruxelles, Editura Bruylant, Paris, L.G.D.J.), 2006.

2. Overview of the legal theory concerning the supremacy of the Basic Law

Every state's legal system consists of a sequence of legal norms that spring one from another, organized in a pyramidal structure where the superior norms regulate the product of the inferior norms. This spatial image has been suggested by Hans Kelsen, the founder of the normative school of law in Wien. According to his theory, the unity and stability of this edifice is due to the interrelation established among its elements. More precisely, on the fact that the validity of a norm is based on the validity of the norm that regulated its creation and which, at its turn, has been generated by another norm. In other words, the validity ground of a legal norm lies in the positive superior norm that regulates its producing.

This concatenation has the supreme reason of validity in a hypothetical fundamental norm: the so-called *Grundnorm* on which is based the entire system[2] and ensures an adequate balance to the whole juridical edifice. This basic law is the Constitution of one state and represents the primordial source of every legal norm. Within the legal state's order, the Constitution has the highest position in the positive law, meaning the actual, vivid law, which is in force in a certain state, in a certain period of time[3].

The supremacy of the Constitution is a complex concept, which incorporates a range of specific features and elements and a diversity of political and legal values which express its prevalence not only in the legal system, but also in the whole social and political system of a state[4]. The essential consequence of the supremacy of the Constitution is the compulsory compliance of each and every legal norm with the constitutional provisions. Any deviation from its prescriptions has as a result the invalidation of the named legal norms[5].

This supreme character has been raised to the rank of a basic, fundamental rule, being, in most of the cases, specified in the constitutional content itself[6].

3. The importance of the constitutional review

The respect of the Basic Law's provisions and its supremacy is a duty that incumbes to all individuals, legal persons - private or public - and to all authorities, regardless of the field of activity. That is why it appeared the necessity of imposing an efficient control system in what concerns its observance. This mechanism resides in reviewing the conformity of the normative acts with the provisions and principles comprised in the Constitution. Thus, the constitutional review represents an effective guarantee of the supremacy of the Constitution.

The constitutional review is circumscribed to two models that are governing to different types of constitutional jurisdictions. On one hand, there is the so called „American model", typical for the United States of America and adopted also by countries like Denmark, Greece, Norway or Sweden. This kind of review is performed by courts which are part of the judiciary. On the other hand, there is the „European model", characterized by the existence of a specialized authority, distinct and detached of any other public authority. Hans Kelsen has developed this concept. The model he promoted had the advantage to prevent two major shortcomings of the American model: the fact that different courts could render divergent solutions over the same legal provision and the relative value of the judgements which had only *inter partes litigantes* effects. Setting up a unique constitutional

[2] Hans Kelsen, *Doctrina pură a dreptului*, (Bucharest, Humanitas, 2000), p.272.

[3] According to Mircea Djuvara, "The positive law is the secretion of the juridical conscience of a certain society" in *Teoria generală a dreptului*, 2nd vol., (Bucharest, All, 1995), p.406.

[4] Ioan Muraru et al., *Constituția României – Comentariu pe articole*, (Bucharest, C.H.Beck, 2008), p.18.

[5] Ibidem.

[6] For instance, in the Romanian Constitution it appears in Article 1 paragraph 5.

court that could centralize the whole constitutional review and which could materialize its assessing in a generally binding decision regarding the validity of a normative act represented a viable idea, which has been extended, in time, at a European level[7].

Louis Favoreu offered a revealing definition of this kind of authority: „A constitutional court is a jurisdiction especially and exclusively invested with the constitutional contentious issues, which is situated outside the ordinary jurisdiction and completely independent"[8].

As the famous professor noticed, the history of constitutional courts build on the European model is not very long. It began in 1920 with the establishment of the Czech Constitutional Court (by the Constitution of the 29th of February 1920) and of the High Constitutional Court of Austria (by the Constitution of the 1st of October 1920). The Spain Constitution of 1931 has created a Tribunal of Constitutional Guarantees which would last until the beginning of the general Franco's dictatorship. There is a second stage, situated after the Second World War: after the re-establishment of the Austrian Court in 1945, Constitutional Court of Italy has been founded in 1948 and the German Federal Constitutional Court in 1949. A few years later, in 1959, appeared the French Constitutional Council and then the Constitutional Court of Turkey in 1961. A third stage took place in the first years of the 70's and included the creation of the Portuguese and Spanish Constitutional Tribunal in 1976 and, respectively, in 1978. This movement extended in Belgium where has been founded La Cour d'Arbitrage in 1983 and had a great development in the Eastern European countries: Poland (1985), Hungary (1989), Czech Republic (1991), Romania (1991), Bulgaria (1991) and the ex-soviet republics (Moldova, Belarus, Armenia, Georgia etc).[9]

The Romanian Constitutional Court has been established by the provisions of the 1991 Constitution and it is the guarantor for the supremacy of the Constitution. The need of such an institution in the Romanian juridical landscape has been confirmed by the experience of the European countries having a much stronger constitutional tradition.

In most European countries, the constitutional courts - a general name for the bodies that perform the review of constitutionality, no matter if they are courts, constitutional tribunals or constitutional councils – are not part of the judiciary, *stricto sensu*. Their place in the constitutional ensemble of the state is different of the one hold by the ordinary or administrative courts. Many of them are *sui generis* court, opposite to the other three traditional authorities – legislative, executive and judicial. Only in isolated cases they are part of the judiciary, being juxtaposed to other state powers, including the highest courts.[10]

The constitutional review is a creative task and the constitutional judge has a much wider ability than the ordinary judge in what concerns the possibility to enrich the significance of legal provisions by means of interpretation and, most important, they are not bound to the inflexible application of the law[11].

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[7] As a matter of fact, Hans Kelsen was the one who, based on the Austrian Basic Law of 1920, has the most significant contribution to the establishment of the Constitutional Court of Austria. He has also been member of the Court between 1920 and 1929.

[8] Louis Favoreu, *Les cours constitutionnelles*, coll. „Que sais-je?", la 2eme edition, (Paris, Press Universitaires de France, 1992), p.3.

[9] Ibidem, 4.

[10] Michel Melchior, Andre Alen şi Frank Meersschaut, General Report on the XIIth Congress of the Constitutional Courts in Europe, Bruxelles, 14-16 mai 2002, *The Relations Between the Constitutional Courts and the Other National Courts, Including the Interference In This Area Of the Action of the European Courts*, (Brugges, Vanden Broele Publishers, 2002), p.73.

[11] Cappelletti, cited by Louis Favoreu in op.cit., p.463.

Instead of being "negative legislators" as Hans Kelsen defined them, the constitutional courts are slightly turning into a positive legislators or, at least, co-legislators.[12] Relevant in this respect is the case of Italy, Hungary or Portugal, countries where the constitutional authorities are entitled to review also legislative omissions of normative acts submitted to their jurisdiction.[13]

4. The impact of the constitutional review on the Basic Law

In order to perform the constitutional review, the constitutional courts extract the correct meaning not only of the checked legal provisions and also of the text of the Constitution to which the conformity of the norm is compared. Within the decision, the constitutional court offers an interpretation of the significance of their content. It has the ability to clarify their sense, in a manner suitable to shape a certain view regarding its approaching, to linger into the society a certain way of thinking, but also to facilitate the perception of their normative content. Starting from the remark of two famous constitutional scholars, according to whom "the interpreter of the law has a legislative power and the interpreter of the constitution has a constituent power"[14], there might be taken into consideration the creative valences of the constitutional courts case-law. There are also some scholars who affirmed that revealing the significance of the interpreted constitutional norm represents an act of creation and is the result of a cognitive process of evaluation of the meaning of the interpreted norm. One can say that the constitutional judge re-creates the norm in the specific circumstances of the situation referred to its jurisdiction[15]. From this point of view, the constitutional judge sometimes reshapes the content of the Basic Law, offering a new perspective over its provisions. The constitutional judge notices its deficiencies and resorts to the classical fundamental principles of law in order to establish the bench-marks necessary to perform the constitutional review.

For instance, in **Romania**, prior to the amendment of the Basic Law in 2003, the Constitutional Court has acknowledge by praetorian way the principle of check and balance of the powers[16] and the principle of the fair trial[17]. These have not been included *in terminis* in the 1991 Constitution. Still, the Constitutional Court has oftenly mentioned them in its decisions and they have been explicitly inserted in the amended Constitution[18]. In this respect, the Constitutional Court of Romania has acted in a similar way with other European constitutional courts which, on their turn, during their activity, have felt the need of innovation in what concerns the content of national Basic Law itself.

The **German** case could be suggestive in this regard, taking into consideration the fact that expressions like „the objective order of the fundamental rights values" (*objective Wertordnung der Grundrechte*), "the principle of proportionality" (*Verhältnismassigkeits-prinzip*), „effectiveness of the fundamental rights" (*Grundrechtseffektuierung*) do not appear in the wording of the German Basic Law, but they are the creation of the German Federal Constitutional Court which gave them constitutional value[19].

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[12] Ion Deleanu, *Justiția constituțională*, (Bucharest, Lumina Lex, 1995), 47.

[13] Michel Melchior, op.cit., 75.

[14] Georges Burdeau et al., *Droit constitutionnel*, Ediția 26, (Librairie Générale de Droit et Jurisprudence, 1999, Paris), p.59.

[15] Ioan Muraru et al., *Interpretarea Constituției. Doctrină și practică*, (Bucharest, Lumina Lex, 2002), 37.

[16] Decision no.96 of 1996, published in the Official Gazette of Romania, Part I, no..251 of the 17 th of Octombre 1996.

[17] Due to Article 11 and Article 20 of the Romanian Basic Law.

[18] For example, Decision no.183 of 2003, published in the Official Gazette of Romania, Part I, no.425 of the 17th of June 2003.

[19] A. Dyèvre, „La place des courts constitutionnelles dans la production des normes: l'étude de l'activité normative du Conseil Constitutionnel et de la Court Constitutitonnelle Fédérale (Bundesverfassungsgericht)", in *Annuaire international de justice constitutionnelle*, *2005*, (Marseilles, Economica, Presses Universitaires, 2006), 40.

France also offers a relevant example in this regard. Due to the constitutional review, the juridical security became a fundamental legal principle and the Constitutional Council has recognized its effects regarding the foreseeability and the quality of the law. Rendering the decision 2010-4/17 QPC[20], the Council has confirmed the existence of an implicit constitutional value consisting in the intelligibility and accessibility of the law.

There are constitutional benchmarks that can be invoked as grounds for priority preliminary ruling on the issue of constitutionality which can be divided into two categories[21]: some of them refer to the general interest and, in this respect, can be mentioned preservation of public order (Decision 80-127 DC)[22], the benchmark of ensuring continuity of public services (Decision 79-105 DC)[23] or the finding the criminal offenders (Decision 99-411 DC)[24]. The other category includes the constitutional rights concerning the social and economical field, like the right to health, the right to a decent dwelling (Decision 94-359 DC)[25] or the right to employment (affirmed by the 5th paragraph of the 1946 Constitution Preamble. These benchmarks can be used by the French Constitutional Council in order to review a normative act that appears to be contrary to them.

In the same respect, illustrative for the creative potential of the constitutional case-law is the fact that, more recently, the French Constitutional Council has stated that the human dignity represents a constitutional value, even if it is not *expressis verbis* mentioned in the French Constitution[26].

In a decision which became famous[27], the Constitutional Council has extended its review by reference to the Preamble of the French Constitution of 1958 and to the Declaration of the Rights of Man and of the Citizen of 1789. It is the so-called „block of constitutionality". This decision was the consequence of a previous one[28] which answered two important questions. The first one was if the provisions of the Preamble of the 1958 Constitution have normative value and the second one referred to power of the constitutional Council to assess the conformity of legal acts with the provisions of the Preamble of the Constitution. The answer was affirmative for both questions[29].

There is also in **Spain** a similar "block of constitutionality" that contains even more referential normative acts having constitutional value. It includes laws issued in order to distinguish between the powers of the State and those of different autonomous communities or in order to

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[20] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2010/2010-4/17-qpc/decision-n-2010-4-17-qpc-du-22-juillet-2010.48784.html.

[21] Bertrand Mathieu, "Neuf mois de jurisprudence relative à la QPC: un bilan" in *Pouvoirs, Revue française d'etudes constitutionnelles et politique*, 137(2011), p.67-68.

[22] French Constitutional Council, Decision 80-127 DC of 20th of January 1981 on the Law of reinforcing security and protecting personal liberties, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1981/80-127-dc/decision-n-80-127-dc-du-20-janvier-1981.7928.html.

[23] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1979/79-105-dc/decision-n-79-105-dc-du-25-juillet-1979.7724.html.

[24] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1999/99-411-dc/decision-n-99-411-dc-du-16-juin-1999.11843.html.

[25] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1995/94-359-dc/decision-n-94-359-dc-du-19-janvier-1995.10618.html

[26] Decision 343-344DC of the 27th of July 1994, known as „bioetica" (cons. no.2), http://www.conseil-constitutionnel.fr/decision/1994/94-343/344-dc/decision-n-94-343-344-dc-du-27-juillet-1994.10566.html?version=dossier_complet.

[27] Decision 71-44 DC of the 16th of July 1971, known as „freedom of association" (cons.no.2): http://www.conseil-constitutionnel.fr/decision/1971/71-44-dc/decision-n-71-44-dc-du-16-juillet-1971.7217.html?version=dossier_complet.

[28] Decision 70-39 DC of the 19th of July 1970.

[29] Christian Behrendt, *Le juge constitutionnel, un legislateur-cadre positif – Une analyse comparative en droit francais, belge et allemand*, (Bruxelles, Editura Bruylant, Paris, L.G.D.J.), 2006, 113.

regulate and harmonize the powers of the latter. The State's territorial structure is not, in fact, defined only by provisions of the Basic Law[30], but also by frame-laws issued by the State in certain fields, relevant for its competence that provide the guiding lines which has to be respected in drafting the legislation of the autonomous communities.[31]

5. The influence of the Romanian Constitutional Court's case-law on the Romanian Basic Law due to its creative interpretation

Following the stream of thinking created by the constitutional authorities from different European countries, the Constitutional Court of Romania has rendered a series of eloquent decisions in this regard.

5.1. For instance, being asked to rule on whether there is a constitutional legal conflict between some state's authorities[32], the Constitutional Court has clarified the meaning of Article 109 of the Constitution, used an extensive interpretation, able to expand its normative content, but which, in the same time, is not distorting the will of the constituent power. On the contrary, it explains and reveals its genuine goal.

In that case, the Court has found the existence of a legal dispute of a constitutional nature between the Public Ministry – the Prosecution Office attached to the High Court of Cassation and Justice, on the one hand, and the Parliament – Chamber of Deputies and Senate –, on the other hand, in connection with the procedure to be followed for claims relating to the prosecution of members and former members of the Government for acts committed in the exercise of their office and who, at the time of referral, are also Deputies or Senators. The dispute has been generated by the different way of interpreting of the mentioned constitutional provisions. According to Article 109 paragraph 2 of the Basic Law, *„Solely the Chamber of Deputies, the Senate, and the President of Romania have the right to demand criminal prosecution be taken against Members of the Government for acts committed in the exercise of their office".* Analyzing this constitutional provision, the Constitutional Court assessed «that the term *„solely"* means that: „no one" other than the three public authorities may require prosecution and that it can not be initiated without referral to the Chamber of Deputies, Senate or the President of Romania, as appropriate. As for the conjunction *„and"* in the text of Article 109 paragraph 2, it signifies the end of a listing, which gives each of the three authorities it own competence. The constitutional text excludes both the cumulative power of requests of the three public authorities and the alternative power between the three authorities».

Regarding the meaning of this constitutional provision, the Constitutional Court has noticed that "the submission of referral to one of the three authorities to require prosecution can not be preferentially or randomly made by the Public Ministry – the Prosecution Office attached to the High Court of Cassation and Justice" The Court stated that "the solution is varied, depending on his quality of Deputy or Senator at the time of referral". It concluded that, consequently, the Prosecution Office attached to the High Court of Cassation and Justice must address the Chamber of Deputies or the Senate – for members of Government or former members of Government who at the time of referral, are also Deputies or Senators or the President of Romania – for members of Government or former members of Government who at the time of referral, are not also Deputies or Senators.

In this way, it is established, unequivocally, a benchmark according to which the Prosecution Office attached to the High Court of Cassation and Justice is going to refer one of the three public

[30] Decision 10/1982 of 23rd of March 1982.

[31] Pierre Bon, "La question d'inconstitutionnalité en Espagne", in *Pouvoirs, Revue française d'etudes constitutionnelles et politique*, 137(2011), 130.

[32] Decizia nr.270 din 10 martie 2008, publicată în Monitorul Oficial al României, Partea I, nr. 290 din 15 aprilie 2008

authorities in order to demand the prosecution of members of the Government in office or of former members the Government.

The Constitutional Court has also noted that "otherwise the provisions of Article 109 paragraph 2 first sentence of the Constitution would become inapplicable as concerns the right of the Chamber of Deputies and the Senate to demand prosecution of members and former members of Government who also act as MPs, leaving to the discretion of the Public Ministry to decide, by itself, to which of the three authorities it should address the referral".

5.2. On a different occasion, assessing over the existence of another legal dispute of a constitutional nature[33] the Constitutional Court has used a *par analogie* interpretation of a constitutional provision and has supplemented it in some way. Upon settlement of the legal dispute raised in the case, the Constitutional Court noticed that it has to give a proper interpretation to the texts of the Basic Law, as to grasp from their letter the spirit that governs the matter.

In the case, it had to adjudicate on the request for the settlement of the legal dispute of constitutional nature between the President of Romania and the Prime Minister concerning the refusal of the President to appoint Mrs. Norica Nicolai to the office of Minister of Justice and on the legal grounds invoked by the parties.

Article 85 paragraph (2) of the Basic Law does not provide how many times is the President of Romania entitled to ask the Prime Minister to make another proposal or the Prime Minister's obligation to come with a different proposal than the initial one.

The Court stated that it must search the meaning of the rule under Article 85 paragraph (2) of the Constitution both in the letter of this text and in the basic principles and in the spirit of the Basic Law.

Regarding the number of cases in which the President of Romania may ask the Prime Minister to make a different nomination for the vacant office of minister, the Court found that, in order to avoid the occurrence of an institutional blockage in the lawmaking process, the constituent legislator provided under Article 77 paragraph (2) of the Basic Law, the President's right to return a law to Parliament for reconsideration, only once.

The Court found that "this solution acts as a constitutional principle in the settlement of legal disputes between two or several public authorities which have conjoint duties in the adoption of a measure provided by the Basic Law and that this principle can be generally applied in similar cases.

Applied to the process of government reshuffle and appointment of some ministers in case of vacancy of the offices, this solution could eliminate the blockage generated by the possible repeated refusal of the President to appoint a minister at the proposal of the Prime Minister.

[…] The limitation to a sole rejection of the proposal is justified by the fact that, further, the answerability for a different nomination rests exclusively with the Prime Minister.

[…] As in case of all the other prerogatives provided by the Constitution, the President is politically answerable before the electorate for the reasons for which he declined the proposal of the Prime Minister, such as the Prime Minister and the Government are politically answerable before the Parliament.

As concerns the Prime Minister's possibility to reiterate his first proposal, the Court finds that such possibility is excluded by fact that the President of Romania declined the proposal from the beginning. Therefore, the Prime Minister must nominate a different person for the office of minister."

5.3. In another decision[34], the Court has proceeded to an elaborate analyze of the ideas contained in Article 115 paragraph (4) of the Basic Law which comprises the conditions of

[33] Decision no.98 din 7 februarie 2008, published in the Official Gazette of Romania, Part I, no.140 of 22nd of February 2008.

[34] Decision no. 255 of the 11th of May 2005.

legislative delegation of power according to which to the Government may adopt an urgency ordinance in the following conditions, met cumulatively: the existence of an exceptional situation; the regulation cannot be delayed; the ordinance must contain the reasons for that urgency. The Court noticed that «beside the trenchant character of the formula used by the constituent legislator, its intention or purpose, consisting in the restriction of the field in which the Government may substitute the Parliament, adopting primary norms for certain reasons which it is sovereign in determining, are clearly underlined by the difference between the constitutional text in force and the previous one, former Article 114 paragraph (4) of the Constitution, in its initial form. According to that text, Government's possibility to adopt urgency ordinances was conditioned exclusively by the existence of certain exceptional cases.

The term „exceptional cases" used in the former wording was replaced, in the new wording, with that of „exceptional situations". Moreover, although the difference between the two terms, from the point of view of the degree of deviation from ordinary or common which they express, is obvious, the same legislator felt that it is necessary to clarify these aspects and not to leave any interpretation that would minimize such difference, by adding the collocation „which call for regulations without delay", enshrining, thus *in terminis* the imperative of the regulation urgency. Finally, for reasons of legislative rigor, it instituted the exigency on the statement of the reasons for the urgency in the very content of the ordinance adopted outside a law of delegation.

Even under the empire of the previous constitutional regulation in the matter, the Court, referring to the exceptional case, of which was depending the constitutional legitimacy of the adoption of an urgency ordinance, was stating that this is defined in relation with „the necessity and urgency of the regulation of a situation which, because of exceptional circumstances, imposed the adoption of immediate solutions, in order to avoid a serious breach of the public interest"[35]. For the same purpose, of a better defining of the exceptional case, the Court mentioned this is characterized by its objective character, „in the sense that its existence does not depend on the Government's will, which, in such circumstances is compelled to react promptly in order to defend a public interest by urgency ordinance"[36].

The aspects stated by the Court in this matter, under the empire of the previous constitutional regulation, as a result of a interpretation that was transgressing the letter of the constitutional text, underlying its meaning in light of the intention of the constituent legislator and of the purpose, as well by using certain principles and constants of the law, are even more pertinent, today, if we have in view the fact that the viewpoint present has full support precisely in the letter of the constitutional regulation of reference, in its present wording.

The Court's influence over the legislator's activity is obvious in this kind of situations. When upholds the unconstitutionality of an urgency ordinance on the ground of the lack of sufficient reasoning of the urgency and on the failing in proving the necessity of such regulation, the Court invalidated, on utility grounds, the normative acts. In the same fore/mentioned decision[37], the Court held that in the preamble of the urgency ordinance approved through the criticized law, the urgency character is determined by the opportunity of identifying shortly a rational and long lasting situation for assuring the necessary means for the preservation, restoration and maintenance of the national, cultural and religious patrimony of Suceava county, issue that concerns the social interest and that constitutes exceptional situation.

[35] Decision no.65 of 20th of June 1995, published in the Official Gazette of Romania, Part I, no.129 of the 28th of June 1995.

[36] Decision no.83 of May 19th 1998, published in the Official Gazette of Romania, Part I, no.211 of the 8th of June 1998.

[37] Decizia nr. 255 din 11 mai 2005.

The reproduced text underlines the reason and the utility of this regulation, but not the existence of an exceptional situation which regulation cannot be delayed, which it proclaims, without setting forth the reasons, as requested by the constitutional text.

Or, "invoking the element of opportunity, subjective by definition, to which is conferred a determinant contributing efficiency of the urgency, which, implicitly, converts it in exceptional situation, leads to the conclusion that it does not have, necessarily and unequivocally, an objective character, but it can give expression also to certain subjective factors, of opportunity, in which account, moreover, this regulation was adopted by means of ordinance. But as such factors are quantifiable, the affirmation of the existence of the exceptional situation, in their account or by converting them in such situation, confers it an arbitrary character, which would create insurmountable difficulties in the legitimacy of the legislative delegation. Thus, we would find ourselves in the situation in which a constitutionality criterion – the exceptional case –, which observance is by definition submitted to Court's review, to be, practically, not control as such, which would be inadmissible.

6. The influence of the constitutional courts' case-law in the case of revision of the Basic Law

6.1. Some constitutional courts of some countries, like Moldova, Ukraine, Romania or Turkey, are expressly empowered to review the constitutional amendments.

Others, like the German Constitutional Court, held that it can review the conformity of constitutional amendments with the substantial limits expressly written in the text of the Constitution[38].

Even if the constitutional review of Basic Law amendments is not listed among the powers granted by the Italian Constitution to the Italian Constitutional Court, the constitutional jurisdiction in this country has stated that it has the ability to check the compliance of procedural conditions required by Article 138 of the Basic Law for adopting constitutional laws[39]. Moreover, considering that the Basic Law contains "supreme principles" which has to be also respected on the occasion of amending the Basic Law, the Constitutional Court of Italy has verified the substance of the amendments[40].

On the contrary, the French Constitutional Council has chosen a different approach, adopting a self restraining attitude regarding the sovereign constituent legislator[41].

The Constitutional Court of Romania is one of the few constitutional authorities in the world that is empowered by the Basic Law's provision to perform the constitutional review over the constitutional amendments. The constituent power has offered to the Constitutional Court the opportunity to render valuable judgements meant to guide the Parliament in what concerns the drafting of proper amendments to the Basic Law. The new draft has to suit the level of democracy to which the Romanian State is making for, the present stage of European political development. This is the reason why the opinion of the Court expressed in its decisions has to found a reflection in the new drafting of the amended Constitution, Such a conclusion is the logical consequence of the role of the Constitutional as a guarantor of the supremacy of the Constitution.

[38] Kemal Gözler, *Judicial Review of Constitutional Amendments – A Comparative Study*, (Bursa, Ekin Press, 2008), 84.

[39] Jean-Jacques Pardini, "Question prioritaire de constitutionalité et question incidente de constitutionalité italienne: ab orgine fidelis" in *Pouvoirs, Revue française d'etudes constitutionnelles et politique*, 137(2011), p.116.

[40] Decision no.1146 of 15th of December 1988, cited by Jean-Jacques Pardini in op.cit., p.116.

[41] Jean-Jacques Pardini in op.cit., 116.

The Constitutional Court has rendered several decisions based on this power and, every time, has expressed various critical remarks regarding the legislative project of amending the Basic Law. Some of the suggested solutions, meant to correct the deficiencies of the draft will be presented in the followings.

6.2. The contribution of the Romanian Constitutional Court at the improvement of the Romanian Basic Law on the occasion of its revision in 2003[42]

Assessing over the suggestion contained in the project regarding the right to the private property, the Court noticed that after the provision of Article 41 Paragraph 7 that provides that *"Lawfully acquired assets shall not be confiscated. Lawfulness of acquirement shall be presumed"* there has been inserted a new paragraph in which circumstantiates this presumption and establishes that it is not applied for *"any goods intended for, used or resulting from a criminal or administrative offence"*.

The Court held that this wording could be criticized and that it might lead to confusions. Thus, if the text meant to permit the confiscation of the goods acquired lawfully, but which was based on a quantity of money results from criminal offences, its wording was inappropriate. From the wording of the newly introduced Paragraph (7^1) resulted that it meant the reverse burden of proof on the licit character of the assets, being provided the illicit character of the goods acquired through the capitalisation of the incomes resulted from criminal offences.

The Court has reminded its own previous case-law adjudicated by Decision no.85 of September 3rd 1996, published in the Official Gazette of Romania, Part I, no.211 of September 6th 1996, occasion in which was stated that the juridical security of the right to property over goods that constitute wealth of a person is indissolubly connected of the presumption of the lawfully acquiring of the goods. The Court has underlined that the removal of this presumption has the significance of the suppression of a constitutional guarantee of the right to property, which is contrary to the provisions of Article 148 paragraph (2) of the Constitution. Therefore, the objective aimed on this way is unconstitutional.

Reexamining the project of amending law, the Parliament took into consideration the Courts conclusion and has kept untouched the presumption of lawfully acquired of the assets.

Nevertheless, only eight years after, the same issue has been raised again and the idea of rejecting this presumption reappeared in the contemporary political landscape[43]. The latest revision project of the Basic Law completely eliminated the fore-mentioned presumption. Consistent with its own case-law, the Court stated[44] that such a provision is unconstitutional.

The role played by the Court in the process of genesis of law and, in particular, of the Basic Law is also underlined by another idea contained in the Decision no.148 of 2003. The Court has sanctioned the legislative technique shortcomings contained in the body of Article 19 paragraph 1 of the Basic Law, namely its inner antinomical structure: in the first thesis is alleged Romanian citizen's right not to be extradited or expelled. Instead, in the second thesis is alleged the contrary, namely that Romanian citizens may be extradited based on the international agreements Romania is a party to, according to the law and on reciprocity basis, which reflects a wording fault/deficiency.

[42] Decision no.148 of the 16th of April 2003, published in the Official Gazzette of Romania, no.317 of the 12th of May 2003.

[43] This matter has been analyzed in the past through the Decision no.85 of the 3rd of Septembre 1996, published in the Official Gazzette of Romania, no.211 of the 6th of September 1996.

[44] In the Decision no.799 of the 11th of June 2011, published in the Official Gazzette of Romania, no.440 of 23rd of June 2011.

Following this remark, the Parliament has corrected the deficient drafting, introducing the possibility of extradition of the Romanian citizens only as an exceptional provision, on the grounds of reciprocity, based on the international treaties to which Romania is a party.

It is to be noticed also the Parliament's reluctance in taking into consideration of some suggestions expressed by the Constitutional Court which were meant to improve the normative content of the Basic Law. For instance, regarding the educational system in Romania, the Court has noticed that, according to the new wording of the provisions under Article 32 paragraph (5) the education may be carried out in State or private establishments, thus being instituted a dichotomy specific to the most profound legal constructions. The Court has stated that the insertion of this new criterion, the confessional one, is not connected with the dichotomy logic, adding to a logical criterion a new determination, inadmissible by the fact that it can be found in the two, defined in the present by the Constitution. Thus, confessional education neither is excluded from the private nor from the state education. Therefore, there is a confessional education both private and public, which justifies the amendment, under this aspect, of the Basic Law. The Court considered that the examined norm would have become coherent if the logical pair of confessional, respectively lay education is inserted in the text submitted for revision. Thus, the new constitutional text would have provide that education of all levels may be lay or religious and conducted in Stat or private institutions, according to the law.

Despite the lack of coherence highlighted by the Court, the Parliament has ignored the correction suggested by the Court[45].

6.3. The constitutional review of the legislative proposal for the revision of the Constitution of Romania in 2011

Assessing *ex oficio* on the recent initiative of amending the Basic Law, the Romanian Constitutional Court has rendered the Decision nr.799 din 17 iunie 2011[46] and has drawn a series of recommendations which represent, in fact, genuine proposals of amending the Basic Law.

The suggestion concerned the national minorities right to identity, the State's liability for damages caused by judicial errors, the Parliament's Standing Orders, the fields regulated by organic laws, conditions for the nomination and removal from the office of the members of the Government, the conditions for organizing the referendum, the narrowing the possibility of assuming by the Government of responsibility before the Senat and the Deputy Chamber, legal disputes of a constitutional nature between public authorities

We shall see to what extent the Parliament will take into consideration the Courts opinions. It is to be noted that one of the solution rendered by the Court in a previous decision[47] has been inserted in the constitutional provisions, the constitutional norm prescribing that the President of Romania has not only the power to award decorations and titles of honor, but also to withdraw it.

Conclusions

The present study has been oriented on the revealing of creative potential of the constitutional jurisdictions case-law, especially in what concerns their possibility of intervening on the normative content of the Basic Law. The importance of the task performed by the constitutional courts is undeniable and the fact that the have a positive influence on the constitutional provisions should consolidate their authority in the State's institutional architecture. This potentially quasi-legislative

[45] According to Article 32 paragraph 5 of the constitutiona, tuition at all levels is conducted in public, private, or confessional schools, according to the law.

[46] published in the Official Gazzette of Romania, no.440 of 23rd of June 2011.

[47] Decision no.88 of the 20th of January 2009.

power does not interfere with the sovereign power of the Parliaments or other similar legislative bodies to elaborate normative acts. That's because one of the most important goals of constitutional courts is to ensure the balance among the state's legislative, executive and judicial authorities. On the contrary, it has softens the conflicts and stimulates the fruitful collaboration among the states' authorities.

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PARLIAMENTARY OVERSIGHT IN ROMANIA, A GUARANTEE OF ACHIEVING SEPARATION OF POWERS IN THE STATE

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Abstract

This paper focuses on the dimension of the relationships between the Parliament and other state institutions in Romania (Government, chief of state, public administration authorities) from the point of view of the parliamentary oversight. The reason and the necessity of the parliamentary oversight comes naturally from the existence of the democratic principle of representation: using the mandate entrusted by the people in the electoral elections, the members of the Parliament are entitled and, in the first place, have the obligation to verify the public affairs related to the safeguarding of the national interest and achievement of the well being. This mechanism is a flexible one and involves collaboration, cooperation, balance and thus, it appears as the strongest form in accomplishing the separation of powers in the state. The paper approaches the early developments and the evolution of the parliamentary oversight, the wide range of tools used by the Parliament to carry out this function (procedures and forms) according to the stipulations of the Constitution, laws and European Treaties and emphasizes the role of the parliamentary practice in this field. The study also puts forward a series of detailed recommendations aiming to improve the quality of this act. A new element is the parliamentary oversight in the field of European affairs, introduced by the implementation of the Lisbon Treaty, which consolidates the role of the national assemblies in order for them to become important actors in the European construction by their active involvement in the decision making.

Keywords: *Parliament, parliamentary oversight, separation of powers, state, Constitution*

Introduction

The people are the sole holders of the power, which is exercised by the state through its institutions. A *division*[1] of the powers occurs and we distinguish between the legislative power, the executive power and the judicial power. The importance of this segmentation brings a balance, each power has control instruments on the others, limiting and preventing the power seizure and thus, avoiding abuses.

The parliamentary institution has remote origins, being recorded in Island in 1930 for the first time, when it was founded and when the first national forum met under the name of *Althing*; in Romania, the parliamentary history started in 1831 along with the Organic Regulations, in 1831 in Wallachia and in 1832 in Moldavia.

The mission assigned to the parliament is very much connected to its functions, namely to provide the citizens' needs according to the mandate received from them. One of these functions is the parliamentary oversight (control), which represents a democratic mechanism for ensuring that necessary balance between the powers in the state in order to prevent the seizing of the . Using

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[1] Nicolae Popa, *General Law Theory*, (C.H.Beck Publishing House, Bucharest, 2008), p. 80

specific means, the legislative authority exercises influence on the Government and the public administration, but also on chief of state, pursuing the general interests of the society.

Even if there are very clear and precise provisions in the Romanian Constitution and other laws, in practice things are very often different and this study aims to underline these aspects taking into account the latest approaches and developments, identifying the slippages also targeting to put forward proposals for future amendments of the actual legislation.

1.Evolution of the parliamentary oversight concept

The Parliament, „the supreme representative body of the Romanian people and the sole legislative authority of the country"[2], is composed of the Chamber of Deputies and Senate, elected by universal, equal, direct, secret and freely expressed vote according to the electoral rules, each of them having different duties.

Professor Ioan Muraru identifies six tasks for the Parliament[3]:

a) adoption of laws;

b) establishment of the socio-economic, cultural, state and legal guidelines;

c) election, appointment or removal of some state authorities;

d) parliamentary oversight;

e) executive board in foreign politics;

f) own organization and operation.

The occurrence of the parliamentary control concept was born long time before the development of modern political parties. Etymologically, the word *control* comes from the old French, *contreroller*, undertaken from the mediaeval Latin word *contrarotulare* (to check by registering in a second register). In English, *scrutiny* is used for defining this concept, undertaken also from the French word *scrutin*, which comes from the Latin word *scrutinium* – exam and the verb *scrutari* – to search, to look over.

Adopted by the French National Assembly on the 26th of August 1798, the Bill of Human Rights and Citizens set at the art. 14 and 15[4] the principle of the governors' accountability to people, principle developed subsequently by the French Constitution from 1791, Title III About public powers: „ministers are liable for all the crimes perpetrated by them against national security and Constitution [5] meanwhile the regulatory power has the authority to prosecute ministers and main agents of the executive body before the High National Court.

In our country, as well as in the other European ones, the transparency of the scrutiny (parliamentary control concept) can't have its origins but in the constitutional provisions, proceeding from the competencies assigned to the state institutions and their inter-relations on the state power separation-based principle.

Once the state power separation principle has been established in the Constitution, we can analyze the existence, size and forms of the parliamentary control within that period of time.

[2] Art. 61 of the Romanian Constitution

[3] Ioan Muraru, Simina Tănăsescu, *Constitutional Law and Political Institutions,* C.H.Beck Publishing House, Bucharest, 2009, p 154

[4] The citizens have the right to find out by themselves or by their representatives, the necessity of the public contribution and to willingly accept it, to follow its destination, to establish its quantum, bases, perception and time. The society has the right to take a public officer to task for the way he/she meet his/her duties.

[5] http://sourcebook.fsc.edu/history/constitutionof1791.html

One of the first constitutional moments was present in Romania in 1822, „the first attempt to give consistency to the Romanians' liberal trends and democratic ruling principles worldwide"[6], by the commissary's, Ionică Tăutu, constitutional project, known also under the name of "*Carvunarilor Constitution"*. Being inspired by the Bill of Human rights and citizens*,* the text broadly underlined the separation of power between the Lord and the Public Assembly. The executive power belonged to the Lord; the legislative power could be carried out by the Lord together with the Public Assembly, while the judicial power was subordinated to the executive one. The great historian, A. D. Xenopol named it as "the first Moldavian constitutional project", but the act couldn't be applied because of the great boyars' opposition, supported by the Ottoman Porte. We do not consider that it has significant items which could have specified the idea of a control performed by the legislative power, but „it announced even from the first years of the earthling reigns the institutional searches which were to mark out the second half of the century"[7].

The first constitutional delimitation of the state power duties, although faulty and "confusedly described in a less clear style,"[8] can be found in the Organic Regulations, acts which instituted a modern state machine, ousting a series of feudal-like institutions.

The executive power was in hands of the Lord, vassal of the Turks and protected by Russia, who appointed and discharged ministers, he also granted clemency and could reduce punishments, he granted and withdrew noble titles, he concluded treaties with foreign powers, within certain limits, but he could also enjoy exclusively the right of legislative initiative, and he shared the legislative prerogatives with the unicameral parliament established under the name of Public Assembly. The Public Assembly was elected for a five-year mandate and although it had the right to vote legislative proposals with full majority, it had no legislative power as the modern parliaments, as the Lord held a veto right.

We have reached to the matter in question for the present research, being found within the text of article 49 of the Wallachia's Organic Regulations and in article 52 of the Moldavian Organic Regulations: „The ordinary deliberations of the Public Assembly shall only have legal power when approved by the Lord who is free not to approve them without giving an explanation on his reason of not doing it". As Marian Enache noticed, within the Lord's right to vote for the implementation of the adopted laws, we find "the origins of the Romanian parliamentary control, origins which were valued in the next constitutional acts of Romania"[9].

There are also similar provisions, but more consolidated, in the Developing Statute of the Paris Convention, adopted within Alexandru Ioan Cuza's reign, in 1864, according to which, due to the state power collaboration, the Assembly was supposed to listen the ministers within the legislative process, if those were asked for taking the floor; The Lord could reject law promulgation.

The provision of Alexandru Ioan Cuza's constitutional project is also deemed to be mentioned, being published in a French newspaper, *La Nation* in 1863 and unapproved by the great powers through which the MPs were granted the right to address questions to a minister without involving the government's political liability. Moreover, the questions were supposed to be notified to the president of the correspondent forum who decided in respect to their opportunity but under the conditions to be appointed for that position by the Lord's decree.

The 1866 Constitution, of Belgian inspiration, was the one which would really establish the state power separation and in consequence a more consolidated form of the parliamentary control;

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[6] Cristian Ionescu, *Constitutional Law and Political Institutions*, vol. I, (Lumina Lex Publishing House, Bucharest, 1997), p. 19

[7] *Constitutional Reform in Romania. Theoretical and historical aspects related to constitutional evolution,* (ProDemocratia Association, Bucharest, 2008) p. 19

[8]. Gheorghe Gh Tănase, *Separation of Powers in the State*, (Editura Ştiinţifică, Bucharest, 1994), p. 218

[9] Marian Enache, *Parliamentary control*, (Polirom Publishing House, Iaşi, 1998), p. 125

„by its essence it is a modern, democratic constitution"[10]. The legislative power was collectively granted to the monarch and to the National Representation, the executive one exclusively to the monarch and the judicial one to the Courts.

The control performed by the Parliament over the executives took concrete shape by establishing the institutions of parliamentary inquiry, questions and by the citizens' right to petition.

Article 47 stated that „Each and every Assembly had the right of inquiry", being performed by each chamber the way they thought suitable and provided in the parliamentary regulations as well. The right of MPs' to address questions to ministers was established for the first time in a promulgated constitutional text (although that was also provided in Cuza's constitutional project as we have shown above): art. 49 - „Each and every member of Assembly has the right to address questions to Ministers".

The parliamentary control was also performed by the motion (petition) right stipulated in art. 50: „Anyone has the right to address motions to Assemblies by means of office or any of its members. Each and every Assembly has the right to submit the addressed motions to Ministers. Ministers have to give explanations over their activity each time the Assemblies would ask for it". In this way, ministers are obliged to notify the Assemblies regarding the solutions to the corresponding requests. There is also important to underline the fact that the right of motion was recognized regardless age, sex, political affiliation, ethnical origin, etc.

Not last, article 99 established „as a pregnant necessity"[11], the collaboration that should exist between the state powers, by a minister's attendance to the parliamentary chambers' debates: „If the ministers aren't members of the Assemblies, they can participate in law debates, but without having right to vote. There is necessary the presence of at least one minister to the Assemblies' debates. Assemblies can ask for the ministers' attendance to their deliberations".

According to the new adopted Constitution, the Lord, exercising the executive power, was deemed to be „inviolable" and couldn't be made liable in the terms of the fundamental law. This situation had to be balanced somehow, and so the official papers issued by the monarch had to be countersigned by the ministers, being liable for that before the Lord and the Parliament, too.

The vote of non-confidence represented a component of the control performed by the Parliament and although in the previous parliamentary practice prior to 1866 there were cases related to the ministers' joint or individual political liability – the so-called reprimand passed in the Assembly of Deputies - (on the 18th of February 1863, Nicolae Crețulescu government -50 pro votes, 5 against votes, 50 abstention votes), the Constitution of 1866 did not comprise any explicit provision related to those situations, acknowledged in a customary manner[12]. After the adoption of the fundamental law, the Government was supposed to resign not only after a negative vote passed in the Assembly, but also in the Senate, but in practice, if an express motion of confidence was adopted in the Assembly, the vote given in the Senate didn't have much importance; moreover, that parliamentary chamber would have been dissolved by the Lord, as it happened in the case of Lascăr Catargiu Government in 1876.

The ministers' legal liability was stipulated in the fundamental act of 1866, in article 101: the Assembly of Deputies, the Senate or the Lord could send them before the High Court of Cassation and Justice, in joint sections.

If things were clear at the level of constitutional provisions, related to the parliamentary control and performance methods, in practice they were totally different. The executive power succeeded many times to assign a predominant role by majority mechanism, dependent on the

[10] Emil Cernea, Emil Molcuț, *The History of State and Romanian Law,* (Universul Juridic Publishing House, Bucharest, 2006), p. 275

[11] Marian Enache, *op. cit.*, p 127

[12] Tudor Draganu, *Constitutional Law*, (Editura Didactica si Pedagogica, Bucharest 1972), p. 170

government's influence, as it used many times the state machinery for the candidates' service in order to win the elections. There were many cases when ministers asked the MPs, who constituted the majority, to vote laws they did not agree with. As an example, we present the confession of Constantin Argetoianu, minister of internal affairs, regarding the situation occurred in 1921, when more MPs of the Peoples' Party didn't want to vote certain articles of agrarian law: „Within the 2-3 days prior to voting, we arranged the groups and on the voting day I assigned my people to demand a vote with nominal appeal. I sat down on the office stairs in front of the banks – I was nearly to say the rack – and on calling each name of our party, I was looking into the called person's eyes and no one dared to be "against" under my stare[13]".

After a five-year reign, Carol I noted in a dateless Memory[14] the insufficient level of development of the Romanian parliamentary regime caused by the existing traditions and continuous confrontations among politicians and came to the conclusion that the Constitution of 1866 needed to be revised for the parliamentary power to be limited, using: withdrawal of the right to control finances, the Lord's approval for the election of the president of Assembly of Deputies, the reduction of time assigned to questions addressed to ministers and the debates related to the vote for the answer of the throne message. But, following "the received suggestions from the diplomatic groups of Berlin"[15], that desire of the monarch was to remain at the level of a mere initiative.

The constitution of 1866 suffered a series of revisions in 1879, 1884, 1917, but the amended dispositions are not important for the subject approached in our research.

The new social, economical and political reality of the country will be regulated by the Constitution of 1923, one of the most European democratic Constitutions of the inter-war period[16], based on the governmental act of 1866, of which 87 articles were entirely kept. The state powers were equally kept, but some improvements were brought in, regarding the Parliament control over the Government.

Besides the MPs' rights to start investigations (article 50) and to address questions and petitions received from citizens to ministers, the obligation to answer the questions was established within the terms provided by the rules of each chamber (article 52), but also the obligation to give explanations about the forwarded petitions (article 53- ministers are obliged to give explanations over their activity each time the Assembly asks for it).

Regarding the subjects approached by the members of the two chambers within the questions addressed to ministers, those had in view matters of different fields as economy, culture, external politics, minorities, education, various social categories, etc.

It is interesting to notice that concerning the collaboration between powers, provided in article 96 of the Constitution[17], this gets new values by the amendment of the two chambers' regulations, in the sense that public sessions of the two Assemblies could only be opened in front of at least one minister.

As an innovation regarding the executive power, the Government is regulated as a distinct body in article 92: „The Government performs the executive power on the King's behalf as

[13] Constantin Argetoianu, *For those of tomorrow. Memories of those of yesterday*, vol. VI, And Publishing House, preface Stelian Neagoe, Bucharest, 1996, p. 235 – 236, taken from http://www.ioanscurtu.ro/content/view/112/28

[14] A.N.I.C. fond Casa Regală, file 12/1871, p. 1-36, taken from http://foaienationala.ro/carol-si-constitutia-romna-de-la-1866.html

[15] *Memories of King Carol I of Romania. By an eyewitness*, vol. II, Bucharest, (Scripta Publishing House, 1993), p. 146-147, taken from http://foaienationala.ro/carol-si-constitutia-romna-de-la-1866.html

[16] Gheorghe Gh. Tănase, *op.cit*, p. 263

[17] If ministers are not members of the Assemblies, they can attend law debates without having the right to vote.
At the Assemblies' debates, the presence of at least one minister is necessary.
Assemblies can request the ministers' presence at their deliberations.

established by Constitution" and the Council of Ministers is established in article 93 being ruled by a person appointed by the monarch in order to create the Government: „The gathered Ministers constitute the Council of Ministers which is presided under the title of President of the Ministers' Council by the one in charge with the government creation".

Under the auspices of those new fundamental laws, they also kept the ministers' liability and the practice of censure votes given in Parliament, a minister or even the entire Government being likely to resign in the event of receiving a vote of non-confidence within the Assemblies.

During that period, the executives manifested their tendency to prevail over the Parliament power, but also to elude the debates on the normative acts of the two Assemblies by using the decree-law method, method which was frequently used starting from 1934 by the governments ruled by Gheorghe Tătărescu.

In 1938, on an intense political tension background and on external threats as well, the King Carol II installed the monarchical dictatorship by introducing a new Constitution approved by the Referendum of the 24th of February, held under a state of siege conditions, by open vote, with a separate list for opponents.

The democratic rights and freedoms were severely limited, but the mimed principle of state power separation was maintained. The Parliament's power was diminished, being granted the limited right of normative initiative[18], and the executive power, the King, was assigned a more important role being the "head of the state". The Constitution stipulated throughout Chapter 3, *About the Government and Ministers* the composition of the government, the necessary requirements for acceding the office of minister or secretary of state, liability and restrictions after the mandate expiry.

In the parliament control field, we can't find anymore the right of parliament chambers to initiate inquiries and to submit the received petitions to ministers, art. 25 stating as follows: „ Anybody has the right to address petitions, undersigned by one or more persons, to public authorities, but on behalf of the undersigned only. The authorities have the right to address collective petitions by themselves".

Ministers are accountable from the political point of view only to the King, the Parliament has no more power to sanction and dismiss the Government, having only a small influence, most of the time invested with a greater importance by some authors of the time[19], just from their desire to justify the new constitutional provisions.

Interpellations were replaced by the institution of the parliamentary questions, article 55 stating as follows: „Each member of the Assemblies has the right to address questions to ministers to which they are obliged to respond within the regulation provided term". The debates are avoided in this way within the Parliament which could have led to the passage of motions and to a censure vote for government as the „question didn't have the value of a question anymore"[20].

The Constitution was suspended in the fall of 1940 following to the forced abdication of King Carol II, the two parliamentary chambers dissolved and Romania was to be ruled for four years throughout decrees by Ion Antonescu's military dictatorship regime. In 1946 the Parliament restored the unicameral Chamber of Deputies and it became the Grand National Assembly by the Constitution of 1948.

This fundamental law, as well as the subsequent ones from 1952 and 1965, established the authoritarian character of the communist regime and visibly diverted from the "state power

[18] Article 31: „ The initiative of laws is granted to the King. Each of the two Assemblies may propose laws for the State public interest only by their own initiative"

[19] „Of course, an unfavourable vote, especially repeatedly, will jeopardize its situation" (Government), Andrei Rădulescu, *The New Constitution, FIVE RADIO CONFERENCES*, Ed.-II-, Cuvântul Românesc Publishing House, 1939, Bucharest, p. 49, www.dacoromanica.ro

[20] Gheorghe Gh. Tănase, *op.cit*, p. 281

separation principle"[21]. Gheorghe Gh Tănase believed that those „did not establish the state power separation principle, as the Marxist doctrine stated the uniqueness of state power and defined it as an organized power of one class oppressing the other"[22].

We'll summarize below the means of the so-called parliamentary control stipulated in these fundamental acts, adapted means which led to the application and fulfilment of the unique party's policy, Romanian Communist Party: the questions and interpellations addressed to the Government or ministers individually, investigations and researches in any field, hearing the reports of the state administration chiefs, of the Prosecution and Supreme Court by the parliament standing committees.

After the Revolution of 1989, Romania returned to a democratic regime based on free elections, political pluralism, separation of state powers, the observance of human rights and the governors' liability before representative bodies. The new Constitution was adopted in 1991 and reviewed in 2003.

2.Parliamentary control – actual constitutional provisions

2.1 Control mechanisms and procedures

In his work,[23] professor Ioan Muraru underlines the parliamentary control and he divided it into six directions, mentioning the powers of the legislative:

1.control performed by giving explanations, messages, reports, programs;
2. control performed by parliamentary commissions;
3. control performed by questions and interpellations;
4. the MPs right to request and obtain necessary information;
5. control performed by settling the citizens' claims;
6. control performed by the Ombudsman.

In the French professor's opinion, Yves Mény[24] we can distinguish three types of parliamentary control over the executives:

- Partisan control, led by the opposition being efficient under the government's condition of vulnerability;
- non-partisan control, by means of the parliamentary control which can embrace various forms: questions, commissions, hearings, etc;
- control with sanction, as a censure motion, which is the most drastic, but it cannot be used many times without destabilizing the system;

2.1.1 Motion

The punitive dimension of control function refers to the effective sanction for the Government. This can be done, as in Romanian Parliament case, by censure or simple motions and it may concern, in increasing order of importance: forcing the Government to adopt certain policy measures (by approving a simple motion), the dismissing one or more ministers (by approving a simple motion where expressly required) or dismissing the entire cabinet (by voting a censure motion).

[21] Marian Enache, *op. cit*, p. 130
[22] Tănase Gheorghe Gh. Tănase, *op.cit*, p 282
[23] Ioan Muraru, Simina Tănăsescu, *op. cit.* p.158
[24] Yves Mény*, France: The Institutionalization of Lordship*, *in Political Institutions in Europe*(edited by Josep M. Colomer), (Routledge Publishing House, London, 2002).

The procedure for submitting and adopting a motion is basically the same in Romania as in the other former-communist countries, with some small differences. Romania does not practice the so-called "constructive motion of censure" which obliges the initiators to mention the name of the potential prime-minister who would probably undertake that charge in case of motion approval. Poland and Hungary are the ones which apply this system. Another noteworthy difference refers to the necessary number of signatures for putting forward a censure motion. Poland has the most permissive Constitution which allows the introduction of a non-confidence vote by 46 MPs of the total of 460. As for the other Central and East European countries, the number equals to one-fifth (Bulgaria, Hungary) or a quarter (Czech Republic) of all those which have the right to initiate a motion of censure. From this point of view, Romania is part of the more restrictive states, being necessary one-third of the total number of MPs.

Due to the system drawbacks described in the previous chapter, for the MPs forming the opposition, the motion of censure has acquired another stake, which is missing for the countries where communication between Parliament and Government works normally. The initiation of a censure motion has become almost the only opportunity on which the Prime Minister may be brought before Parliament for an effective debate on actual acute problems. This is also valid for simple motions which determine the presence of the other cabinet members before the regulatory forum, depending on their subject. In this way, the Romanian, "parliamentarism" is the generator of a paradoxical and abnormal phenomenon for an operative system: in conditions in which, on one hand, the information dimension of the parliamentary control function is atrophied and on the other hand the chances that a simple or censure motion to be adopted are minimal, as a translation produces between the punitive and information dimension of the control function. In other words, the second dimension – represented by motions – loses its punitive character and it assumes the role and purpose of the information dimension. Given the fact that the mechanisms designed to generate debates among the MPs and cabinet members and to ensure communication, information – interpellations and questions – slightly fulfil their role, they were undertaken by stronger mechanisms - motions. Thus, the tolls of parliamentary struggle involving sanctions are used to generate debates which questions and interpellations would have meant. This aspect explains the increasing frequency of filed simple motions in both Chambers.

Moreover, the public "attention"-enjoyed motions and in general parliamentary debate of utmost importance is extremely low. The public character of Parliament sessions does not equal and does not trigger their promotion. Only motions of censure enjoyed some publicity in the last legislation (there were 10 censure motions initiated in the actual legislature).

Simple motions filed in the Chamber of Deputies and Senate

Legislature	Chamber of Deputies	Senate
2008 – up to present	15	8
2004 – 2008	15	13
2000 – 2004	20	12
1996 – 2000	13	6
1992 - 1996	3	5

2.1.2 Questions and interpellations

These tools represent the most common and convenient way to control the executive power activities. According to article 112, par. (1) in the Romanian Constitution „The Government and each of its members shall be bound to answer the questions or interpellations raised by the deputies or senators, under the terms stipulated by the regulations of the two Chambers of the Parliament". Thus, the Romanian fundamental law, unlike other European constitutions (Austria, Bulgaria, Cyprus, Ireland, Luxemburg, Russian Federation), provides the difference between these two parliamentary tools, belonging to the so-called non-legislative activity of Parliament.

The differences between questions and interpellations are basically related to procedure and content.

Questions

In European countries with a rich parliamentary tradition, to address questions to Government is one of the most ancient rights of the members of legislative power, being used for the first time in 1721 by the House of Lords in UK. Also in that country in 1902, there was inaugurated the system of written responses for the questions which couldn't receive one due to lack of time.

This mean of parliamentary control is defined both in the Regulation of the Chamber of Deputies in article 165, par. 2, and in the Senate's in article 158, par. 2, as a "simple request to answer whether or not a fact is true, whether or not an information is accurate, whether or not the Government or other public administration bodies will release to the Chamber the information and documents required by the Chamber of Deputies or by the Parliamentary Committees, or if the Government intends to rule on a particular matter".

Thus, certain information is required by means of questions, explanations and the Government, ministers or other leaders of public administration are their targets. An MP cannot address more than two questions in the same week.

Regarding their content, the questions of personal or private matter are not allowed, as well as the ones which aim to obtain legal advice, or refer to lawsuits pending before courts or the ones concerning the activity of some persons who do not hold public offices.

The questions raised by the Romanian MPs should have a single author, while in some countries there are regulations regarding the number of persons who can initiate such question: for instance five in Austria or Latvia or nine in Lithuania.

We can distinguish between oral and written questions, each category being subject to certain procedural rules which varies depending on parliamentary chamber.

The Chamber of Deputies has schedule for receiving questions on Monday at every two weeks, between 18,30-19,30, provided prior notification of the object, the answer being received within 15 days after sending. The answer cannot exceed 3 minutes and another 2 if there are comments from the author or clarifications are required. Also, for justified cases, the answer can be delayed, fact which occurs in the absence of the targeted minister.

Written questions are sent to the appointed secretary of the Chamber of Deputies and there should be mentioned the type of desired answer: oral, written or both which will be done within maximum 15 days from filing. No deputy can address more than two questions in the same meeting.

Questions pending on answer are published in the Official Gazette of Romania, Part II, at the end of each ordinary session.

In the Senate, although not stipulated in the Regulation, according to the parliamentary custom, the answer to the oral questions addressed by senators is given on Mondays too, being the last point on the agenda between 18:00 -19:30 and they are usually broadcasted live on public radio

station. The time allocated to an intervention is also of three minutes and it may be extended with another two minutes for further clarifications or comments. If the orally asked person is not present, the answer will be given in the next week meeting.

Oral answers to written questions are given after the questions are over and the written ones are sent to the author within maximum 15 days.

Questions and answers are recorded in the transcript and they are published in the Official Gazette of Romania, Part II.

The questions' subjects cover a large range of topics and they can be both of local issues, of the parliamentary constituency and of general interest.

Sometimes, using this mean of parliamentary control can be a launching springboard, being used by the MPs to improve, enhance the public image or inside their own party. In this way, the remarks, made in the XIX century by the famous essayist and British journalist, Walter Bagehot, are still valid: „there are no limits concerning the parliament curiosity. (...) Some of them address question from a genuine desire of knowledge or a real desire to improve the subject of what they ask; others to see their names in newspapers; others to demonstrate to a vigilant constituency they are always in alert; others to go ahead and get an office in the government; others because their habit is to ask questions"[25].

Interpellations

An interpellation is, according to article 173, par. 1 in the Regulation of the Chamber of Deputies and article 161, par. 1 of the Senate's, a request addressed to the Government or to a minister by one or more MPs or by a parliamentary group by means of which they require explanations on Government policies.

They differ from questions both by their high importance and their regulatory procedure.

In the Chamber of Deputies, interpellations are made in writing by underlying their object and they are read in public sessions assigned to questions, following to be sent by the president to the chamber of the receiver; they occur on Mondays in the same time with the question sessions and the time of an interpellation cannot exceed five minutes. The answer has to last five minutes too and it can be extended with another two minutes if any further questions or comments from the author.

An interpellation is formulated to create a debate, sometimes its object can turn into a simple motion adopted by the Chamber of Deputies.

Interpellations addressed to the prime-minister are filed to the Secretary of the Chamber of Deputies till Wednesdays, hours 14,00, from the week preceding the prime-minister's responses and they should refer to the Government policy on important issues of its external or internal affairs and the answers are given on Mondays at every two weeks, hours 18,00-18,30, and they can be postponed one week only.

The Regulation also provides, at the request of one or more parliamentary groups or of the prime-minister, the possibility to organize political debates in the plenary with the prime-minister's attendance at issues of major interest for the political, economical and social development. The same parliamentary group can ask for a political debate just once per session, while the prime-minister can ask for maximum two political debates per session.

In the Senate, unlike the lower chamber, interpellations are filed in writing by underlying the object and the motivation, following to be sent after their reading in public session established by

[25] Walter Bagehot, undertaken by Matti Wiberg*, Parliamentary Questioning: Control by Communication*, in the work *Parliaments and Majority Rule in Western Europe*, edited by Herbert Dőring, St. Martin's Press, New York, 1996, p 181

the Standing Bureau. The deadline for answering is of two weeks and sometimes three weeks in certain occasions.

The author of an interpellation has three minutes in the debate session and the prime-minister or his representative five. These terms can be extended by the same ones in case of replies. The answer to the interpellations addressed to the Government members is presented by the minister or, as it might be, by a state secretary.

The Senate may also pass a motion by which it can express its position on a matter which was the object of an interpellation.

As the lower Chamber of Parliament, interpellations are written, in chronologic order, in a special register and they are displayed at the Senate's.

Due to the blooming activity of the parliamentary groups in the opposition, the number of questions and interpellations addressed to Government has dramatically increased so that we can notice by comparing them to the registered figures in the Chamber of Deputies in fig. 1 for 2000 and 2010, that the number of questions has multiplied by more than 13 times and the interpellations by approx. 10 times. The Senate has recorded the same upward trend.

Another factor which increased the number of questions and interpellations is represented by the electoral law amendment, as the uninominal vote was preferred instead of the party list, a fact that generated a stronger relationship between the MP and his electoral constituency. There can be noticed the great importance of local issues within the approached topics by these parliamentary control means.

Analyzing the actual regulations of the Chamber of Deputies and Senate and the way they are reflected in practice, we can notice certain inadvertences which influence directly the relations between Parliament and Government and also the efficiency of the parliamentary control.

Thus we take into account the fact that many times the prime-minister or ministers don't answer the questions and interpellations addressed to them. In order to illustrate this fact we'll use the data presented in a report[26] elaborated by The Institute of Public Policies which reveals that 24% of the formulated interpellations in the February – June 2009 session by MPs remained unanswered.

Another important element is the fact that the direct receivers of questions and interpellations attend the plenary debates very seldom. The parliamentary rules have been amended and they allow the prime-minister's replacement with a representative and the ministers' with a state secretary, but we do consider that their direct involvement would improve the scrutiny performance and would fully justify the institution of the executives' political accountability to the legislative power as found in modern states with strongly consolidated democracy.

Also, the two-week interval, long enough for receiving answers, leads in certain situations to the topic out of date, to the loss of attention and topicality. In order to avoid such situations, we consider as compulsory the introduction of the institution of urgent questions/interpellations on current issues at least in the regulations of one parliamentary chamber as demonstrated by some member states in the EU: Austria, Denmark, France, Germany, Greece, Ireland, Latvia, Lithuania, and Luxembourg. In UK, questions can be addressed from Monday to Thursday, after exhausting the agenda and answered within maximum 3 days, except the emergencies, whose answer is formulated on the same day.

[26] Institute for Public Policies, *MPs' activity in the February – June 2009 session***,** Bucharest, July 2009, p 45: the deputies addressed 584 interpellations and 143 of them did not get an answer at the end of the session.

2.1.3 Committees of Inquiry

In order to conduct further inquiries, clarification of cases or circumstances related to particular events or facts, the parliamentary control can be performed the standing committees, but, basically, these powers may be assigned to some special inquiry committees.

Article 64 par. (4) in the Romanian Constitution states that „Each Chamber shall set up Standing Committees and may institute inquiry committees or other special committees. The Chambers may set up joint committees". The Chambers can also constitute joint committees; the dispositions related to their establishment and functioning are detailed within the rules of each parliamentary chamber as well as in the rules of joint meetings.

In order to establish an inquiry commission there are required signatures of at least 50 deputies coming from two parliamentary groups or of 1/3 of the number of senators, and the joint decision shall be submitted to the Standing Bureau/Joint Standing Bureaus of the respective chamber or parliament, accompanied by the list of signatures; the vote will follow in the plenary. The committee starts its activity and it can hear any person who may be aware of facts or circumstances which can lead to the truth and can also instruct for an expertise to be conducted. After finishing and submitting the report to be voted, the committee ceases its activity.

The reports originated from such a committee have a consultative character and they do not constitute legal evidences, but they can be a start for criminal prosecutions by the judiciary bodies. The influence of such an inquiry committee on the public opinion shouldn't be overlooked.

Legislature	Inquiry committees Chamber of Deputies	Joint inquiry committees
2008 – up to date	5	-
2004 – 2008	2	6-
2000 – 2004	-	-
1996 – 2000	2	3
1992 – 1996	-	-
1990 - 1992	2	1

2.1.4 The investigation of citizens' petitions

Citizens can send petitions to MPs in virtue of the received popular mandate, being an intermediary between citizens and the Government. In the Chamber of Deputies works the Committee for the Investigation of Abuses, Corrupt Practices, and for Petitions and in the Senate the Committee for the investigation of Abuse, Corruption and Petitions.

The cases reported by petitions are examined, processed, investigations can be made regarding the reported cases or they can notify the competent public authorities**.**

2.2 Parliamentary control on European affairs

One of the goals of the Lisbon Treaty, ratified by the member states on the 1st of December 2009, was to strengthen the role of national parliaments, making them important players for the European construction by active involvement in decision-making.

Under the Treaty decisions, the European institutions (The Commission, the European Parliament and the Council) send their draft projects of normative acts to national parliaments, the latter being able to express its motivated point of view regarding the subsidiarity principle within 8 weeks.

Thus, the Romanian Parliament is granted the competence to perform parliamentary control on the government's activity with respect to the European affairs as well. The received informational flow is also relevant (either it is about projects of normative acts, consultative documents as white, green books or communications or by the Council's agendas and minutes), which can be fructified and also the political dialogue[27] with the European Commission.

Parliamentary control on European affairs (scrutiny) is a control which has in view the following documents issued by the institutions of the European Union:

a) draft projects of eligible normative acts for checking the compliance or breach of the subsidiarity principle (it also bears the name of subsidiarity test);

b) draft projects of normative acts of the European Commission, European Union Council or European Parliament and the consultative documents of the European Commission selected by their political, economical, legal, social or financial relevance;

c) draft projects of normative acts of the EU for which the Romanian Government elaborates general mandates.

The procedure of parliamentary control on European affairs is an *ex-ante* intervention, performed before the adoption of the European acts (directives, regulations, decisions), unlike the legislative ordinary procedure, which operates after their adoption in order to be implemented in the national law. Its final product is an opinion, a point of view formulated after analyzing those policies which do not generate legal obligations and do not produce direct applicable effects, while the final product of the legislative procedure is the law itself which is directly applicable.

In order to perform this operation, it is necessary to establish a whole construction with implications to normative, institutional and administrative level. At institutional level, a cooperation law is required between Parliament and Government on European affairs; finally, after a long delay the Government put forward, on the 18th of January 2012, a draft bill[28].

According to the Treaty's provisions, the Chamber of Deputies and the Senate have each one vote and also a specific procedure.

3 Relations between the Parliament and other institutions

3.1 Chief of state

We chose to use this title as, in our opinion, these two institutions, the Parliament and the chief of state, should have permanently collaboration and balanced relations, considering the fact that they both express the will of the majority among citizens and also the fact that the President is a mediator between ''the state powers and between the state and society''[29]; the control mechanisms should be used responsibly, without generating crisis and constitutional instability.

These relations between the Parliament and the President can only come from the Constitution and are determined by analyzing and interpreting the provisions of the fundamental act.

Article 88 from the Constitution gives the President the power to address ''messages on the main political issues of the nation" and does not represent a mechanism of parliamentary control; but it was long discussed when we came to the moment of the debates in the two chambers of the

[27] Also named the „Barroso initiative". It was initiated on September 2006 and it meant an important change especially in the countries where Parliament depended on the information offered by Government regarding legislation discussed in Strasbourg or Brussels.

[28] In more European member countries there are inserted dispositions in the fundamental acts with respect to control on European affairs – Finland, Greece, Bulgaria

[29] Muraru Ioan, Tănăsescu Simina, *op.cit.* p. 250

Parliament and lead to the conclusion that it can even be rejected, which, in our opinion, is the equivalent of exercising parliamentary control.

The Constitutional Court of Romania was called in 1994 to decide on the issue of constitutionality of Article 7 in the Standing Rules on the joint sessions of the Chamber of Deputies and of the Senate. On this occasion, the Court[30] defined the message as ''an exclusive and unilateral politic act of the President of Romania, which the Chambers, met in joint session, have … only the obligation of *receiving* it ''. Therefore, a parliamentary debate cannot be organized in order for the message to be discussed with the participation of the President, because this would mean engaging his political responsibility; after the presentation of the message, the Parliament can debate it and even adopt measures, without rejecting the message, as ''*receiving*'' cannot be confused with ''*rejecting*''. In the same document, the Court interpreted the provisions from article 88 as a ''modality of cooperation between the two authorities, elected by direct vote – The Parliament and the President of Romania".

The parliamentary control resides in other two constitutional articles: suspension from office and impeachment.

Article 95 refers to what professor Ioan Muraru calls ''the political responsibility of the President…in order to differentiate it from the criminal liability"[31]. The same author considers that the suspension from office is in fact an element of the parliamentary control exercised upon the executive power represented by the President of Romania[32].

Thus, in case of having committed grave acts infringing upon the provisions of the fundamental law, the President may be proposed for suspension from office by at least one third of the number of deputies and senators. The proposal must include a motivation, all the imputations and all the proofs. This initiative is debated in the joint meeting of the two chambers which can decide, with the vote of the majority and after a consultation with the Constitutional Court[33]. The President may participate in the debate in order to explain the facts which are imputed to him. After a positive vote, the Parliament decides the date for the referendum, organised for the dismissal of the President[34], but no later than 30 days, according to Law 3 / 2000. The interim chief of state is the President of the Senate, second in the state line.

When the 1991 Constitution was written, the provisions of article 95 were taken from the Austrian Constitution, but in an incomplete way, as that article states the dissolution of the Parliament in case of a favourable result in the referendum for the chief of state. This is a fair situation, so in case the initiative for the dismissal of the President fails, before term parliamentary elections should come as a natural consequence. In our opinion, this change should be also introduced in case of a future amendment of the Constitution.

The criminal liability of the chief of state is engaged in case of high treason and the members of the two chambers, in joint session, based on a two thirds votes, can impeach him, according to article 97, paragraph (1) from the Constitution.

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[30] Decision no.87 of September 30th 1994

[31] Ioan Muraru, Simina Tănăsescu, *op cit*, p. 257

[32] Mihai Constatinescu, Ioan Muraru, *Parliamentary Law, (*Gramar Publishing House, Bucharest, 1994)

[33] The Parliament debated so far two such suspension cases:

1. On the 4th of July 1994 regarding Ion Iliescu's suspension, initiated by 167 members of the Parliament; it was rejected with 242 votes against and 166 votes in favour.

2. On the 19th of April 2007 regarding Traian Basescu's suspension, initiated by 182 members of the Parliament; it was adopted with 322 votes in favour, 108 votes against and 10 null votes.

[34] The Referendum for Traian Băsescu's dismissal took place on the 19th of May 2007 and the results were: 24,75% in favour and 74,48% against.

The New Criminal Code, coming into force on the 1st of September 2012, introduces the high treason offence in article 398 and it defines the following facts: treason by transmitting secret state information, treason by helping the enemy, actions against the constitutional order, which are punished with life imprisonment or prison from 15 to 25 years and prohibition of certain rights.

The decision issued by the Parliament and signed by the presidents of the two chambers is sent to the General prosecutor for the High Court of Cassation and Justice to be notified.

3.2 Authorities of the public administration

The fundamental law institutes three types of control for the activity of the authorities of the public administration: parliamentary – the Government and other bodies of the public administration have the obligation to present the information and documents requested by the Chamber of Deputies, the Senate, or parliamentary committees, through their respective presidents (article 111), judicial – article 25 and 52 and administrative – article 102.

Some of the instruments presented above are also used in this type of control performed by the Parliament: questions, interpellations, inquiry committees, but in this case we shouldn't be dealing with a strict political control aiming for the law, human rights and citizens' freedoms to be observed, for the prevention and sanctioning of the abuses of the public servants.

A peculiar aspect is represented by the autonomous administrative authorities which may be established by an organic law and are also situated in the area of the parliamentary control. They are not under the authority of the Government but they have a special relation with the legislative body, either by presenting annual reporst or by having their leadership appointed by the Parliament:

- Court of Accounts
- Legislative Council
- Romanian Ombudsman
- Romanian Intelligence Service
- Competition Council
- Foreign Intelligence Service
- Guard and Protection Service
- Special Telecommunications Service
- Insurance Supervisory Commission
- National Audio-Visual Council
- Romanian Broadcasting Society
- National Council for the Search of Security Archives
- Romanian Television Society
- National Authority for Communications
- National Council for Combating Discrimination
- Private Pension System Supervisory Commission
- Romanian National News Agency AGERPRES
- National Bank of Romania
- Romanian National Securities Commission

As for the parliamentary oversight of the intelligence agencies, there are The Joint Standing Committee of the Chamber of Deputies and the Senate for the exercise of parliamentary control over the activity of the Romanian Intelligent Service SRI and The Joint Standing Committee of the Chamber of Deputies and the Senate for the exercise of parliamentary control over the activity of the Foreign Intelligent Service SIE. These committees permanently evaluate the manner in which the political option is converted and applied. Thus, the parliamentary control represents a dimension of the decisional activities accomplished by the public supreme authority.

The powers of the two committees extend over examining the observance of the constitutional provisions and of other acts in this field, controlling the way the money from the state budget is spent, approving the draft bills and resolving the complaints and petitions of the citizens which consider their rights and freedoms affected by the means used in intelligence.

4.Conclusions

The dimension of the mechanisms of parliamentary control, their intensity and quality may vary according to the state's form of governance – political regime, electoral system, unicameral/bicameral organization of Parliament, its political structure, criteria which are also heightened by the tradition and parliamentary culture of each state. An interesting situation and transformation might follow in case of the announced changes to take place in Romania: unicameral Parliament (as a result of the referendum held on the 19th of May 2007), amendment of the electoral laws (also from the point of view of the results of the census conducted in 2011), establishment of regions as a new form of territorial organisation of the Romanian state (political as in Spain or administrative as in France).

The Romanian Parliament must prevent any possible slippages which sometimes are common in practice and avoid becoming a voting machine without amending the texts put forward by the Government. A very dangerous approach, an abuse in the relation between the Parliament and Government is the use of the responsibility assumptions (14 times for 19 laws during the last 3 years) and government ordinances by eluding the legislative debate and thus threatening the democracy rules. Thus, in our opinion, it is necessary to provide in the constitutional text a limitation in time and number regarding these instruments.

Using the sociological method, in our next future papers we intend to conduct a poll/survey among the members of the actual legislature of the Romanian Parliament, from all political parties represented, regarding the efficiency of the parliamentary on the executive by the means presented in our current study. The questionnaire, the sample and the methods for data interpretation will be set in collaboration with experts in sociology.

None of the three powers in the state prevails, there are many cooperation, collaboration areas, traced wider or narrower and despite its critics, Montesquieu's principle remains one of the main values of contemporaneous democratic political regimes.

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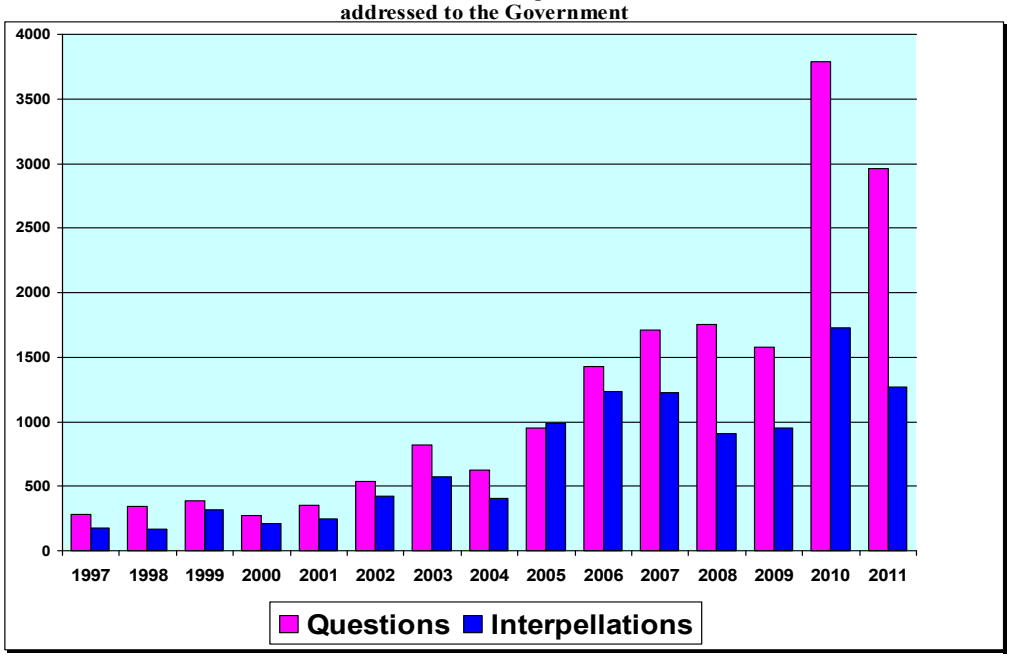
Fig 1. Chamber of Deputies
Questions and Interpellations addressed to the Government



THE JUNE 2012 OPINION OF THE VENICE COMMISSION OF THE COUNCIL OF EUROPE ON THE ACT ON THE RIGHTS OF NATIONALITIES OF HUNGARY. PRESENTATION AND ASSESSMENT

Bogdan AURESCU[*]

Abstract

The paper undertakes an analysis of the June 2012 Opinion of the European Commission for Democracy through Law (the Venice Commission) of the Council of Europe on the Hungarian Act on the Rights of Nationalities of Hungary, adopted in December 2011. The paper approaches this task having as a reference point the European standards on minority protection, but also the concrete needs of the Romanian minority of Hungary in preserving and developing its cultural identity, effort which might be directly affected by the Act. The paper shows that the Opinion of the Venice Commission acknowledges not only the positive aspects set forth by the Act, but also certain important shortcomings that have to be redressed by further amending the Act. Among these, inter alia, one may identify the following: the fact that, being a "cardinal" law, it is quite difficult to amend it; the fact that it sometimes includes an excessively detailed regulation; that it changes the terminology from "national minority" to "nationality", with important consequences on the manner of projecting the Hungarian interests in connection with the Hungarian minorities abroad (as well as the fact that the Act consecrates the controversial concept of "collective rights"); it includes a narrow definition of the "nationality", thus excluding the new minorities and creating some difficulties for the Roma, who are not (by tradition) strictly linked to territory; it does not include sufficient guarantees as to the accuracy of ethnic data collection, especially by censuses; it does not provide for concrete measures to ensure the verification of the mother tongue knowledge by minority electors and candidates for self-governments, thus living place for the perpetuation of the phenomenon of the so-called "ethno-business"; the regulation of education for minorities has a degree of uncertainty with regard to the stability and continuity of minority education and might have a negative impact on the parents' choice as to their children education; it does not address in an appropriate manner the problem of financing of the media for national minorities, and so on.

Keywords: *Venice Commission, kin-minority, promotion and protection of rights of persons belonging to national minorities, "collective" rights, individual rights, self-government, ethno-business*

Introduction

The European Commission for Democracy through Law, better known as the "Venice Commission", adopted, at its 91st plenary session (15-16 June 2012, Venice), its Opinion on the Act on the Rights of Nationalities of Hungary (hereafter referred to as "the Opinion").[1] The Opinion of

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[1] Opinion on the Act on the Rights of Nationalities of Hungary, adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), on the basis of comments by Mr Sergio BARTOLE (Substitute Member, Italy), Mr Latif HUSEYNOV (Member, Azerbaijan), Mr Jan VELAERS (Member, Belgium), Opinion no. 671/2012, CDL-AD(2012)011, the official site of the Venice Commission, accessed July 4, 2012, http://www.venice.coe.int/docs/2012/CDL-AD(2012)011-e.pdf.

the Commission was asked, on 1 February 2012, by the President of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe.[2]

This Act on the Rights on Nationalities (Act no. CLXXIX of 2011)[3] (hereafter referred to as "the Act") was adopted by the Hungarian Parliament on 19 December 2011 following the adoption of the new Hungarian Constitution, which entered in force on 1 January 2012. According to this Constitution, a number of so-called "cardinal acts" were supposed to be passed. The "cardinal law" is similar to the organic law in the Romanian system, as it is has to be adopted with a certain qualified majority, that is two-thirds majority of the votes of the Members of Parliament present at the session approving the Act. This new Act replaces the former Hungarian Act on National and Ethnic Minorities of 1993. The 1993 Act was promoting the controversial concept of "collective" rights for minorities, approach which is reflected constantly in the overall policy on the matter of the Hungarian state, and which is also maintained in the new Act. This approach is reflected in the Act by declaratory means (it is mentioned as such), but also by conserving the organization of minorities in the so-called "self-governments" of minorities: the collective rights are supposed to be exercised, on behalf of the minority, by the self-government at national level.[4] Another interesting aspect of the new Act is the re-denomination of national minorities of Hungary as "nationalities".

For Romania, this new Act of 2011 is important for several reasons. First, it is relevant as far as the promotion and protection of the rights of persons belonging to the Romanian minority living in Hungary, which, in time, has become less and less numerous, for various motives. The adequate level of promotion and protection of the rights of these persons and the preservation of its cultural identity, including by the means provided by the national domestic legislation of Hungary, are of great relevance. Second, because a comparison between this domestic legislation and the European standards on minority protection – as performed by the Venice Commission in its June Opinion – is necessary to assess if the former is compatible with the latter. Third, because Romania (as the majority of the European doctrine on human rights and International Law) does not consider "collective" rights for minorities as part of the generally accepted standards on minority protection. Therefore, any potential evolutions on the matter must be accordingly treated with due attention. Last but not least, the issue of the legal regime of minorities in Hungary is also an item on the agenda of the Romanian-Hungarian Joint Committee on national minorities, a bilateral body created 15 years ago in order to monitor the situation of the Romanian minority in Hungary and of the Hungarian minority in Romania, as well to assess the needs of our respective kin-minorities and to propose recommendations for each of the two governments and to both of them. This Commission meets annually and is supposed to adopt Protocols of the annual sessions, negotiated by the Commission on the basis of the previously mentioned assessment. During the 15 years of continuous functioning, the two sides have concluded five protocols during seven sessions of debates and the two parties are now in the process of negotiating the sixth.

An evaluation of the way in which both sides put into practice the recommendations from all adopted Protocols shows that Romania has fulfilled more than 65% (25 completed out of 39) of all recommendations addressed to it between 1997 and 2009. As to the Hungarian side, it has completed less than 50% (out of 35 recommendations, 15 are unaccomplished and 18 were partially accomplished); there is still a number of recommendations that are repeated constantly over the years (parliamentary representation, education in Romanian, ensuring adequate financing and personal for the Romanian mass-media, financing the activity of the Romanian Orthodox Episcopacy).

[2] Paragraph 1 of the Opinion.

[3] Act on the Rights of Nationalities of Hungary, CDL-REF(2012)014, (English version), the official site of the Venice Commission, accessed July 4, 2012, http://www.venice.coe.int/docs/2012/CDL-REF(2012)014-e.pdf.

[4] See article 2 paragraphs 2, 3 of the Act.

The Hungarian Act and the International Standards, as reflected in the Relevant International Conventions and International law Doctrine

Hungary is a party to the International Covenant on Civil and Political Rights of 1966 (article 27 of this treaty refers to national minorities), the Framework Convention for the Protection of National Minorities of 1995 and the European Charter for Regional or Minority Languages of 1992.

The Framework Convention for the Protection of National Minorities is considered as the most relevant international treaty codifying, at European level, the standards on minority protection. Article 3 paragraph 2 of the Framework Convention provides that "Persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others."

Also, the Explanatory Report to the Framework Convention mentions, in its paragraph 13, that "The implementation of the principles set out in this Framework Convention shall be done through national legislation and appropriate governmental policies. *It does not imply the recognition of collective rights*. The emphasis is placed on the protection of persons belonging to national minorities, who may exercise their rights individually and in community with others (see Article 3, paragraph 2). In this respect, the framework Convention follows the approach of texts adopted by other international organizations."[5] Paragraph 37 highlights that paragraph 2 of article 3 "provides that the rights and freedoms flowing from the principles of the Framework Convention may be exercised individually or in community with others. *It thus recognizes the possibility of joint exercise of those rights and freedoms, which is distinct from the notion of collective rights*."[6]

It is thus clear that the Framework Convention does not include the concept of collective rights within the standards embodied in the Convention.[7]

The issue of collective rights was also raised in the context of the Opinion of the Venice Commission on the new Constitution of Hungary,[8] adopted in 2011. In its analysis on article D of the Constitution, the Venice Commission made several comments and expressed certain criticism. Article D has the following content: "Bearing in mind that there is one single Hungarian nation that belongs together, Hungary shall bear responsibility for the fate of Hungarians living beyond borders, and shall facilitate the survival and development of their communities; it shall support their efforts to preserve their Hungarian identity, the assertion of their individual and collective rights, the establishment of their community self-governments, and their prosperity in their native lands, and shall promote their cooperation with each other and with Hungary."

The Venice Commission considered first[9] that there is a "very delicate problem of the sovereignty of States" created by the formula "*Hungary shall bear responsibility for the fate of Hungarians living beyond its borders*", which "might give reason to concerns", being "a rather wide and not too precise formulation". The problem identified by the Commission was with the use of the

[5] Framework Convention for the Protection of National Minorities and Explanatory Report, the official site of the Council of Europe, accessed July 4, 2012, http://www.coe.int/t/dghl/monitoring/minorities/1_atglance/PDF_H(1995)010_FCNM_ExplanReport_en.pdf; italics added.

[6] Idem.

[7] See also Bogdan Aurescu, "Drepturi individuale vs. drepturi colective. Drepturi exercitate individual şi drepturi exercitate împreună cu alţii", *Observator cultural* 434 (2008), accessed July 4, 2012, http://www.observatorcultural.ro/Drepturi-individuale-vs.-drepturi-colective*articleID_20210-articles_details.html.

[8] Opinion on the new Constitution of Hungary, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011) on the basis of comments by Mr Christoph GRABENWARTER, (Member, Austria), Mr Wolfgang HOFFMANN-RIEM (Member, Germany), Ms Hanna SUCHOCKA (Member, Poland), Mr Kaarlo TUORI (Member, Finland), Mr Jan VELAERS (Member, Belgium), Opinion no. 621 / 2011, CDL-AD(2011)016, the official site of the Venice Commission, accessed July 4, 2012, http://www.venice.coe.int/docs/2011/CDL-AD(2011)016-e.pdf.

[9] In paragraph 41 of the Opinion on the new Constitution of Hungary.

term "responsibility", which was found as "unfortunate", as "it may be interpreted as authorizing the Hungarian authorities to adopt decisions and take action abroad in favor of persons of Hungarian origin being citizens of other states and therefore lead to conflict of competences between Hungarian authorities and authorities of the country concerned." Than, the Commission drew attention on the fact that article D of the Constitution mentions that instruments for achieving this "responsibility" are "*inter alia* support to the "*establishment of their community self-governments*" or "*the assertion of their individual and collective rights*"."

These concepts are to be found also in the text of the Act on the Rights of Nationalities of Hungary of 2011, and the analysis on this Act cannot be done adequately without making the connection between the internal and the external dimensions (and instruments) of the action of the Hungarian State for minority protection.

Also, the Commission recalled[10] that according to the existing standards, as included in the Report on the Preferential Treatment of National Minorities by their Kin-State, adopted by the Venice Commission in October 2001, while States may legitimately protect their own citizens during a stay abroad, as indicated in its Report, "responsibility for minority protection lies primarily with the home-States" and that "kin-States also, lay a role in the protection and preservation of their kin-minorities, aiming at ensuring that their genuine linguistic and cultural links remain strong". It also reminded that the same Report considered that respect for the existing framework of minority protection, consisting of multilateral and bilateral treaties, must be held a priority and that unilateral measures by a State with respect of kin-minorities are only legitimate "if the principles of territorial sovereignty of States, *pacta sunt servanda*, friendly relations amongst States and the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination, are respected".

As far as the "collective rights" issue is concerned, the Commission mentioned Article 2 of the Framework Convention (to which Hungary is a Contracting Party), in connection with the provisions of Article Q of the new Constitution, which sets forth that "*Hungary shall ensure harmony between international law and Hungarian law in order to fulfill its obligations under international law*". Thus, the Commission notes that the Explanatory Report to the Framework Convention stresses that the text of the Convention does not accredit the concept of collective rights. Also, the Commission continues: "Nevertheless, it is not up to the Hungarian authorities to decide whether Hungarians leaving in other States shall enjoy collective rights or establish their own self-governments."[11] The Commission expresses its hope[12] that these provisions of the Constitution as well as the subsequent legislation will be applied "in co-operation with the States concerned", and "not as a basis for extra-territorial decision-making".

It is thus a clear link, which has to be taken into account, between the concepts promoted by Hungary in its domestic legislation with regard to the national minorities on its territory and the promotion of the same concepts, by Hungary, abroad, with regard to its kin-minority. That is why the assessment of the compatibility of the Hungarian legislation regarding the protection for the minorities living in Hungary is even more relevant.

It is to be noted that during the debates in the plenary session of the Commission of June 2012, following a proposal for amendment of the Opinion by the author of this article in his capacity of substitute member of the Commission, the draft Opinion was amended so as to exclude any interpretation that the Venice Commission endorses the concept of collective rights for national minorities.

[10] In paragraph 42 of the Opinion on the new Constitution of Hungary.
[11] In paragraph 43 of the Opinion on the new Constitution of Hungary.
[12] In paragraph 44 of the Opinion on the new Constitution of Hungary.

The Opinion on the Act on the Rights of Nationalities of Hungary. Presentation and Analysis

Despite claims on the contrary by the Hungarian authorities, the Opinion contains a rather important number of critic remarks and recommendations on the Act.

One remark made by the Commission refers to the fact that the Act, as a "cardinal law", has a narrow possibility to be revised, as cardinal laws require a two third majority to be amended, "with the ensuing risk for possible future reforms to be stuck in long-lasting political conflicts and undue pressure and costs for society".[13]

The Venice Commission also noted[14] that the overwhelming majority of the transitional provisions contained in Chapter XII of the Act contain substantial rules relating, in particular, to educational and cultural rights of nationalities, to the status and remuneration of members of nationality self-governments of different levels etc. In the view of the Commission, this procedure complicates the reading and understanding of the law. The Commission considered that these provisions dealing with organizational matters are also of particular importance since the creation and the operation of nationalities' institutions is in Hungary crucial for the implementation of the minority protection measures and the enjoyment of the guaranteed rights.

The Commission also considered[15] that the Act contains "too specific and detailed provisions, of a merely technical and procedural nature, which could have been set out by the ordinary legislation". The Opinion claims that "such a detailed regulation reduces the possibility of adapting the law in the light of the experience in its application and may lead to undue restriction of the free exercise by the minorities of their rights, In addition, despite their very detailed nature, important provisions of the law lack clarity and their inter-relation is sometimes difficult to understand." The Opinion also notes that "different dates are set up for the entry into force of different provisions of the Act, which "adds to its length and complexity and may make its interpretation and application difficult."[16]

Another issue tackled by the Opinion refers to the changed terminology used by the Act in respect to national minorities: if the 1993 Act used the term "national minority", the 2011 Act employs the formula "nationality". The Hungarian authorities did not provide for a clear explanation why this modification was performed. It is not just a formal change. One can only infer that this change is connected, again, with the approach of Hungary in relation with its kin-minority abroad.

Indeed, for Hungary, as it was stated in its new Constitution, there exists a constitutional "responsibility" for the Hungarian minorities living in neighboring countries (see article D of the new Constitution, cited above). At the same time, it was a constant approach in the foreign policy of Hungary that its kin-minorities living abroad form part of the "Hungarian nation as a whole": this approach was at the essence of the controversial Law on Hungarians living in neighboring countries of 2001.[17] This wording was included in the Preamble of that Law, and it was criticized for that

[13] In paragraph 25 of the Opinion on the Act.
[14] In paragraph 26 of the Opinion on the Act.
[15] In paragraph 27 of the Opinion on the Act.
[16] In paragraph 28 of the Opinion on the Act.
[17] See, for details, Adrian Nastase, Raluca Miga Besteliu, Bogdan Aurescu, Irina Donciu, *Protecting Minorities in the Future Europe – between Political Interest and International Law* (Bucharest**:** R.A. Monitorul Oficial, 2002); Bogdan Aurescu, "Bilateral Agreements as a Means of Solving Minority Issues: The Case of the Hungarian Status Law", *European Yearbook of Minority Issues*, Martinus Nijhoff Publishers, European Academy of Bolzano, Vol. 3 (2003-2004): 509-530; Bogdan Aurescu, ed., *Kin-State Involvement in Minority Protection. Lessons Learned,* International Law Section of ADIRI and Venice Commission (Bucharest: R. A. Monitorul Oficial, 2005); Bogdan Aurescu**, "**Cultural Nation versus Civic Nation: Which Concept for the Future Europe? A Critical Analysis of Recommendation No. 1735/2006 of the Parliamentary Assembly of the Council of Europe on The Concept of Nation**"**, *European Yearbook of Minority Issues*, Martinus Nijhoff Publishers, European Academy of Bolzano, Vol. 5 (2005-2006): 147-159.

reason by various European bodies, including by the European Commission. This concept of the "big cultural/ethnic nation" means that the Hungarian nation is formed by the Hungarian ethnic majority of Hungary, as well as, by extension on the territories of the neighboring States, by the Hungarian communities living there. As a consequence and as a logic step in this conceptual line of thinking, the Hungarian communities in neighboring countries are not "minorities" (in relation to the ethnic majority of the home-State), but communities which "belong" to the Hungarian nation, parts of it. So, they are "nationalities" – components of the Hungarian (bigger) nation. That is why it appears logic for the minorities in Hungary not to be seen as such, but as "nationalities", in order to justify logically the official approach towards the Hungarian minorities abroad. It is the same logic of parallelism that can be noticed as far as the organization of national minorities in Hungary: in order to justify the claim for collective rights and cultural and territorial autonomy on ethnic basis for its kin-minority abroad, Hungary introduced since 1993 the concept of self-governments for the national minorities of Hungary, which are deemed to implement the "collective" rights of these communities in Hungary.

The Venice Commission did not elaborate on the issue. The opinion only remarked that there is no definition of national minority conventionally agreed at international level: the Framework Convention did not include such a definition, so the matter of terminology as well as the definition at domestic level is a matter of discretion of the respective State. The opinion mentions that "The States Parties to this Convention therefore have a margin of appreciation in this respect in order to take into due account the specific circumstances prevailing in their countries.", but this margin should be "in accordance with general principles of international law and the fundamental principles set out in art. 3 FCNM"." The Commission underlines that the margin of appreciation is "however not unlimited, so that the implementation of the Framework Convention is not a source of arbitrary or unjustified distinctions."[18]

As far as the definition included in the Law is concerned ("*all ethnic groups resident in Hungary for at least one century are nationalities which are in numerical minority amongst the population of the State, are distinguished from the rest of the population by their own language, culture and traditions and manifest a sense of cohesion that is aimed at the preservation of these and at the expression and protection of the interests of their historically established communities*", set forth by article 1 paragraph 1 of the Act), the Commission criticized certain elements: the 100 years criterion, which in the view of the Commission excludes the so-called "new minorities", the strict link to the territory, which the Commission considers as problematic as far as Roma are concerned, and the citizenship requirement (which is not obvious, but results from the Constitution and other provisions of the Act).[19]

This criticism is the expression of a certain trend in the doctrine on the matter to extend as much as possible the minority protection to other groups than the traditional minorities. If the observation related to the difficulties that Roma might face, if the link to the territory is strictly followed, is founded, and the 100 years criterion (or similar provisions in other legislations) is generally linked to financial restrictions (which do not allow in practice for the application of all facilities to every minority group), the one related to citizenship is, to my view, subject to a more nuanced approach. The Opinion refers to the conclusions of another important study of the Commission, of 2006, that is the Report on non-citizens and minority rights.[20]

[18] In paragraph 31 of the Opinion on the Act.

[19] In paragraphs 32-35 of the Opinion on the Act.

[20] Report on non-citizens and minority rights adopted by the Venice Commission at its 69th plenary session (Venice, 15-16 December 2006), on the basis of comments by Mr Gudmundur ALFREDSSON (Expert, Iceland), Mr Bogdan AURESCU (Substitute Member, Romania), Mr Sergio BARTOLE (Substitute Member, Italy), Mr Pieter van DIJK (Member, the Netherlands), Ms Mirjana LAZAROVA TRAJKOVSKA (Member, "The former Yugoslav

The Commission reminds[21] that according to this Report, it is recommended that "[*c]itizenship should therefore not be regarded as an element of the definition of the term "minority", but it is more appropriate for the States to regard it as a condition of access to certain minority rights*" and found appropriate to "*encourage those States which have adopted constitutional provisions and/or entered a formal declaration under the FCNM restricting the scope of protection for minorities to their citizens only, to consider, where necessary, the possibility of extending on an article-by-article basis, the scope of protection of the rights and facilities concerned to non-citizens*". This is not entirely accurate. The first version of the 2006 Report, to which the author of this paper was one of the co-rapporteurs, intended to recommend to States to simply remove the citizenship criterion from the definition of national minority adopted at domestic level, but at the end, as a result of the debates inside the Commission, concluded that "where necessary", to extend the protection to non-citizens. So, it is not an automatic conclusion that citizenship should be deleted from the conditions of a definition of a national minority.[22] As a matter of fact, the citizenship of the home-State provides for the best protection for a person belonging to a national minority, as it grants access to political rights such as to vote and to be elected, thus ensuring participation to decision-making.

Further, the Commission welcomes that the Act provides for a certain procedure for new ethnic groups to be included in the scope of the Act, beyond the 13 national minorities recognized as such by the Act.[23]

Another matter examined by the Commission was about the accurate collection of data regarding the ethnic making-up of the population of Hungary. In this regard, the Commission stresses in the Opinion the need for the census to be organized in such a manner so as to ensure that the data collected are correct. In paragraph 43 of the Opinion, the Commission noted that the choice – made by the Act – to use the data collected in the census as a basis for elections for the self-governments "has raised concern and debate in Hungary, notably because the census was held prior to the adoption of the new Act and that the members of Hungary's nationalities were – as indicated by their representatives – not adequately informed of the impact of the data collected through the population census on the minority protection policies." The Commission also recalled, in paragraph 44, "that awareness-raising activities among nationality communities, well in advance of the population census and in co-operation with nationality representatives, are instrumental for the proper understanding of the census' aims and usefulness and of the importance of collecting data on the ethnic composition of the population. These are also an excellent opportunity to inform the population about the national safeguards and international standards for the protection of personal data." But the Commission also recommended[24] for other sources to be used as well: sociological and other studies and surveys for obtaining data on the numerical size of the nationality communities and their relative situation. This should also enable, in designing and implementing minority protection policies, a more flexible reference to the actual number of the concerned persons in between censuses

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Republic of Macedonia"), Mr Giorgio MALINVERNI (Member, Switzerland), Mr Franz MATSCHER (Expert, Austria), in consultation with the Advisory Committee on the Framework Convention for the Protection of National Minorities, the Committee of Experts of the European Charter for Regional or Minority Languages, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, the OSCE High Commissioner on National Minorities, the Office of the UN High Commissioner for Human Rights, Study no. 294/ 2004, CDL-AD(2007)001, the official site of the Venice Commission, accessed July 7, 2012, http://www.venice.coe.int/docs/2007/CDL-AD(2007)001-e.pdf.

[21] In paragraph 36 of the Opinion on the Act.

[22] See Bogdan Aurescu, "The 2006 Venice Commission Report on Non-citizens and Minority Rights – Presentation and Assessment", *Helsinki Monitor. Security and Human Rights*, Martinus Nijhoff Publishers, Vol. 18, No.2 (2007): 150-163.

[23] In paragraphs 38 and 39 of the Opinion on the Act.

[24] In paragraph 45 of the Opinion on the Act.

(held every ten years)." Indeed, the last census organized in Hungary in 2011 has raised certain concerns as far as the accurate manner of collecting ethnic data.

This issue is important, because, as already mentioned above, according to the Act, the ethnic data collected in the census are relevant for creating self-governments of national minorities: "local self-government elections can only be held in settlements where a nationality has a genuine presence." In practice, the issue is crucial, as the former legal framework of Hungary has generated the phenomenon of "ethno-business" – the formation of minority self-governments by persons who have nothing to do with the respective minority, which greatly affected the situation of the Romanian minority. The situation was prompted by the fact that the previous legislation in force did not include any provision to make sure that the electors or the candidates for self-governments of a certain national minority do belong to the respective minority. Such a "filtering" element may be the certification of minority language proficiency/knowledge as mother tongue.

The 2011 Act introduces such a provision: "The conditions to exercise the passive electoral rights are strengthened: only an elector recorded in the nationality register who is eligible at the local elections and who has not been a candidate of another nationality in general or by-elections, *who speaks the language of the nationality and is familiar with its culture and traditions* can be a candidate in local council nationality election (article 54)."[25] But the Commission noticed that the Act does not include any concrete specification on who and how shall verify whether or not this last requirement is fulfilled. Following a proposal by the author of this paper, as substitute member of the Commission, put forward in the June 2012 plenary session, the Opinion included a specific recommendation to this purpose, in paragraph 48: "In order to guarantee legal certainty in this respect, the Act should contain some specific rules on the certification of the compliance with this requirement."

Regarding the overall regime of self-governments in the Act, the Commission noticed, in paragraph 50, the too detailed regulation of many procedural aspects: "the rules governing the operation of nationality self-governments and of their internal structures appear to be excessively detailed. This is the case *inter alia* for the filling of vacant mandates, for the by elections, the transformation of nationality self-governments and their coming into being and cessation, the convening of the meetings, their publicity, the required quorum and majorities for the adoption of decisions and even the contents of the minutes. In the Commission's view, many of these organizational and/or procedural rules might be set out in the relevant internal regulations. More generally, the Commission is concerned that such a detailed and not always clear regulation may negatively affect the autonomy of nationality self-governments and lead to undue restriction of the free exercise by the persons belonging to nationalities of their rights." Indeed, even if they are supposed to be autonomous, the self-governments are – according to the Act – to be supervised by the government: "the exercise of the said supervisory powers by the executive might raise concerns: first, given the very detailed regulation of the operation and functioning of nationality self-governments referred to above, it would be rather difficult for the latter to ensure full compliance with the law and thus to avoid undue and excessive interference by the executive; and second, the Act does not specify how this supervision shall be exercised."[26]

As far as the issue of education, as set forth in the Act, the Commission welcomed in general the provisions of the Act, but noticed, in paragraph 59 of the Opinion, that "the Act does not require the establishment of a fixed and permanent number of educational institutions covering all the levels of the nationality education, but it entrusts the competent authorities to arrange year by year the solution enabling them to respond to the needs and thus comply with the obligation of the nationality

[25] In paragraph 48 of the Opinion on the Act (italics added).
[26] See paragraph 52 of the Opinion on the Act.

education. This is confirmed by art. 83.7 of the Act CXC of 2011 on national public education, which provides for an yearly investigation of the "education held in the nationality language"." The Commission expressed the opinion that this approach "may result in uncertainty with regard to the stability and continuity of minority education and have a negative impact on the parents' choice as to their children education (nationality language education//Hungarian language education)."

Starting from the regime provided for in the Act, according to which the "competent authority" may be either the public authority or the self-government, which have the right to establish and maintain institutions of public education and/or to take over already established such institutions (article 24 (1) of the Act), the Opinion mentions the fact that the "inter-relations between the provisions regulating the conditions required for establishing nationality education schools/classes/groups (article 22 (5)) and those dealing with the actual educational self-governance of the nationalities (article 24 (1)) are not sufficiently clear and may lead to misunderstanding as to the distribution of tasks between nationalities' self-governances and the public authorities."[27]

Further, the Commission criticized the degree of discretion introduced by article 160 of the Act, according to which education in mother tongue and teaching of the mother tongue are subject, in addition to the already mentioned conditions, to the local opportunities and needs. So, the Opinion asks, in paragraph 62, for "increased clarity with regard to the authority entitled to decide and (to) the participation of nationality self-governments in that decision." The same clarity is required as to the crucial issue of the funding of education for national minorities (article 26, article 30 of the Act), in particular as regards the resources allocated by the State – and the modality for accessing them - to the nationality self-governments, which are running educational establishments. "Since it entrusts nationality self-governments with operating rights of public educational institutions, the Act should provide for detailed and explicit rules with regard to their funding and/or make clear reference to the applicable provisions in other laws."[28]

The next issue examined by the Opinion was the cultural development of national minorities and especially their access to media. The Commission was concerned with the lack of clarity of the provisions regarding the transfer to self-governments of the operating rights of cultural institutions that fulfill nationality cultural duties "in at least seventy-five per cent" and satisfy the cultural needs of the nationality concerned "in at least seventy-five per cent".[29]

But it was also particularly concerned with the problem of financing of the media for national minorities. In paragraph 66 of the Opinion, the Commissions found "*regrettable that the financial dimension of the mechanism set up by the Act, essential for its effective implementation and for giving life to the minorities' cultural autonomy, is covered by one single provision*, article 39 (6), which only makes a general reference to the Act on the central budget. *This is especially important since, during the last period, the national minorities have experienced in Hungary serious financial difficulties, having an adverse impact on the implementation of numerous cultural projects and on their prospects in this field.* In the Commission's view, *adequate mechanisms for accessing state funds should be established, in consultation with nationalities' representatives*, as part of the implementation of the Act. The adoption of specific and detailed financial rules and procedures could be one important way to provide clarity in this respect."[30]

Indeed, it is an important issue including for the Romanian minority in Hungary: last year, allegedly due to financial constraints, the Romanian Studio of the Hungarian Radio and Television Society has been downsized, although in the 2009 Protocol of the Joint Committee on national minorities the Hungarian side has acknowledge the clear need for more positions to the Romanian radio.

[27] In paragraph 60 of the Opinion on the Act.
[28] Paragraph 62 of the Opinion on the Act.
[29] Paragraph 65 of the Opinion on the Act.
[30] Italics added.

Furthermore, the Commission endorsed and reiterated the views of the Advisory Committee of the Framework Convention which expressed concern that "minorities' programmes often still are broadcasted at off-peak times when few people are able to listen or to watch them".[31] The Commission considered important that the Hungarian authorities "*find ways to provide more effective guarantees for the nationalities in this field*, including in the specific regulations of the public radio and television services."[32]

As far as the language rights provided for by the Act, the Opinion reiterates the concerns expressed already as to the use of census data "as a precondition for the implementation of the nationalities' linguistic rights. This concerns in particular those rights whose implementation has a territorial dimension, such as the use of minority languages within and with the local public administration and for topographical and other local indications."[33] Indeed, the Act uses as a reference the ratio registered in the census of a national minority within the local population in order to enjoy language rights: "*ten per cent* for the use of the nationality language by the local administration for its documentation and for broadcasting regular nationality public service programmes, and *twenty per cent* for the decisions of the board of representatives, the bilingual inscriptions and the recruitment of persons with minority language knowledge within the local public administration."[34] Or, during the 2011 census, as acknowledged by the Commission in the same paragraph 72, there were "insufficient information available, when the census was conducted, on the importance and relevance of the ethnic data for the implementation of minority protection measures" and this situation raised concerns among the national minorities.

The Commission also tackled the problem of the use of the minority language within the bodies of the self-governments: the current practice shows a trend of almost exclusive use of Hungarian, to the detriment of the minority language (and this is the case also as far as the Romanian self-governments). The Commission reiterated[35] that "it is the responsibility of the legislator to strike a fair balance between the protection of the right to use the minority language and the protection of the official State language". It took note, in this sense, in the same paragraph 73, "that the law provides for the use of the mother tongue in the boards of representatives of local municipalities and in the minutes and decisions of these boards alongside the Hungarian language (article 5 § (4) and (5))." The Commission also stressed in this respect that financial resources should be provided to ensure translation, when it is required by the law.

Paragraph 74 of the Opinion refers to the important issue of ensuring representation of national minorities in the Hungarian Parliament. The same session of June 2012 of the Commission also adopted an Opinion[36] on Act CCIII of 2011 on the elections of Members of Parliament of Hungary, adopted in December 2011[37]. This piece of legislation sets forth the parliamentary

[31] Advisory Committee on the Framework Convention for the Protection of National Minorities, Third Opinion on Hungary, adopted on 18 March 2010, ACFC/OP/III(2010)001, § 93-95, accessed July 7, 2012, http://www.coe.int/t/dghl/monitoring/minorities/3_fcnmdocs/PDF_3rd_OP_Hungary_en.pdf.

[32] Paragraph 68 of the Opinion on the Act.

[33] Paragraph 71 of the Opinion on the Act.

[34] Paragraph 72 of the Opinion on the Act.

[35] In paragraph 73 of the Opinion on the Act.

[36] Joint Venice Commission - OSCE/ODIHR Opinion on the Act CCIII on the Elections of Members of Parliament of Hungary, adopted by the Council for Democratic Elections at its 41st meeting (Venice, 14 June 2012) and the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), on the basis of comments by Mr Ugo MIFSUD BONNICI (Member, Malta), Mr Ángel SÁNCHEZ NAVARRO (Substitute Member, Spain), Mr Kåre VOLLAN (Expert, Norway), Mr Denis PETIT (Expert, OSCE/ODIHR), Opinion No. 662 / 2012, CDL-AD(2012)012, accessed July 7, 2012, http://www.venice.coe.int/docs/2012/CDL-AD(2012)012-e.pdf.

[37] Act CCIII on the Elections of Members of Parliament of Hungary, CDL-REF(2012)003, accessed July 7, 2012, http://www.venice.coe.int/docs/2012/CDL-REF(2012)003-e.pdf.

representation of national minorities of Hungary through a system of "preferential mandates" and "spokespersons" (for those national minorities that failed to meet the conditions for getting a preferential mandate). This system is supposed to be applied for the first time during the 2014 general parliamentary elections.

The issue of parliamentary representation of the Romanian minority of Hungary was constantly raised in the framework of the Romanian-Hungarian Joint Committee on national minorities.

In this context, one has to remind the solution chosen by the Romanian legislators to ensure the parliamentary representation of national minorities. In Romania, all recognized national minorities (20) have one representative, with full powers of vote, in the Chamber of Deputies, elected through a special procedure. If the national minorities have a larger number of persons, such as the Hungarian minority, they can be elected through the normal procedure and can form a separate Parliamentary Group. In the current legislature (2008-2012), there are 31 members of Parliament (9 senators and 22 deputies) representing the Hungarian minority and another 18 deputies representing the other national minorities.

But the new piece of legislation of 2011 on the elections of Members of Parliament of Hungary, adopted in December 2011, does not provide for an equal framework for all minorities, as is the case in Romania, but favours only larger minorities.

The new Hungarian legislation states that a deputy of the minority can be elected if it has obtained one quarter of the votes obtained by a normal deputy. In case this does not happen, that minority will be represented by a "spokesperson", which will not have the right to vote in the Parliament. For the Romanian minority, which is a small minority, to be fully represented in the Parliament, the general presence at the voting stands will have to be extremely reduced and, at the same time, the entire minority must vote. A simulation based on the turnout in the 2010 Hungarian elections shows that the Romanian minority deputy will have to get more than 14.000 votes to be elected as a member with full rights. Given that our minority has approximately less than 8000 member in total, there is basically no possibility for it to obtain a full mandate.

I believe that this situation of discrimination between smaller and larger national minorities of Hungary as far as the rights of the minority representatives in the Hungarian parliament should be eliminated, by providing the same voting rights for both representatives with preferential mandate, and spokespersons. In the case of Romania, which may be considered as a European model in this respect, full participation of minorities in domestic political decision-making increased mutual confidence between majority and minorities, and transformed the organizations of national minorities into active participants in building the democratic system in Romania.

Another issue discussed in the Opinion referred to the fact that the new Act provides for a deputy ombudsman (commissioner for fundamental rights) to be in charge with national minorities. In the previous constitutional framework, there was a specialized ombudsman for the protection of minority rights. So, the Commission states in paragraph 77 that "the abolition of the position of an independent, separate and autonomous minority ombudsperson has raised some concerns" and that "it is however important that the reorganization of the institution of the ombudsperson(s) does not entail a lowering of the existing level of guarantees for the protection and promotion of rights in the field of national minority protection."

The Conclusions of the Opinion also acknowledge, besides the positive aspects of the Act, the fact that "the new framework for minority protection as provided by the Nationalities Act appears, however, to be particularly complex and to be at times, excessively detailed and nonetheless sometimes to lack legal clarity. This may result in difficulties in its implementation and have an adverse impact on the autonomy provided by the act to Hungary's nationalities. In particular, the overly-detailed regulation of nationality self-governments' operation and supervision, as well as the

sometimes unclear provisions regulating specific areas, may lead to undue restriction of the free exercise by the minorities of their rights and by nationality self-governments of their competences." In paragraph 85, the Opinion also mentions that the status of the Act as a cardinal law, requiring a special majority for its amendment, "may also be a source of difficulties in the context of possible future amendments."

Conclusions

The Act on the Rights of Nationalities of Hungary of 2011, as assessed by the Venice Commission in its Opinion of June 2012, has both positive, and problematic provisions.

Among the latter, *inter alia*, the fact that it is a "cardinal" law, thus quite difficult to be amended, it sometimes includes an excessively detailed regulation, it changes the terminology from "national minority" to "nationality", with important consequences to the manner of projecting the Hungarian interests as far as the Hungarian minorities abroad, it includes a narrow definition of the "nationality", thus excluding the new minorities and creating some difficulties for the Roma, who are not (by tradition) strictly linked to territory, it does not include sufficient guarantees as to the accuracy of ethnic data collection, especially by censuses, it does not provide for concrete measures to ensure the verification of the mother tongue knowledge by minority electors and candidates for self-governments, the education regime has a degree of uncertainty with regard to the stability and continuity of minority education and might have a negative impact on the parents' choice as to their children education, it does not address in an appropriate manner the problem of financing of the media for national minorities, and so on.

All these issues are to be seen in connection with other pieces of legislation of Hungary, like the Act on elections, which creates a situation of discrimination between smaller and larger national minorities of Hungary as far as the rights of the minority representatives in the Hungarian parliament.

Of course, these shortcomings should be addressed by further amending the Act, as keeping the Act as such might have consequences on the adequate protection of the rights of persons belonging to the 13 national minorities recognized in Hungary, among which the Romanian minority. Romania should continue to make good use of the bilateral mechanisms in place, especially the Joint Committee on national minorities and its Protocols, in order to promote further improvements of the legal framework on national minorities in Hungary, as well as a fair implementation of it as far as the Romanian minority is concerned. In doing so, a point of reference will be of course the degree of protection granted to the minorities of Romania, including to the Hungarian minority, whose participation in the society and decision-making in the political life was and will be appreciated.

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THE ROLE OF THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS IN THE NEW EUROPEAN CONTEXT

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Abstract

The Charter of fundamental rights of the European Union was proclaimed by the European Commission, the European Parliament, and the Council of the European Union at the European Council held at Nice on the 7 December 2000, was modified on 12 December 2007 at Strasbourg, and, today, according to article 6 in the Treaty on European Union, the Charter gained the juridical value of an constitutive European treaty. The way it has been conceived, the content of the Charter reflects the Union's desire for the autonomy of the juridical order. The Charter clearly states the fact that it solely seeks to protect the fundamental rights of the individuals with regard to acts undertaken by the EU institutions and by the member states in applying of the Union treaties. A protocol to Lisbon Treaty introduces specific measures for the United Kingdom and Poland seeking to establish national exceptions to the application of the Charter. The new treaty provides a new legal basis for accessing of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

Keywords: *autonomy, rights, courts, institutions, European Convention*

1. Introduction:

The protection of the human rights at the European Communities and European Union level has been increased in the same time and in a complementary way with the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights.

The Cologne European Council (3-4 June 1999) entrusted the task of drafting the Charter to a Convention and she is is the end-result of a special procedure, which is without precedent in the history of the European Union and may be summarized as follows:

- the Convention held its constituent meeting in December 1999*)* and adopted the draft on 2 October 2000,
- the Biarritz European Council (13-14 October 2000) unanimously approved the draft and forwarded it to the European Parliament and the Commission,
- the European Parliament gave its agreement on 14 November 2000 and the Commission on 6 December 2000,
- the Presidents of the European Parliament, the Council and the Commission signed and proclaimed the Charter on behalf of their institutions on 7 December 2000 in Nice[1].

The Nice European Council decided to consider the question of the Charter's legal status during the general debate on the future of the European Union, which was initiated on 1 January 2001. The Lisbon Treaty guarantee the enforcement of the Charter of Fundamental Rights, which are

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[1] http://www.europarl.europa.eu/charter/default_fr.htm#

legally binding not only on the Union and its institutions, but also on the Member States as regards the implementation of Union law.

The European Union Charter of Fundamental Rights sets out in a single text, for the first time in the European Union's history, the whole range of civil, political, economic and social rights of European citizens and all persons resident in the EU.

They are based, in particular, on the fundamental rights and freedoms recognized by the European Convention on Human Rights, the constitutional traditions of the EU Member States (see the case of the European Court of Justice - *Internationale Handelsgesellschaft, 11/70)*, the Council of Europe's Social Charter, the Community Charter of Fundamental Social Rights of Workers and other international conventions to which the European Union or its Member States are parties[2].

2. Content

In the doctrine it was sustained the idea that "the purpose of the Charter was that to emphasize the importance of the fundamental rights and their content in a easy way of understanding for the European citizens, in a critical moment, when the European construction was facing with a serious democratic deficit[3], obtaining thus, in our opinion, a more revealing nature than innovative*;* we are already mentioned that some of the rights of the Charter have been consecrated and guaranteed by the primary and secondary community law and by case-law of the European Court of Justice.

The Charter lists all the fundamental rights under six major chapters: *Dignity, Freedom, Equality, Solidarity, Citizenship and Justice*, in the light of the social and economic European Union priorities and in the respect of the Union approach values. The Preamble of the Charter sets the person in the core of European actions, affirms the European citizenship and the establishment of the area of freedom, security and justice.

Thus, being the result of an original procedure of elaboration, the Charter also confirms the fact that the EU started an unprecedented renewal process of the human rights protection4.

At present, the article 6 of the European Union Treaty, mention that "the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties". So, the Charter is compulsory for all 27 Member States, with some exceptions[5].

The Charter will be modified in the same way as the treaties, in accordance with the procedure stated in the new article 48: "*The Treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures*".

Also, the Charter will get the same features as the treaty's provisions in connection with the national law: priority/preeminence, direct effect (which will not apply to all treaty's provisions), immediate applicability, direct applicability. We consider that the Charter's provisions must get the direct effect in order to assure the effectiveness and the respect of the fundamental rights, because the principle of direct effect enables individuals to immediately invoke an European provision before a

[2] Article 6.3. "*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*".

[3] R.M Besteliu, C.Brumar, *Protecţia internaţională a drepturilor omului*, Note de curs, Ed a IV-a revizuită, (Ed. Universul Juridic, Bucureşti, 2008), p. 88

[4] F. SUDRE, *Drept european şi internaţional al drepturilor omului*, (Ed. POLIROM, Bucureşti, 2006), p. 126

[5] See the Protocol (no 30) on the application of the Charter of fundamental rights of the European Union to Poland and to the United Kingdom which is annexed to the Lisbon Treaty.

national or European Court of Justice[6]. The direct effect principle therefore ensures the application and effectiveness of European law in the Member States. When a Member State does not respect fundamental rights when implementing Union law[7], the Commission, as guardian of the Treaties, has powers of its own to try to put an end to the infringement and may, if necessary, take the matter to the Court of Justice (action for failure to fulfill an obligation). So, in accordance with the Charter's provisions, Member States are bound by the Charter only when they are implementing Union law.

However, the European Court of Justice defined several conditions in order for a European legal act to be immediately applicable. In addition, the direct effect may only relate to relations between an individual and a Member State or be extended to relations between individuals. The article 51 of the Charter state, in this view, that "*the provisions of this Charter are addressed to the Member States only when they are implementing Union law*"; it is a mention "more accurate and rigorous"[8] than the judgment of the European Court which determines the respect of the European law only when the Member States operate within the community law.[9]

In its Communication of 19 October 2010 on a *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union,* the Commission committed itself to strengthening the "fundamental rights culture" (a innovative concept, in our opinion) at all stages of the procedure leading to the adoption of legislation and other acts.

The Commission will check [10] the respect of the fundamental rights at the moment of the elaboration of its legislative proposal. Non-legislative measures adopted by the Commission, such as decisions, are also subject to checks on their compatibility with the Charter during drafting, even if there is no impact assessment. The impact assessments that accompany Commission proposals examine the impact of the proposal on fundamental rights when such an assessment is relevant. After the impact assessment, when the draft legislative proposal (or delegated/implementing act) is prepared, the Commission will check its legality, and in particular its compatibility with the Charter. The Explanatory Memorandums accompanying sensitive proposals will be reinforced by a summary of all the fundamental rights aspects contained in the impact assessment and the legislative proposal.

We consider that the Charter has an important external feature and the external action of the Union must take into account their provisions. Furthermore the title of Charter - "of the European Union" and not of the Union's institutions indicates its external dimension, which reaffirms the rights as they result „from the constitutional traditions and international obligations common to the Member

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[6] http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14547_en.htm
The direct effect of European law is, along with the principle of precendence a fundamental principle of European law. It was enshrined by the Court of Justice of the European Union. It enables individuals to immediately invoke European law before courts, independent of whether national law test exist.

[7] 53. Declaration by the Czech Republic on the Charter of Fundamental Rights of the European Union:
The Czech Republic stresses that its provisions are addressed to the Member States only when they are implementing Union law, and not when they are adopting and implementing national law independently from Union law.

[8] M. DONY, *Droit de l'Union Europénne*, (Edition de l'Université de Bruxelles, Bruxelles, 2008), p. 50

[9] **CJCE**, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft,* case 5/88, 13 July 1989

[10] "Fundamental Rights "Check-List":
1. What fundamental rights are affected? 2. Are the rights in question absolute rights (which may not be subject to limitations, examples being human dignity and the ban on torture)? 3. What is the impact of the various policy options under consideration on fundamental rights? Is the impact beneficial (promotion of fundamental rights) or negative (limitation of fundamental rights)? 4. Do the options have both a beneficial and a negative impact, depending on the fundamental rights concerned (for example, a negative impact on freedom of expression and beneficial one on intellectual property)? 5. Would any limitation of fundamental rights be formulated in a clear and predictable manner? 6. Would any limitation of fundamental rights: - be necessary to achieve an objective of general interest or to protect the rights and freedoms of others (which)? - be proportionate to the desired aim? - preserve the essence of the fundamental rights concerned?"

States"; also, the Charter isn't addressed only to the European citizens, but also to the citizens of the third countries (article 15) or to all persons (article 2). In the context, the respect of the fundamental rights will be mandatory for the candidates or potential candidates States for the European Union accession (see the accession of Turkey).

The respect of the Charter will represent an important element within the external relations of the Union with the third countries, in particular within the development cooperation and the humanitarian aid. Every international treaty which will be concluded by the Union must be compatible with the Charter, as a treaty of the Union (article 218 of the Treaty on the Functioning of the European Union), and it will be interpreted in accordance with their provisions. Since 90's all agreements on trade or cooperation with non-European Union countries contain a clause stipulating that human rights - the conditionality clause. There are now more than 120 such agreements and the most comprehensive is the Cotonou Agreement – the trade and aid pact which links the European Union with 79 countries in Africa, the Caribbean and Pacific (the ACP group). If any ACP country fails to respect human rights, European Union trade concessions can be suspended and aid programs curtailed. The European Union sees democratic political structures as a precondition for reducing poverty – the main objective of its overseas development policy and it applies the same principles to other partner countries[11]. So, this human rights clause's can facilitate the respect of these rights or can impose that the third countries should comply with them.

We consider that the Charter will activate the European Union Agency for Fundamental Rights, an advisory body of the European Union, which was established in 2007 by a legal act of the European Union[12]. This Agency helps to ensure that fundamental rights of people living in the EU are protected. It does this by collecting evidence about the situation of fundamental rights across the European Union and providing advice, based on evidence, about how to improve the situation. The European Union Agency for Fundamental Rights also informs people about their fundamental rights. In doing so, it helps to make fundamental rights a reality for everyone in the European Union. The Agency should refer in its work to fundamental rights within the meaning of article 6(2) of the Treaty on European Union, including the European Convention on Human Rights and Fundamental Freedoms, and as reflected in particular in the Charter of Fundamental Rights, bearing in mind its status and the accompanying explanations. It considers that the close connection to the Charter should be reflected in the name of the Agency.

Another important European institution - The European Parliament appreciated the new statute of Charter in its *Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008*, which mentions that "the Charter constitutes a common basis of minimum rights, and the Member States cannot use the argument that the Charter would provide a lower level of protection of certain rights than the safeguards offered under their own constitutions as a pretext for watering down those safeguards". This Resolution welcomes article 53 of the Charter, which will enable the European Court of Justice to develop its case-law on fundamental rights, thereby giving them a basis in law which is vitally important in the context of the development of European Union law and stresses that the judiciary in the Member States have a vital role to play in the enforcement of human rights; urges the Member States to introduce a system of continuous training for national judges on systems for the protection of fundamental rights.

The Charter has also an important role in accessing of the European Union to the European Convention on Human Rights and Fundamental Freedoms in accordance with the article 6 of the Lisbon Treaty (European Union Treaty), which statues that "*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall*

[11] http://europa.eu/pol/rights/index_en.htm
[12] http://fra.europa.eu/fraWebsite/home/home_en.htm

not affect the Union's competences as defined in the Treaties". Also, the European Parliament welcomes, in its Resolution of 14 January 2009, "the prospect of the Union acceding to the European Convention, even if that accession does not bring about fundamental changes, given that "when questions relating to the rights and freedoms enshrined in the Convention are raised before the Court of Justice of the European Communities, the latter treats the European Convention as forming a genuine part of the European Union's legal system".

This accession will assure "a increased coherence of the human rights protection in Europe, because the European Court of the Human Rights could guarantee the harmony between the Convention and the Charter, checking the interpretation of the Convention by the judge of Luxembourg when apply the Charter"[13]; this value judgment imposes an analysis on the role of the two Courts in the field of human rights.

The Charter relaunched the idea of the accession to the Convention which had a specifically evolution at the level of the Council of Europe and the European Communities. The Court of Luxembourg opinion's – 2/1994[14] stated that the European Union has been not prepared, at that moment, for accessing, because the "accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond" the treaty's provisions (article 235).

At present, the European Convention on Human Rights is not directly bound on European Union institutions, but it will be once the process of accession to the Convention will be finalized; all Member States of the Union are directly bound by the Convention. Therefore, all proposals for legal acts of the Union that need to be applied by Member States must fully respect the Convention.

We mentioned already that many of the rights contained in the Charter correspond to rights guaranteed by the Convention, but it also protects certain rights that are not covered by the European Convention. The Charter precises that "*the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions*".

Furthermore the Court of Strasbourg stated, in its case-law, the Charter as external source. For example, the article 9 of the Charter, which guarantees the right to marry ("*The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights*") "departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women"[15]. Or a dissenting opinion of a judge of

[13] F. SUDRE, *Drept european şi internaţional al drepturilor omului,(* Ed. POLIROM, Bucureşti, 2006), p. 130

[14] **CJCE**, *opinion no. 2/94* from 28 march 1996. „It is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the Court has stated that the Convention has special significance (see, in particular, the judgment in Case C-260/89 *ERT*. Respect for human rights is therefore a condition of the lawfulness of Community acts".

[15] **CEDO**, *Christine Goodwin v. United Kingdom,* no. 28957/95, 7 July 2002. The applicant claims a violation of Article 8 of the Convention, the relevant part of which provides as follows:

"1. *Everyone has the right to respect for his private ... life...*

the Court of Strasbourg[16] stated that it is obvious that the premise of the debate on genetic safeguards in a number of recent conventions and the prohibition on the reproductive cloning of "human beings" in the Charter of Fundamental Rights of the European Union (Article 3 § 2, final sub-paragraph) is that the protection of life extends to the initial phase of human life. In conformity with this dissenting opinion, the article 2 applies to human beings even before they are born, an interpretation which seems to me to be consistent with the approach of the Charter of Fundamental Rights of the European Union, and since France does not afford sufficient protection to the *foetus* against the negligent acts of third parties, "there has been a violation of Article 2 of the Convention". "As regards the specific measures necessary to discharge that positive obligation, that is a matter for the respondent State, which should either take strict disciplinary measures or afford the protection of the criminal law (against unintentional homicide)".

On the other hand, the judge of Luxembourg interpreted the community law in the light of the Charter's provisions, before acquiring the compulsory statute; for example, in the case C-275/06, when the community judge outlined the necessity to assure a balance between the various fundamental rights guaranteed by the community judicial order[17].

Conclusions

In conclusion, we consider that the Charter will get an important role in the new European Union context and development, at internal and international level. The Union European action must be above reproach when it comes to fundamental rights and the Charter must serve as compass for the Union's policies and their implementation by the Member States. So, the European Union institutions and Member States are obliged to respect the rights, observe the principles and promote the application of the Charter in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it by the Treaties.

This role of the Charter could be analyzed in the context of the actual procedure of the Union accession to the European Convention on Human Rights and Fundamental Freedoms, because their provisions will be interpreted by the European Court on the Human Rights. Also, we consider that it is important and useful to elaborate a research on the application of the Charter's provisions by the nationals courts.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

[16] **CEDO**, *VO v. France***,** no. 53924/00*,* 8 July 2004.

[17] **CJCE,** *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, C-275/06, 29 January 2008. Even if, formally, the national court has limited its question to the interpretation of Directives 2000/31, 2001/29 and 2004/48 and the Charter, that circumstance does not prevent the Court from providing the national court with all the elements of interpretation of Community law which may be of use for deciding the case before it, whether or not that court has referred to them in the wording of its question (see case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 64 and the case-law cited)...Finally, if that is not the case either, in order to provide the national court with an answer of use to it, it will have to be examined, starting from the national court's reference to the Charter, whether in a situation such as that at issue in the main proceedings other rules of Community law might require a different reading of those three directives.

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NEW RELATIONS BETWEEN NATURAL RESOURCES AND INDUSTRY IN A GLOBALIZED WORLD ECONOMY

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Abstract

Natural resources are not homogeneous in nature, having certain features in the productive process that require grouping them into different categories by different criteria. Consequently, natural resources cannot be addressed all at once, but only distinctly, according to relevant criteria selected based on the proposed goals. Changing approaches based resources (materials) to the knowledge, from quantity to quality, from mass products to new concepts of higher added value, follows a development that is based on eco-efficiency and sustainable products and services. In this respect, integrated research will become key factors towards global processing.

Keywords: *economy, mining industry, natural resources market, property rights regime, total economic value*

Introduction

The knowledge of the crisis and the clear economic value of resources may impose a series of initial constraints as short-term relatively high costs, but in the same time, such effective increases may also provide incentives for economic innovations necessary to any problem which may arise in times of crisis. Optimistic predictions are often supported by old innovations responsible for the lack of raw materials and energy.

The modern industrial economy lies in a remarkable number of options which require compliance with environmental and natural resource exploitation. The technological changes generating new substitutes increase the productivity of the old ones. The way of improving these processes include:

1. Increase production per unit of resources entered into the economic process, for example, the decrease in the amount of coal needed to generate a kWh.
2. The discovery of new metals, synthetic fibers, plastics, etc.
3. Productivity growth in mining processes.
4. Productivity growth in extraction processes and discovery of resources.
5. Develop techniques for waste reuse and recyclable materials.
6. Develop techniques for deep mining or other abundant resources.

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One of the major effects of these technological developments is the reduction of economic dependence on some expensive resources and a progressive widening of the range of raw materials used. Limiting the analysis to the crisis of these natural resources used as raw materials in the production process, we notice that they impose higher economic costs as their degree of depletion increases. This automatically requires increased fund allocation for innovation. The conventional approach is generally optimistic about the ability of the economic system to overcome such constraints of the long-term natural resources crisis in a globalized economy.

Each great discovery, from fire to nuclear energy, had good and bad parts. It depends on how it was used by humans, for or against themselves. Even the process of industrialization in itself had positive and negative aspects. It all depends on how it is done, for what purpose and how it is integrated into the social and economic structures of the respective company.

Each time something new appeared there were the **optimists**, who saw in change new opportunities for progress and the **pessimists**, who feared apparent or unexpected incidents may arise from the new created context. In reality, mankind has permanently faced slow or abrupt changes, evolving or obsolete, deeper or more superficial, but it eventually found all the resources and ability to solve these problems.

Today, for example, there are many arguments supporting the thesis that even major crisis, such as energy or raw materials, accelerate progress, forcing people to search for new "ways" in the development of new "breakthroughs", in finding new options. Every time the "costs" of such an impact are higher. Also, one has to find a new approach to these problems in their broader context, economic, social, technological, cultural and ideological. Thus, either we would not understand them or we will partially understand their meanings, and solutions would not be other than partial. There are many signals indicating that we can only go one way, that of "knowing more about the least." The too narrow view of the specialist, the "tunnel" vision, may turn into a handicap of understanding interdependencies. The attempt of a more precise evaluation on phenomena or processes with high specialization arise "barriers" in the way of noticing and handling complexity. We are in a period when we equally need integrative synthesis, holistic visions. From this point of view, the problems regarding the mineral resources depletion acquire special significance. Therefore, it is worth reflecting on the idea that as earth is finite so are its resources. This is obviously true, but the error presented as irrefutable proof of the final catastrophe is to take the finite for exhaustible. With very few exceptions, the huge volume of earth's mineral resources is not lost by extraction and use, but it continues to form an integral part of the planet's resources. They can be temporarily incorporated in inputs or consumer goods, they can be chemically combined with other elements, and however they remain indestructible.

New technologies have proven their capacity to find ways to extract resources from various geological formations. Also, through them, we can recover materials that have already been used once or several times.

However, the gloomy forecasts on the depletion of mineral resources have drawn the attention of the contemporary world by even urging economic slowdown.

Actual Content

The increasing demand for metals, directly influenced by the industrialization processes, together with the continuous reduction of the amount of metal obtained from the mining, determined and will determine the increase of mining production. In fact, in recent years at world level was recorded a trend of continuous decrease in the content of useful substances from ore mining and an increase in the size of mining mass extracted to obtain the same amount of metal which leads to higher material and energy costs. Therefore, the main restriction in metal consumption shall be in the

future the "energy cost", as total energy consumed to produce one ton of metal, from ore extraction to obtaining the basic metals (steel, aluminum and electric copper, lead and refined zinc, etc.). This cost increases rapidly as the content of metal from the mining mass extracted decreases.

The decreased useful content form the exploited deposits also involve special technologies for the recovery of a larger quantity of metals from the extracted mining mass subject to processing, which in turn leads to a considerable increase in investment, energy and production costs and raise special problems of environmental protection. Therefore, in the past few years, special attention is paid to the recovery and reuse of metals, which besides bringing energy savings help in conserving the world's metal resources.

Under these conditions, the dependence on the demand of metals at the economic development level is reduced. One important aspect these days is to save mineral resources, particularly the defective ones, to recycle and reuse them and to raise awareness of recovery. In fact, structural modification occurring in the global economy, the emergence and development of new industries with low consumption of metals, but with high volume of human resources, entail new economic policy guidelines of the states.

Also, subject to structural changes taking place in the world economy, new guidelines appear in the metal demand. Currently, we are witnessing a new phenomenon which manifests itself in a growing number of countries, namely, the gradual reduction of dependence of the industrial development on the natural resources. In countries where raw materials and energy is reduced gradually, depending on either the accelerated development of processing industries, or the stagnation or reduction of internal reserves, the share of imports in total consumption of resources is becoming greater. Illustrative of this case are Japan, the U.S. and some European countries, which cover most metal needs from imports.

New geological discoveries shall continue to enrich the picture of mineral reserves in the world, providing global demand for certain resources still remaining a difficult problem of the contemporary world due to more or less economic reasons. Newly discovered deposits generally have harder extraction conditions, being located in less accessible locations or having lower contents of useful substances, which require new technologies for the recovery of useful substances.

The increased dependence of national industries on the world commodity market may lead to imbalances and disruptions in the global economy. Given the policies of the developing countries, owning mineral resources, of protecting their own raw material base and developing processing industries to exploit the local natural riches, special importance is given to restructuration and reorientation of their economies towards top branches, with low energy and material consumption.

Despite the policy of reducing specific consumption due to the introduction in production of technical progress, the demand is reduced. At world level, both now and in the medium and short term forecasts global demand for metals, especially the base ones, is satisfied, although certain disorders may appear due to postponement of some projects, lack of funds or because of the diminishing absorption capacity of the volume of metal production by the industry. The problem of ensuring metal resources may not represent a problem even on longer term. The current situation does not allow precise answers to the question: how long the earth reserves can keep up with the rapid growth and demand for mineral exploitation?

Along with the global economic development, the new procurement possibilities for resources from different parts of the world, the countries' dependence on the world market is becoming increasingly important.

Natural availability of the different metal resources, their geographical distribution and geopolitics, the cost of their extraction and preparation, the energy consumption, transport etc., give a perfect overview on how these resources are placed according to the level of economic development. In the future we believe this proportion shall be decisively influenced by energy and extraction costs,

mainly due to the transition to ores with lower useful content, with high degree of impurities and more difficult operating conditions.

The development of national economies based on an intense industrialization process from many countries in the world economic system had led, as we stated earlier, to a growing demand for metals, tempered in recent years by the economic crisis. Whether they dispose or not of metal reserves, in their economic development process and industrialization, most countries have given special attention to metallurgy, as priority industry field ensuring the conversion of resources in raw materials necessary for other industries.

Industrial developed countries, which have reserves of metal resources (such as: U.S.A., Australia, Canada, Sweden, etc.), search, first to protect their national heritage and then to exploit as much as they can these resources. For example, the U.S.A, a bauxite importing country, despite its high quality reserves, in order to protect them undertakes extensive research to extract alumina using different substitutes like: clay, kaolin etc.

Although these procedures to obtain aluminum need more energy than through conventional processes, from bauxite, in order to reduce the dependence of these resources on the world market the countries allocate substantial funds for research in this area. Also, both by using the most advanced technologies for extracting and processing metals and by the policy of restructuring industries towards increasing those fields with low consumption, superior capitalization of metals and bigger profits are aimed.

Industrial developed countries, which do not have metal resources (such as: Japan, Italy, Switzerland, etc.) or have insufficient amounts, orient their production towards high efficiency and low cost fields. Through the high processed products these countries offer for sale on the world market, they cover the necessary expenses for importing resources. Japan is quite a convincing example, if we take into account this country has low natural reserves of metals, but is one of the biggest metal consumers. In the same time, it offers high-tech products at reasonable prices on the world market.

The developing countries, with metal resources, orient their economic policy on the one hard to develop the national first processing industry (primarily), and on the other hand to market these resources on the world market at reasonable prices. However, these countries in order to cover domestic demand for superior manufactured products have to export considerable quantities of ores.

In the new economic conditions, favored by the development of transports and capital and technology transfers, covering the need for raw materials is partly or entirely based on imported resources.

For most non-energy mineral resources, the known reserves are concentrated in certain regions or countries which represent, in fact, the most important manufacturing regions. These attract large capital investments in order to exploit these deposits. Also, the mining activities, provided with adequate social and economic infrastructure, stimulate research and development of mining on the same territories or in neighboring regions, more accessible and which offer greater economic benefits. As such, the interrelations between the three activities of research, prospecting and extraction, stimulate development, with influences both from the exploitation of mineral reserves and from the extension of exploitation, mainly in countries with tradition. These processes were slowed with the onset of the world economic crisis. Economic decrease in industrialized countries has led to lower imports and hence the appearance of commodity price fluctuations on the world markets. Therefore, the operating activities of mineral deposits and the various industrial manufacturing processes are not as closely related as before; the non-ferrous metal industry and the metal industry, for example, develop independently from the place of extraction of the respective resources.

The close dependence between the metallurgical and the processing industries, one the one hand, and the mineral resources, on the other hand, was present since the beginnings of industrial

development. This dependence was gradually reduced with the change of industrial centers and gradual depletion of rich reserves from the consuming regions, as well as the penetration of technological progress in all areas including transportation.

Changes occurring worldwide in terms of minerals supply sources supporting the industry development and the transition from self-consumption of raw materials to importers, especially over long distances, have caused many economic and technological changes. Thus, import of raw materials began to be the basis for development of certain industries in more and more countries.

Despite efforts to find new perimeters and widening the geographical area of operation, the extraction of minerals remains concentrated in a relatively small number of countries. Taken as a whole, the world's mineral production is concentrated in proportion of 70-75% in 12 countries, of which approx. 50% are developing countries. By increasing the mining capacity also the export availabilities have increased, thus creating the premises for more intense trade in this area. The ore trade flows are extended from regional and neighboring level, to large and very large distances.

Seven major producing countries (Australia, Brazil, Canada, Sweden, Russia, India and China) export more than half the world production of iron ore. It is worth mentioning that two of the seven major countries exporting metal ores decreased their production especially after 1990. Thus, the former USSR, by subdividing in independent countries, has lost its status as large producer of iron ore. In addition to Russia states such as Ukraine, Latvia, Belarus have emerged, leading to redistribution of power in the extraction and export of minerals. But Russia remains a worldwide major producer and exporter of iron ore.

Sweden, adopting a series of regulations for environmental protection, decreased both the iron ore production and the metallurgical production, considered as heavily polluting and energy-consuming.

Expanding minerals international trade has been possible due to the introduction of new technologies of concentration, agglomeration and transportation over long distances. To ensure efficient transportation from the extraction location to the consumer, a special importance was given on the quality of the ore. For example, by increasing the content of iron from 51% to 62% transportation costs of useful content are reduced with 20%. Moreover, the shipping, auto and rail capacity increased, in order to reduce long distance transport costs.

Economic development and the use of advanced primary processing technologies determined a new global division of mineral production. Thus, an increasing share of world production of mineral raw material is processed in developed countries and a relatively small amount in the developing countries, which own significant non-energy mineral resource deposits. For example, only 10% of the total production of extracted bauxite is processed and converted into alumina in the countries where it is extracted from. In the case of iron ore and manganese the part which is processed in the countries of origin is of approx. 15-30% for zinc, approx. 50% for lead and approx. 70% for nickel. On average, developing countries process locally only 30% of the extracted ores, the remaining 70% being processed in the importing countries. A special case is China which, in recent years, has experienced a strong economic growth, and reached to impact on the price of raw materials worldwide.

The big differences between countries and regions, as well as between minerals in the different levels of processing, depend on a series of factors such as: the necessary of investment and the investment power of the countries; the degree of integration of production in the respective industries; the level of required technologies and the specific energy consumption; energy capacity of the respective countries; the size and evolution of demand etc. These factors have certain mobility, an evolution according to the technical progress and level of economic development of the countries, to the pace of this development, as well as to the stability and political and economic interests of these countries and the international organizations in those areas.

The countries with mineral raw materials tend, through their economic development programs, to capitalize their natural riches by developing the respective industries, processing such wealth and gradually restricting exports of raw materials.

Achieving these goals shall be possible if the mineral processing expands and intensifies, which will influence the global trade restructuring in terms of goods flows on groups of countries and, in particular, flows of metallurgical goods. Moreover, the balance of international trade with metallurgical goods reflects the effects of the development level of some countries, but also the restructuring necessary in the world economy and in the trade relations between countries.

Increasingly strong is the desire of many developing countries, producers of natural resources, to move to industrialization by extending the processing of minerals extracted. At the same time, some developed importing countries build in the developing countries industrial units of extraction and primary processing of natural resources in order to obtain intermediates, especially through direct investment and providing long-term loans repayable in products. This support may be explained by the fact that the developed countries are interested in ensuring their supply of raw materials, while avoiding the expansion on their territories of heavily polluting and energy-intensive processes. Therefore, by the high processing of intermediates imported from the developing countries, the countries with tradition in metallurgy may obtain many economic, environmental and energy advantages.

The customs tariff system is used, frequently, by the developed countries, on the one hand to stimulate the developing countries to export raw minerals, and on the other hand to stop them – from the economic point of view – from exporting manufactured goods. Thus, tariffs increase with the transition to higher stages of processing.

The industrial development increases the demand for mineral resources. Even if we reduce the specific consumption, the recycling of materials and the use of substitutes, the demand for non-energy mineral resources shall experience significant growth, without taking into account the real possibilities to satisfy such need. Therefore, on the one hand the exploitable reserves have a certain evolution based on the research activity and geologic exploration, like that of ore extraction, and on the other hand the possibilities of expanding the supply with mineral raw materials are more and more limited.

Conclusions

It would be wrong to believe that these facts are just situational, and it would also be wrong not to notice that behind them are much deeper economic and social reasons. However, as time passes it becomes increasingly clear that it is not just about solving some practical, economic, financial, monetary, technological problems or problems regarding the economic restructuring policies or the industry, even though these are urgent and inevitable. There are “deep currents of change” which forecast changes in much wider areas, in concepts, in values mainly due to the global crisis and the global problems arising from it. Therefore, together with the immediate restructuring of fields such as industry, technology, raw materials, energy etc., it is necessary to better clarify the directions of change in multiple areas. Access to energy and raw materials is essential for a developing world. Also, the access to technologies is extremely important in a globalizing world, in order to stop the depletion of these.

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COORDINATES OF ROMANIAN SUSTAINABLE DEVELOPMENT

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Abstract

Strategic objective of macroeconomic management, sustainable development implies the identification of an interaction space between economic, social, environmental and technological systems, in a dynamic and flexible process of functioning. Starting from fundamental macroeconomic principles, the paper synthesizes relevant aspects concerning planning, as main instrument of macroeconomic management and macroeconomic modelling, as a basis of substantiating development strategies. Likewise, the paper presents a mix of politics which operationalization could register Romania on sustainable development coordinates.

Keywords*: sustainable development, macroeconomic management, planning, macroeconomic modelling, strategic objectives, development politics.*

1. Introduction

Romania has come, over the passed few years, an ample and complex process of systemic transformation, of legal, institutional and organizational frame readjustment, having strategic objectives in settling a democratic system and building a functional, modern and competitive economy. Economy reforming took place by a compacting process of structures, of resources control, privatization and economic sectors restructuration, of ensuring a balanced and predictable business environment.

In implementation of structural reformation, Romania permanently benefits of support and consultancy from European Union and international financial institution (World Bank, International Monetary Fund, European Bank for Reconstruction and Development and so on), by multiannual reforming programmes of public administration, law and budgetary systems, of privatization support, bank and state enterprises restructuring, improvement of business environment, assistance in preparation for integrating in economic and institutional structures of European Union.[1]

The National Strategic Reference Framework 2007/2013 (CSNR), approved by European Committee in 2007, establishes intervention priorities of Structural Instruments of European Union[1]. Likewise, CSNR connects between priorities of National Development Plan 2007 – 2013 and those of European Union, established by Community Strategic Orientation concerning Cohesion and by revised Lisbon Strategy[7].

European Commission has allocated Romania, for 2007-2013, a total amount of approximately 19,67 billion euro, from which 19, 21 billion for Convergence objective and 0, 46 billion for European Territorial Cooperation objective. Reforming and Convergence programme answer the accomplishment efforts of convergence targets by defining direction of action at national level for subscribing to politics objectives and European strategies.

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In 2010, European Commission launched "Europe of 2020" Strategy, for a smart economic growth, ecologic and in favour of inclusion. Romanian, as a state member of European Union, assumed general targets of "Europe of 2020" Strategy, as well as national development targets subsumed to European document [2].

It is necessary to promote an integrated system of planning to reunite national politics with European politics in terms of a wholesome coordination. Also, "Europe of 2020" Strategy, as a central document of planning of public politics, will be filled with precise objective in priority domains form national perspective.

2. Macroeconomic principles

From conceptual point of view, macroeconomic could be defined as the ensemble of economic activities seen in their unit and interdependency, which takes place in a political-cultural frame and constituted in a historical ethics, within state borders.[12] Mezoeconomics reunites economics activities in frames, subframes and regions, while microeconomics describes the total of economic process in economic unities, approached through existent interaction between these.

In time, macroeconomics has been the subject of many controversies. Research in this area had as a result the elaboration of five principles which compose the so-called "macroeconomics core"[4] nowadays, these principles are accepted by the majority of macroeconomics specialists. The macroeconomics core presents a double dimension: theoretical and applicative. The theoretical dimension comes from the scientific substantiation of principles, which develops a methodological support of macroeconomics, while the practical dimension is derivate from the significant impact of such nucleus on options of macroeconomic politics.

According to first principle, in national economy quasitotality, the real gross domestic product is fluctuant around a climbing trend.[13] This trend is determined by the offer manifested on economy ensemble, while the fluctuation of real gross domestic product is a consequence of registered modification within the sphere of demand. The second principle states there is no compromise on long term between inflation and unemployment [14]. The essence of such principle resides in the fact that monetary expansion acceleration is reflected on long term in inflation rate growth, without having an impact on unemployment decrease.

Accepting compromise on short term between inflation and unemployment develops the content of a third principle of macroeconomics core. There are different opinions on what concerns the efficiency of monetary politics reported to the fiscal one, though, unanimously recognized the fact that macroeconomic politics have the role of fading gross domestic product fluctuation by balancing aggregate nominal demand.

The fourth principle underlines that anticipation is a factor which influences macroeconomic politics' effect. The principle emphasizes a connection between the level of credibility of macroeconomic politics and the short term cost of disinflation. Nevertheless, last principle recommends fitting macroeconomic politics, which in uncertain terms, are landmarks of macroeconomic politics. This core represents the theoretical-methodological fundament of macroeconomic management.

3. Planning and macroeconomic management

Constructing a modern and competitive economy needs an efficient management at macroeconomic level, which main instrument is planning. Macroeconomic planning was institutionalized in developed countries right after World War II. In these states were established

national plans or economical – social development projects. In the second half of '70's and the beginning of '80's was registered a reduction of manifested interest for planning. Presently, the problem of planning and its importance in a modern economy represents a controversy in the world of economists. In our opinion, macroeconomic planning is absolutely necessary in contemporary economic context, marked by profound evolution, complex and unpredictable. It is important to mention the fact that planning presents a pronounced international dimension, becoming a global phenomenon. Some authors appreciate that planning is present also in interstate and superstate economic structures, which give content to international economic integration, including economical-social life globalization process[11]. Use of macroeconomic planning is determined by a series of objective factors, between which we remind: insufficiency of information offered by market; its incapacity of adequately allocating resources; modifying economic agents' behaviour, by transition from organizing production with the purpose of immediate profit, to organizing on long term; the impure and imperfect nature of existent competiveness in present economies.

Macroeconomic planning includes two stages, such as: diagnosis-analysis of national economic system and projecting national strategy of economic development. The diagnosis – analysis of national economy aims to an evaluation of internal economic potential, as well as identifying progressive landmarks in international economic environment. The national strategy of development is planned on the basis of diagnosis-analysis of economy. As a fact, the strategy constitutes the result of macroeconomic planning activity, the "national product" with which a state enters the existent competition on grounds of elaborating partial – sector strategies, of branch, of sub-branch and regional. Strategy constitutes an essential premise of economic progress, creating, by means of present times, a bridge to connect past and future. Strategy defines first exterior concretization of paradigm "start thinking to finish". Such paradigm is based on the principle "All things are created twice", meaning there is an initial creation, of mental order and a second physical creation.[3]

Projecting strategies of development represents a complex step with the help of macroeconomic modelling activity. In the second half of XX century we witnessed an accelerated development of macroeconomic modelling, as a consequence of progress registered in areas such as macroeconomic, national accounting, econometrics and calculus techniques. Thus, in states with advanced economy, were created informational banks and macro-models, one of the most important being the Institute of Statistics and Quantity Economics in Hamburg.

The macroeconomic model is a mathematic construction made by variables which condition one another and have a significant impact on functioning mechanism of a national economy. Academician Emilian Dobrescu appreciates that a macroeconomic model could be expressed by a function such as[5]:

$ST_T = \phi\ [ST_t, EX_\tau, AP_T, OP_T, R]$

where:

ST_T = vector of indicators which mark economic system status in T time;

STt = historical information, consisting in data referring to economic system status in previous time;

EX_τ = variables expected or planned, representing anticipated evaluation of indicators which significantly influence the decisions of economic operators ($\tau \geq T$);

AP_T = values determined by algorithms of calculus outside the specific model;

OPT = optional or control parameters which mark politics with great impact on business environment (public expenses, international position of economy, monetary politics, operating mode of markets);

R = set of relations through which values of models are connected (balance relations, behavioural equations, objective functions).

Nowadays, we find a great number of macroeconomic models worldwide, fact which indicates a significant importance given to modelling by states with advanced economy, as a support to project activity of development strategies. Necessity of macroeconomic planning is confirmed, therefore, also by recent activity registered internationally.

4. Romanian politics of sustainable development

The fundamental objective of sustainable development is identifying a space of interaction between economic, social, environmental and technological systems, in a dynamic process and flexible of functioning[9].

Sustainable development is defined, in essence, by the following coordinates[12]: permanent compatibility of man created environment with natural environment; equality of chances of generations who coexist succeeding each other in time and space; interpretation of present by future, under introducing as a purpose lasting development of ecologic security, instead of maximizing profit; moving the gravity centre in ensuring general welfare from quantity and intensity of economic growth to its quality; organic integration of ecologic assets with human assets.

For subscribing to sustainability trajectory, Romania must fulfil the following strategic objectives on short, medium and long term[7]:

- 2013 horizon – organic embodying of principles and lasting development practice in the sum of programmes and public politics of Romania, as a member state of European Union;
- 2020 horizon – reaching present medium level of community countries to main indicators of sustainable development;
- Romania's significant approximation to the medium level of the year of European Union member states from the point of view of sustainable development indicators.

Sustainable development of Romanian economy implies the operationalization of a mix of economic politics structured by the following main axes[7,8]:

- Economic competitiveness increase and economic development based on knowledge;
- Development and modernization of transportation infrastructure;
- Protection and improvement of environmental quality;
- Developing human resources, promoting occupancy and social inclusion, as well as reinforcement of administrative capacity;
- Developing rural economy and productivity growth in agriculture;
- Decrease of development disparities countrywide;

First priority axis of development has three major directions:

- Improvement of market access for enterprises, especially small and medium ones, by sustain of productive investment, by certifying enterprises and products, by creating an environment favourable to business financing, by developing business infrastructure (incubators, business centres, emerging clusters), as well as by promoting the Romanian touristic potential;
- Developing economy based on knowledge by promoting research and innovation as well as by efficiency of modern electronic public services (e-Governance, e-Education and e-Health);
- Energy efficiency improvement and value renewable resources of energy.

The transportation strategy targets an infrastructure modernisation in trans-European transportation and connectivity networks, developing transportation infrastructure of national interest, improving afferent services and sustainable development in transportation sector, by promoting intermodality, by traffic security enhancement on all transportation modes, as well as by decreasing the impact of transportation work and activities on the environment.

Environmental policy has as main targets to provide public utilities services at highest standards of quality and necessary quantity, development of integrated systems of waste management, improvement of sector systems of environmental management, developing systems of natural resources management (preservation of biologic diversity, ecologic reconstruction of deteriorated systems, prevention and intervention in case of natural hazards and so on), as well as infrastructure modernisation of air protection.

The fourth axis of development implies to fundament and to adopt measures of structuring on the following directions:

- Developing human assets, by investment which target initial educational system, disseminators of learning (human resources from education), content of learning (diversification and providing quality to educational offers) and professional formation system continues;
- Promoting fully occupying (are taken into concern the growth of adaptability of work labour and enterprises; development of initiative for social partners; improving transition from school to work places, promoting entrepreneurial culture in education and formation, identifying and capitalizing all opportunities of labour market integration and so on);
- Promoting social inclusion (main domains of intervention are integration on labour market and fighting discrimination, improving access and participation to initial education and continues to vulnerable groups, developing an efficient system of social services destined to marginalization risk reduction and social exclusion);
- Developing administrative capacity and good governing, by creating a public administration – central and local – which to become an important factor of competitiveness, of development, progress and cohesion.

Rural economy development and raise of productivity in agriculture have as strategic objective building a competitive agriculture based on knowledge and private initiative, along with protection of natural, cultural and historical patrimony in rural areas of Romania. Thus there will be taken actions in directions such as increase competitiveness in agrifood and forest economy, raising standard of life in rural areas, sustainable economic development of farms and forest exploit, as well as promoting "LEADER" initiatives, by which it is expected to increase rural community capacity to develop business initiatives based on partnerships.

Diminishing disparities of development between country regions implies, mainly, improving transportation infrastructure, health, social and education services, developing business infrastructure and supporting local business activities with innovation character, increase the degree of touristic attraction of certain regions by creating an adequate infrastructure and improving specific services, developing alternative ways of tourism, protecting and promoting natural and cultural patrimony locally and regionally, renewing urban areas affected by industrial restructuration or which handle serious social-economic problems, such as European territorial cooperation at crossborder level, transnational and interregional.

Reaching strategic objective within the six national priorities of development represents support for a sustainable economic development. Increase long term competiveness in Romanian economy, developing basic infrastructure in conformity with European standards and continuous improvement of local human asset are the fundamental premises of Romanian integration in economic, institutional and social architecture of European Union.

Conclusions

In structural reform implementation, Romania beneficiated of support and consultancy from European Union and international financial institutions by multiannual programmes of reform in public administration, law and budgetary system, support of privatization and bank restructuration, as

well as state enterprises, improvement of business environment, as well as assistance in preparation to integrate in economic and community institutional structures.

European committee allocated Romania, for 2007 – 2013, the total amount of 19, 67 billion Euros, from which 19, 21 billion for Convergence objective and 0, 46 for European Territorial Cooperation programme. Convergence Reform and Programme answer the efforts to accomplish convergence targets by defining directions of actions at national level for framing politics objectives and European strategies. Romania assumed general targets of "Europe of 2020" Strategy, launched in European Committee in 2010, as well as national objective in development subsumed to European document.

After accomplished research in macroeconomics the so-called "macroeconomics nucleus" appeared, which presents a theoretical-methodological dimension as well as a practical-applicative dimension. First dimension derives from scientific substantiation of principles, which is a methodological support of macroeconomics, while the second has in sight the significant impact of this nucleus on macroeconomic politics options.

Creating and consolidating a functional economic system, modern and competitive, needs a performing management a macroeconomic level. Main instrument of macroeconomic management, macroeconomic planning needs a diagnosis-analysis of national economic system, followed by projection of national strategy of economic development. Diagnosis-analysis of national economy has as main objectives evaluation of internal economic potential, also indentifying landmarks of evolution in international economic environment. Based on diagnosis-analysis the national strategy of economic development is projected. Actually, the strategy is the result of activity in macroeconomic planning, "national product" with which a state enters international competition.

For subscribing the sustainable development trajectory, Romania must operationalize a mix of economic politics structured on the following main axes: increase of economic competiveness and economic development based on knowledge; development and modernization of transportation infrastructure; protecting and improving environmental quality; developing human resources, promoting social occupancy and inclusion, as well as enhancement of administrative capacity; developing rural economy and increase agriculture productivity; diminishing disparities of development countrywide.

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CONSIDERATIONS CONCERNING ACCOUNTING INFORMATIONS AND ACCOUNTING DECISIONS AND THEIR IMPLICATIONS IN BUSINESS MANAGEMENT

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Abstract

The accountants need to make choices to recognize, evaluate and classify business transactions for assuring true and fair value of informations. In this paper, we try to classify these choises so that called accounting decisions. Also we try to view them in an informational perspective knowing the importance that accounting informations has in the process of making business decisions.

Keywords*: accounting decisions, accounting information, business management*

Introduction

Many professional writers that define accounting as technology science argue that accounting information, they predominantly due to the specific number, is placed within the perimeter of objectivity and accuracy.

It is known that accounting information as a starting point are two different sources and uneven in terms of quality.

Thus, the following transactions carried out from various markets are seen in the emergence during the financial year. They are largely the result of estimates and reflect the accounting policies of the enterprise management.

Even when there are seemingly strict rules, professional accountant can do to make ordering choises to describe the facts, of a margin of fredoom that lead to a subjective interpretation of them.

Economic decision-maker needs information coming from the external environment and internal environment of the enterprise.

Accounting information is essential in making economic decisions by management factors.

Accounting performs a data processing transactions and economic events held in the firm providing financial information (if the form of a monetary valued information), non financial (if expressed quantitatively) and/or accounting (if it has undergone a process of specific data processing accounting).

In their concern to provide a true and fair view in order to help decision makers, professional accountants reasoning applies (according to International Accounting Standards/Financial Reporting), taking decisions on the use of another treatment or to make a good information.

In this context, in this paper, we will try to outline a possible answer to these questions:

1. ***Use accounting information in accounting decisons ?***
2. ***Accounting decision is an economic decision ?***
3. ***Accounting decision is an operating decision, an investment decision, or a financing decision ?***

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Importance of professional reasoning – a skill summum

In their concern to provide a true and fair view in order to help decision makers, professional accountants reasoning applies (according to International Accounting Standards/Financial Reporting), taking decisions on the use of another treatment or to make a good information.

Accounting is not an exact science for obtaining relevant information requires making judgments for each case - shows a business associate of the French audit firm.

Financial Accounting provides financial information to external users. Is and why it is called so. It should be noted however, that it applied accounting treatment of the data represented by economic events in order to provide financial information.

Economic decisions concerning the optimal functioning of the company so long term and short term.

Financial decisions relate to financial instruments are financial risks for the enterprise or speculative purposes. They occur under the conditions of capital markets where the price negotiated equity investors offered securities of companies that listed on the stock market.

The major role of management accounting is to produce information that allows modeling of the relationship between resources deployed and consumed and results in return; in an optical forecast, management accounting help decision makers, and a retrospective measure optical performance[1].

Managerial accounting provides accounting decision-maker in the spotlight. He must deal with planning and budgeting, performance evaluation and cost control so that the overall objectives of the company can be reached.

Lack of standardization in the field of management accounting provides accounting in abiguous situations where you must prove velleities the decider. Furthermore, by applying the International Accounting Standards, accountants must use professional reasoning in finding problems, evaluation and classification.

In accordance with International Accounting Standards, in case there is no relevant accounting standard, enterprise management develop accounting policies in accordance with *"General preparation and presentation of financial statements"* and ensure that "financial statements provide information showing true results and financial position of the company, reflecting the economic reality of events and transactions, not just their legal form, are unbiased and prudent and has all significant material[2].

If in special circumstances, compliance with accounting standards do not meet the requirement to present a true, enterprises management will deviate from these requirements as necessary to present a true. In this case, the company must submit in the notes, the provisions from which deviations were made, the nature of misconduct, considered improper accounting treatment, the treatment adopted, and the financial impact of these deviations.

The main areas in which management accounting estimates and judgments are important is: tangible and intangible assets, financial investments, provisions for assets, long-term contracts, determining provisions and contingent liabilities, segment reporting.

[1] Bouquin H. – *Comptabilité de gestion,* translation and introductory study – professor N.Tabară, Publishing TipoMoldova, Iaşi, 2004, pp.65

[2] Bogdan V. – *Harmonisation of international accounting,* Economic Publishing House, Bucharest, 2004, pp.404

Accounting decisions and their adoption results in business management

Accounting management of the enterprise lies in its administration regulatory compliance with accounting data so that decisions and actions of the company to respect the fundamental objective of the true and fair value.

The objective of financial statements is to provide information about financial position, performance and changes in financial positionm performance and changes in financial position of the enterprise, which are useful to a broad scope of users in making economic decisions[3].

Often the leaders pursuing the objectives of enterprise management, the accounting will be tempted to make a subjective choice[4]:

1. The reduction result: by extracting depreciation and provisions for risks and charges; by extracting overheads; the undervaluation of stocks;

2. The increase in earnings: by estimating from a lack of provisions for impairment; by generating a profit from a financial leasing operations; the abandoument of claims within a group; by estimate asset value as a result of mergers between companies; incorporating the financial costs of the acquisition cost of an asset or a stock; the failure to update a term debt and interest without generating.

So far we have tried to emphasize that the accounting work is not limited to the registration of a company acts in the economic and technical knowledge does not require registration in accounts skills decider they do not make books in a management team member. Robert Kaplan says the team that creates value for an organization is one in which accountants are involved and that they should participate in formulating and implementing strategies in an organization.

Identify activities that are decisions to be made carefully, because not every activity performed by an accountant involves a decision.

These decisions consist of choosing from a set of possible alternatives.

Research in the field of accounting decisions are not many studies on the role although there are numerous accounting and information provided by it in decision making.

In the field of management research organization well known are those relating to economic decision.

In the field of accounting decisions proves significant with reconsidering the accounting officer responsabilities and powers in the chief financial officer. This was not an accident but was caused by the adoptation of Romanian companies in the management structures of capitalist organization. This feature of the proffesional accountant and business leaders namely dress specific to certain types of managerial responsabilities.

Chief financial officer is responsible for managing the organization, compliance directives dealing with senior management control and effective management of organizational resources.

Management is planning, organization, coordination and control. Being chief is in our opinion, not only to drive and we belive that in the financial accounting function to perform all the attributes of enterprise management. Thus we speak of enterprise accounting management. Presence of several options in a country's accounting referential that fact and the presence of several reference in the accounting system of a country or difficulties resulting from international comparisons, diversity in accounting policies and estimation techniques can create a state of anarchy with serious consequences for decision making.

When asked if there is only one true account?

[3] IASB – Framework, paragraph 12

[4] Popescu A.F. – *Methods and techniques of reconciling the differences between accounting and taxation in the application of International Accounting Standards,* Congress of the accounting profession in Romania – "*Harmonisation or convergence in the International Accounting Standards",* Bucharest, 2006

The answer is definitely negative although that can be answered, however, each accounting provides economic and social life protagonist in truth it needs[5].

Economic event analysis reveals practical problems of quantification enterprise: problem finding, problem assessment and classification problem.

These three issues are now based on almost any major decisions in the field of financial accounting and application of accounting policies.

Thus, these decisions can be listed asset management activity represented by assets, stocks and cash: choosing a method of depreciation of property, choosing a method of evaluation of goodwill, inventory selection system, the choice of assessment methods outflows of stocks, assessing claims based on certain valuation bases, the problem in assessing the fair value of assets, the revaluation for assets using historical cost to register.

Decisions in business debt management: debt evaluation according to certain bases of assessment, classification and distinction in debt, contingent liabilities or provisions as appropriate, the classification of leasing operations, classification of financial instruments that assess their accounting and financial assets or liabilities, credit risk problem in assessing the fair value of financial instruments, hedge accounting issues related to credit risk arising from the use of derivatives, tax management.

Decisions in business enterprise capital management sizing issue and redemption premiums, subsidies for investment management, classification of financial instruments in debt and equity elements.

Table 1

Accounting decisions and their adoption results in business management

Scope	Name	Detail	Result
Financial Accounting	Observation Evaluation Classification	Decisions related to professional reasoning in making management accounting firm heritage	Presentation of financial information used by these external users in financing and investment decisions.
Management Accounting	Make or buy Capital expenditure policy and management Award costs of products and services	Decisions related to performance management (balanced scorecard, dash boards) and monitoring budgets to achieve the planned levels	Disclosure by the management company for planning, control and decision making (especially those operating work-related).

Internal Management

Reveal internal management issues: performance evaluation, planning and budgeting (track to achieve planned levels by budgeting), cost allocation methods used for products and services, forecasts, assess each area of responsibility within a company, determining the causes of deviations

[5] Pop A. – *Romanian financial accounting harmonised with EU Accounting Directives and International Accounting Standards,* Publisher Intelcredo, Deva, 2002, pp.15

and taking the necessary measures, budgeting capital expenditures, such decisions to produce or buy, decisions on special orders, capital expenditure policy and management, maintain control over production costs (continuous comparison of costs with revenues expected proceeds from the sale of products), inventory control structure, (there are enough goods products, raw materials and products in progress to meet future demand), critical point analysis.

Decisions management accounting for assets, liabilities and equity are taken by the chief financial officer with other accountants in the financial accounting department, on the basis of financial accounting information, economic environment, the existing norms and standards in the field and analysis based on information held, provide appropriate solutions.

Note that all these decisions are not subject to approval by the general manager, they have adopted or approved by the chief financial and information resulting from the adoption of such decisions in the company's information flow is materialized in the accounting system output and active input, debt or equity.

Supporting documents for the information represented by these accounting decisions are economic manager decisions.

For internal management, decisions are taken by the chief financial support of management accountants performers, based on information relating to costs or activities provides cost management solutions, performance evaluation and for budgeting and planning.

Conclusions

The first question asked in this approach is:

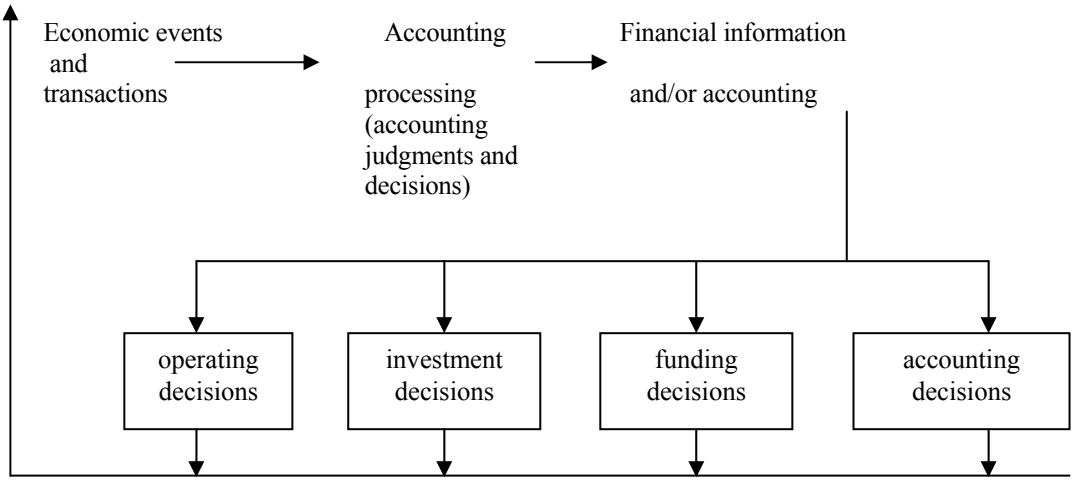
1.Use accounting information in accounting decisons ?

Accounting decisons makes a primary data processing system provided by transactions and economic events.

Our opinion is that the accounting information used in decisions related to management accounting (decisions make or buy) sizing budgets, performance evaluation of managers).

In the following figure we present the link between accounting information and accounting decisions.

Figure 1



A second question that arises is:

2. Accounting decision is an economic decision ?

Accounting decison is an economic decision to the extent that it takes place in a company and is related to its economic life. But accounting decisions related to management activities specifically, accounting is known as a science of business maangement.

Going concern is an accounting principle and a goal for management.

The third question that arises is:

3.Accounting decision is an operating decision, an investment decision, or a financing decision ?

Cycles of economic activity of the company are divided into: investment cycles, cycles of operation and funding cycles.

In their accounting decisions are provide information relevant internal and external users.

In conclusions, the decision is specific accounting of all business cycles of the enterprise.

What does this mean for users of financial accounting information ?

Users of financial accounting information is ussually in a paperless environment, a system needs to offer the conditions for satisfying its decision. In fact, based on information and knowledge are making a decision. Translated in accounting, decision making based on accounting information and knowledge are carrying.

Current systems for automatic data processing transactions are focused on transactions (namely the supporting document).

It is enough for an accountant to get that operate with a supporting document in the accounting and recording solution is offered by computer application.

In this context, it is proven that an accountant apply knowledge, reasoning and even make decisions in accounting problems, we belive that under International Financial Reporting Standards implementation, IT applications should include more opportunities for analyzing information to help makers.

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COMPARATIVE STUDY ON ACCOUNTING AND FISCAL AMORTIZATION

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Abstract

Placed in the international trend, Romanian accounting had experienced various changes, especially as regards of progress on disconnection between accounting and fiscality. In the present, fiscal rules should not have any role in accounting decisions, because accounting rules are applied to produce accounting information that is useful in making decisions and to provide a "true and fair view" upon financial reality of the entity. However, the barrier in the habit of accounting to thinking for fiscal point of view all economic transactions remains insurmountable, yet. Starting from this perspective on disconnection between accounting and fiscality would mean that amortization recorded in the accounting, as a result of management policy, to be different from fiscality amortization, to calculate income tax. Although formally accepted, disconnect between accounting and fiscality continues to meet many difficulties. In this sense, it is usual in practice to use the same method of amortization for accounting purposes and for fiscal purposes to prevent complications of double track amortization and prevent wandering in the rules in this field. Accounting rule is deliberately eluded in favor of the fiscal rules. This is the reason we proposed to make in this paper a comparative study between norms and rules on accounting and fiscal amortization, paper in which we intend to show the benefits of applying accounting and fiscal rules separately.

Keywords: *true and fair view, fiscal amortization, linear amortization, disconnect between accounting and fiscality*

Introduction

In the engaged (integrated) relationship between accounting and fiscality is integrated recognition, measurement, amortisation, all these being subordinated to profit tax. In regard to the acceptance by fiscality of accounting rules and treatment in regarding items listed, occur three types of situations:

- fiscality accept tacit the accounting treatment;
- fiscality accept explicit the accounting treatment;
- fiscality defines its own behavior and its own treatment.

Situations in which fiscality defines its own behavior and its own treatment refer to taxation of profit, but also to those elements that converge to the taxation of profits.

One of the problems that develop asymmetries between accounting and fiscality, amortization, as a resource to rebuild equity, urges businesses to reflections in order to choose the best methods in accordance with the economic context in which they operate, but also with the strategy of the entity.

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State aims to reduce amortization costs for the income taxes to be as high. On short term higher fiscal incomes collected, in the long term this fact determines disequilibrium at the microeconomic level, which subsequently has macroeconomic effects. In terms of inflation it must not have tax interest; duration of use should be adjusted to finance fixed capital.

1. Symmetries and asymmetries on accounting and fiscality amortization

Amortization in accounting understanding

Assets that are subject to amortization are tangible and intangible assets. In the amortization study are important to define some elements in terms of European and international accounting rules. In this regard:

- *amortization* is the allocation of the depreciable amount of an fixed asset over the estimated life. Collection of the year amortization is deducted directly or indirectly from the result of that financial year;
- *useful life* is the period in which the entity expects to use a depreciable asset or the number of production units expected to be produced by functioning of the respective asset;
- *appreciation of useful life* of amortizable assets or a group of similar assets is generally based on physical depreciation estimated moral wear and legal or other limits imposed on asset. Durations useful life should be reviewed periodically, default rates of depreciation must be updated to the current and future periods.
- *The depreciable amount* of an asset subject to amortization is its historical cost or other value which replaced the historical cost from the financial statements, less estimated residual value; If it is considered a significant residual value, it is estimated at the time of recognition or on any further review. National accounting rules do not recognize the residual value of an amortizable asset.

Amounts related to amortization of assets shall be allocated on each financial year during the use of asset, as different methods. Whatever is the amortization method chosen, it must be used with consistency in the spirit of the principle of consistent methods, without being conditioned by the level of the company profitability, by the tax considerations or changing the economic strategy.

There must never lose sight of the fact that a change of accounting method have the effect of distortion of the image reflected by the financial statements and that the information offered by them may not be comparable from one year to another. Amortization method may be modified only when it is determined by an error in the estimation of consumption of the benefits for that fixed assets, and this must be mentioned in the notes to financial statements, together with the reason that led to changing the method of amortization.

Fiscal amortization

In the acceptation of the Fiscal Code, the concept of asset is used to define any property, which is held for use in the production or supply of goods or services, to be leased to third parties or for administrative purposes, if it has a normal duration more than one year and a value greater than the limit established by Government decision.

We can define amortization, in fiscal terms, as a recovery by deductions of acquisition, production, construction assembly or improvement assets costs from the result.

Fixed assets are differentiated in amortizable fixed assets and unamortized fixed assets. Fiscality defines amortizable fixed assets as any tangible assets that satisfying the following conditions:

a) is owned and used in the production, supply of goods or services to be leased to third parties or for administrative purposes;

b) has a tax value higher than the limit established by Government decision, the entry in the assets of the taxpayer;

c) has a normal duration of use more than one year.

In the Tax Code sense are considered amortizable fixed assets too:

a) investments to fixed assets subject to leases, lease, location management or other similar;

b) fixed assets partially put into operation, for which no registration forms as tangible were prepared. They are included in those groups in witch it will be recorded, with the value resulting from the sum of actual expenses occasioned for their implementation;

c) investments for uncovering in order to exploit the useful minerals, as well as openness and readiness work to underground and surface extraction;

d) investments to existing fixed assets, as further expenditures made to improve the initial technical parameters and leading to future economic benefits, by increasing the asset value;

e) investments from own resources, embodied in new goods, on the nature of public domain and in the development and modernization of public owned property;

f) fittings of land.

For tangible assets that are used in lots, sets or forming only one wing, lot or set, to determine amortization should consider the value of entire body lot or set. For parts in the structure of a tangible asset, of which normal period of use differs from the normal use of the asset result, the amortization shall be determined for each component.

From the perspective of accounting rules, from the tangible assets, only land are not amortized. In fiscal terms, in addition there are also other fixed assets which are not amortized as follows: land, including woodland, paintings and works of art, lakes , marshes and ponds which are not the result of an investment, public goods financed from the budget, any asset that does not lose their value over time due to use, according to the rules, own rest houses, housing protocol, vessels, aircraft, vessels cruising, other than those used for his income realization.

The evaluation base of accounting and tax amortization

From an accounting perspective, the amortizable value of an asset is historical cost or other value which replaced the historical cost, respectively the input value of the tangible assets. Therefore, the assessment base of amortization is represented by:

- *acquisition cost* for bought goods;
- *production cost* for goods produced in the entity;
- *contribution value* determined by an expert assessor for property obtained as a contribution to capital;
- *market value* or fair value for assets received free of charge or plus to the inventory found;
- in amortizable value are included the costs after putting into service of an asset when they improve operational status of the asset in comparation with the initially estimated performance of that asset ;
- amortizable value may be decreased if the utility of an asset or group of assets is permanently altered as a result of moral damage or wear;
- revalued value, in case of application for revaluation treatment.

From a fiscal perspective, the evaluation base for amortization consists of costs for acquisition, production, construction, assembly, installation or improvement of depreciable assets that are recovered in terms of tax by deducting amortization.

Fiscality uses as a evaluation basis, *fiscal value* represented by:

- acquisition cost,
- production cost,

- market value of assets gained free of charge or provided as contribution, the entry in the property taxpayer

Fiscal value includes accounting revaluations.

Accounting and fiscal policies for amortization

Amortization along with recognition and evaluation of amortizable assets is, in our opinion, the most bidder section on accounting methods and alternative treatments that give the possibility of accounting options, more or less correct, to serve the interest of the economic entity.

In this regard, we take into account:

- **useful life / normal operating period**;
- **amortization methods** ;
- **the borrowing costs** directly attributable to the acquisition, construction or production of a qualifying asset production, which may be included in the cost of that asset.

Useful life

From an **accounting** perspective, amortization period for an amortizable asset is called useful life or economic period. Amortization period should correspond with the useful life, which have be determined by reference to the future economic benefits expected to be obtained by use of amortizable assets.

In setting amortization of tangible assets are considered duration of economic use and conditions of use.

Most often choose amortization period is a matter of optimization ranging from accounting and fiscal interest, amortization enrolling between components of self-financing capacity of the entity.

Just as often there is no agreement between accounting and fiscal interest, the same happens when choosing the amortization period. Accounting may choose a different amortization period than fiscality does, at least in theory, although in practice not much happens.

More specifically, economic duration, and the normal amortization duration of fixed assets are estimated, not measured, depending on experience offered by the practice for amortizable asset categories. On the other hand, this period may be different from the physical life of assets.

Factors that determine the establishment of normal duration of use are:

- physical wear, which sets a limit for the duration of service;
- moral wear due to new technology which shortens the life of the asset before the exhaustion of physical life, and
- inadequacy of assets in relation to changes in the profile and increasing the capacity of the entity.

With regard to the freedom that accounting rules allow for setting service life, it is important to note that, if fully amortizated tangible can be more used, to reevaluation a new value is established and a new period of economic use, for the period estimated to still use.

Amortization period initially set may change if there is a significant change in the terms of use, the aging of a tangible or in other exceptional cases. This should be chosen independent of the fiscal arrangements in the field.

The normal operating period

In terms of taxation, the amortization period is called the normal operating period. Establish normal operating duration imposed an authorized control to temper the businesses policy to establish small duration of use, and amortization too.

In this sense, the amortization duration is fiscal period which may differ from the accounting and are governed by Decision no. 2139/2004 for approving the Catalogue for classification and normal operating duration of fixed assets.

This catalog includes the classification of fixed assets used in the economy and their normal operating period, corresponding to amortization times, in years, for the system of linear amortization.

The normal operating period is the period of use in which recovering by amortization, from fiscal point of view, the fiscal value of the assets. The catalog specifies that normal operation period is lower than the physical life of respectively asset and for each fixed asset are presented a system in years of beach between a minimum and maximum, with a choice of choose normal operation period between these limits.

We can say therefore that there is some flexibility in determining the normal operating period.

The normal operation period of the asset, determined as the range of years from the catalog, remain unchanged until full recovery of its input value or removed from function.

An overview of symmetry and asymmetry between accounting and fiscality regarding amortization, starting from the known fact that fiscality divides tangible assets in amortizable and unamortizable tangible assets, is shown in the table below:

Accounting amortization of fixed assets	**Fiscal amortization of fixed assets**
Tangible assets are assets that: - Are held by an entity for use in the production of goods or services to be leased to third parties or used for administrative purposes and - Are used for a period longer than one year.	Depreciable fixed assets are represented by any tangible which meets the following conditions: - Are owned and used in the production, supply of goods or services to be leased to third parties or for administrative purposes; - Have a fiscal value higher than the limit established by Government decision; - Have a duration of use more than one year.
	By exception, if an item of tangible asset has a fiscal value less than the limit established by Government decision, the taxpayer may choose to deduct costs or to recover these costs by amortization deductions.
The assessment base is: - acquisition cost for bought goods; - production cost for goods produced in the entity; - contribution value determined by an expert assessor for property obtained as a contribution to capital; - market value or fair	The assessment base is *fiscal value* represented by: - acquisition cost, - production cost, - market value of assets gained free of charge or provided as contribution, the entry in the property taxpayer Fiscal value includes accounting revaluations.

value for assets received free of charge or plus to the inventory found;	
The assessment base can change with: - including in amortization of value of the costs after putting into service of an asset when they improve operational status of the asset in comparation with the initially estimated performance of that asset ; - amortizable value may be decreased if the utility of an asset or group of assets is permanently altered as a result of moral damage or wear; - revalued value, in case of application for revaluation treatment.	The assessment base can change with: - the later costs will be included in asset cost, if this leading to higher economic benefits - Replacing the initial fiscal value with revalued value, only if it is not lower than the entry value.
Useful life is determined by economic life.	The normal operating period – from Catalog
Useful life can change: - After revaluation; - May be reviewed	The normal operating period can not be reviewed (change).
Not amortized: land	Not amortized: - Land, including forests; - Paintings and works of art; - Goodwill; - Lakes, ponds and lakes that are not the result of an investment; - Public goods financed from the budget; - Any asset that does not lose value over time due to use, according to the rules; - Own holiday homes, housing protocol, vessels, aircraft, cruise ships, other than those used for his income.
It amortized and: - investments for arrangement of lakes, ponds, land and other similar works.	It amortized and: Land arrangements, linear over a period of 10 years

It amortized: - Investments to tangible assets leased, on the lease duration. On expiry of the contract value of the made investment and the corresponding amortization gives to the property's owner	It amortized: - Costs of investments to fixed assets leased, rented or leased by the management who made the investment, during the contract or during normal use, as appropriate.
Amortization method: - The linear method; - Degressive method; - Accelerated method; - Method per unit of product.	Amortization method: - In case of construction applies linear amortization method; - In case of technological equipment, machinery, tools and plants, as well as computers and peripherals thereof, may opt for linear amortization method, degressive or accelerated; - In case of any depreciable asset, can opt for linear or degressive amortization method. - Per unit of product for exploitation of mineral substances useful; - Vehicles can be amortized and depending on the number of kilometers or number of operating hours provided in the manuals
It is necessary to use the same method of amortization for all assets of the same nature and having identical terms of use	It is necessary to use the same method of amortization for all assets of the same nature and having identical terms of use
It is also amortized - Development costs are amortized over the contract period or duration of use - Costs of setting up are amortized over a maximum period of five years, if the entity choose not to recognise them in period's costs. - Goodwill is amortized, usually within a period not exceeding five years. - Patents, licenses, trademarks, rights and other similar assets are amortized over their expected use by the entity holding them.	It is also amortized • using linear method during the contract period or useful life of: - Costs related to the acquisition of patents, copyrights, licenses, trade marks or factory - Other intangible assets recognized for accounting purposes, - Development costs which are recognized like intangible assets from accounting point of view • linear, over a period of three years - Cost of acquisition or production software. • Degressive or accelerated amortization method. - For invention patents

	Not amortized: - Costs of setting; - Goodwill,

As can be seen from the table, between accounting and fiscal treatment there are asymmetries at all levels: elements that are subject to amortization, amortization methods, the possibility of revision, revaluation. Perhaps for this reason, the accounting rules and fiscal rules come to meet the need of specialists with very clear specifications about amortization.

In the case of amortization there are the most differences between accounting and fiscal rules. Accountants must understand that this should not affect the true and fair view of the entity showed through financial statements. Knowing the symmetries and asymmetries of amortization, we can calculate and record amortization in accounting according to accounting rules, and in terms of taxation (in the register of fiscality) depending on fiscality rules. Also, the Income Tax Declaration (101) we have to declare separately accounting and fiscal amortization. Note that if is chosen to apply the fiscal rules for accounting too, is compulsory to complete the information about accounting and fiscal amortization in the Income Tax Declaration 101.

Conclusions

Financial statements should provide a true and fair view of the entity. We believe this is a great ideal in the context of the market is too complex to be captured by any accounting system, and the establishment (by choice) to amortization methods involve a high degree of subjectivity, the classification of this process into an accounting set of rules can be dangerous, or even impossible.

We consider that it is necessary awareness of the inherent accounting's limits by its nature and by the complexity of economic reality for which reflection aims to realize. In our opinion, economic entities have no reason to not apply accounting rules for financial statements and fiscal rules, other than accounting, in order to determine the taxable profit in the direction of amortization. Maybe just one of convenience, because the use of different methods for the two areas involves double work: accounting by accounting documents and fiscal evidence, into the Fiscal Register for amortization.

In conclusion, we can say that the national accounting regulations contain explicit provisions relating to amortizable assets mostly converging with IFRS and offer the possibility of detaching of the fiscality, perhaps in the greatest extent by comparison with other cases of this kind.

We hope that shown comparative analysis of accounting and fiscal amortization to be useful for accounting specialists in selecting of accounting policies on amortization.

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ORGANIZATIONAL CHANGE IN KNOWLEDGE-BASED FIRM

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ABSTRACT

For sustainable competitive advantages gain, modern organizations, knowledge-based, must promote a proactive and flexible management, permanently connected to change which occur in business environment. Contextually, the paper analyses impact factors of the environment which could determine a firm to initiate a programme strategic organizational change. Likewise, the paper identifies the main organizational variables involved in a changing process and emphasizes the essential role which managers and entrepreneurs have in substantiation, elaboration and implementation of organizational change models.

Keywords: *knowledge-based firm, organizational change, impact factors, organizational variables, competitive advantage.*

1. Introduction

In the society and knowledge-based economy context, change is by itself the essence of business development. Approach of change became a key-element of competitive advantage, because only by a coordination of employees with the purpose of the fastest implementation of change, organization may react to market pressures before a context modification. [6]

Continuous change of the organizations evolutional environment is determined by a series of factors within which we remind technological evolution, knowledge boom, a fast moral depreciation of products, work conditions and mutation in labour power character. [4]

Managers and entrepreneurs in modern firms, based on knowledge, must identify, analyze, and evaluate systematically main variables of impact on the environment inside and outside the organization. To enter the sphere of operational excellence, organizations must show flexibility, substantiate and implement proactive business strategies, which include initiation processes and periodical implementation of proper organizational changes. Viable organizational system is the flexible one, which can answer favourably to any challenge of the environment. [9]

An eloquent example on what concerns the understanding of organizational change is famous company Hewlett Packard. William Redington Hewlett, one of the co-founders of the company, states: "Above anything, consider change inevitable, do not try to oppose it. Always be ready for 180˚ turn when discover a new and promising direction".

A significant number of papers, studies and articles are found in literature, which address issues of organizational change, underlining the necessity of projecting and implementing several programmes of organizational change in modern firms, as a sine qua non condition of competiveness. [1, 3, 10]

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2. Conceptual delimitation

Established on strategic diagnosis-analysis, organizational change covers a sum of activities for the firm to be prepared to gain necessary competence to implement a new business strategy. An important premise of subscribe a firm on the trajectory of economic and social efficiency is represented by the existence of an organizational infrastructure, flexible and adaptable. In the context of contemporary economic dynamics, change became necessary, for medium and long term objectives are permanently reviewed and modified according to registered evolution in business environment.

Organizational change implies a change of mission and vision in organization, introducing new technologies, a modern system of performance evaluation, redesigning remuneration system, orientation towards new clients' target-groups, as well as applying several complex managerial methods such as management by objectives, management by projects, management by budgets, total quality management and so on. [11]

Organization change corresponds to new orientation, fundamental and radical, concerning ways which the organization follows to develop activity, having essential implication on the behaviour of all its members. Launching a process of change implies the awareness of change necessity, to manifest desire of change, accumulation of knowledge as well as formation of necessary ability for implementing change.

Peter. M. Senge [13], management professor at Massachusetts Institute of Technology, introduced the notion of "learning organization". In such organizations, it is are developed and grown new models of thinking, human resource are permanently stimulated in the learning process for gaining competences and every experience is considered as being an opportunity to learn.

Knowledge-based firm is, by, an organization which learns, and also a sustainable organization, an entity generating added value integrated in economic, social and ecologic environment, which, by a proactive management, flexible and innovative, creates constantly competition advantages reported to competitive firms.

For adjusting to business environment mutations, knowledge-based modern firms must be permanently connected to change. Over time were developed a series of models which support managers and entrepreneurs in the trial of understanding and implementing change. Organizational change models are based on gaining consensus between human resources of organization. One of the model's, such as Lewin's, helps managers to analyse change, to preview probable consequences and identify solutions to decrease resistance and difficulties of such step.

Lewin's model suggests that it should be accomplished a balance between change sources and resistant forces to change. Robbins appreciates a simple announcement of change and does not eliminate previous conditions and its success. For gaining a sustainable effect of change, it is necessary that managers to anticipate and to evaluate forces which are opposed to change and reduce intensity.

Beer and Eisenstat [2] believe that enterprises tend to oppose a greater resistance to change if this is not of paramount importance for their surviving. Other authors state that for reducing resistance to change, managers must induce to their employees the sense of urgency.

3. Forces of organizational change

First step in initiating organizational change represents identifying factor which greatly influenced the evolution of firm. Researches of specialists and professional consultants reveal the connection between these factors, mainly, to the firm environment, to the organizational and management structure. [15]

Of the environmental factors which could generate failure of and organization we remind new firms on the market, technological innovation of competitors, and dependence on a supplier or a single costumer and so on. On what concerns organizational structure, in most of small and medium enterprises, this is flexible and marks, usually, a potential source of success. Issues on inadequacy of any changes of the organizational structure may appear in some medium firms which develop diverse activities or are expanding, such as larger firms.

In small enterprises and many other small firms, management factors which generate failure are, in our opinion, the insufficient managerial training of entrepreneur, promoting an authoritarian managing style and inadequate coordination of developed activities within the organization. In medium and large enterprises, management factor which generate failure are, mainly, the excessive analysis of information and the existence of some conflicts which can determine serious dysfunctions when they neither are nor well controlled. Groups in conflict reduce efficiency and often establish personal objective to prevail on those organizational. For such reason, conflict must be controlled thus to remain in accepted limits.

Modern organizations represent open economic systems to correspond more diverse consumers' demand. Firm's ability to adapt market manifestation demands depend on their flexibility. Henk Volberda considers that flexibility must represent a defining characteristic of organizations. Thus, from organizational perspective, flexibility could be defined as being the capacity of a firm to react to change. In a turbulent business environment, development strategies must be permanently filled and connected to programmes of planned strategic change. Actually, strategic organizational change includes continuous initiatives starting at entrepreneurs and manager. Management implementation of total quality is and example of organizational change within a firm.

Forces to determine an organizational change could be internal or external. Strategic orientation change of competitors, government regulation, new firms on the market technological innovation of competitors and product and services quality growth offer by these represent forces to determine a firm to resort to making some strategic organizational changes.

Organizational change could find its origin inside and enterprise – a new vision of entrepreneur or managerial team, introducing a new fabrication technology, developing a product or a service, intention to enter a new market. Change can produce reactively (as a response) or proactively (as an initiation). Otherwise, the firm either anticipates the necessity

Several authors appreciate that organizational change must be approached as a phenomenon which is the result of the interaction between economic, technological, social and political factors on the environment.

4. Variables involved in organizational change

Despite the firm's proactive or reactive approach on strategic organizational change, should be established main involved variables of changing process. As we see it, organizational change variables are strategic view, objective, organizational structure, technology, organizational culture and managerial techniques. Such variables are found either totally or partly, in different proportions, based on the firm's dimension. In small enterprises, main variables of organizational change are represented in the entrepreneur's view also by organizational culture which, at its turn, carries the imprint of his personality. In medium enterprises with productive profile or which develops more activities, as well as in large enterprises, in the process of organizational change are found, usually, all above mentioned variables.

Key-elements of organizational change, human resources – entrepreneurs, managers and employees – create and implement organizational change model, connecting mentioned variables and coordinating interaction between these. In many firms, strategic vision and system of objectives are

not connected adequately. Entrepreneurs and managers must have the capacity to communicate employees their strategic vision and firm's mission. Unfulfilled objectives, inadequate communication between different hierarchical steps, lack of management involvement are obstacles in changing process. [7]

Implementing an organizational change programme implies operationalization of certain systems, methods and managerial techniques which to lead to reaching afferent objectives for new strategic orientation of the enterprise. Managerial practice targets the connection between human resources and organizational activities, as well as regulating and developing principles to govern labour process of the firm. If employees are not motivated to fulfil attributed tasks or do not understand the report between their objectives and the firm's objectives, we may find a "system incoherence" which is necessary to be analyzed and solved for the enterprise to be successful in the change initiative. [14] Rogers and Byham suggests that posts in a firm should be projected such that subscribed tasks, competencies and responsibilities to be congruent with the new organizational strategy. [12]

Organizational change represents an integrating process in which are involved two interconnected subsystems: human resources – managers and employees – and organizational change variables – strategic vision, objectives, organizatorional structure, technologies, organizational culture, managerial methods and techniques.

Vectors which define connection between the two subsystems are orientation towards change, change resistance and organizational learning. Human resources are main actors of change. Managers and entrepreneurs have an important role by their strategic vision leads the effort of change, as well as the involved process in organizational change. Also, managers and entrepreneurs must know what are the employees' opinions and attitude towards change and to induce a feeling of mobilization for accomplishing a sustainable change. Communication between managers and employees is essential for understanding the essence of change and for implementing it successfully.

Strategy changes of competitors, technology mutations, law regulations, and new firms as well as the general trend to quality growth of products and services lead to certain organizational changes. A new strategic vision of managers, introducing new modern fabrication technologies, developing a new product or service and entering a new market implies profound change on organizational environment.

Taking into account pressures of the environment, modern firms, knowledge-based, must have flexible and adaptable infrastructures which to allow reaching high levels of performance. The greatest difficulties are not connected to technological change and managerial methods, though to human resources change.

5. Conclusion

Managers and entrepreneurs in modern firms, based on knowledge, must identify, analyze, and evaluate systematically main variables of impact on the environment inside and outside the organization. To enter the sphere of operational excellence, organizations must show flexibility, substantiate and implement proactive business strategies, which include initiation processes and periodical implementation of proper organizational changes. Viable organizational system is the flexible one, which can answer favourably to any challenge of the environment. Knowledge-based firm is an organization which learns and a sustainable organization, integrated in economic, social and ecologic environment which, by a proactive, flexible and innovative management creates constantly competitive advantages reported to competitors. Organizational change implies new competences, as a result to gathering information through continuous learning process.

Strategic orientation change of competitors, government regulation, new firms on the market, technological innovation of competitors as well as quality of products and services growth offered represent external forces that determine the firm take use of strategic organizational change. Internal forces of organizational change we remind the new vision of entrepreneur and managerial team, introducing a fabrication technology, development of a product or service, re-projecting organizational structure, operationalization of new management methods, intention to enter a new market and so on.

Organizational change represents an integrating process in which it are involved two interconnected subsystems: human resources – managers and employees – and organizational change variables – strategic vision, objectives, organizational structure, technologies, organizational culture, managerial methods and techniques.

Human resources are the main actors of change. Managers and entrepreneurs have a determinant role in transformation of firms they lead in flexible organizations, towards change, for they create and implement projects of planned strategic change, connecting involved organizational variables and coordinating interactions between these. In the society context and modern knowledge-based economy it is necessary a new mentality of managers and entrepreneurs on what concerns change, which must be gradually induced to employees, in an adequate cultural model, thus to pass from acceptant of change to initiators.

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THE RELATIONSHIP BETWEEN THE COST OF EDUCATION AND THE HUMAN CAPITAL. THE ALIGNEMENT OF ROMANIA TO THE EUROPEAN STANDARDS

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Abstract

Once with the development of the human capital theory, the education received an economic value, which is a quality variable of human resources and the main determinant of economic growth. The famed economists have shown that the remarkable economic effects of the investments in education influence the chances of acquiring a job and earnings, demonstrating how the theory justifies such an investment. Human capital approach allows also estimating the costs of education in schools and higher education, as well as the profits that comes out of it. Thus, the human capital theory is primarily focused on the demand for education. Moreover, the objective function of the state, in terms of education, contains itself two contradictory arguments: the state, theoretically, is a representative and guarantor of the collective good and its organizer; the state will seek to maximize individual education on the one hand and on the other hand will search for the optimization of the relationship between professional training and formal education. Also, in the context of recent years, the budgetary constraints are raising the problem of optimal allocation of the resources, as well as the funding of the performance of the educational services. The particularities, in terms of flexibility and cumulative distribution of the investment levels in the human factors, are translated into a practical action in the sense that global competition, from which Romania cannot decouple. In the long run, there are winning and resisting only those with academic flexible formation and the intelligent persons. Considering the above arguments, the purpose of this paper is to analyze the main characteristics of funding mechanisms for education systems, the volume of spending on education and ways of managing the resources allocated to the education. The cost allocation for education in Romania is investigated in terms of government policies, but also in terms of human capital theory. Also, to answer to the question how Romania had aligned to the modern trends in terms of allocation of the resources more and more important for human capital formation, this paper attempts to estimate the economic effort claimed by the financing of the education system.

Keywords: *investment, human capital, cost, economic growth, performance*

Introduction

The economy and the efficiency of education is an area that integrates public economy and the economy of human resources. Over time and especially today, the issue of budgetary constraints underlines the problem of optimal allocation of the resources and the funding on performance of the educational services. Following the above considerations, the content of this paper will focus on analyzing the main characteristics of funding mechanisms for education systems, the volume of spending on education and the ways of managing the resources allocated to the education. The cost

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allocation for education in Romania is investigated in this paper both in terms of government policies and in terms of human capital theory.

Also, to answer the question of how to connect Romania to the modern trend of the allocation of resources more important for human capital formation, we attempted to estimate the economic effort claimed with regards to financing the education.

As for the literature notes, several currents are highlighted and referred to in this paper. The first research papers have focused on the *cost measurement methodology, the study of determinants of the unit costs, on their laws of evolution*[1]*, and the measurement of educational costs supported by the family*[2]**.** 80s decade has seen a deepening of this line of thinking - further comparative studies[3]and more specific studies mainly on the cost of systems using new technological means (Eicher, Hawkridge, MacAnany, Orivel, 1986). Recently, the scientific speech of financing has been the object of the numerous papers. Thus, education systems are currently funded, sometimes even totally by the public power. On the other hand, economic theory does recommend full public funding only in the cases of pure collective goods. Therefore, in front of growing constraint of the budget, the problem arises not only for the optimal allocation of resources, but also how best to finance educational services. This issue concerns the specialized literature, as well as governments of the developed and emerging countries.

1. The role of human resources education and training in Economic theory

The education and the training of human resources stands more than six decades in the interdisciplinary focus of governmental structures, national and international non-governmental organizations.

The research and the economics – in their permanent renewal, development and structure included as a separate specialty, in the late 50's, a new branch and economic discipline called education. Although the influence that education can have on human productivity was pointed out and still stressed by classical economists, particularly Adam Smith, in their works are not found consistent and detailed analysis to substantiate their statements. If we exclude the work and management studies (financial - accounting) of the educational institutions that have developed and have considerable experience in Western countries, the new economic approach to education includes two major research topics:

– Application of the theory of education analyzed and evaluated by the theory of the human capital;

– The correlation between education and training of the labor force and economic growth.

In time, the crisis phenomena accompanied by increasing budgetary constraints have produced an additional application for studies and research regarding optimal allocation of resources for education and lookup for more efficient ways of financing it. Also, growth and persistence of unemployment have generated a certain priority of employment for continuous education and training issues, recycling and retraining the workforce, directly and indirectly influencing demand, content, duration and pragmatism of the formal education.

Therefore, education core economy - the human capital theory - has been a subject to criticism and contradictions, as well as extensions of the scope and content approaches.

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[2] Mingat, A. şi Perrot, J., 1980, Familles: coûts d'éducation et pratiques socioculturelles, Dijon, Cahier De l` IREDU, N.32

[3] Eicher, J.C, 1986, L`évolution des systems d`enseignement dans le monde de 1960 à nos jours: aspects économiques et financiers, Paris, UNESCO

2. Human capital theory and the effectiveness of education

The concept of the human capital is attributed to Theodore Schultz.Theoretical developments around this concept date from the 60s and is related to the author contributions quoted to which we can add the contribution of Gary Becker and Jacob Mincer.

However, the core of thinking about human capital is much older: Jean Bodin states so that "there is no greater wealth than men", Adam Smith, in Chapter 10 of Book I, "Wealth of Nations" show that "the man who was educated by a significant expense and time is necessary to provide work/activity that would reimburse the cost of his training, with an ordinary income at least equal to that of a capital equal value."It can be easily seen that assimilation of the education with an investment and human capital prepared is obvious, but this idea has been analytically resumed neither by Smith nor by his closer successors.

Among other tangential references, but significant economic importance of education, we can mention Benjamin Franklin – "an investment in knowledge brings the best profit"[4] or John Stuart Mill that argued that the return of development is fast only when the population is allowed to use the same knowledge and skills they had before[5].

At the beginning of the twentieth century, Irving Fischer has developed a theory that considers any stock as capital resources leading to the birth of future income, considering training people, along with the construction of cars as investments.

Thus, the spectacular increase in the needs of specialists of different professions, generated by technical and technological developments determined also the restructuring of general knowledge essential for most jobs; vocational training was becoming more and more perceived and considered as an investment.

Currently, education systems are funded primarily - sometimes almost totally–by the public power, from the public funds, but the economic theory does recommend full public funding only in the case of pure public goods. Since the potential demand for education is higher than the number of places or facilities offered, it cannot practice the principle of non-exclusion and therefore do not represent a "pure public good".

The budget constraints raise the problem not only of an optimal allocation of resources but also of the performing funding of the educational services. As in the developed countries the principle of free primary and secondary education in public institutions is still intangible, the economic research has been focused on the financing of higher education. Related to these issues, under the pressure coming from social demand, higher education budget has a rapidly growing trend and quasi public funding - full of this form of education is income redistribution from poor to rich because at this level of access the social inequalities are particularly evident.

In their approach to finding the best financing mechanisms, the researchers often produced descriptive studies, comparing methods used by different countries, the European solutions compared to the U.S. or Japan solutions. The results show that optimal funding was initially addressed by analysis of the redistributive effects in the higher education; concomitantly there are studied

[4] Becker, G., Capitalul uman. O analiză teoretică şi empirică, cu referire specială la educaţie, Editura All, Bucureşti, 1997, p. 173

[5] Mill, J.S., Principles of Political Economy with some of their application to social philosophy, London, Prker, p. 57, citat de G. Becker în op. cit.

efficiency problems and those of equity, asking to increase tuition fees and scholarships reform, it is proposed more often by funding student by the loans.

Also, as I mentioned above, in the developing countries, the size of the financial crisis and internal and external public debt increased the demand for research on education funding. This research has been conducted mainly under the financial impetus of the World Bank[6]. The results of the researches take in consideration the introduction of the enrollment fees, reforming scholarships, creating credit market for education, development of the private education, etc. Therefore, in education, not only the cost is important but also the methods and the resources of the funding.

The optimal funding issue was first addressed through an analysis of the redistributive effects of higher education[7]. This research was directly achieved by simultaneously taking into account efficiency and equity issues and highlight the need to increase tuition fees, where they are almost nominal (symbolic) and to reform the support systems granted to the students.

With all the explosive nature of the debate on taxes, most European countries seem to take into account the recommendations or being about to implement them.

The most debated is the support systems granted to the students. The controversy over "Bons education" (Education vouchers) was not always entirely clear, but it has helped, finally, to highlight various possible solutions, the advantages and disadvantages (in Blaug, 1987)[8].While until recently, these findings influenced policies on higher education was almost zero, the recent evolution of influential groups in the principle of student financing through loans and extent of reforms put into action in some countries, like in United Kingdom, shows that these ideas are building their own way.

In the developing countries, the extent of the financial crisis is so great that the demand for research on education financing has become, for some years, very high. The World Bank has played an exciting role. Much of reflections is emanating either from its members (Psacharapoulos and Woodhall, 1988) or from experts working for this institution. They prepared major reports (BanqueMondiale, 1986 and 1988).

Conclusions concerns the favorable effects on the efficiency and equity of the institutionalization establishment of the selective enrollment fees, on a reform of the support systems going to a selective reduction and allocation of scholarships to students in higher education, to create a market for education loans, loan financing for this purpose and, finally, to the relaxation of restrictions on private and local schools.

Regarding the financing of educational institutions by themselves due to the education production, economists have shown that logically they can expect little from these activities (Eicher, 1984).

3. The cost of the education in European Union

The funding structure and policies applied in education vary from state to state and sometimes even within the same state from one region to another. In the education system of any state is of particular importance its funding mechanisms, and compatibility with public financing legislation.

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[6] 6Le financement de l'education dans les pays en développement, Washington, 1986, L'éducation en Afrique Sub –Saharienne, Washington, 1988

[7] Blaug, M., 1987, The Economics of Education and the Education of Economist, New York, New York University Press

[8] Idem

All sources of funding of education can be grouped into two broad categories, namely: public sources and private sources. Public sources come from central, regional and local authorities, while private sources come from students, households and non-governmental organizations. The relative importance of each type of funding source, whether public or private, varies significantly from state to state, ranging from "total funding of education in countries such as Denmark, Finland and Sweden, while in many Member States taxes for the study are burned by the students"[9]. Therefore, it should be noted that the European Union in recent years, there is a constant concern to find effective ways of financing education. "For example, the Netherlands, is promoting a performance-based lending, where loans can also take the form of reimbursable grants if the student successfully complete its studies. This keeps the public funding source, while contributing to increased efficiency in education"[10]. To highlight the interest that European Union Member States show to education, I will use as support statistical data developed by Eurostat[11] upon the total expenditures for education in 2008. The statistic mentioned reveal that in European Union (EU -27) the public expenditure on education in 2008 measured up to 5.1 % of GDP. The highest public spending on education relative to GDP was observed in Denmark (7.8 % of GDP), while Cyprus (7.4 %), Sweden (6.7 %), Belgium (6.5 %), Finland (6.1 %) and Malta (6.0 %) also recorded relatively high proportions. The situation at the level of all the EU members' states is not so good if we take into consideration that in 2008 the share of public expenditure on education was less than 5% of GDP, in more than half of European countries (Figures 1). It should be noted that the EU-15 total expenditure percentage is below 5%, and the situation is slightly better in the EU - 27 where the percentage of total spending severely stands at 5.07 %. Also, compared with 2003, in 2008 the percentage of total expenditure in the EU-15 is lower by 0.06 points; Hungary and Slovenia recorded the largest decreases, both down 0.8 percentage points. It should be noted that changes in GDP (growth or contraction) can mask significant increases or decreases made in terms of education spending.

[9] Consiliul Concurenței, Ghid privind finanțarea sistemului de învățământ din România, comparativ cu unele state membre ale U. E., din perspective legislației ajutorului de stat (The Competition Council, Guidelines about the financing of education in Romania, a comparison with some EU member states in terms of state aid legislation.)

[10] Idem

[11] Educational expenditure statistics ,Eurostat (http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Expenditure_on_educational_institutions,_2003_and_2008_(1).png&filetimestamp=20111117102022, accesed March 2011

Tabel 1: Total public expenditure on education as a percentage of GDP (2003 and 2008)

	Public expenditure (% of GDP)		Private expenditure (% of GDP)		Expenditure on public & private educational institutions per pupil/student (PPS for full-time equivalents)	
	2003	2008	2003	2008	2003	2008
EU-27	5.14	5.07	0.64	0.75	5 414	6 459
Euro area (EA–15)	5.03	4.97	:	:	:	:
Belgium	6.03	6.46	0.35	0.37	6 343	7 866
Bulgaria	4.23	4.61	0.67	0.58	1 692	2 840
Czech Republic	4.51	4.08	0.37	0.57	3 354	4 520
Denmark	8.33	7.75	0.32	0.55	7 133	8 701
Germany	4.70	4.55	0.92	0.70	6 005	6 953
Estonia	5.29	5.67	:	0.30	:	4 226
Ireland (2)	4.38	5.62	0.31	0.34	5 279	7 172
Greece	3.56	:	0.20	:	3 778	:
Spain	4.28	4.62	0.54	0.66	5 042	6 941
France	5.90	5.58	0.56	0.60	6 038	7 031
Italy	4.74	4.58	0.40	0.41	6 118	6 609
Cyprus	7.29	7.41	1.35	1.35	5 968	8 461
Latvia	5.32	5.71	0.83	0.60	2 258	4 332
Lithuania	5.16	4.91	0.46	0.52	2 183	3 622
Luxembourg (3)	3.77	3.15	:	:	:	:
Hungary (4)	5.89	5.10	0.56	0.54	:	3 995
Malta (5)	4.70	6.01	1.40	0.31	4 272	6 220
Netherlands	5.42	5.46	0.94	0.92	6 881	8 069
Austria	5.57	5.46	0.31	0.50	7 604	8 836
Poland	5.35	5.09	0.66	0.74	2 524	3 781
Portugal	5.57	4.89	0.09	0.49	4 287	4 979
Romania (6)	3.45	4.25	:	0.50	:	:
Slovenia	5.82	5.22	0.83	0.63	5 021	6 529
Slovakia	4.30	3.59	0.45	0.70	2 325	3 523
Finland	6.44	6.13	0.13	0.15	5 858	6 988
Sweden	7.30	6.74	0.19	0.17	6 825	8 067
United Kingdom	5.24	5.36	0.95	1.72	6 097	7 942
Iceland	7.71	7.57	0.70	0.71	6 727	8 290
Liechtenstein (2)	2.46	2.11	:	:	5 851	7 788
Norway	7.54	6.51	0.10	0.09	8 275	10 084
Switzerland	6.00	5.37	0.62	0.56	:	:
Croatia	3.96	4.33	:	0.36	:	4 147
FYR of Macedonia	3.39	:	:	:	:	:
Turkey (7)	2.96	2.86	0.04	:	:	:
Japan	3.70	3.44	1.25	1.66	6 682	7 530
United States	5.61	5.40	2.05	2.10	9 924	11 759

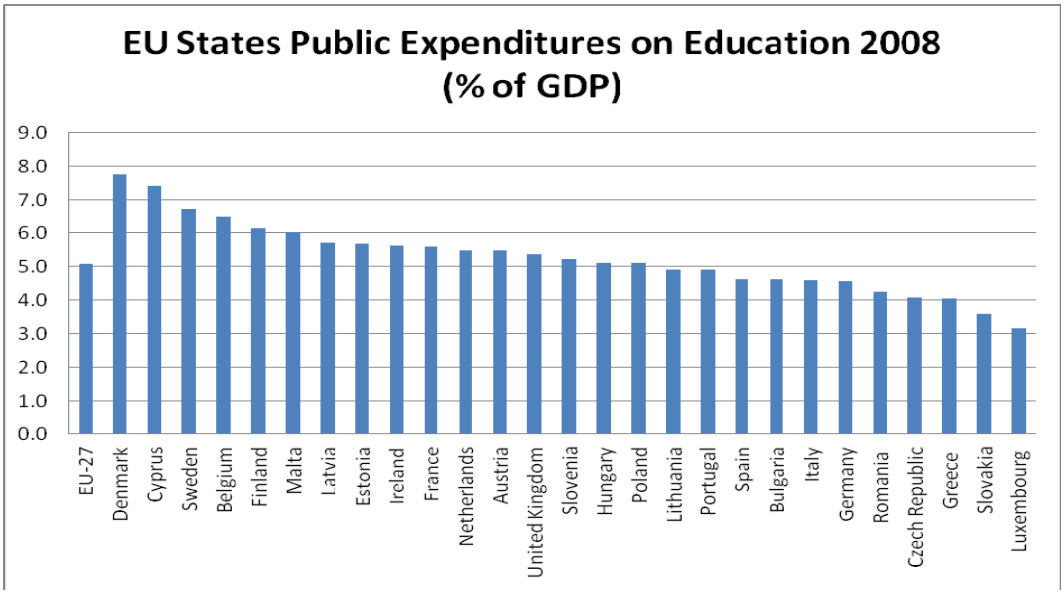
Source: Eurostat[12]

In essence, education accounts for a significant proportion of public expenditure in all of the EU Member States – the most important budget item being expenditure on staff. The cost of teaching increases significantly as a child moves through the education system, with expenditure per pupil/student considerably higher in universities than in primary schools. Although tertiary education costs more per head, the highest proportion of total education spending is devoted to secondary education systems, as these teach a larger share of the total number of pupils/students. However, in

[12]Educational expenditure statistics ,Eurostat (http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Expenditure_on_educational_institutions,_2003_and_2008_(1).png&filetimestamp=20111117102022, accesed March 2012

absolute terms, there is almost no change between 2008 and 2009 and several countries even had a decrease in education spending.

Figure 1: EU-27 Public expenditure on education, 2008 (% of GDP)

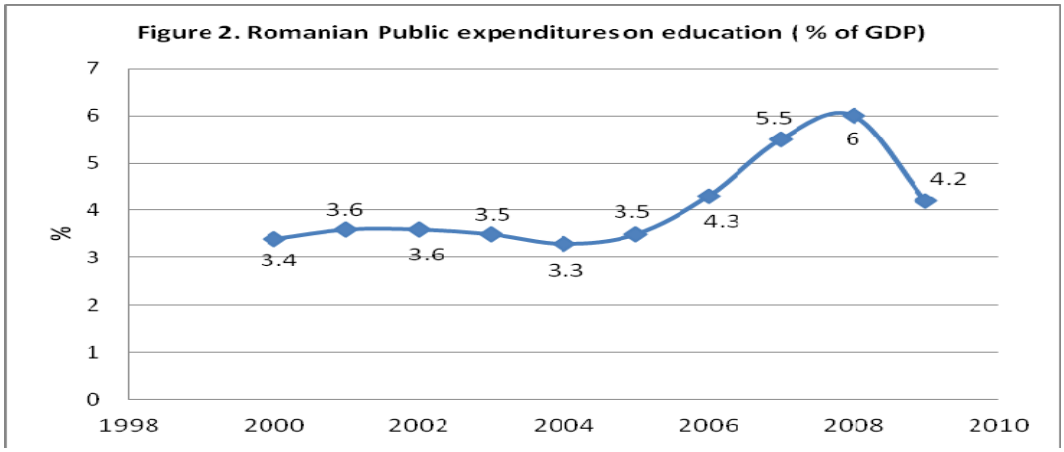


Source: Eurostat[13]

In 2009, government spending on education as percentage of GDP was the highest in Denmark (8.0 %), Sweden (7.3 %), Cyprus (7.1 %), and Estonia (7.0 %). The lowest percentages were found in Romania (4.2 %), Slovakia (4.3 %), Germany and Bulgaria (both 4.4 %), and Greece (4.5 %).

Compared with the other member states, the percentage of GDP allocated to education in Romania ranks our country at the one of the last position of the EU Member States, close to the Czech Republic and Slovakia. In 2009, has decreased its growth rate registered in 2007 and 2008 (see Figure 2) due to anti-crisis measures imposed by the Romanian Government. The significant decrease in GDP in 2009 led to a decrease in funds allocated to education, reaching a value of 4.2%.

[13] Educational expenditure statistics, Eurostat, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Public_expenditure_on_education,_2008_(1)_(%25_of_GDP).png&filetimestamp=20111117102037, accesed March 2012



Source: Ministry of Education, Research, Youth and Sports

The lower percentage of GDP in education has led to measures, primarily to reduce technology and material investments and, secondly, reduce salaries of teachers and administrative staff. Thus, in Romania, the average salary that a teacher can receive is 21,468 lei (5,063 Euros) per year, while a high school teacher is 23,353 lei (5,508 Euros) per year. Only Bulgarian teachers are paid less than the Romanian, with 4271 Euros per year. In contrast, the highest salary paid per year to teachers in the European Union are in Luxembourg (88 315 Euros), Denmark (61,804 Euros) and Austria (57,663 Euros). Moreover, in some countries, including Romania, the basic gross wages for teachers in the early years of their career are lower than the national GDP per capita, except Germany, Spain and Portugal.

Even so, in all European countries, staff costs represent the largest part of the costs of education, they are found, on average, around 71% of annual costs in the European Union.

Central governments and/or local ones take most decisions on the total amount allocated to public schools in compulsory education cycle, depending on the category of resources involved. Only in four countries, are found the key regional donors and recipients of education budgets. These countries are Belgium, Germany, and Spain and to a lesser extent, the Czech Republic, here more than 70% of funds allocated to education (45.5% in the Czech Republic) are collected and spent at regional level. In three of these countries, regional institutions (Communities of Belgium, the Spanish Autonomous Communities and provinces of Germany) are the highest level of authority in education. In Austria, the situation is slightly more complex - almost 75% of resources are collected by central government contribution, which can spend only 53% of available funds. In Estonia, Slovakia and Finland, the central authorities provide a big part of resources, but uses less than 40%. Countries where there is a greater decentralization are Latvia, Lithuania, Poland, Romania, United Kingdom and Iceland. In these countries, local authorities are providing and consuming most of the financial resources allocated to education. This is due to the organizational structure of education in these countries and because the regional authorities are not involved, except Poland.

In majority of the countries, total public expenditure with the teaching staff are determined centrally, at the government level, while decision-making procedures involving non-teaching staff costs, operational resources and current assets are divided between local and central authorities or are implemented only locally.

The general tendency is to decentralize the decision to determine the total amount which will be allocated to the resources not directly related to the teaching activities.

To support the development of human capital, in all European countries family allowances are granted for studies. They are offered when children born and paid by the end of compulsory education. The amounts awarded will vary depending on the number and age of children. For example, in Bulgaria, Czech Republic, Italy, Portugal, Slovakia and Iceland, the amounts are proportional to family income. It should be noted that in some cases, families that exceed a certain level of income do not receive financial support in the Czech Republic, Spain, Malta, Poland, Slovenia and Slovakia. Also, scholarships for children who are enrolled in compulsory education exist only a in a few countries. In four countries (Belgium, France, Luxembourg and the Netherlands), scholarships are available only from lower secondary education and family options are always evaluated. In Romania allowance is granted to children from birth until the age of 18 years, provided under the condition that the student is enrolled in an educational institution. The amount allocated does not vary by family income or other criteria. It should be remembered that the person shaving an economic and social disadvantaged can receive additional support from the state as a social scholarship is given throughout the school year. It also supports the involvement of children in Romanian state education system, respectively, human capital formation by free / discounts offered for transport, health, reductions in price ticket for artistic and cultural institutions.

In various countries are implemented and other specific measures to assist parents with children in additional compulsory education. Some of these approaches involve reducing the price of transport, free meals at school, specifically to support the purchase of teaching materials, free distribution of textbooks, etc.

4.The cost of education in Romania

Education funding in Romania is a long debated topic in the last 20 years. Many analysts in educational policy, theoretical field, press and representatives of education institutions management in Romania presented and analyzed different aspects both positive and negative about the funding of education in our country. A recent study conducted by Eurostat reveals that Romania is the state that allocates the least amount per student across the European Union[14].According to the research cited above, The total annual unit cost of a pupil/student which is on average PPS EUR 5 748 in the EU-27 varies widely between countries. One group of countries (Bulgaria, Estonia, Latvia, Lithuania, Malta, Poland, Romania and Slovakia) is characterized by unit costs per pupil/student which are relatively modest compared to the other member states average and do not go beyond PPS EUR 4 000 (ranging from Romania with 1 467 to Poland with 3 278).

There is a second group of countries in which the unit costs vary from PPS EUR 7 000 to 8 000, namely Belgium, Spain, Cyprus, the Netherlands, Sweden and Liechtenstein and to a lesser extent Ireland, France and Italy (slightly below). In a third group the unit costs are more than PPS EUR 8 000, as in Denmark, Iceland, Norway or Luxembourg, which is way ahead with more than PPS EUR 14 000 per pupil/student.

Lack of funds necessary for financing the European Union average and close to the high costs faced by families to support a pupil / student in school has a direct impact on school attendance by children and culminating in early school leaving. It also shows that between access to education and involvement of children in work there is a double link: on the one hand children are forced to work to contribute to family income (including to cover part of tuition fees) and on the other hand, the involvement of children in school can affect time work, which leads to absenteeism and even drop of

[14] Key Data on Education in Europe 2009, Eurostat http://eacea.ec.europa.eu/education/eurydice/documents/key_data_series/105EN.pdf

education. Data from the Ministry of Education, Research, Youth and Sports reports show that the dropout rate has tripled in the period 2000-2007.

Also in the current context of economic and financial crisis, it is expected that the situation will be worse in the future. Thus, according to recent research undertaken by the Institute for Quality of Life points out that during the crisis, Romania's children will suffer even more, they are "hit indirectly by lowering income families, coupled with decreasing financial support for social system, but also for education and health". The report highlights that the relative poverty rate increased even during the period of economic growth 2000-2008 particularly for vulnerable populations, including single-parent family find with dependent children (relative poverty rate increased from 25.6% in 2000 from 27.1% in 2006), and especially the family of two adults with two dependent children (in which case the increase is about 5 percentage points from 12.8% to 17.6%).

At present, in Romania the education funding is based on standard cost per pupil / preschool. In accordance with decision no. 1395[15], the standard cost per student is determined for each level of education, branch, field, specialization / field, the number of students, language teaching, education and other specific indicators of urban / rural. Therefore, the standard cost per student / preschool is an indicator of substantiation necessary funds to cover basic costs of financing. Standard cost level that of each category of expense base funding is determined by physical indicators of human and material resources consumption established by laws and government decisions or regulations issued by ministries and central institutions in the field. The standard size cost and actual cost per student / preschool is determined by at least two reasons:

- Standard cost relates to a school with a standard number of pupils, a number of classes and students/class, a regulated space necessary for a student etc. while teaching a particular unit may have a number of students other than standard, different volume of space per student, a certain degree of education, etc. equipped with means.
- Actual costs of staff in a school/ student may be higher or lower than standard depending on the degree of qualification of teachers, average length of education, and number of students per teacher position etc.

These differences between actual costs and standard costs are not related to the objective quality of management or policy management. These differences can be eliminated through a medium and long term policy regarding the school network, concentration and modernization of educational facilities, etc. On average, in the year 2011, the standard cost per pupil / school / day is highlighted in the table below:

Tabel 2: Some standard cost per pupil / school / day

Nr. Crt.	Level / chain / profile	Type of education	Average number of students per class		Standards of cost per pupil, on average and level RON		Standards of cost per pupil, on average and the levels[16]	
			Urban	Rural	Urban	Rural	Urban	Rural
1	Kindergarten with normal program	with frequency	20	18	1.478	1.617	1.478	1.617
2	Primary education	with	22	18	1.701	2.027	2.041	2.432

[15] HOTĂRÂRE NR. 1395 privind finanţarea unităţilor de învăţământ preuniversitar de stat, finanţate din bugetele locale, pe baza standardelor de cost pe elev/preşcolar pentru anul 2011, publicată în M.Of. nr. 896 din 31 decembrie 2010

[16] Education in minority languages

		frequency						
3	Secondery education	with frequency	25	20	2.230	2.727	2.549	3.117
4	College	with frequency	28**	28	2.119	2.119	2.401	2.401

Source: author

If we look overall, in reality, the cost of education per student is higher. In the study conducted by Save the Children Organization, in 2010, regarding the cost of education of children at the family level[17] has revealed a number of expenses that the family makes for a student during a school year. The average cost spent by parents for a child's schooling is 1490 RON, and per family is about 2,000 RON. It should be noted that the above amount is calculated taking into account the average costs for parents in the sample budgets, representing a trend as it emphasizes not an absolute value. Also, looking at the results we see that the total cost may reach values of over 4,500 RON per year, per student. The survey questionnaire was conducted based on a sample of approximately 600 parents and 300 teachers, thus the data has a more rough guide character; generally, the expenditures differ regionally, at the school level, considering also school popularity rank and the parent's salary level who allocate more or less financial resources for children human capital development.

Regarding higher education, university funding is based on actual work performed. Funds and thus the responsibility to develop their own strategies for the cost optimization is the freedom of university management. Of the total base funding of 70% shall be distributed based on the number of students unitary equivalent and 30% are considered as quality indicators.

In fact, at higher education institutions in 2011 the average amount paid for a student was about 2,750 RON, slightly lower than in 2010 when the state paid about 2840 RON / student equivalent. In 2010 approximately 470,000 students have disposed of 1,903,513,398 RON - as far as core funding has been granted from the budget for higher education. In 2009, the amount allocated from the budget for students was 1,990,932,992 RON, and in 2011 the Ministry of Education Research, Youth and Sports has provided an allowance for equivalent unit student an average of 2,750 RON. The reason for reductions of funding is the financial crisis affecting our country. This cost varies depending on the criteria above. At a minimum calculation relative to the cost factors used to determine the areas of education funding, it appears that a "a medicine student will benefit from support from the state amounting to 6.187 RON (1467 Euros), a chemist - 5225 RON (1244 Euros), a student of a faculty of the human and socio-economic profile - 2,750 RON (654 Euros). The biggest amount of money - 20,625 RON (4910 Euros) - will receive the students who want to make a career in cinematographic art"[18].In addition to costs incurred by the state, the student and / or family have the direct private annual total costs[19] of between 2000-6000 thousands of Euros, depending on the locality in which the educational institution has it activities, on faculty requirements related to books, on software and on family financial availability. To cover some of the hidden costs that have to support student or family, the Romanian authorities offers performance scholarships for students with exceptional results, scholarships for students with good results, but

[17] Cercetare cu privire la costurile „ascunse" din educație "Învățământul gratuit costă", realizată de Organizația Salvați Copiii, București, 2010 (Research about the "hidden" costs of education - Free education costs, conducted by Save the Children, Bucharest, 2010). The survey questionnaire was conducted based on a sample of approximately 600 parents and 300 teachers.

[18] Cât investește statul roman într-un student, articol publicat în Săptămâna financiară, 4 Martie2011 (How much Romanian state invests in a student. Article published in Financial Week, March 4, 2011)

[19] Becker, G., Capitalul uman. O analiză teoretică şi empirică cu referire specială la educație, p. 180

also social aid scholarships for students from families with very small financial funds. Also, some private companies assist the performing students through foundations offering scholarships.

Therefore, the biggest problem remains at the primary and secondary levels of education where the Romanian state must find better solutions to encourage school attendance and lower school dropout in poor families or with single parents. In terms of human capital it is noted that rural schools in counties with a low level of socioeconomic development are characterized by poor learning conditions, low quality education, socially disadvantaged segment of pupils which get low educational performance: lower participation in the yearly evaluations with very poor results, which often either exclude them from the competition, or do not allow them the enrollment and attendance in a desired school to continue their studies.

Conclusions

Currently, education systems are funded primarily - sometimes almost totally by the public power, public funds, even if the economic theory does not recommend full public funding. Community practice revealed that at the European Union level funding modalities of the educational system varies significantly from state to state, ranging from full funding to the combination of private funds with public ones. Low potential of the Romanian education funding from private sources and needs and stringent requirements which Romania has to face, require increased attention to the educational process from decision makers, both in the quality and in ensuring an appropriate degree of financing. The need to find adapted solutions for the Romanian education system is urgent because the low level of public expenditure on education (about 4% of GDP) leads to the proliferation of serious effects on educational performance and human capital accumulation. Among them are:

– Decreased level of teacher's training because of the lack of motivation due to lower wages;

– Migration of highly qualified teaching staff to better paying areas of the country or abroad;

– Loss of logistics that cannot sustain an efficient teaching process;

– Decreased quality of students performance and accumulation of skills necessary after graduation;

– Increased school dropout, especially in rural areas where it is found a constant need for qualified teachers, especially in Moldova.

All these effects cause the loss of human capital among both teachers and pupils. Underdevelopment of human capital can lead to a partial exclusion of human resources able to work, but unprepared in terms of knowledge and skills required on the labor market. This "exclusion" of human resources creates serious social and economic effects like increasing unemployment rate and number of social assistance or hiring on low qualifications jobs for small salaries. These effects will be extended by the author in other works.

In conclusion, the differences of the educational system between Romania and European Union developed countries can be eliminated through a medium and long term policy regarding the school network, concentration and modernization of educational facilities. Therefore, it is recommended that Romania has to create an efficient financial system, along with the development of educational policies designed to enhance the quality and prestige of education that should be regarded as a national priority and activity of a general interest that the future depends largely on the degree of development of the country.

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CONSUMER OPINIONS TOWARDS ONLINE MARKETING COMMUNICATION AND ADVERTISING ON SOCIAL NETWORKS

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Abstract

On the Internet, a medium that has already proven its effectiveness in marketing activities, changes take place with astonishing speed. The recent explosion of social networking applications and their number of users has captured the marketers' attention. Companies have started to rethink their relationships with consumers and adapt to the new online world. In this virtual world of social networks the public is the key element. Consumers perceive the social network as a personal space where they control the content. They decide on their own what they want to see and share with others. Thus, in order to manage marketing communications effectively, marketers must know the consumers' opinions towards their presence in social networks.

Keywords: *online marketing, online advertising, social networks, Social Media, marketing research*

Introduction

Knowing that, currently, social networks, blogs, forums and sharing sites are the main centers of interest for Internet users, marketers have started to rethink their online communication strategies and adjust to the new trend. Many companies are realizing that having a website and making it visible and easy to find through search engines (SEO) is simply not enough anymore. Nowadays it is vital that their online presence includes a Social Media component on sites like Facebook, Google+, Hi5, MySpace or Twitter.

The specialists' opinion, expressed by the American research firm MarketingSherpa, is that "Social Media moved from the notion of *novelty* to the one of *necessity*, and it should be perceived as an integrated element of the business communication strategy."[1]

Analyzing the maturing of this field, MarketingSherpa also noticed that most marketers, who use Social Media tools, relied themselves more on intuition and did not outline a precise plan to conduct and measure the success of their campaigns. Thus, the effectiveness of the online marketing activities was usually affected.

This situation may be the consequence of the fact that, in general, commercial messages posted on social networks belong to less known brands or companies, with little experience in promoting their products/services. Another explanation may be the fact that many companies didn't

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[1] Sergio Balegno, *Social Marketing ROAD Map Handbook: A method for mapping an effective social media strategy*, (Warren, Rhode Island: MarketingSherpa LLC, 2010),
http:// www.marketingsherpa.com/heap/SocialMediaHandbookExcerpt.pdf

study well enough the consumer opinions and behaviour towards online marketing and advertising before implementing their campaigns on such a highly humanized channel like Social Media.

Therefore this paper aims to underline the significance of knowing and studying the consumer perceptions, attitudes and opinions before trying to engage their attention with specific online marketing tools.

The importance of this research stems from the fact that many small Romanian companies still need guidance in interacting with consumers on the Internet and taking full advantage of all the opportunities the online medium offers.

Thus, with the help of an exploratory research, this paper will outline the features, online social activity and opinions of social networks users in Bucharest. These findings may provide some guidelines on how to implement efficient marketing campaigns through social networking applications.

Content

About online marketing and Social Media

In essence, "online marketing involves using the Internet to communicate directly personalized, interactively and at a long distance in order to achieve the relational and/or transactional objectives of the organization."[2]

Online marketing activities mainly consist of four categories of actions:[3]

- creating company identities through corporate websites,
- placing online advertisements (especially banners) on different sites,
- participating in group discussions (forums, newsgroups), virtual communities, electronic newsletters, to increase awareness and interest among some well-defined consumer segments,
- using the e-mail as a direct channel of communication with consumers.

The third category primarily focuses on Social Media, which is a virtual space divided into five categories: social networks, blogs and microblogging platforms, wikis, forums and sharing communities (for audio and video content). Amongst all, until now, the social networks proved the most efficient in capturing the user's attention and their potential is far greater than any other application.

A social network can be defined as "an application that expands and gains consistency by means of human interaction, usually an interaction between groups that share the same interests, that come from the same cultural or geographical region or groups formed on a specific criterium."[4] In other words, virtual social networks are a form of public space, led by the concept *"users with common interests/needs"*. A social network is a place where the passion for a common interest, the need for affiliation or for personal development, or even the need to share life experiences, brings people together.

A social network generally has the following features:

- it is built around a regional particularity, local culture, a specific function or dominant traits of its members;
- aims mostly at aspects of work and personal life;
- attracts mainly members of a certain age, depending on their interest.

On this basis, online marketing developed a new facet, that of the communicational campaigns created using well known references about consumers. Based on the information provided

[2] Călin Vegheş, *Marketing direct*, (Bucharest: Uranus, 2003), 334
[3] Philip Kotler et al., *Principles of Marketing - European Third Edition,* (London: Prentice Hall, 2002), 801
[4] Marius Mailat Blog, *Listă reţele sociale România*, January 28, 2009, www.submitsuite.ro/blog/

by users on their profile pages, marketers can target a specific audience, defined by age, gender, preferences, hobbies or even by the groups of which they are members.

Beside this aspect, online marketing through social networks has other advantages such as:

- the consumers' personal data can be easily obtained; this helps to establish specific market segments and user typologies;
- it is based on online conversations, dialogues, grants freedom of expression and encourages the direct involvement of the consumer;
- offers direct, rapid feedback from users;
- companies can create their own communication channels with target groups, through newsletter or blogs;
- the fans can promote themselves a message or a brand;
- the enthusiastic consumers can become "ambassadors" or promoters of brands;
- consumers can influence each other by creating homogeneous groups where they may get together and exchange opinions or pieces of advice;
- events that receive attention and create a certain „buzz" form the basis of viral marking, which is an essential element for success on social networks.

Being aware of all the advantages and opportunities that online marketing offers, companies may decide to start communicating on the Internet. After doing that, they should take into account that implementing a promotion through social networks requires, above all, rigorous organization and planning in order for the results to be maximized.

Companies should also take into consideration that, on social networks, the public is the key element. They perceive the social network as a personal space in which power and control over the content is in their hands. Due to these characteristics, implementing a Social Media campaign must be creative, transparent and perfectly adapted to this environment.

Extending companies' presence on these platforms which have a large number of users should be a natural thing since brands should be always heading where they future audience is.

The benefits are obvious when taking into account the fact that two thirds of the world's Internet users constantly use social networks, which overcame e-mail in the top of online activities. The time spent on these social networks has been growing three times faster than the time spent online in general.

An estimated number of 1.2 billion persons are using Social Media applications and nearly 20% of overall time spent online is spent on social networking sites.

According to The Nielsen Company's study, published at the end of January 2010, global consumers spent, on average, more than five and a half hours on social networking sites like Facebook and Twitter in December 2009. The study showed an 82% increase from the same month of 2008 when users spent just over three hours on social networks.

In Europe, a demographic analysis of time spent on social networking sites in five countries (France, Germany, Italy, Spain and United Kingdom) revealed that women spent significantly more time on social networks than men across all age groups, during April 2011. Women aged between 15-24 years were the most engaged audience as they spent 8.4 hours on social networking sites, followed by 45-54 years old women with 5.5 hours, which is double the time spent by men, in the same age group, during the month.

In addition, the overall traffic to social networking sites has grown over the last four years. Specifically, two thirds of online visitors spend their time on social networks and blogs, placing them ahead of other online forms of engagement and interaction including games and instant messaging.

In our country the situation is different. Until recently, companies in Romania took little notice of social networks as potential marketing goals destinations. The reason was the fact that the

number of customers who had membership accounts on such platforms was not large and only a small part of the public was deemed relevant by companies that were using the Internet to advertise.

However things began to change. The phenomenon of social networks has been growing in our country especially during the last two years and has been gradually arousing interest among companies keen on promoting.

With an impressive number of over six million Romanians who use social networks (out of over 7.4 million Internet users in our country) and for whom signing in on sites like Hi5, Facebook, MySpace, Twitter and LinkedIn has become routine, social networks have become more attractive for companies in Romania who have started to see this as new means of promotion worth investing into. For example, in 2012 there are 4.161.340 Facebook users in Romania and 26.87% of them live in Bucharest.

Industry experts say that during recent years advertisers have become less reluctant as before when it came to placing their ads on these platforms. At the moment, all big Romanian companies advertise on Social Media.[5]

In this context, the companies efforts must be sustained by researches and studies meant to create an overview of the present situation.

The methodology used within research

The current study was based on a quantitative research conducted among a small group of Bucharest inhabitants, active members of different social networks.

The data collection method used for this research was the survey and an online self-managed questionnaire was used as a research instrument. The questionnaire consisted of 20 closed questions, with choice offered answers, all ranked by research objectives. The introductory section of the questionnaire aimed to reveal the habits of using social networking platforms, the main section of the questionnaire centered on the actual consumer opinions towards Social Media marketing, and the final part's purpose was to identify the socio-demographic characteristics of the respondents.

The measurement scales used were generally non-metric, nominal and ordinal (for Likert scale), and metric scales, interval (for responses using semantic differential).

Given that this research has an exploratory character, the final size of sample was set at 200 persons. The target group of the study consisted of Bucharest residents, aged between 18-35, selected using the non-random (nonprobability) method of snowball sampling. Snowball sampling relies on referrals from initial subjects to generate additional subjects and it was used because the snowball chain can be obtained easily when using social networks.

The main research results and their implications

The research results showed that Facebook is the social network where most of the respondents own an user account (27.8% of responses), followed by Hi5 with 21.6%, Youtube with 14.7%, Neogen (9.2%), LinkedIn (7 %) and Twitter (6.6%).

Regarding the frequency of using social networks, 55% of the respondents said they sign in daily or almost daily, 25% of them sign in several times a week and 20% several times a month or less frequently than once a month. For 60% of the respondents the average time spent on social networks on a regular day is less than an hour and the locations used to access social networks are in

[5] Anca Arsene-Bărbulescu, „*Tot mai mulți români sunt pe rețelele sociale iar reclamele îi urmează"*, Business Magazin, 29 martie 2010, accesed May 15, 2010, http://www.businessmagazin.ro/business-hi-tech/new-media/tot-mai-multi-romani-sunt-pe-retelele-sociale-iar-reclamele-ii-urmeaza-5779806

order: from home (67.4%), from work (20.8%), from school/college (2.8%) and only 9% of respondents said they are using a mobile platform or a mobile phone to log in on a social network.

The purpose why users access social networks is keeping in touch with friends or acquaintances (32.9%), followed by entertainment (30.6% of responses). Only 4.2% of respondents showed interest in using social networks to take advantage of special offers, contests or promotions for various products/services.

In terms of categories that users link to on social networks, the highest percentage was assembled by clubs/bars/restaurants pages with 21.1% of responses, followed by products or services (20.5%), private parties and events (13.7%) and celebrities (12.6%).

Other results, regarding aspects of Social Media marketing, showed that almost half of respondents (49%) rarely seek for advertisements within these platforms.

Regarding the frequency of advertising messages' occurrence on the social networks, opinions are divided between the 54% of Internet users who believe that ads appear in an acceptable number and the 46% who believe that they occur too often. Analysing the responses according to the division by gender, the research shows that women tend to believe that commercial messages appear in an acceptable number, while most men say they appear too often.

About banner ads, most respondents (33%) stated that it's quite disturbing when they appear in their browsing windows, 88% tending to ignore and close them. In the case of men, the responses indicate a more pronounced disturbance regarding the emergence of banners, unlike the women who are less disturbed by their appearance.

Another result shows that respondents tend to agree with the idea that promoting products through social networks is useful. This is shown by the high percentage of responses: 41% of respondents agree and only 11% disagree.

The results for the idea that the promotional methods used on social networks are too aggressive, show that 34% of people agree, 38% are indifferent and 16% disagree.

For most respondents (38%) the element of the greatest importance for the success of promotional campaigns through social networks is the originality, followed by a consistent and well transmitted message (for 25%), interactivity (16%), attractive design (15%) and animation (with only 6% of responses).

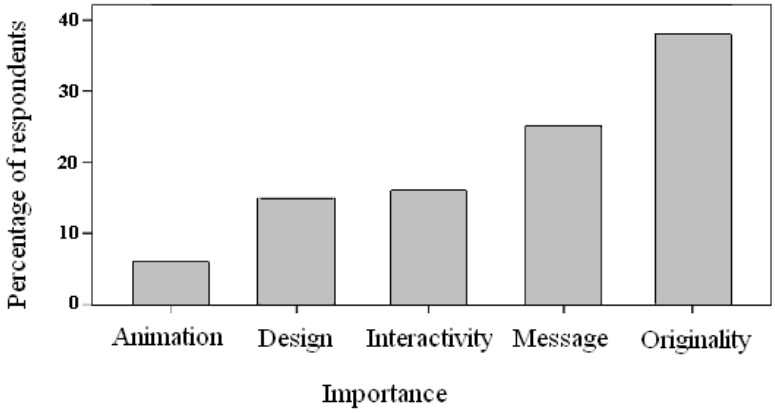

Figure 1. Important elements for the success of promotional campaigns

For more than 50% of the Social Media users the brand, the company name and the company characteristics are also very important for capturing their attention.

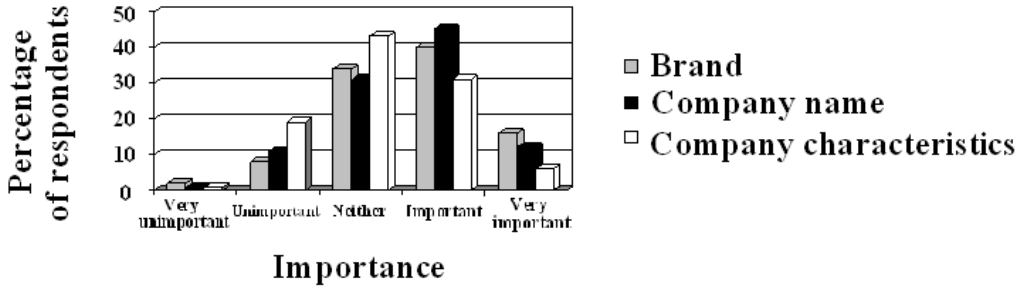

Figure 2. The extent to which brand, company name and company characteristics influences the respondents

The purchase of a product as a result of experiencing a form of online advertising through social networks was achieved by only 16% of respondents who said they had purchased clothing or accessories (sunglasses, jewelry), electronics (cell phones, cameras, laptops), IT products (software and hardware) or flight tickets.

Knowing all the results we can next present a series of conclusions, suggestions and recommendations for marketers in order to manage marketing communications more effectively.

As an exploratory research, conducted on a small sample of respondents, the limits within the research are obvious, but we can shape some conclusions regarding the characteristics of social network users.

The first important conclusion that emerges from the research is that Internet users in Bucharest are more and more open towards social networking platforms and spend a lot of time surfing them. Most users are young, educated and are middle-income employees. The respondents own on average 2.73 membership accounts on social networks, which means that a typical user has accounts on at least two different social platforms.

The fact that more consumers sign in every day on one or more social networks is essential in creating a successful online marketing campaign, because in this way their visibility and contact will be ensured among a large number of Internet users.

Another interesting conclusion is that almost all respondents aged between 18 and 25 have a Facebook account and the purpose for using the network is entertainment (games, quizzes, music, videos etc.), which shapes the typical Facebook user as being a young, dynamic, modern person, eager for information and entertainment.

Most respondents aged between 26 and 35 and all the respondents who have corporate leadership or decision making positions have a Twitter account, which may confirm the idea that the members of this site are opinion leaders or aspirational models, mature professional people, who have an important point of view to share with others.

The research revealed another important finding, namely that users agree to the idea that promoting products or services through social networks can be useful and that advertisements appear in an acceptable number within these platforms. The study also shows that women tend to be more open and tolerant than men in these aspects.

On the other hand, the Internet user's sensitivity towards traditional forms of online advertising is gradually decreasing. This is revealed by the very high percentage of respondents who have the tendency of ignoring and closing the advertising banners displayed when browsing on social networks.

In this context, user's interest and attention should be captured by new promotional methods. According to this research, the solution for a successful promotional campaign in the future could be originality combined with a consistent and well communicated message.

The content is the key element according to experts' opinions too. Companies interested in the promotion must come up with content of interest to grab the public's attention. Consumers have become reluctant to brands because of the aggressive publicity and assault of a huge number of promotional banners in recent years. So a more original content could be the right solution, and in social networks, this solution is extremely convenient and easy to implement. The organization's goal is to find an interesting subject of discussion for users and people will create content and interact.

On this basis, advertising on blogs can be a segment of increasingly success. Being addressed to a well established segment and not for mass exposure, it has the advantage that in this way consumers can get involved, can offer suggestions and other users are able to see their daily comments posted on blogs.

Another solution to capture the consumer attention, could be the adaptation to user requirements and features. Instead of using the traditional *push* marketing messages, companies could use *pull* messages as:

- interruptive messages (animated banners, display ads, overlay ads, video banners, pre-roll videos);
- involving activities (affiliate marketing, contests, promotions, viral marketing);
- participative branding (blogs, forums, online questions);
- applied actions (sponsored applications, custom tools);
- conversational messages (topics related to brands, products or services).

Another highlighted result of the research is that, although not in large numbers, respondents access social networks through mobile phones as well. However, the international trend shows that more and more users use the mobile Internet, and according to the comScore M: Metrics study "in Europe accessing social networking sites on mobile phone is the fourth most popular activity after e-mail, music and photos."[6]

Currently there are only four social networks that can be accessed from a mobile phone: Facebook, Google+, MySpace and Twitter. In August 2009, 65 million Facebook members (almost one third of users), have accessed the website from a mobile phone, four times more than the same period in 2008, and in 2010 their number has exceeded 100 million persons. In addition, people who have accessed the site from their mobile phones were almost 50% more active than those not using mobile Internet.

In Romania, mobile service companies did not fail to meet users demand. Thus, Vodafone has partnered with Facebook to launch 0.facebook.com. This is an optimized, faster and easier version of m.facebook.com page, which lets you use Facebook Mobile free of charge for data traffic.

Mobile phone as media channel comes with many advantages for Social Media because it is part of the personal things that the user always has with him, always in operation and involves strong participation from consumers. Through them, companies have guaranteed their message's visibility virtually wherever and whenever. Mobile advertising began in 2008 and grew significantly in 2009 with more than 85% invested budgets and 50% more advertising.

Another conclusion outlined by research is that online advertising on social networks can be useful especially for electronic devices (laptops, cameras, mobile phones, computer products), which are the products that most respondents have purchased after viewing an ad.

[6] Ed Flower, *„Când Social Media întâlneşte telefonul mobil",* OnMedia, February 2010, 10

Having known all this data, we can say that in the future the development of marketing on social networks has all the opportunities and reasons to keep on growing in our country.

Conclusions

The recent development of what is called Web 2.0 was an important step in expanding ways to communicate on the Internet. Consisting of applications such as social networks, blogs, forums or sharing content sites, the Web 2.0 differs from the previous 1.0 versions in that it changes people's relationship with information and media, encourages and provides more niche platforms for users to discuss about their hobbies or interests.

It is worth noting again that, although social networks are proving to be a core partner in the promotional and communication activities for the companies interested to take by surprise the audience, yet looking at them like a saving solution meant to produce miraculous results in a short time, is an exaggeration. The Web is not the ideal way to successfully promote and communicate, because its facilities will not make a poor advertisement to be successful and does not guarantee the sale of unsuitable products.

Providing it has access to all sources of information, a company is able to reap the full benefits of promoting through social networks, while minimizing the disadvantages, and the Internet may prove to be the most convenient form of action for the company in its quest for alternative marketing solutions.

Since the research had an exploratory character, with obvious limits, and because the Internet is a changing environment, the current research could be improved in the future. A larger and representative sample of users, a more complex set of questions or maybe a qualitative research are all possible ways of getting an in-depth insight onto the subject. By applying all these measures of improvement, the research may very well grow into a useful and powerful tool for marketers in the near future.

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THE ASSESSMENT OF RISKS THAT THREATEN A PROJECT

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Abstract

A project consists of a number of interrelated tasks whose aim is to produce a specific result. A project risk analysis consists of analyzing schedule, cost risk, quality of the final product etc. A cost risk analysis consists of looking at the various costs associated with a project, their uncertainties and any risks or opportunities that may affect these costs. The distributions of cost are added up in a risk analysis to determine the uncertainty in the total cost of the project. A schedule risk analysis looks at the time required to complete the various tasks associated with a project, and the interrelationship between these tasks. In this paper we want to study the various risks associated with the project. We start this study with the assumption that a project's cost and duration are linked together and also cost elements and schedule durations are correlated. The normal uncertainties in the cost items are modeled by continuous distributions like the Pert or triangular distribution. For project schedule modeling the most flexible environment is spreadsheet. We are interested in building blocks that typically make up a schedule risk analysis (also a cost risk analysis) and then show how these elements are combined to produce a realistic model. In the same time we want implement software tools for run Monte Carlo simulations on standard project planning applications.

Keywords: *feedback loops, cascading risks, portfolios of risks, sensitivity analysis, Monte Carlo simulations, critical path analysis, ModelRisk software*

Introduction

A project consists of a number of interrelated tasks, whose aim is to produce a certain result. Typically, a risk analysis on the achievement of a project implies the analysis of the risk regarding the plan of the project and its cost. In some cases the analysis may also include other aspects, such as for instance the quality of the final product. Risk may be defined as the possibility of the emergence of an event that affects the achievement of technical or cost objectives, or of project terms. The risk is aleatory, unpredictable, may be favorable, yet most of the times is unfavorable and thus, under these circumstances the analysis and prevention of risks should be an utmost preoccupation for project managers.

In this paper one intends to identify the risks that may appear during the execution of a project, as well as to identify techniques and methodologies of dealing with these risks. Since the risk is usually tackled statistically and since the statistical results are better only if the statistical distributions used are closer to the distribution of real data, one emphasized here the creation of new statistical distributions that would fulfill this requirement.

With this aim in view the team leaded by the author of this article created a library of programs, named ***DistriRisk*** which is based on the following four methods of creating new

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distributions: **the composition method, the „Rejection Sampling" (RS) method, the „Importance Resampling" (IR) method** and **the Metropolis – Hastings (MH) algorithm.** Using the random generation of numbers, one also created a program for the generation of beta distribution, applicable in the Monte Carlo method. All these new distributions are to be included in the pack of programs ModelRisk developed by the company VOSE Consulting with its European headquarters in Belgium.

This paper also suggests another way to calculate the cost of a project by applying the central limit theorem. Since the ordinance of a project is a simulation based on a privileged scenario for each task, we hereby suggest the use of the Monte-Carlo method, which allows the exploitation of several ordinances, combining different scenarios for the tasks of the project, and leading to a probabilistic analysis of certain information, such as the duration of the project or the probability for a task to be difficult to achieve.

In the future we intend to develop a sampling algorithm based on **the Latin hypercube** method, which will provide a sampling method that **seems** to be random but **guarantees** the reproduction of the input distribution with greater efficiency that the one provided by the Monte Carlo method.

Once this methodology is certified, we will try together with the specialists of the company VOSE Consulting to tackle the quantitative calculation of risk, as well as the possibility to model it, so as to evaluate as many projects as possible.

The risks of a project

The risks corresponding to the main stages of a project are the following: the analysis of the needs, preparing the project and the execution of a project.

The analysis of the needs. There are four categories of risks that should be taken into account before launching a project: - the risk of competition; - the risk of market (the commercial situation);- commercial risks (the manufacture of the product, the relation cost / quality); - technological risks.

The factors that may increase the risk could be the following: - the inexistence or the incomplete previous research in the field of the project; - a need formulated in a wrong way; - functions or restrictions unspecified by the user; - functions, whose complexity is inadequately assessed when analyzing need, one also noticing an under-estimate of the level of difficulty that requires expensive resources; - non-negotiable functions, imposing thus highly restrictive objectives from a technical point of view or when it comes to price or terms, choosing some functional performances without being in fact imposed by the needs; - not knowing norms and regulations imposed on certain products.

Preparing the project. These analyses and conception considerations exert an important effect in the stage of the execution of the project. *In the second stage the following risks may be mentioned:*

- various flaws and constant hesitations in the first version of the project, to which one may add an incomplete and less competent technical documentation;

- under-estimating the complexity of the methods and conception procedures (programs, automatization microcontrollers), which leads to too little time spent for the learning of working techniques;

- difficulties in defining and planning the stages mentioned in the program;

- the wrong assessment of the availability and performance of resources used; generally, there is the tendency to over - estimate performances and to under-dimension costs, being too optimist in what regards the terms;

- if we also take into consideration the subcontracting of certain stages to specialized companies, the dimensioning of the performances of resources is an extremely laborious and risky action;

- the generation of conflicts in using available resources. The resources are limited and most of the times they should be used simultaneously in various activities. Under these circumstances, neglecting critical activities may lead to delay.

The execution of the project. The risks here are related to various flaws in the identification and analysis of critical information (delayed diagnosis, wrong diagnosis, improper answers). According to the method AMDEC (the analysis of the defecting ways and their effects) a rational perception of the risk is done according to the following typology:

- identifying the flaws and weak points before they occur may be more or less precise and tardy, depending on the case.

A controlled procedure in a favorable organizational context may generate good results. Practically, *a good piece of information* travels *in a favorable moment* towards *a responsible actor;*

- the diagnosis of the cause – there are statistical methods which may provide data, according to which one may decide ensuring measures against diagnosis errors*;*

- prognosticated analysis of effect – appears when the effect is not yet evident or will be achieved on long term, and cannot be yet mentioned.

Emphasizing a risk in the management of a project

A project is defined by price objectives, performance objectives and terms objectives. Each category of objectives has its own risk issues, which make up the object of specific research:

- *The analysis of the risk to exceed the cost of the project* is usually done during its execution, appealing to techniques of financial and accounting control; the analysis of this type of risks may be also done in the stage of defining the project, appealing to the qualitative risk analysis.

- *The analysis of the risk of the failure to comply with performances* is an issue for technicians and its approach should focus on the technical fields to which it is related. Becoming aware of certain technical risks may be facilitated by the qualitative risk analysis.

- *The analysis of the risk of the failure to comply with terms*; its insufficiencies lead to its completion by approaching the risk from a qualitative point of view.

- *The quantitative approach* does not provide the decisive factor with information meant to guide one in action, this being oriented towards the quantification of the dispersion of results for an objective such as duration or price.

- *The qualitative approach* – the intuition of the leader, as well as good knowledge of the company and its environment have always played an essential role. A formal approach structures the reason with the help of control lists, which allow a fast and significant diagnosis.

This emphasis of the risk may be done either when defining the project (or the in-depth periodic re-examination of the project), as well as during the execution of the project, even if one does not use the same methods.

The quantitative risk analysis

The risk specific to this category is the failure to comply with terms and with the initially allocated budget.

A. The quantitative approach of the risk of not complying with terms.

The quantitative approach of the risk is done in a classical way, using statistical distributions. Of course, nowadays there simulation methods that are far richer in possibilities and information. This thing is a result of the use of computing techniques and implies highly sophisticated software.

The statistical methods[1] used for the management of the working time is based on the two classical distributions, i.e.:

- the empirical statistical distribution;
- the theoretical statistical distribution (beta, normal, triangular etc.).

Usually distributive methods are used. *These are based on the following principles*:

- the duration of each task in a project is considered random;
- one uses especially the Beta statistical distribution;
- one determines the parameters of this distribution starting from the extreme values A and B that the duration of the execution may take, and from the most probable value M_0 of the duration of execution.

Therefore one should come up with answers to the following three questions:

1. Which is the minimum duration (time)? – parameter A;
2. Which is the maximum duration (time)? – parameter B;
3. Which is the most probable duration (time)? – parameter M_0.

Once the parameters A, B, and M_0 are known, one may calculate the average mean and the variation of this random duration (time):

$$\mathbf{E}(t) = \frac{\mathbf{A} + \mathbf{B} + 4\mathbf{M}_0}{6}; \quad \mathbf{V}(t) = \left(\frac{\mathbf{B} - \mathbf{A}}{6}\right)^2$$

- one determines the critical path of the project placed in a concrete situation, after which making use of the average times, one emphasizes the critical stages that cannot be delayed;
- the duration of the project is considered to be the sum of the durations (times) of the tasks of the critical path previously identified. This is a simplifying hypothesis;
- we use the central limit theorem in order to approximate the law of distribution of the probability of the project's execution schedule, using the approximation with continuity corrections for the Beta distribution. In other words we do, with the help of the corrections mentioned above, the normal approximation for the Beta distribution, with which the distribution of the project's execution schedule was configured;
- knowing the law of the probability distribution of the execution schedule of a project allows the calculation of trust intervals or of the probability for a schedule to be exceeded.

In order to generate a random variable with beta distribution we shall use two independent generations for the random variables with gama distribution, as can be noticed in the source code of the program that implements this generating way:

```
program rndbeta
  write(*,20)
 20 format(' ','introduce values for ix, iy, alpha, beta, n')
 read(*,*) ix, iy, alpha, beta, n
  do 100 i = 1, n
            ix = ix + i
            do 200 j = 1, n
                      iy = iy + j
```

[1] Creangă Camelia, Darabonț Doru, Ionescu Dan, Kovacs Ştefan, *Metodologii pentru aprecierea riscului la locul de muncă – ARLM*; The Office for documentary information for industry, research and management (*Oficiul de informare documentară pentru industrie, cercetare, management – ICTCM*), Bucureşti, 2001, p. 134

```
                                call betarnd (ix,iy,alpha,beta,rn)
                                write(*,*) ix, iy, rn
200                     Continue
100 Continue
end
  subroutine betarnd(ix,iy,alpha,beta,rn)
c Input: ix, iy - seeds
c alpha : form parameter
c beta : scala parameter
c Output: rn
      call gammarnd(ix,iy,alpha,1.0,rn1)
      call gammarnd(ix,iy,beta ,1.0,rn2)
      rn = rn1 / (rn1+rn2)
      return
      end
subroutine gammarnd(ix,iy,alpha,beta,rn)
c Input: ix, iy - seeds
c alpha : form parameter
c beta : scala parameter
c Output: rn
      rn = 0.0
      Do 1 i = 1, nint(alpha)
      call exprnd(ix,iy,beta,rn1)
      1       rn = rn + rn1
      return
      end
subroutine exprnd(ix,iy,beta,rn)
c Input: ix, iy - seeds
c beta: parameter
c Output: rn
      call urnd(ix,iy,rn1)
      rn = -beta * log(rn1)
      return
      end
subroutine urnd(ix,iy,rn)
1 kx = ix / 53668
  ix = 40014 * (ix – kx * 53668) – kx * 12211
  if(ix .lt. 0) ix = ix + 2147483563
  ky = iy / 52774
  iy = 40692 * (iy – ky * 52774) – ky * 3791
  if(iy .lt. 0) iy = iy + 2147483399
  rn = ix - iy
  if(rn .lt. 1.) rn = rn + 2147483562
  rn = rn * 4.656613e-10
  if(rn .le. 0.) go to 1
  return
  end
```

ix and iy are the seeds, whereas rn is a random number between 0 and 1.

B. The analysis by simulation, using the Monte Carlo method [2]

The Monte Carlo method starts from the so-called "what – if" scenarios. The "what – if" scenarios are based on **the deterministic modeling**. This type of modeling implies the use of a single "well guessed" estimation for each variable, with the purpose of determining the results (effects) of the model. In practice, one varies the parameters of the model, thus slightly modifying the "well guessed" estimations, in order to determine the degree to which the effects **in reality** vary from those calculated by using the model. This thing can be done by selecting various combinations for each input variable. These various combinations of the possible values around the best guess, are known as the "what – if" scenarios. The model is quite often "stressed", since the variables (parameters) take values, so that they represent highly realistic scenarios.

For instance, let us consider the following simple problem: the sum of the costs for five articles. As values to be used in a "what – if" analysis, we may choose the following three points: the minimum, the best guess and the maximum. Since we have five costs (one for each article) and three values for each article, we therefore have $3^5 = 243$ possible combinations that may be generated during the analysis. Obviously this set of scenarios is far too large for a practical application. The process also suffers from two further drawbacks:

1. for each variable one uses only three values, even though in practice these values may be in large number;

2. one conducts no analysis whatsoever in what regards the probability of the emergence of the value that represents the best guess in comparison to the probability of the emergence of the minimum, respectively maximum values.

We may stress the model by raising the minimum value of the cost, so as to obtain the best scenario, or by raising the maximum value of the cost, so as to obtain the worst scenario. By doing so, we usually obtain an unrealistically great number of values that provide however no real image of the model. There is only one exception, i.e. when the scenario is still acceptable.

The quantitative risk analysis (QRA), which uses the Monte Carlo simulation, one of the most important modeling techniques, is similar to the "what if" scenarios, which generate a number of possible scenarios. Basically, one simulates scenarios for each possible value that may be taken by the variables of the model, after which these scenarios are weighted by their probability of emergence. QRA makes this thing by modeling each variable that appears in the model by means of a **probability distribution**.

In other words, the structure of a QRA model is very similar to that of a deterministic model where the variables are no longer simple values, but are represented by probability distribution functions. The objective of QRA is to calculate the combined impact of the uncertainty from the parameters of the model, with the purpose of determining an uncertainty distribution of the possible effects of the model.

The Monte Carlo method implies the random sampling of each probability distribution within a model, so as to generate hundreds or even thousands of scenarios, called **iterations** or **attempts**.

Each probability distribution is sampled in such a way so as to reproduce the shape of the distribution.

Therefore, the distribution of the values calculated for the results of the model reflect the probability of the values that may appear.

The Monte Carlo simulation provides lots of advantages, among which the most important are the following:

- the distributions of the variables of the model need not be approximated in any way;
- the correlations and other inter - dependencies among variables may be modeled;

[2] Boris Constantin, *Utilizarea calculatorului în analiza statistică*, vol.1, Editura Tehnopress, Iaşi, 2010, p. 130-165

- the level of mathematics necessary to use this simulation is basic knowledge;
- determining the distribution of the results obtained after the simulation is done entirely by the computer;
- the programs necessary to do this are commercially available;
- one may at any time include more complex mathematical notions (powers, logarithms, IF structures etc.);
- the Monte Carlo simulation is widely acknowledged as a valid method, so that the results obtained by using it are more likely to be accepted;
- the behavior of the model may be more easily investigated;
- a model may be changed really fast, the new results thus obtained being easily comparable to the results obtained by using previous methods.

The Monte Carlo simulation method may reach at least in practice any level of precision required, by the simple increase of the number of iterations. The only limitations are imposed by the number of random numbers that may be produced by using a generator of random numbers and by the time necessary for a computer to generate them.

For most of the problems in practice these limitations are irrelevant or may be easily surpassed by structuring the model into several sections.

In order to generate random samples for the input distributions of a model, one starts from a random variable X and a number p, which fulfill the condition $0 < p < 1$. We define **the quantile of order p** of the random variable X, or of its distribution function F, **the number** x_p with the following characteristics:

i. $P(X \leq x_p) \geq p$
ii. $P(X \geq x_p) \geq 1 - p$

For p = 0.25 or 0.75 one obtains a **quartile** of X, and for p = 0.5 a **median line** of X. For instance, if X is distributed N(0,1) and p = 0.1, 0.2, 0.3, 0.4, 0.5, 0.6, 0.7, 0.8, 0.9, by interpolation, symmetry and considering the tables of normal distribution, we determine the **deciles**: $x_{0.1} = -1.282$, $x_{0.2} = -0.842$, $x_{0.3} = -0.524$, $x_{0.4} = -0.253$, $x_{0.5} = 0$, $x_{0.6} = 0.253$, $x_{0.7} = 0.524$, $x_{0.8} = 0.842$, $x_{0.9} = 1.282$. The values of the quantiles for conveniently chosen values of p allow us to have a representation on the distribution function.

Knowing them gives us a clue on the way in which the probability unit is distributed above the real line. If F(x) is a monotone continuous function, the quantile x_p is the single solution of the equation:

$$F(x_p) = p$$

If F(x) is continuous and $p' > p$, then: $P\{x_p \leq x \leq x_{p'}\} = p - p'$. The quantiles may be calculated with the help of the **quantile function,** or as it is also known, **the inverse distribution function**. Let us choose the random variable X characterized by the distribution function F(x): $\alpha = \mathbf{P}\{\mathbf{X} < \mathbf{x}\} = \mathbf{F}(\mathbf{x})$.

The inverse function

$$\mathbf{x} = \mathbf{F}^{-1}(\mathbf{x}) = \mathbf{G}(\alpha) = \mathbf{G}(\mathbf{F}(\mathbf{x}))$$

is called **the quantile function**: $x = G(\alpha)$ is that number for which with the probability α, the random variable has a value that does not exceed this number. In other words, if the cumulative distribution function F(x) gives us the probability P for the variable X to be higher than or equal to x

($F(x) = P(X \leq x)$), the inverse function allows us to answer the following question: which is the value of F(x) for a given value of x?. The concept of inverse function is that concept used in the generation of random samples starting from each distribution that appears in a risk analysis.

In order to **generate** a random sample for a probability distribution, one should generate a random number α between 0 and 1. This value is then introduced in the equation $x = G(\alpha)$ in order to determine the value that should be generated for the distribution. The random number α is usually generated starting from the uniform distribution (0,1) in order to ensure an equal opportunity for an x to be generated in any series of percentiles. The concept of the inverse function is used in almost all sampling methods. In practice, in the case of some probability distributions one may not determine an equation for G(F(x)), and this is when we appeal to numerical methods.

There are various packs of programs which may used in this respect, such as ModelRisk, @RISK, Crystal Ball etc. The ModelRisk pack uses the method of inverse function for the entire family of more than 70 single-varied distributions, also allowing the user to control the way in which the distribution is sampled via the so-called "U parameter". For example:

Normal(mu, sigma, U)

where mu and sigma are the mean value and respectively the standard deviation of the normal distribution;

Normal(mu, sigma, 0.9)

returns the 90th percentile of the distribution;

Normal(mu, sigma) or Normal(mu, sigma, RiskUniform(0,1))

for the users of the @RISK pack, or

Normal(mu, sigma, CB.Uniform(0,1))

for the users of the Crystal Ball pack etc. returns the random samples from the distributions controlled by ModelRisk, @RISK or Crystal Ball.

If the random variable is continuous and one has the probability α (the generated random number), $x = G(\alpha)$ may be found out by solving the usually transcendent equation in a numerical way:

$$\alpha - \int_{-\infty}^{x} \mathbf{f}(\mathbf{t})\,\mathbf{dt} = 0$$

The survival function, written down as S(x) is defined as the probability for the random variable to have a value greater than or equal to x.

The inverse function of the survival function, also known as **the probability function**, written down as $Z(\alpha)$, represents that value that the random variable exceeds with the probability α:

$$\mathbf{x} = \mathbf{Z}(\alpha) = \mathbf{Z}(\mathbf{S}(\mathbf{x}))$$
$$\mathbf{P}\{\mathbf{X} > \mathbf{Z}(\alpha)\} = \alpha$$

i.e. $Z(\alpha) = G(1 - \alpha)$

where G is the inverse function of the distribution function and S is the survival function. In the case of a continuous random variable, with the probability density f(t), the value x, also known as **critical point** may be found out by solving the transcendent equation:

$$1 - \alpha - \int_{-\infty}^{x} \mathbf{f(t)dt} = 0$$

The critical point is that point of the axis t that has the abscissa x. The function Z(α), the inverse function of the survival function, is one of mostly used statistical functions; for this function there is in the specialty literature the greatest number of tabled values.

From the relation Z(α) = G(1 - α), it results that the values of the probability function (the inverse survival function) may be obtained with the help of the quantile function, in which $\alpha \to 1-\alpha$.

The risk function, also known as **the intensity of death**, is written down as h(x) and is defined as the relation between probability density and the survival function in the point x:

$$\mathbf{h(x)} = \frac{\mathbf{f(x)}}{\mathbf{S(x)}} = \frac{\mathbf{f(x)}}{1 - \mathbf{F(x)}}$$

In the case of a discrete random variable, the risk function is defined in the following way:

$$\mathbf{h\ (\ x\ )\ =\ \frac{f\ (\ x\ +\ 1\ )}{1\ -\ F\ (\ x\ )}}\ ;\ \text{x whole number}$$

The cumulative risk function, written down as H(x) is defined as an integral from the risk function:

$$\mathbf{H(x)} = \int_{-\infty}^{x} \mathbf{h(u)du}$$

The following relations exist:

$$\mathbf{H\ (\ x\ )\ =\ -\ \ln(\ 1\ -\ F\ (\ x\ ))}$$
$$\mathbf{S\ (\ x\ )\ =\ 1\ -\ F\ (\ x\ )\ =\ \exp(\ -H\ (\ x\ ))}$$

In many statistical applications (building trust intervals, searching for critical fields for verification criteria of statistical hypotheses) one should find out the so-called **critical points in percentages** or the **percentage critical points**. In order to do this, in the equation $1-\alpha-\int_{-\infty}^{x} \mathbf{f(t)dt} = 0$, one expresses the probability α in percentages Q, i.e. $\alpha = 0.01Q$. The critical point in percentage is defined as the root x of the equation:

$$1\ -\ \int_{-\infty}^{x} \mathbf{f\ (\ t\ )\ dt}\ \ =\ \ 0\ .01\ \mathbf{Q}$$

The critical point x is the abscissa for which the shaded area represents Q percentages of the entire area under the probability density curve (= with 1).

The Monte Carlo method uses as sampling method precisely the method described above. The Monte Carlo sampling fulfils the most exigent needs of a natural random sampling method. It is

extremely useful when one tries to obtain a model that should imitate a random sampling coming from a certain population or when we wish to conduct statistical experiments.

The random feature of the sampling of the Monte Carlo method refers to the fact that we may have **over-** or **under-**samplings on various pieces of the distribution, which does not give us faith that we could correctly reproduce (model) the shape of the input distribution. This aspect may be removed by considerably increasing the number of iterations done.

For most of the analyses regarding risk modeling, this random feature of the Monte Carlo sampling is not relevant. We are far more concerned to see whether **the model** reproduces the distributions determined (chosen) by us for its inputs. Therefore, why spend so much time and effort to find these correct distributions? The answer to this question has been recently provided by the sampling method named **Latin hypercube**, which provides a sampling method that **seems** to be random but **guarantees** the reproduction of the input distribution with far greater efficiency than the one provided by the Monte Carlo method.

The qualitative risk analysis of not complying with terms

The limits of the quantitative analysis lead to a qualitative approach, as well, thus facilitating the understanding of the causes of delays and subsequently a better way to prevent them.[3]

Chronologically speaking, the management of a project has a preparation stage, in which the work to be done is technically defined, based on a certain number of work hypotheses, and a simple ordinance by an achievement stage, during which the programming is applied.

The problems encountered during the execution lead quite often to a revision of the project analysis and thus to a coming-back towards the preparation stage. This type of analysis may be applied in a series of categories of risks presented in the following paragraphs of the paper.

The risks in the stage of project elaboration

In this moment of the stage, the responsible person of the project, as well as the team define the activities to be executed, conditioned by inner and outer factors and by the resources applied in this purpose. These risks may be re-grouped into four categories.

A. The internal risks when defining the project specifications

In the preliminary stages of the project, the information cannot always be very precise, defining a certain number of fundamental characteristics [4] (the list of tasks that need to be achieved, the duration periods of various tasks, the human and material resources necessary for each task, the quality criteria).

The reasons that generate these imprecisions may be the following:

- the existence of future tasks, whose exact content depends on the decisions made during previous activities that are not yet executed;
- the incomplete analysis of tasks, due to time crisis, of partial information of appealing to a temporization logic;
- the existence of various possible technical scenarios that the analysis did not intend to tackle in the research done;
- an under-assessment of the activities and what should be executed, the absence of previous experience for certain types of tasks (the inexistence of fabrication, package or control series);

[3] Walliser, B., *Systemes et modeles. Introduction critique a l'analyse des systemes*, Economica, Paris, 1977, p. 166

[4] Opran Constantin**;** Stan Sergiu, *Managementul proiectelor,* Editura comunicare.ro, Bucureşti, 2004, p. 44

- an under-assessment of the new difficulties determined by the simultaneous execution of several tasks;
- postponing to designate the responsible persons with the execution of certain tasks;
-vagueness in defining objectives of the project (quality, quantity, tolerance, durability, reliability, maintenance);
- modifying the content of the project depending on the human or material resources available;
- modifying the content of the project and the responsible persons during the execution of a task or a project.

This list should be completed before initiating the project. This process is not always possible, even unwanted due to the excessive delay caused by the search for complementary information.

The incoherence of the functional data sheets of the project

The data sheet of a project specifies the main objectives and means, but nothing guarantees the coherence between the objectives proposed and the means that can only result from the iterative evolution between the various parts of the project. In this stage competence and honesty should prevail.

The paymasters of the project are tempted to abuse of their position so as to excessively limit the means, in relation to the objectives assigned; on the other hand, the responsible person with the execution of tasks would like to have some time and space to get ready for possible execution difficulties and to be able to comply with their arrangements.

The exchange of information may be ”distorted” from both sides, the objective of transparency being outside the power of perception, the information having nothing but a technical role and the denaturized effects of this informational transaction being only limited and not eliminated. [5]

Among the possible causes of informational incoherence in the datasheets one may mention the following:

- the date of the project finalization is too optimist (too close in time);
- the budget for the project is insufficient;
- the desired quality specifications are too ambitious;
- the technical performances of resources are over-estimated, therefore an unrealistic succession.

Technical and industrialization risks

These refer to the companies organized on project management. Under these circumstances the following cases may be emphasized [6]:

- under-estimating the complexity of the product or its innovating character may lead to a wrong perception of the difficulties at the level of the project coordination;
- choosing a new manufacturing method relies on the hypotheses regarding the development time and the performance of the method, which in turn condition the objectives of price (cost), terms and quality; these performances may not be reached if one does not mobilize more resources;

[5] Alexander Carol, *Operational Risk, Regulation, Analysis and Management,* Prentice Hall, Finanacial Times, Pearson Education Limited, London, UK, 2003, p. 276

[6] Carroll Tery, WEBB Mark, *The risk factor. How to make risk management work for you in strategic planning and enterprise*, Take That Ltd., England, 2001, p. 194

- the possible appearance of a new manufacturing method or a new technique during the execution of a project could lead to abandoning an already known technical solution, possibly partly done, if the new method diminishes the cost, increases the reliability or improves other performances;

- the anteriority relations between the tasks may double their technical connections: the specifications of a task take shape in the manufacturing of a product with precise technical characteristics; otherwise, the content itself of the guarantee task for the use of a product should be revised even taking into account additional costs and delays;

- combining several verified solutions may lead to problems difficult to predict.

The weak capacity to manage the development and tracing of projects

The organizational context of the project may or may not favor the appearance of realistic hypotheses and conditions the efficiency of the continuation of the execution. It is a factor that may lead either to the increase or decrease of risks exposed.

Tackling the organization of a project is justified by a certain number of advantages, with the help of which one may better manage time and costs; furthermore, one may also see beneficial effects in what regards the level of knowledge gained.

This means looking for alternatives from the class of specific problems and writing them under a transmissible form adequate to the limitation of the emergence of certain errors.

In the absence of all collective reflections on this field, the capitalization is individual and reveals the expertise of the responsible persons, and transmitting the skill is difficult and tributary to the individual and the circumstances. A too fast rotation of the personnel is a major obstacle in gaining experience.[7]

The procedures of elaborating the project may lead to the emphasis of certain lacks or their explanation with the help of grids. The analysis of risks may seem useless to those who chasing for immediate results prefer to come up with an action plan without wondering about its fundamentals.

The procedures used for the elaboration of a project may limit the exchanges of information and commitments, and thus when establishing an ordinance with infinite capacity, assuming that all resources are available, the emphasis of possible conflicts that might appear at the request of using the same resources at the same moment, coming from various tasks of the project or from other projects, differ.

The procedures to continue the execution of the project may increase or decrease the effects of certain risks. The absence of formal procedures leads to a tardy detection of problems, and the correction actions taken under the pressure of emergency may not be the best (the compromises from technical validations of components transfer the risk towards the final characteristics of the product)[8].

A continuous activity is done by periodical update of work hypotheses, since the control of the project's progress may be done in comparison to a realistic technical recommendation and not to an initial recommendation lacking in significance and supported by out-of-date information and data.

The rigor implied by these updates represents the cost paid so as to be able to manage possible technical and financial deviations. The conflicts between the departments involved in the project appear inevitable. The procedures to solve or mediate these conflicts may be inexistent or may not be suited to the situation, which leads to more specific risks.

[7] Lupu Ramona Ana, Daniela Coman, *Managementul proiectelor*, Editura INFOREC, Bucureşti, 2000, p. 217

[8] Prunea, Petru *Riscul în activitatea economică*, Editura Economică, Bucureşti, 2003, p. 25

B. External risks in defining specifications

Anticipating the demand is mandatory for the launching of new products. This implies prognoses, as well as a certain level of risk: the norms that the product should comply with may change and may lead to regulated risks. Such errors may have serious consequences in specifying the resources required, with implications in delays and costly corrective actions.[9]

Unpredictable change of the environment is rather rare, but the following two risks may appear:

- the enforcement of new regulations in a certain field may be unsafe; a new law (such as pollution norms) has to be enforced, but the precise enforcement date is still unknown;
- the relative ignoring of the exact content of the future regulation.

In order to limit these types of risk, one may prefer adopting expensive technical solutions, which provide better reactivity, or maintaining restrictive specifications for the products.

Risks connected to use of resources

The risks connected to the use of resources focus on defining the resources required and their forecasted availability.

C. Risks connected to defining the resources requested

The legal environment does not condition only the specifications of products, but also the use of personnel and equipment resources, thus generating regulated risks regarding the resources, the variables also according to the country in which the manufacturing process is ensured.

These restrictions may be internal (internal regulations, provisions), quite predictable, and external (laws, reports), less predictable, that are imposed upon the company: [10]

- *in what regards the personnel* the hypotheses on the environment susceptible to change may cause a modification of the personnel registries, referring to: the paragraphs imposing the duration of work (paid leave, weekly duration of work, permanent team), collective agreements, interior regulations of order;
- *in what regards the equipment* the following restrictions are to be taken into consideration at the level of the company (complying with security and safety norms) and at the level of the impact of their use on the environment (limitation of chemical, thermal, sonic pollution).[11]

The hypotheses regarding the defining of resources required may turn out to be ungrounded because of:

- ignoring the exact resources, human and material,
- ignoring their mobilization and the capacity of the execution of work required in a certain period of time.

An underestimation of the complexity of a task may require more complex resources than the ones forecasted:

- the incoherence between resources: the introduction of a new machine may have as a consequence a prior formation (or recruit) of operators, as well as an adaptation of technology and maintenance;
- the problems are bound to appear if these incidents are not brought to a minimum level.

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[9] *****,** *Dicționar de managementul proiectelor;* AFITEP, Asociația Franceză de Managementul Proiectelor; translation from French into Romanian, Ion Năftănăilă; Editura Tehnică, București, 2001, p. 251

[10] Budica, Ilie, Mitrache, Marius, *Metode specifice de asumare a riscului în deciziile manageriale,* în: Revista Finanțe publice și contabilitate, v. 17, nr. 5, 2006, pp. 55-57

[11] Bibu Nicolae, Claudiu Brandas – *Managementul prin proiecte*, Editura Mirton, Timişoara, 2000, p. 118

Risks regarding the availability of resources required

Programming the project imposes special attention given to various mobilized resources, the productive potential available and the way to solve possible conflicts. A wrong definition of the productive potential may be determined by:

- ignoring the performances of certain resources (newly acquired machines, new operators) or of their reliability;
- the bad emphasis of the continuous improvement in using resources (the Kaizen approach in Japanese management);
- under-estimating the period of knowing the new resources (employing a new operator or machine may not become immediately operational);
- the bad emphasis of organizational issues (problems of coordinating the mobilization of resources).

D. Risks in the stage of project execution

During the execution of the project, unfavorable events (be they forecasted or not) may compromise the objectives of the project, and the notion of risk has a specific meaning.

The reaction of those responsible with the adaptation to a new situation may be more or less adequate, this changing the hypotheses of the labor of programming and the risks continue afterwards, as well. The risks during the stage of project execution are related to: the tardy detection of the problem, wrong diagnosis and inadequate reaction.[12]

The risk of late detection

In order to have a good diagnosis, the operator should dispose rapidly of good information and should obtain timely and adequate protection against flaws and deviations. Making use of necessary information varies according to risk: the external information regarding the surrounding technical and economic environment is relatively comfortable but often quite expensive; the internal information necessary is usually available but rarely adequate, on good support and in the right place.[13]

An active and non-passive attitude in front of information is a mandatory condition of a good reactivity. The problem of defining data to follow and the quality of the information available depends on the regularity of daily check-ups, and the emergency of other obligations is often invoked so as to differentiate certain daily check-ups; this behavior is the cause of the delays in identifying problems, which in their turn maintain the "pressure" on the operationalization of the project.

The risk of the wrong diagnosis [14]

The analysis of partial information may lead to the over or under-estimation of a problem. A diagnosis may be wrong because the phenomenon we fear does not have the degree perceived. At the same time, the error of the diagnosis may lead to the interpretation of facts:

- more possible causes may have the same effect, the cause retained being the wrong one;
- we may focus on an apparent cause, without looking for a remedy for profound causes;

[12] *** *Manual de Managementul Proiectelor,* Guvernul României, Departamentul pentru Integrare Europeană, Bucureşti, 2008, p. 117

[13] Bowman, Wiliam Archibald, *Căi de îmbunătățire a activității unei companii printr-o abordare bazată pe risc*, în: Audit financiar, v. 5, nr. 4, 2007, pp. 9-12

[14] Butler Cormac, *Mastering Value at Risc; A step-by-step guide to understanding andapplying VaR;* Financial Times, Prentice Hall; London, United Kingdom, 2001, p. 17

- the mental representation of reality by actors (the inadequate use of the model of complete costs) always has deviations and may lead to wrong hypotheses of causal relations and consequently a false diagnosis in what regards the origin or the consequences of the problem detected.

A wrong diagnosis may lead to an inadequate answer, but a good diagnosis does not necessarily require adequate answers.

The risk of the inadequate answers

Once the diagnosis is formulated, the answer chosen may be inadequate. This phenomenon occurs if the diagnosis is justified by a local logic, because this tackles the problem only partially (the predominance from the point of view of the service performed or quite on the contrary, from the point of view of the management of projects) or does nothing else but temporize (the predominance of a budget or short-term argument), thus postponing solutions that need to be adopted, but which generate conflicts.

Another objectionable answer to the problem identified is the creation of new rules (procedures) that aim at the prevention of the reappearance of a problem with a slight chance of repeating itself, thus leading to the progressive suffocation of the system. [15]

The risk regarding the cost of the project

A risk analysis regarding the cost starts from a document, in which the various working packs contained by the project are mentioned and detailed. Each pack is then divided into a series of quantities estimating the quantity of work necessary for their achievement. Each pack is associated to an item of cost, which may also have an element of uncertainty.

These elements of uncertainty may be discreet events (of risk or opportunity), which may change the sizes of costs and are modeled by continuous distributions, such as the PERT distribution or the triangular distribution. We shall use here the triangular distribution, because it is highly popular in risk analysis. This distribution allows a good modeling when the minimum and maximum values of a variable, as well as its mode (the most probable value) can be estimated.

For instance let us assume that the body of a ship consists of 562 boards, and each of these boards should be clinched in its right position. Each board is clinched by a workman. The head engineer assesses that a board should be clinched the fastest in 3 hours and 45 minutes and the slowest in 5 hours and 30 minutes. The most probable value of the clinching time is thus 4 hours and 15 minutes. Clinching each board is paid with 50 lei per hour. The total cost for the entire process of clinching can be thus modeled:

$$\text{Cost} = 562 * \text{Triangle}(3.75, 4.25, 5.5) * 50$$

Having a number of 1000 simulations, one notices that we have quite a lot of values close to 3.75 and 5.5 respectively, which cannot be accepted because this means that the workmen work either too fast, or too slow. The problem appears because the triangular distribution models the uncertainties starting from the mean value of the working time for the 562 boards.

The easiest way to remedy this failure is to model each board in part. We thus obtain a column with 562 Triangle (3.75, 4.25, 5.5) distributions that we add and then multiply by 50. Even though the result is correct, the method is basically impossible to apply into practice because we

[15] Kieffer, J.P., *Les systemes de production, leur conception et leur exploatation*, Edition Dunod, Paris,1997, p. 153

would have to use a very large number of cells. In this case we shall use an aggregate model created by the company Vose Consulting and implemented in the pack ModelRisk:

VoseAggregateMC(562, VoseTriangleObject(3.75, 4.25, 5.5))

We would also like to suggest another way to solve the problem mentioned above, i.e. by applying the central limit theorem. We start from the fact hat the average mean μ and the standard deviation σ of the Triangle(3.75, 4.25, 5.5) distribution are:

$$\mu = 4.5$$
$$\sigma = 0.368$$

Therefore, considering the fact that we have 562 items, the distribution hours – total persons for the entire technological process is the following:

$$\text{hours – total persons} = \text{Normal}(4.5 \times 562, 0.368 \times \sqrt{562}) =$$
$$= \text{Normal}(2529, 8.724)$$

Therefore, the total cost for the clinching of all boards is estimated to be:

$$\text{Cost} = \text{Normal}(2529, 8.724) \times 50$$

Conclusions

We consider that this paper sets the methodological and scientific bases necessary for tackling the quantitative and qualitative study of risks which may appear during a project. Generating new distributions, different from the ones used nowadays, and finalizing the algorithm for the sampling method known as the Latin square will allow in the future a much more **precise** statistical analysis of risk phenomena. The inclusion of the new distributions in the ModelRisk pack of the Vose company, specialized in risk analyses, will allow the authors to take part in **real** risk analyses together with the specialists of this company.

In the future one wishes to tackle the risks that may appear during very large projects, in which their number may be of thousands. In such a case each risk should be associated to a certain probability of appearance and a PERT – type distribution should reflect the size of that risk. We believe that in the near future the change of the organizational culture regarding the qualitative and quantitative analysis of risks of any kind should become of utmost importance.

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ACTIVE AGEING AND REFORMING PENSION SYSTEM. MAIN CHALLENGES

Valentina VASILE*

Abstract

Active ageing and economic crisis create a great pressure on pension systems, from the financial sustainability and performance of the old architectures of the 3 tired system point of view. Reforms of public pension systems during the last years highlight that demographic ageing is a major influence factor on financial sustainability of the national insurance and social assistance systems, with long-term effects. Associated with "classic" demographic ageing (low birth-rate, increase of the average life expectancy) for some new member states, such Romania, labour mobility on medium- and long-term and the change of its largest part into emigration, heightens labour force ageing and diminishes participation to insurance systems (due to the low portability of pensions). To these are added also the specific effects generated by the crisis that have put pressure on decreasing social expenditures, in reverse trend against the demand generated by demographic ageing. Romania, and also several EU member countries are involved in large-scale actions of reforming pension systems both as answer to the increase in the numbers of elderly population, and implicitly of associated social expenditures, but also for stimulating the extension of active life. The increase in the standard retirement age and its correlation to life expectancy constitute priorities of changing the methodology in pension computation. The reformed policies in the field of pensions pursue as well restricting accessibility and diminishing early-age retirement schemes in parallel with stimulating the employability of individuals aged 50 and over. In this paper we present the main policy action in order to stimulate and develop a new model of old age insurance and a new pattern of incomes after retirement, and also to investigate the support measures among EU member state for active ageing and increase incomes for elder persons.

Keywords: *active aging, reforming pension system, financial sustainability*
JEL Classification: J40, J2, B26

Introduction[1]

The impact of the financial crisis on private pensions and financial restrictions of the state have strengthened the necessity of developing sustainable, combined/multi-tiered pension systems, the creation of financial balances on each component, as well as assuring medium- and long-term the individual sustainability. As a result, assuring decent life at old age turned into an actual challenge, the weaknesses of the public system triggering the rethinking of the association scheme for various types of pensions, for assuring total comfortable/decent incomes (EC, 2011)[2]. Moreover, in some EU

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[1] Present paper represent an synthesis of the Chapter 1 of the Study "Analiza evoluţiilor şi politicilor sociale în UE în ultimii trei ani – pensii suplimentare/private şi impactul îmbătrânirii populaţiei" Strategy and Policy Studies (SPOS) 2011, Study no 4, European Institute from Romania, Bucharest, 2011, coord Valentina Vasile

[2] Concluding the first European semester of economic policy coordination: Guidance for national policies in 2011-2012, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions COM(2011) 400 final, EC, Brussels, 7.6.2011, http://ec.europa.eu/europe2020/pdf/communication_en.pdf

countries is pursued to ensure the compatibility of the pension system's structure and the possibility of benefiting from pension under various systems of public or private insurance, irrespective of the fund's type where the contribution was made and the location of the person at retirement age.

Economic development level, social model and pension system

The level of economic development and the social model represents main determinants of the national pension systems evolution and performance. The main restrictions of the financial sustainability were: economic dependency ratio, the employment rate and average level of incomes of the contributors of the public and private pensions

An economic developed country can afford to build up public insurance systems for pensions that would promote to a large extent the safety of old-age income, supporting at legal and institutional level and by adopted policies the participation to the system and the development of complementariness. Private pensions become attractive for supplementing incomes from the public system and are used as additional safety system by persons with decent and/or comfortable incomes. In the case of weak state insurance systems, where the pensions becomes insufficient and there is no adequate (decent) ceiling of the minimum pension, or where the principle of the social minimum pension is not applied, private pensions are attractive as alternative to public insurances in particular for persons with incomes above average or high, in general non-wage employed population, for whom in many countries, the public pension pillar is optional. The attempt has been made in the last years to increase the contribution base by attracting within the system all types of active population, yet the deterioration of the economic dependency ration leads to the option of aggregating sources for incomes on retirement by broader participation, hence more risky to the private system of old-age insurance.

If the public pillar is mainly based on the PAYG system, the private one, in its constructive variants has as ground principle capitalisation and preserving the purchasing power of the saved amounts (contributions) by investment portfolio.

If, at the beginning, the private systems were predominantly optional, and represented an individual, singular option of the beneficiary, in the last decades, as social relationships and social accountability of the companies and of the state as market stakeholders developed, private pension systems evolved supported by companies or by the state: a) occupational pensions related especially to the activity of the social partners, and firstly of the trade unions and guilds/professional associations, and b) compulsory private pensions supported under various forms by the state, respectively by fiscal deductions, management support systems for the funds, by regulating supervision and guaranteeing institutions, etc.

Also individual insurances remain, yet they develop and diversify, gravitating around the idea of life insurance (pension insurances on the life insurance system), and represents a specific market insurances for those with average and high incomes and a culture of managing incomes oriented on the market mechanisms (as form of risk management and of active participation on the market for generating positive yields of saved funds).

The multi-tiered system is present in several countries of the world, and at EU level was promoted the coordination policy (EC, 2004)[3] for insuring financial flows between national funds and for rendering efficient systems.

Population ageing has developed specific systems of insuring elderly persons, based on integrated adequate health services, social assistance centred on the particular needs, etc. In the field of pension insurances was pursued the *development of individual insurance culture* and of extending

[3] Regulation (EC) no 883/2004 of the European Parliament and of the Council from 29 April 2004 regarding the coordination of social security systems.

the active life as direct active measure. At the same time, the increase of the average number of years spent as pensioner has triggered the reconsideration and reform of public systems – the system of contribution and the calculation formulae, the transfer rate wage-pension. In parallel, as answer to increasing social responsibility, in many countries was constituted (and in the last years also in Romania) the system of the minimal social pension and the access conditions to early retirement pension and invalidity pension were hardened. The entry in deficit of several pension systems due to the diminishment of the contributors' base and of extending the period of paying the old-age pension became permanent and acute in some national systems, the transfer of funds for balancing from the state budget turning more difficult, in particular during the crisis period.

Many experts propose the in-depth revision of the multi-tiered pension system, and even the question of their sustainability for medium- and long-term was raised for the PAYG-type public system! Moreover, the crisis with its manifestation forms and extended duration (and from the relapse perspective but on other more restrictive and complex coordinates) challenges us to analyse from the current pension systems' sustainability viewpoint[4] the survival potential of the present capitalist system (N Roubini, 2011 on K Marx's theory of capitalism self-destruction).

Recent developments of pension policies within the EU and Romania

The pension systems' of the EU member countries are multi-tiered combining the PAYG principle for the public pillar with the one of capitalising for the private and occupational pension pillars, either compulsory or optional. Employers, through the social partners, have developed insurance systems with capitalisation of the occupational pensions' type as form of supporting employees and instrument of stabilising employment, the transfers between these funds being, in general, more difficult.

The private pensions' market is represented on one hand, by actual private funds, subjected to particular regulations in the field of private pensions, and coordinated/supervised by specific institutions, and on the other hand to the life insurance systems of the pension-type, where reimbursement of capitalised sums under the form of annuities or monthly payments is constituted into additional income for pensioners.

The pensions are the most important component of social expenditures and remains the basic source of pension-type incomes. With respect to the private pension funds, according to available data for 2010, is found that these are significant in the Netherlands (over 1.3 times of GDP), Great Britain (86%), Finland (82%), Denmark and Ireland (about 50% of GDP), modest in Portugal, Spain, Poland, Hungary, Estonia and Slovakia (about 7-16% of GDP) and very low (under 1% of GDP) in France, Romania, Latvia. The national pension system analysis of the country files shows thus a very broad variety of the constituents and structure for pension funds, public and private, largely depending on the social model and the history of insurances' development, and the size of state's involvement in the field. Also, a diversity of old-age insurance forms is found as well, and the association with the development level and the social model certifies a stronger involvement of the state in countries with a generous social model and an important public pensions' system. The significance of the public pensions' system for EU-15 countries decreases on the geographic axis North-South. For transition countries, that still define their social models (which are developed to the vast majority under a hybrid form) and that have a lower development level, the public pillar is strong, yet with high efficiency deficit. The reforms in these countries are mostly under development,

[4] http://www.realitatea.net/foto_1182141_profetul-crizei-marx-a-avut-dreptate-cu-privire-la-autodistrugerea-capitalismului_875627.html şi http://europe.wsj.com/video/nouriel-roubini-karl-marx-was-right/68EE8F89-EC24-42F8-9B9D-47B510E473B0.html?KEYWORDS=Roubini

promoting both adjustment by in-depth reforms of pillar I, and the gradual implementation and expansion of the contributors' basis for the pillars II and III.

Under the conditions in which, at EU-level, by the Green Paper the pension insurance policies are reoriented towards "**adequacy, sustainability and safety**", also a **convergence of the systems** is developed in their reformed shapes. The measures of the last years[5] are focused towards *efficiency and balance of funds, by promoting new insurance and integrated assistance services policies for third-age individuals* (employment for active ageing, adjusted health system, a pension system generating decent pensions, safety net for disfavoured categories, increasing efficiency and sustainability of each component/pillar, etc.).

At Euro-area[6] level it is estimated that from the perspective of ageing population, the reform of pensions and of the social security systems are not enough for ensuring the long-term financial sustainability, the Commission requesting measures that would allow for "**coordinating the pensions reform with the national demographic situation**". In this context, recommendations are made for diminishing public debt under the threshold of 60%, including by reforming the public pension systems. At national level, the recommendations and policy measures initiated by governments are varied as impact and severity, with a different potential of adjustment/adequacy of the pension system to particular requirements of ensuring long-term sustainability and correlation with the social assistance measure package for the third age.

For EU-15 countries the pension systems have a history based on the three pillars, well-defined and with a private component integrated into the system long time ago. Transition countries developed an adjusted/adequate public system to the market economy, or in the best circumstances, reformed to which is attached a private system under construction. As result, the reform of the public system under conditions of economic crisis and budgetary restrictions of various intensities, is the more important for countries that cannot support themselves by a coherent and performance private system and that face issues related to the general level of incomes and the capacity of the public pension of ensuring adequate incomes in old age. Additionally, these countries have also poorly developed social assistance systems for third-age individuals, still inadequate to current and future circumstances, or which are still under construction and not always with a clearly defined and agreed on intergenerational responsibility and/or the involvement of the state as artisan of minimal social conditions.

Without performing a detailed analysis of the public pension systems with the EU-27, we shall present some of the current guidelines regarding the PAYG pillar reform, from the viewpoint of its sustainability[7].

The reform of the pension systems based on restricting access, of increasing the contribution period, the retirement age, etc, under conditions of diminishing labour incomes which are the backbone of constituting social funds and budgetary sources of the state for social assistance generate

[5] The main policy measures in the field of pensions for the last years in EU-27 are synthesised in three categories of documents: a) recommendations of the European Council, specific to each member state; b) working papers for each country elaborated by the Staff of the Commission, and c) national documents, respectively national programmes of reforms and/or Stability Programmes/Convergence Programmes. COUNCIL RECOMMENDATION of 12 July 2011 on the implementation of the broad guidelines for the economic policies of the Member States whose currency is the euro (2011/C 217/05), Official Journal of the European Union, C217/15

[6] http://ec.europa.eu/europe2020/pdf/recommendations_2011/dts_737_euro_en.pdf

[7] The build-up of the national multi-tiered models is extensively presented and periodically analysed in EU and OECD documents, fact for which we consider as important in the current paper to present the adjustments triggered by the convergence of the systems and by the ones associated with the financial crisis, with emphasis on the development, performances and perspectives of the private pensions' systems, as a constant for a performance system, based on the complementariness between individual's responsibility and the one of the society for decent, active and comfortable ageing under the aspect of incomes and of the quality of life.

reverse effects and intergenerational pressures, imbalances on the labour market, diminishment of replacement flows of contributors' basis and, finally the decrease of required financial resources. A comparative analysis of demographic ageing costs emphasises the following aspects:

- public pensions represent the most important component of social costs, with an increasing trend, mainly due to a growing number of beneficiaries, and they are followed by health expenditures;
- the ageing dynamics differ on countries and the increase estimated is of up to 15.3 pp from GDP in Luxemburg. In Romania the estimated increase is of 7.4 pp which means almost doubling the expenditures with pensions, and puts the country into the group of countries with a high pressure on budgetary expenditures for pensions;
- a hierarchy of pensions' pressure on budgetary costs places Romania on the 17th position after the 2010 level of pensions expenditures in GDP, next to Malta and Luxemburg and on the 5th position under the aspect of their expected increase, after Luxemburg, Cyprus, Greece and Slovenia; as compared with the European average, the share of pensions in GDP for Romania is of 8.4%, inferior to the European average of 10.2% and by 5.6 pp lower than in Italy, country which has the highest share and by 3.3 pp over the minimum European value recorded in Latvia. But, this relative ranking hides significant differences of the policies and, particularly, of the performances for public pension funds.

Increase of costs associated with demographic ageing within the EU

% in GDP	Pensions		Medical Assistance		Long-term Assistance		Unemployment		Total	
	2010	Change 2010-2060	2010	Change 2010-2060	2010	Change 2010-2060	2010	Change 2010-2060	2010	Change 2010-2060
RO	**8,4**	**7,4**	**3,6**	**1,3**	**0**	**0**	**2,7**	**-0,2**	**14,7**	**8,5**
EU	10,2	2,3	6,8	1,4	1,3	1,1	4,9	-0,2	23,2	4,6
Italy	14,0	-0,4	5,9	1,0	1,7	1,2	4,3	-0,2	26,0	1,6
France	13,5	0,6	8,2	1,1	1,5	0,7	5,8	-0,2	29,0	2,2
Austria	12,7	1,0	6,6	1,4	1,3	1,2	5,2	-0,2	25,7	3,3
Portugal	11,9	1,5	7,3	1,8	0,1	0,1	5,6	-0,4	24,9	2,9
Greece	11,6	12,5	5,1	1,3	1,5	2,1	3,8	0,1	21,9	16,0
Poland	10,8	-2,1	4,1	0,8	0,4	0,7	3,8	-0,6	19,1	-1,1
Finland	10,7	2,6	5,6	0,8	1,9	2,5	6,4	0,0	24,7	5,9
Hungary	10,5	0,6	5,8	1,3	0,3	0,4	4,5	-0,3	21,0	2,0
Belgium	10.3	4,5	7,7	1,1	1,5	1,3	7,3	-0,3	26,8	6,6
Germany	10,2	2,5	7,6	1,6	1,0	1,4	4,6	-0,4	23,3	5,1
Slovenia	10,1	8,5	6,8	1,7	1,2	1,7	5,1	0,7	23,1	12,7
Sweden	9,6	-0,2	7,3	0,7	3,5	2,2	6,6	0,0	27,1	2,7
Denmark	9,4	-0,2	6,0	0,9	1,8	1,5	8,0	0,1	25,2	2,2
Bulgaria	9,1	2,2	4,8	0,6	0,2	0,2	3,0	0,2	17,1	3,2
Spain	8,9	6,2	5,6	1,6	0,7	0,7	4,8	-0,2	20,0	8,3
Luxemburg	8,6	15,3	5,9	1,1	1,4	2,0	4,0	-0,3	19,9	18,2
Malta	8,3	5,1	4,9	3,1	1,0	1,6	5,0	-0,7	19,2	9,2
Czech R.	7,1	4,0	6,4	2,0	0,2	0,4	3,3	0,0	17,0	6,3
Cyprus	6,9	10,8	2,8	0,6	0,0	0,0	5,8	-0,6	15,5	10,7

United Kingdom	6,7	2,5	7,6	1,8	0,8	0,5	4,0	0,0	19,2	4,8
Slovakia	6,6	3,6	5,2	2,1	0,2	0,4	2,9	-0,6	14,9	5,5
Netherlands	6,5	4,0	4,9	0,9	3,5	4,6	5,6	-0,2	20,5	9,4
Lithuania	6,5	4,9	4,6	1,0	0,5	0,6	3,5	-0,4	15,1	6,0
Estonia	6,4	-1,6	5,1	1,1	0,1	0,1	3,2	0,3	14,8	-0,1
Ireland	5,5	5,9	5,9	1,7	0,9	1,3	5,3	-0,2	17,5	8,7
Latvia	5,1	0,0	3,5	0,5	0,4	0,5	3,3	0,3	12,3	1,3

Source: Belgian Stability Programme (2011-2014), p 55

In fact, it is considered that active ageing represents a sustainable solution for counteracting both the effects of demographic ageing and of the crisis, the reforms within pension systems having, mainly, for the largest part of the member states three general coordinates: *increasing the legal retirement age, diminishing access to early-retirement schemes and diminishing implicit taxation for supporting continued activity for elderly* (Regional Economic Outlook: Europe, Oct 2011, FMI)

A brief synthesis of EC recommendations from 12 July 2011 regarding the reform of the pension systems includes as main required measures and recommends their implementation, the following: *limiting access to early retirement and special schemes; extending the contribution period, and increasing the retirement age (with gender uniformity, establishing relationships between benefits and actual demographic and economic conditions, stimulating employment as alternative or in complementariness, stimulating optional/private insurance, etc.*

Measures for ensuring the sustainability of pensions' systems and increasing the effective retirement age

Measures	*Countries*
Limiting access to early retirement schemes	AT (for persons with long insurance periods), BE, BG, DK (reform of very early retirement schemes VERP), LU, MT, FR
Revision of the accelerated pension system for public officers, diminishing pension by 10% for newly entered into the system and indexing pensions with inflation.	IE,
Diminishing pensions	PT
Low taxes on pensions	SE
Change of the pensions' indexing system	RO, SK,
Limited access to invalidity pensions	AT
Increasing the standard retirement age	AT, BE, BG, IE, LU, MT, NL, PL, RO,ES, UK (from 65 la 66), FR (from 65 to 67)
Harmonising/equalising the retirement age for women and men	AT, RO,
Establishing a relationship between the standard retirement age and the development of life expectancy at birth	BE, CY, CZ, FI, LU, MT, NL, PL, RO, SK, ES,

Determining a strict relationship between benefits and contributions	EL, RO,
Increasing the standard contribution period	BG, CY, RO, ES,
Promoting attractive participation schemes for wider contribution to the system	CZ,
Maintaining low rates for the pension funds' administrative costs and ensuring transparency	CZ,
Policies for stimulating employment for elderly	BG, DK („flex-job" system), LT, MT,
Measures preventing the increase of poverty risks for elderly	CY
Measures for ensuring the sustainability of the public pillar	CZ, FR, EL, IE, LU, NL, RO, SK, SI, UK, FR (balance in 2018)
Measures for stimulating participation to private insurance and savings systems for old-age	CZ, MT
Eliminating the feeding of the private pensions feeding and transfer of already accumulated sums to pillar I PAYG	HU,
Diminishing transfers to private pensions (temporary)	IE, LV,

Source: Selection based on 2011 Report on Public Finances in EMU, European Economy 3/2011, EC, Directorate General for Economic and Financial Affaires

The majority of recommended or assumed measures by the governments aims **in-depth and radical changes** for long-term/final which imply the calculation methodology or the access conditions to various forms of pensions. Other measures consider short-time periods and do not change the build of the system, only its enforcement. From the latter category we mention the measures taken and/or foreseen by Portugal: progressive diminishment of pensions higher than 1500 Euro, in 2011, suspending indexation and freezing pensions for 2012 (save for the **lower** ones)[8].

For some countries no concrete measures are stipulated, that would aim to reform or restrictions regarding the management of the pension funds, but indirect measures are recommended for stimulating the participation to private systems, among others by diminishing compulsory social contributions to various funds (neutral budgetary manner). Among these countries we mention EE, FR ('niches fiscales'), and DE.

The reforms were accompanied in some cases by the (re)construction/development of the institutional system, like in France, where a public body was created "Comité de pilotage des régimes de retraite" which presents some yearly analyses on the pension accounts and makes proposals for adjusting policies in the field.

The EU recommendations consider also particular measures, depending on the possibilities of each state and on the build of the national pension system, for ensuring the separate sustainability of each pension pillar. To this end, the measures taken by the member states were extremely different:

- In Hungary eliminating the compulsory private pillar and funds' transfer back to the public pillar;

- Greece: a new reform of the pensions' system in 2012, after the recent one of 2010 for ensuring the sustainability of the state pillar. The reform includes both legislative measures for public

[8] Portugal: Memorandum of understanding on specific economic policy conditionality, 3 May 2011, http://www.ste.pt/actualidade/2011/05/memorandotroika_04-05-2011.pdf

and private pensions based on the analysis of the National Actuarial Authority and considers, among others, the auxiliary funds of pension and the welfare funds: diminishing the number of funds, eliminating deficits and ensuring medium- and long-term sustainability for secondary schemes by relating contributions to benefits. It is projected to freeze nominal supplemental pension and adjust the replacement rate for funds with deficit, as well as constituting a computerised system of individual accounts of pensions[9];

- Ireland: increasing the retirement age for the social welfare pension from 65 to 68 years of age in the interval 2014-28 and implementing a single scheme for pensions for the newly entered within the public system which will relate the retirement age to the pension level and average career earnings and annual inflation[10].

- Romania: freezing for 2011 the level of transfers to pillar II at the level of 3 per cents, in order to attenuate the deficit of the public pillar; for 2012 the intention is to increase contribution to 3,5%, but this is conditioned by the economic growth perspectives and on finding the financial sources for covering the deficit of the PAYG system. At the same time, the passing of the legislation for implementing the pillar of occupational pensions is postponed.

Some countries, like Latvia have developed strategic documents that envisage a general rethinking of the pensions system that shall be implemented as of 2012 and by which is pursued ensuring the long-term sustainability of the 3 pension pillars. The intention is that as the economic situation turns around to return to the contribution for pillar II of 6% from the gross wage up to 2013. In a similar manner is reformed the pension system from Latvia, the secondary legislation undergoing approval procedures, in parallel with fiscal measures for maintaining on the labour market individuals of retirement age (eliminating fiscal instruments to restrict the continuation of retirement age persons on the labour market).

Private pensions – role in building-up the pension system for transition countries

The social model on one hand, and the culture of savings on the other hand, determine the role and place of private pensions for each country, and their capacity of satisfactorily supplementing old-age incomes is related to the development level, the average level of incomes as compared with the poverty threshold and the consumption model.

The PAYG system is the backbone of the pension system for the majority of European countries. Several countries have supplemented statutory pensions with a pillar based on defined contributions and in many instances managed in a private system by specialised financial institutions. . Other states have in place, or complementary an occupational and individual system. In some instances, the occupational systems are of the PAYG-type by book reserves constituted by the employer, or by schemes managed by pension or insurance funds (group insurance contracts). Individual pensions have as basis individual contracts signed with the private pensions' provider – in general an insurance company or a private pensions' fund. Individual contributions are accumulated and invested, and the final sums are the basis of the individual pension. The participation to the occupational and individual pension schemes may be compulsory or voluntary, and in some countries it is used as an alternative to the compulsory pension schemes.

If we would analyse the importance of private pensions, we must consider a series of elements, that is:

- current level of development for private pensions and their history;

[9] IMF, Greece: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding, 28 February 2011, http://www.imf.org/external/np/loi/2011/grc/022811.pdf

[10] EC, Memorandum of understanding between the EU and Ireland, Brussels 20.5.2011 SEC(2011) XXX final, http://www.finance.gov.ie/documents/publications/other/2011/moumay2011.pdf

- population participation to the life insurance systems of the pensions type and their share against total private pensions;
- level and build-up model of compulsory private pensions;
- possibility of the population to participate to optional old-age insurance systems and their propensity for using this market instrument as compared with the traditional ones of bank savings, or securities;

The countries from the last integration wave (EU 10+2) are in different stages of implementing the multi-pillar system, the most advanced ones being Hungary, the Czech Republic, and Poland. The reform is delayed in Lithuania, Slovakia and Romania for pillar II (compulsory private pensions), and optional private pensions were enforced as of 2004 in Lithuania and are still under implementation in Romania.

Development of non-PAYG components in EU transition countries

Country	Pillar II Compulsory Pensions	Pillar III Optional Pensions
Hungary	1998	1994
Czech R	unavailable	1994
Poland	1999	1999
Slovenia	2000	2000
Latvia	2001	1998
Bulgaria	2002	1994
Estonia	2002	1998
Croatia	2002	2002
Lithuania	2004	2004
Slovakia	2005	1997
Romania	2007	2007

Source: APAPR, http://www.aparp.ro

A multi-tiered system in which the **emphasis changes towards private pensions** as solutions for long-term performance of old-age insurances is not a new orientation (OECD 1992, IMF 1997) and begins with two considerations: the limits of the Bismark modeland the relationship between contributions and benefits at individual level. The diversity of models and the development degree of industrial relations defined and developed a large diversity of occupational funds and a private system that depend on the quality of the social dialogue and the availability of individual incomes. In fact, the existence and performance of the Bismark-type systems (insurance related to obtained incomes) and of the Beveridge-type (basic/minimum pension for all – social pension) have triggered the availability and use of optional and occupational private systems. Yet, the lack of individual optional insurance culture and the low level of economic development associated with low incomes have promoted during the last years in transition countries the implementation of the compulsory private system for those active population cohorts for whom the period remaining for contributing to the system is relevant under the aspect of "building-up" an adequate supplemental private pension (for Romania the participation to the private system is compulsory for individuals up to 35 years of age, and for those aged between 35 and 45 years of age the participation is optional and performance depends on the level of insurance, and for those above 45 years of age the system is irrelevant under the aspect of the resulting pension).

The increase of labour mobility in the last decades, associated with the change of the employment model and the development of open career and the dynamic of creating new jobs generated by the absorption of RDI outcomes and of promoting LLL on one hand, and the relative rigidity of the transfer between funds on the other hand, have diminished the interest for occupational pensions, allowing for the development of the optional private insurance for old-age.

The main factor supporting or inhibiting the participation to private pensions is represented by the conversion rate between the income on retirement and the total incomes from compulsory old-age insurance systems. Development countries, such as France, Switzerland, the Netherlands, Sweden, Denmark, Germany, Italy, United Kingdom have generous insurance schemes, supported by the economic performances, in various combinations of the PAYG pillar with the occupational one and the promotion of a minimal income of old-age incomes. Others, such as Luxemburg have a strong and on surplus PAYG pillar that allows for continuing the policy even under crisis conditions, without restrictions, but only by modernising the system and strengthening sustainability.

The replacement rate of incomes with public pension (and additionally with the occupational one) is on decrease, same as the long-term financial sustainability of the PAYG system reason for which currently all states consider private pensions as a complementariness alternative (Ebbinghaus B., Gronwald M., 2009)[11]. Yet, access to optional private pension is limited by the supplementary financial effort, the associated costs and high risk of final benefits, being less accessible to those with low incomes.

For some transition countries, the private pension system developed as optional pillar and/or with a compulsory component (Hungary, Romania).

Characteristics and architecture of the Romanian pension system

The pension system in Romania is a multi-pillared one and, theoretically, includes the following categories of pensions:

- the public pillar PAYG, initially adopted and reformed in 2000 and 2010 introducing the calculation algorithm of the personal contribution "history"; there is a minimum and standard period of contribution for access to the pension right of the DC type. Currently the system is regulated by Law no. 263/2010 regarding the unitary public pensions system;

- the compulsory private pillar, constituted by partial and gradual transfer from total individual contribution to old-age social insurance system (to 6% in 2016) with capitalisation of the DC type, compulsory for persons up to 35 years of age in the implementation year, and optional for those aged between 35 and 45 years of age; currently the number of contributors to the system is of about 5,5 million persons, and the share of corresponding assets' volume in GDP is of 0,5% (Hungary 10%, Poland 14%, Bulgaria 4%) – data of CSSPP (Law 411/2004, with subsequent amendments, enforced as of July 2007);

- occupational pension schemes for which the specific legislation is undergoing reviewing/amendments and the implementation of which follows to be realised in the next future, after passing new regulations; in accordance with the Law Draft regarding occupational pensions, the right to propose an occupational pensions' scheme pertains to the employer, alone or in association with other employers, and by consulting the representatives of the employees. Also, the occupational pension schemes would follow to be supplied by managers based on a prospect. At the same time, the managers collect contributions, invest financial resources of the occupational pension funds, and pay occupational pensions[12];

[11] Ebbinghaus B., Gronwald M., 2009, The Changing Public-Private Pension Mix in Europe: from the Path Dependence to Path Departure, http://www2.asanet.org/sectionchs/09conf/Ebbinghaus.pdf

[12] http://www.romanialibera.ro/bani-afaceri/economie/legea-pensiilor-ocupationale-in-dezbatere-publica-16077.html

- individual pension schemes, based on life insurances of the pension-type supplied by national and international insurance companies, regulated by Law 204/2006 applicable as of June 2006; **Pillar III** is the name given to the system of optional pensions, managed by private companies, a system based on individual accounts and optional adhesion. The contributors to this system number almost 212 thousand persons with a fund under 300 million Lei (2010, CSSPP data). As opposed to "compulsory private pensions" (Pillar II), the legislation for Pillar III does not forbid the participation to optional pensions depending on age, anyone being able to contribute to the system with up to 15% from the monthly gross achieved incomes. In order to benefit of an optional pension, the legal conditions impose for each contributor to have at least 90 monthly contributions (not necessarily consecutive) made to the fund, up to an age of at least 60 years, and a minimum accumulated sum[13].

In conclusion, the current contribution scheme for Romania to the pensions' system includes 3 sources of constituting the pension, with the involvement of the state and private national/international market operators. The system develops the voluntary savings side and was reformed for answering better to the profile of the contributor, as to be anticipative, stimulative, and allowing for correlating benefits depending on contribution.

The scheme of the pension insurance system in Romania for the year 2011

System structure	State involvement	Employer's involvement	Individual contribution	Components structure
Pillar I	YES	Compulsory	Compulsory	Employee/employer contributions
Pillar II Compulsory private pension	YES	compulsory	Compulsory up to 35 years of age Optional – 35-45 years of age (in 2007)	Contribution transfer of up to 6% from pillar I
Pillar III Optional private pension	NO	Optional	Optional	Up to maximum 15% from individual incomes

Source: based on enforced legislation for 2011

Contributions to the public pension funds increased in the last two decades from 17%[14] of the gross income bill 31,3% for normal labour conditions (41,3% for special conditions), from which is born by the employer to a share of 20,8% (25,8% – special labour conditions, 30,8% – exceptional labour conditions) and by the employee in percent of 10,5 % for normal labour conditions (10,5% – special labour conditions, 10,5% – exceptional labour conditions). From the compulsory contribution of each employee that fulfils the conditions and is affiliated to a private pensions' fund (selected individually or by automated redistribution), thus in 2011 were redistributed to the compulsory private pensions' fund 3 pp and other 3.5 pp shall be transferred in 2012.

The optional pension has as basis the individual choice and presupposes additional payment. The eligible individuals may contribute to several optional pension funds provided that the maximum contribution limit imposed by law is not exceeded (Law 204/2006 regarding optional pensions, with subsequent changes and amendments). Moreover, to pillar III may contribute also employers,

[13] http://www.csspp.ro/pilonul-3

[14] http://www.mmuncii.ro/pub/imagemanager/images/file/Statistica/Statistici%20lunare/Evolutia%20valorii%20cotelor%20de%20CAS%202011.pdf

providing thus for actual benefits for their employees. The contribution to this pillar (pillar III) is stimulated by assuring through the Fiscal Code the facility of fiscal deductions of employee's and employer's contributions. In 2011, for contributions born by employers on behalf of their employees, these benefit from the exclusion from the calculation basis of the taxes of the contributions of social insurances (including the insurance contribution for work accidents and professional diseases), to the deductibility limit established by law, respectively the equivalent in Lei of the amount of 400 Euro yearly, for each participant. The own contribution of the employee to Pillar Iii is considered deductible on calculating the tax on wage earnings to the same limit.

The expenditures with pensions in Romania are lower as share in GDP than in the majority of EU member countries. For instance, according to the Eurostat statistics, in 2009 the expenditures on pensions[15] (last available data) represented 9,4% in GDP, close to the ones in Luxemburg, yet lower by 3,6 pp than the EU-27 average and by 6,6 pp lower than in Italy which recorded the highest value for this indicator.

Share of expenditures on pensions in GDP, for the years 2005, 2008 and 2009 (%)

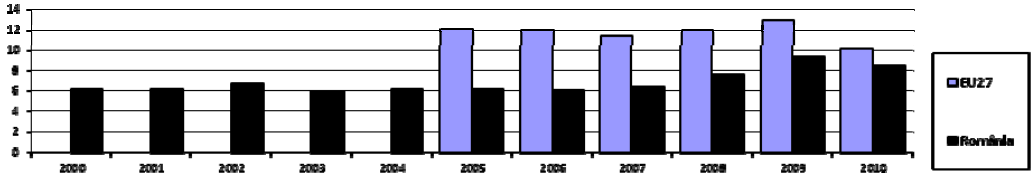
	2005	**2008**	**2009**
EU (27 countries)	12.15	12.05	13.07
Norway	7.97	7.64	8.79
Bulgaria	7.57	7.02	8.80
Romania	6.19	7.61	9.41
Luxembourg	9.57	8.30	9.45
Spain	:	9.26	10.10
Slovenia	10.33	9.63	10.89
Denmark	10.99	11.08	12.06
Belgium	11.16	11.32	12.14
Sweden (2004)	12.15	12.15	12.15
Switzerland (2008)	:	12.15	12.15
United Kingdom	10.76	11.35	12.53
Finland	11.18	10.80	12.57
Netherlands	12.54	12.01	12.83
Germany	13.37	12.32	13.14
Portugal	12.34	13.20	14.12
France	13.30	13.67	14.51
Austria	14.17	14.02	15.06
Italy	14.71	14.96	16.03

Source: http://epp.eurostat.ec.europa.eu/portal/page/portal/social_protection/data/main_tables

[15] The 'Pensions' aggregate comprises part of periodic cash benefits under the disability, old-age, survivors and unemployment functions. It is defined as the sum of the following social benefits: disability pension, early-retirement due to reduced capacity to work, old-age pension, anticipated old-age pension, partial pension, survivors' pension, early-retirement benefit for labour market reasons.

Under the aspect of their evolution in time, as of 2000 when the reform was initiated, the share of expenditures with pensions in GDP increased about 1,5 times from 6,11% to 9,41%, and more considerable in 2007.

Share of expenditures with pension in GDP (%)



Source: http://epp.eurostat.ec.europa.eu/portal/page/portal/social_protection/data/main_tables

The old-age social benefits as share in total social benefits[16] represent for Romania 47,4%, being exceeded only by Poland and Italy which denotes a **social insurance system centred on pensions.** Against the EU-27 average, the share of pension benefits is by about 8 pp higher, and against Ireland with the lowest share, it is over 26 pp. Due to this structure, **any imbalance in the public pensions system has a higher magnitude on the social insurance budget and the risk associated to individuals with social vulnerabilities increases.**

Share of old-age benefits in total social benefits, 2000-2009

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
EU27	:	:	:	:	:	38.97	39.02	38.89	39.69	38.97
Ireland	19.50	19.09	22.58	23.03	22.57	22.25	22.53	22.39	21.84	21.11
Iceland	28.55	27.66	28.07	27.74	28.02	28.60	28.63	22.62	22.33	21.22
Luxemburg	36.85	26.20	26.28	26.11	25.87	26.32	26.75	27.38	26.79	27.27
Norway	29.41	29.23	28.83	28.20	28.52	29.44	29.87	30.34	30.58	30.08
Spain	34.85	34.41	33.96	33.11	32.71	32.35	32.35	32.47	32.04	31.28
Belgium	33.33	33.70	33.42	32.60	32.43	32.36	32.99	32.23	32.72	32.68
Germany	32.95	33.38	33.30	33.61	34.30	34.46	34.78	34.87	34.65	33.11
Netherlands	37.05	36.35	35.98	35.42	36.54	37.37	35.20	36.12	35.82	35.18
Finland	31.85	32.64	33.00	33.22	33.25	33.65	34.26	34.96	34.61	35.34
Slovakia	32.17	33.21	33.37	35.45	36.99	39.08	38.48	38.27	37.14	36.78
Denmark	38.05	37.95	37.64	37.20	37.17	37.51	37.87	38.10	38.38	37.13
Cyprus	41.27	39.62	41.53	39.98	41.40	39.99	39.61	40.22	38.97	38.48
Slovenia	43.24	43.63	44.68	43.28	43.31	42.36	38.09	39.48	38.53	38.83
France	38.41	38.47	37.07	36.94	37.03	37.36	38.06	38.67	39.39	39.20

[16] Social benefits consist of transfers, in cash or in kind, by social protection schemes to households and individuals to relieve them of the burden of a defined set of risks or needs. The functions (or risks) are: sickness/healthcare, disability, old age, survivors, family/children, unemployment, housing, social exclusion not elsewhere classified.

Hungary	35.76	36.67	37.63	35.90	36.64	36.50	36.35	37.80	39.38	39.63
Sweden	37.08	36.89	36.64	37.18	37.25	37.78	37.41	38.62	39.95	40.23
Lithuania	43.70	43.14	42.98	43.18	42.68	42.13	40.49	42.82	40.97	40.57
Greece	46.39	48.10	47.15	47.44	47.38	47.76	43.24	43.57	42.43	41.35
Estonia	43.38	42.50	43.61	44.01	42.86	43.14	44.36	42.97	42.29	41.89
Czech R.	38.84	38.30	37.87	36.72	36.92	38.36	38.97	39.76	41.88	41.94
Austria	39.67	40.02	40.08	40.09	40.22	40.61	41.26	41.84	42.18	42.35
United Kingdom	44.43	42.44	41.69	41.26	41.21	41.74	41.20	38.17	42.79	42.62
Malta	39.76	41.76	40.70	39.95	39.51	41.05	42.08	42.35	42.49	42.92
Portugal	37.60	38.65	38.55	39.28	40.09	41.24	42.15	42.93	44.24	43.54
Latvia	55.82	53.75	53.90	50.66	48.37	46.32	44.58	43.78	43.67	45.21
Switzerland	47.31	47.03	45.03	44.01	44.46	44.13	44.55	45.64	45.98	:
Bulgaria	:	:	:	:	:	46.53	47.81	46.84	45.03	46.76
Romania	41.43	42.79	43.18	40.56	42.77	39.93	41.50	41.72	46.24	47.39
Poland	44.47	45.33	45.95	46.73	48.48	48.27	49.48	49.04	48.73	50.71
Italy	52.48	51.56	51.66	51.85	51.00	50.67	50.79	51.55	51.46	50.81

Source: http://epp.eurostat.ec.europa.eu/portal/page/portal/social_protection/data/main_tables

It should be noted that the share of old-age benefits increased from under 40% in 2005, to more than 47% in 2009 and more heightened during the crisis.

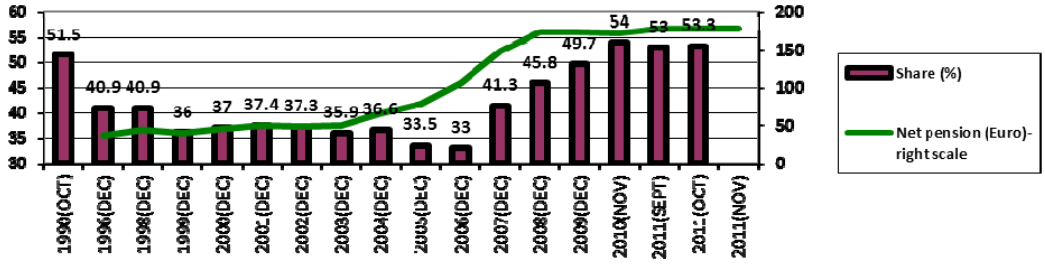
If we refer to absolute values per person in PPS, then we can nuance our previous findings with the following:

- Romania allots for old-age benefits 27.66% from the EU-27 level in 2009, against only 17.72% in 2000

- the highest growth within the EU was recorded, of over 3 times of the value per capita expressed in PPS, more marked after 2005

The public pension pillar ensures currently a net average level of the pension of less than 50% from the net wage at national level and the average pension is of about 178 Euros.

Net pension from public pillar (Euro) and share of pension of net average wage (%)



Source: http://www.cnpas.org/portal/media-type/html/language/ro/user/anon/page/default.psml/template/ generic?url= %2Fcontent%2Fcnpas%2Fstatistics.html&title=Indicatori+statistici+pilon+I

Taking into account the cost of living, in particular housing expenditures in the urban area to which are added the specific costs for the third age (health and specific services) it can be appreciated that the minimum pension (about 81 Euros/month) is insufficient for ensuring decent

In the last years Romania pursued the reform of the public pension system, unifying funds for different professional categories and building-up the compulsory private system and the optional one. The factors that triggered the shaping of the multi-tiered system were similar to the ones in other countries, respectively: life-span increase, respectively the pensioners live longer and benefit for a longer period from the public pension, the PAYG system being incapable of ensuring the obligations assumed towards the beneficiaries, with an economic dependency ratio in marked deterioration, the number of contributors to the public systems of social insurances decreasing and the public pensions no longer being able to ensure decent replacement rates, adequate for the pensioners.

Even though initiated in 2000, the reform of the pensions' system for developing pillar II – compulsory and private – was started 8 years later by feeding from initially paid contributions to the public pillar. The legal framework was also created for the occupational pensions. In parallel operated also the system of life insurances under the form of private pensions, until the implementation of compulsory private pensions, constituting the only form of insurance with capitalisation and payments (integrally or gradually) after fulfilment of the retirement age. **To the compulsory private system in the month of October 2011 contributed** within the system 5516038 individuals, with a fund of over 40,2 million Euros. Among contributors, 51,7% were men and the distribution on age groups indicated: 28,7% for up to 25 years of age, 41,5% with ages between 25and 35 years of age and 39,8% for those over 35 de years of age (CNPAS data)[17].

The increase of the economic dependency ratio of elderly persons due to demographic ageing and diminishment of the number of contributors to the system (lower entries on labour market and exits due to labour mobility and definitive migration) generated **deficits in fund's growth**. In order to ensure long-term sustainability the shift was made to a new restructuring stage of the system, first by recalculating pensions by introducing the system of determining the history of individual contributions and then by rethinking its build-up for the purpose of ensuring long-term sustainability. **The strategy in the field of pensions** provides for: balancing and strengthening the public pensions' system; diversifying the insurance resources of old-age incomes; creating insurance resources for labour accidents and professional diseases. The reform is still underway, and in parallel changes were brought to the law of pensions, the objectives for the period 2009-2012 established by CNPAS being: assuring the financial sustainability of the public pensions' system based on the principle of contribution and social solidarity; eliminating inequities and anomalies still existing in the public pension system; reaching a target of 45% from the gross average wage on economy of the pension point (in October 2011 it was of 36.5%) under the conditions of public pensions' system sustainability; ensuring a minimum guaranteed social pension that would add the pension of up to 350 Lei monthly for all pensioners with a pension quantum under this stipulated amount, financed from the state budget; eliminating inequities with respect to pensions for persons employed in the former labour categories I and II, as well as for special and exceptional labour conditions, in accordance with the provisions of Law no. 218/2000; enforcing the provisions of the new legislation regarding the public pensions' system for farmers[18].

The reform aims to key parameters of the pensions' system construction, respectively indexing pensions by inflation and not depending on the development of the average wage on economy, limiting discretionary increases of some pension categories, extending the taxation

[17] http://www.cnpas.org/portal/media-type/html/language/ro/user/anon/page/contributions.psml/template/generic?url=%2Fcontent%2Fcnpas%2Fstatistics2.html&title=Indicatori+statistici+pilon+II

[18] http://www.cnpas.org/portal/media-type/html/language/ro/user/anon/page/ integration.psml/template /generic?url=%2Fcontent%2Fcnpas%2Fobjectives.html&title=Obiective

basis by including also some public officer employees who were excepted by the old system. The scheme of increasing the retirement age is continued, also the one of closing the gap and then equalizing the standard age between men and women, and relating the standard retirement age to the life expectancy at birth. In parallel, support programmes shall be developed for sustaining poor elderly. ***The building-up of the compulsory private pillar is continued by the annual increase of the contribution to the fund.*** The target of the reform is to ensure a transfer rate pension-wage at the time of retirement of 45% on the background of ensuring (gradually) the sustainability of each pillar[19]. In the new memorandum signed with IMF are included as reform measures of the pension system: freezing for 2011 the value of the pension point and enforcing the reformed legislative framework in the field for ensuring the sustainability of the private pensions' pillar[20].

In conclusion, the reform of the pensions' system by leaving aside consideration about consistent participation to the private system is of less performance for the majority of future pensioners. If we refer to the fiscal deductibility for supplementary pension insurances provided for by law, we can appreciate that the minimum conditions are met for stimulating the additional insurance, yet the quantum of the additional contribution benefiting of fiscal deductibility is much too low as compared with the savings need for ensuring a financially comfortable wage-pension conversion. Moreover, the insurance risk is double: on one hand the risk of receiving a diminished pension or cessation of payments to pillar I, under conditions of chronic deficits of the PAYG fund; on the other hand, the market risks for private funds. Finally, the risk that the final aggregated pension is insufficient at the level of maximal contributions under the conditions of integrally making use of the fiscal facilities. Recent studies (AVIVA, 2011[21]) have shown that the savings need for a decent pension is proportional with the age, respectively the total period of contribution. The average yearly deficit of pension savings is of 3700 Euros/year for the persons from Romania who retire between 2011 and 2051(in Poland is of 3400, in the Czech Republic of 4600 and Hungary 1900), which is equivalent with about 300 Euros/month and a total amount of 40,2 billion Euros, the equivalent of 35% from GDP in 2009 If we consider the age of persons in 2010, the average deficit of savings/person is of 4800 Euros/year for those of 50 years of age, 2900 for individuals of 40 years of age, 1700 for those of 30 years and of only 1300 for the ones aged 20 years, respectively almost 120 Euros/month (for 11 months of savings per year). If we consider the deductibility limit of 15% at total monthly earnings it is obvious that the gross monthly income should be at least 800 Euros/month, an amount that is hardly accessible to a young graduate and not only, particularly that the average gross wage in October 2011 was of about 467 Euros.

In fact, any actuarial calculation taking into account DC or DB for contributors from Romania, by using the input data of the analysis based on: the maximum level of fiscal deductibility (400 Euros), the contribution limit to the private optional pension (15% from monthly earnings) leads us either to required amounts to be saved by the systems of public pensions that are hardly accessible for those with low and average incomes, or to insignificant complementary sums. Currently, such official estimates are inexistent and cannot be made in a systematic manner[22]. Such determinations

[19] IMF, Romania: Letter of intent and technical memorandum of understanding, 24 April 2009

[20] IMF, Romania: Letter of intent and technical memorandum of understanding, 10 March 2011

[21] Document-2011-09-22-7812507-0-raport-deficitul-pensii.pdf The study quantifies for the first time the savings deficit at Pan-European level. The analysis realised by Deloitte on Aviva commission quantifies the savings deficit for pensions in Europe and separately in the countries where Aviva operates, such as Romania. The savings deficit for pensions refers to the gap between the income individuals retiring in the period 2011 to 2051 will require for an adequate living standard on retirement and the estimated level of the pension.

[22] CSSPP opinion: Currently there is no law has been passed for pensions' payment, nor the secondary law applicable to it that contains provisions about the payment manner, including here also types of pensions, mortality

were made by the experts already in the year 2005[23], and more recently by companies operating on the private pensions' market (the AVIVA study)[24]. The future development of the private pensions' pillar and its value is determined by several factors among which the most important are the yield obtained in investing the assets and the level of cashed contributions.

Conclusions

One of the priorities of each modern state is to create a legal framework that would allow for organising a pension system as sustainable as possible and realistic which is capable of assuring for the citizens reaching the retirement age a decent and careless living standard as much as possible, even under the conditions of the existence of some performance pension systems both public and private, at the time of retirement a dramatic diminishment of income takes place yet without an according diminishment of the level of expenditures. As result, the living standard to which each citizen was accustomed is difficult, if not impossible, to maintain.

Elderly persons represent a human capital that is under-used at present from the perspective of active involvement/participation to community life and to sustaining the economic and social development at local level. The extension of the period of financial independence for elderly against public social assistance services can be realised both by ensuring comfortable incomes on exiting the labour market through diversified pension-type benefits, and by providing for the possibility of continuing the activity and completing pension incomes with ones achieved on the labour market.

The developments of the last years have highlighted the issues of the current system of old-age insurances and the vulnerability, in particular of the public pensions' system against conjectural developments of the economy.

The crisis has proved that: a) the present operational pension systems must be rethought, reanalysed, and improved in particular from the perspective of ensuring the financial sustainability; b) more efforts should be made in order to improve the efficiency and safety of the pension schemes that would provide elderly with means for decent living. The pension systems are faced with hard difficulties in fulfilling their "pension promises" due to increased unemployment, to recession and to the volatility of the financial market. EU Member-States are in various stages of (re)forming the insurance and social assistance systems, in particular the pensions' system. In Central and Eastern Europe, Romania was the most delayed country in the process of pensions' reform and shifting to the system of private pensions. The reform of the pensions' system in Romania began, practically, only

tables, computation formula, etc. Thus, at present, we cannot realize any estimate about the yearly saved amount that could lead to a private pension of one unit. After the emergence of the applicable legislation to the payment of private pension we shall be able to make first scenarios that shall be made available to the large public.

[23] http://hermes-ir.lib.hit-u.ac.jp/rs/bitstream/10086/14248/1/pie_dp268.pdf Vasile. V, Zaman. Gh., Romania's pension system between present restrictions and future exigencies, p 19 "..Additionally, the 200 Euros/year deduction from personal incomes taxation for participating to the system could not be considered as an incentive because it assures a very small (completion) pension (a simple calculation shows us that under the conditions of a contribution within the limits of deductible sums until the fulfillment of the legal retirement age, the obtained additional pension is of 80 Euros/month for a person up to 35 years, 35 Euros/month for a person up to 45 years and of about 11 Euros if the age of entering into the occupational scheme is of 55 years). If we consider a decent additional pension of approximately 400 Euros per year, a beneficiary of 35 years should contribute about 800 Euros/year for 30 years, one of 45 years with 1800 Euros in 20 years, amounts that cannot be directed to these destinations just from work incomes!)"

[24] Document-2011-09-22-7812507-0-raport-deficitul-pensii.pdf and http://www.evz.ro/detalii/stiri/studiu-aviva-romanii-trebuie-sa-economiseasca-3700-de-euroan-pensie-decenta-906676.html#ixzz1bPvWENSI " In average, each Polish citizen must save yearly the amount of 3.400 Euros, respectively 4.600 Euros for each employee in the Czech Republic. The best placed are the employees from Hungary, who must save 1.900 Euros yearly", stated the chairmen of Aviva Life Insurances..

in 2000 when the new pension law was passed (Law 19/2000) and enforced as of 2001. Up to the current year repeated revisions took place of the old pension law, the financial issues of the system were partially improved/solved by sequential measures, without a long-term strategy which deepened and created even (new) inequities within the system.

The demographic developments of the last decade, labour force mobility and informal employment sizes as well as the dynamics of the economic dependency rate impose a series of measures in the field of pensions' system reform and of ensuring old-age specific social assistance such as: increasing the pensioning age (65 years of age for both men and women); eliminating early-retirement age within the public system or, at least, limiting access and avoiding the facile issuing of necessary approvals; attracting youth for registration with the optional pension funds next to compulsory private pensions for benefiting at old age from higher and more diversified incomes than the ones due according to the public pension system; the development of some retirement delaying programmes for elderly who show they are still apt of performance on the job, including by partial/flexible employment programmes, associated fiscal facilities, etc.; vocational re-training or improvement, and extending active life period as well as encouraging significant participation of elderly to society life, including by means of another vocational path, or in the system of social and/or community activities, etc.

Also for the future the policy in the matter of pensions shall remain a common concern for public authorities, social partners, the pensions' sector and the civil society at national and EU-level. A common platform for monitoring all aspects related to the policy and regulation in the matter of pensions in an integrated manner and for joining together all interested parties might contribute to obtaining and maintaining adequate, sustainable and safe pensions.

The crisis has shown the importance of the European approach of the pension systems, questioned the long-term sustainability of the PAYG-type public system, and proved the interdependency of the different pillars of the pension systems within each member state, but especially, the importance of common approaches at EU-level in the matter of solvency and social adequacy.

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