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PROTECTION OF DRAWINGS AND PATTERNS BY ADMINISTRATIVE LAW MEANS IN INTELLECTUAL PROPERTY LAW

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Abstract

According to the relevant Romanian legislation, i.e. Law no. 129/1992 on the protection of drawings and patterns and Government Decision no. 211/2008 for the approval of the Regulation enforcing Law no. 129/1992, rights over drawings or patterns may also be protected via administrative law. Administrative law means ensure the recognition of the right during the procedure of registering the drawings and patterns and of issuing the drawing or pattern registration certificate, which, as mentioned above, represents the protection title granted by OSIM for registered drawings and patterns. This category of means includes the opposition and challenge, which may be filed with the administrative authority ensuring the protection of drawings and patterns, i.e. the State Office for Inventions and Trademarks.

Keywords: *drawings or patterns, administrative law, opposition, challenge, opposition examination commission, drawings and patterns examination commission*

1. Introduction

The scope covered by the topic of the proposed study is how drawings and patters can be protected by administrative law means also, which is relevant in the national law. Thus, through a short but concise study the author tries to identify the main drawings and patters protection methods in terms of administrative law (opposition and challenge), i.e. those means of protection that account for the protection title granted by OSIM for drawings and patterns registered. The importance of this study is to identify these means of protection and to detail them, and the goal is to identify as clearly as possible these means and to show their importance. The author responds to objectives set by explaining and substantially detailing research topic and discussion about it. Romanian legislation regulates this protection, i.e. Law no. 129/1992 on the protection of drawings and patterns and Government Decision no. 211/2008 for the approval of the Regulation enforcing Law no. 129/1992.

2. Content

2.1. Preliminary matters

According to the relevant Romanian legislation, i.e. Law no. 129/1992 on the protection of drawings and patterns and Government Decision no. 211/2008 for the approval of the Regulation enforcing Law no. 129/1992, rights over drawings or patterns may also be protected via administrative law[1].

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[1] See A. Postavaru, *Means of defending the rights over industrial drawings and patterns*, material presented at the Symposium "Counterfeiting and protection of trademarks, industrial drawings and patterns", Eforie Nord, May 19-20,

Administrative law means ensure the recognition of the right during the procedure of registering the drawings and patterns and of issuing the drawing or pattern registration certificate, which, as mentioned above, represents the protection title granted by OSIM for registered drawings and patterns.

This category of means includes the *opposition* and *challenge*, which may be filed with the administrative authority ensuring the protection of drawings and patterns, i.e. the State Office for Inventions and Trademarks.

2. Opposition

Art. 21 of the Special Law on the protection of drawings and patterns in the version adopted in 1992, provided that any interested person could make written *objections* to OSIM on industrial drawing or patterns registration within 3 months from the date of its publication in the Official Industrial Property Bulletin – Drawings or Patterns Section.

Though not specifically mentioned in the law, the interested third parties who could object in writing, included: the holder of a prior drawing or pattern, the applicant of a request for industrial drawing or pattern having precedence over the published application, the holder of another industrial property right, the holder of a copyright or any other interested person[2].

In the analysis of the law in its version adopted in 1992, we see that the opposition was not provided as an administrative or jurisdictional administrative mean in the procedure for registering the industrial drawing or pattern.

Concurrently, we find that the resolution of written objections (remarks) was not made in a specific procedure, and finally a decision be adopted, instead the objections were taken into account when considering the merits of the application for registration of the industrial drawing or pattern. Also, the authors of written objections did not have parties to the proceedings, nor a fee for submission was levied.

Objections were not genuine means of appeal, but if reasoned, the result obtained was similar to that obtained by exercising the means of appeal. The review of objections was made by the commission examining the application for drawing or pattern registration[3].

With the adoption of Law no. 585/2002 amending and supplementing Law no. 129/1992 on the protection of industrial drawings and patterns, written objections procedure was abandoned and *the opposition proceedings were adopted*, whose settlement lies within the powers of opposition reviewing Commission.

Opposition is a petition that actuates a research, namely an administrative control the outcome of which the two persons with competing interests are concerned with, namely, the person who formulated the opposition and the person who filed the application for registration of a drawing or pattern. Thus, we consider, among other authors[4], that *"the opposition rather takes the form of a gracious intimation, which (atypically) is directed to a body of the consultative public administration."*

2006, C. Feraru, *Defending the rights on drawings and patterns*, paper presented at the Symposium "Community design protection", Tulcea, July 28-29, 2008.

[2] C. Solzaru, P. Ohan, *On objection and challenge in the procedure for registering IDP in the context of Law no. 129/1992*, in RRPI (Romanian Journal of Intellectual Property) no. 5-6/2000, p. 51.

[3] V. Ros, *Intellectual property law*, Global Lex Publishing House, Bucharest, 2002, p. 516.

[4] Cr. Clipa, *Jurisdictional and administrative bodies and procedures*. *Introduction to the study of public jurisdictionalised administration*, Hamangiu Publishing House, Bucharest, 2012, p. 26.

2.1. Filing the opposition

Pursuant to art. 21 par. (1) the relevant specific law, interested persons may submit written objections to the State Office for Inventions and Trademarks on application for registration of the drawing or pattern, within two months of its publication, for the reasons set out in art. 22 par. (3) in the examination procedure.

The term "interested person" means "any person who has a legitimate interest related to the drawing or pattern in question and whose interests may be affected by its registration[5]." "Interested person" may also be any natural or legal entity that owns an earlier right over a drawing or pattern[6].

Regulation of opposition proceedings in drawings or patterns aims at preventing the occurrence of a potential conflict of rights between the ownership claimed and other rights that were previously recognized to another person.

The interest in opposition formulation coincides with interest justifying the exercise of the civil action[7] and must meet the requirements on the *legitimate, vested and present, personal and direct*[8] nature, and the conditions provided by art. 33 1st sentence of the New Code of Civil Procedure[9] according to which the interest must be *determined, legitimate, personal, vested and present*[10].

In connection with those interest conditions identified by law, we observe that the new legislator of the New Code of Civil Procedure preferred the attribute "determined" instead of the traditional phrase *"positive and tangible interest"* which, as Professor Ion Deleanu assessed, *"considered it ambiguous, vague and useless."* The new wording *"clearly and more rigorously calls for interest concreteness precisely to be expected judicial review*[11]."

2.2. Grounds of the opposition

According to art. 22 par. (3) of Law no. 129/1992 on the protection of drawings and patterns, application for registration of a drawing or pattern shall be rejected or the registration will be cancelled for the following reasons:

– failure to meet the provisions relating to conditions which a drawing or pattern must meet to be registered, i.e. to constitute a drawing or pattern, as defined, is new and individual and also upon its disclosure;

– the object of the application falls within the provisions of art. 8 (the drawing or pattern is determined solely by a technical function) and art. 9 which stipulates that the drawings or patterns which conflict with

[5] Art. 2 letter p) of the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns.
[6] L. Badea *Third party opposition*, paper presented at the Symposium "Community design protection", Tulcea, July 28-29, 2008.
[7] V.M. Ciobanu, G. Boroi, T.C. Briciu, *Civil procedural law. Selective course. Multiple choice tests*, 5th edition, C.H. Beck Publishing House, Bucharest, 2011, p.4.
[8] See High Court of Cassation and Justice, civil and intellectual property department, civil decision no. 3315 of April 24, 2007 in RRDPI (Romanian Journal of Intellectual Property Law) no. 3/2007, page 178, in the selection and processing of M. Tabarca, High Court of Cassation and Justice, civil and intellectual property department, decision no. 2776 of March 10, 2009, in O. Spineanu Matei, *Intellectual Property (4). Court Practice 2010*, Hamangiu Publishing House, Bucharest, 2010, p 289.
[9] Republished in the OG. no. 545 of August 3, 2012.
[10] For details, see M. Tabarca, Civil procedural law, General Theory, Vol. I, Universul Juridic Publishing House, Bucharest, 2013, pp. 236-239, as well as comments from the case.
[11] I. Deleanu, *New code of civil procedure. Comments by articles*, Volume I, Universul Juridic Publishing House, Bucharest, 2013, p 82.

public order or morality are excluded from protection;

– incorporates, without the proprietor's consent, a work protected by Law. 8/1996 on copyright and related rights, as amended and supplemented, or any other intellectual property right protected;

– constitutes an improper use of any of the items mentioned in the list contained in art. 6 ter of Paris Convention for the Protection of Industrial Property, as revised at Stockholm on July 14, 1967, to which Romania adhered by the Decree. no. 1.177/1968 or misuse of emblems and blazons other than those mentioned in art. 6 ter of the Convention;

– applicant has not demonstrated that it is entitled to the registration of the drawing or pattern for the purposes of art. 3, which refers to drawings or patterns created independently or as a result of creative mission contracts or by employees in their duties;

– the drawing or pattern conflicts with a prior drawing or pattern which has been subject to public disclosure after the date of filing the application for registration or after the priority date if priority is claimed, and which is protected from a date prior to the registration of a community drawing or pattern or by an application of registration of a community drawing or pattern, or by registering a drawing or pattern in Romania or by an application for obtaining protection in Romania;

– drawing or pattern uses a hallmark that provides the holder of that mark with the right to prohibit such use.

Opposition procedure is not regulated in any specific laws of the Member States of the European Union. Thus, given that Regulation no. 6/2002 on community drawings or patterns does not provide the opposition procedure either, the relevant legislation in France, Italy and the UK does not provide this procedure. The application for registration of the drawing or pattern is examined only by reference to the formal conditions.

2.3. Opposition content

The opposition shall be filed in writing and, according to art. 23 of the Regulations for the implementation of the Law no. 129/1992 on the protection of drawings and patterns should contain:

– directions on the drawing or pattern against which such application is made, and the file number, the name of the applicant and Official Industrial Property Bulletin – Drawing or Pattern Section in which that publication was made;

– directions of prior drawing or pattern or earlier right, which the opposition is based on, for each drawing or pattern;

– documents indicated in the notice of opposition must have legal date and be published before legal filing;

– the notice of opposition should also state precisely the opposing drawing or pattern (page and position in the opposable matter); every notice of opposition and acts in support thereof shall be submitted in two copies, one for the Opposition Examining Commission and one for the applicant;

– mentions on the quality and interest of the person formulating the opposition;

– the grounds underlying the opposition;

– name and address or registered office of the authorized representative, if appropriate.

Matters submitted in support of the opposition should be publicly accessible, taking into account the date when they were deposited in places where the public could

take notice of, to be submitted in original or certified copy[12].

If OSIM finds that the opposition does not satisfy the requirements of paragraph (3) above, it requires the person who filed the opposition that within 15 days it remedy the deficiencies. If they are not remedied within the time limit, OSIM shall settle the opposition only under existing documents.

2.4. Addressing the opposition

The opposition shall not be considered if the above provisions are not all met and the legal fee is not paid[13].

Opposition shall be settled within 3 months of its submission by the Opposition Examining Commission consisting of a chairman and 2 members appointed by the chairman, and a legally qualified examiner in the Drawing and Pattern Division and the application examiner.

The examiner of the application, who is OSIM expert with basic responsibility of examining the applications for registration of drawings and patterns[14], communicates the objection to the applicant in order to submit its opinion within 30 days, according to art. 23 par. (8) of the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns.

If the applicant does not express its opinion, OSIM shall decide on the opposition, relying upon the records in the file.

Chairman of the Opposition Examining Commission, if deemed necessary, may invite the parties to the hearing set for the settlement of the opposition.

Opposition Examining Commission may accept or reject the opposition, drawing up, in this regard, a report in connection thereto. The report shall be submitted to the Commission examining the drawings and patterns for further examination in terms of fulfilling the conditions on the matter and shall be forwarded to the applicant and the opponent.

In conclusion, we find that for the settlement of an objection, the Opposition Examining Commission of OSIM allows conflicting parties to express their views on objection filed and propose evidence in support of their positions. Thus, solving an opposition to an application for registration of a drawing or pattern supposes passing a procedure pertaining to *"advisory-type public administration, but marked by numerous elements of apparent jurisdictionality[15]."*

As shown, the Opposition Examining Commission of OSIM completes its activities not issuing an administrative act, but with a report that *"in terms of formality, does not act as an administrative document, but as a technical-material operation"*[16].

Also, in terms of substantiality, the report groups the conclusions of the administrative body *"on issues under consideration by specifying various matters of fact or law, the clarification of which will*

[12] Art. 23 par. (3) of the Regulations for the implementation of Law no. 129/1992 on the protection of drawings and patterns.
[13] According to paragraph 12 of Annex no. 5 of GD no. 41/1998 on fees for the protection of industrial property and rules for their use, the fee for the examination of an opposition to the registration of a drawing or pattern is 30 euros, equivalent in lei at the date of payment.
[14] Art. 2 letter l) of the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns.
[15] Cr. Clipa, works cited, p. 25.
[16] *Idem.*

depend on the issue of an administrative act by another public administration body"[17].

In 2012, the Opposition Examining Commission of OSIM had to solve a number of 19 oppositions, of which 18 objections were introduced during the year. Of the 19 objections, the Commission resolved 15 objections, 4 oppositions whose term expires in the first part of 2013 pending settlement[18].

2.5. Suspension of opposition settlement

In some cases expressly provided by law, the resolution of opposition may be suspended. Thus, the settlement of the opposition may be suspended when relying on an application for registration of a drawing or pattern, until a decision is made in connection thereto, where, opposing drawing or pattern is the subject of an action for annulment by final resolution of the case[19].

However, both the legislation in force and the practice show that there are no regulations regarding the establishment of a deadline by which the opposition suspension procedure is settled, nor sanctions against the parties that do not apply that the opposition settlement procedure be resumed. For these reasons, we propose *de lege ferenda*, that provisions establishing deadlines by which the settlement of opposition may be suspended, be adopted and the possible sanctions if the parties do not apply for the procedure be resumed in order to complete the opposition.

From reading the art. 21 par. (3) of Law no. 129/1992 on the protection of drawings and patterns, we observe that the term in which the applicant may submit its views with regard to the opposition filed is two months[20], and in art. 23 par. (8) of the Regulation for the implementation of Law no. 129/1992 states that "the examiner of the application shall communicate the objection to the applicant for it to submit its views within 30 days."

Thus, we find that the two laws, namely Law no. 129/1992 on the protection of drawings and patterns and the Regulations for implementation thereof, provide for different times in which the applicant for the registration of a drawing or pattern can present its point of view with reference to the opposition filed.

Given these inconsistencies, and taking into account the provisions of art. 1 par. (5) of the Constitution of Romania, according to which "in Romania, observing Constitution, its supremacy and the laws is mandatory" and that the purpose of a regulation implementing a law is to allow the law be executed, to clarify concepts and legal situation arising from the law, and also to detail specific issues and/or procedures arising from the law in question, we believe that, as already shown in literature,[21] time in which the applicant for the registration of a drawing or pattern must present its point of view with reference to the opposition filed is that provided in art. 21 par. (3) of Law no. 129/1992 on the protection of drawings and patterns, i.e. *two months*.

To avoid misunderstanding, we consider *de lege ferenda* that in art. 23 par. (8) of the Regulation for the implementation of Law no. 129/1992 on the protection of

[17] T. Draganu, *Acts of administrative law, Ed. Stiintifica Publishing House, Bucharest*, 1959, p. 130, quoted by Cr. Clipa, works cited, p. 25.
[18] OSIM Activity Report for 2012, available at www.osim.ro
[19] Art. 21 [par. (5) letter a)-b)] of Law no. 129/1992 on the protection of drawings and patterns.
[20] According to art. 21 par. (3) of Law no. 129/1992 on the protection of drawings and patterns "*Within two months of the notification of opposition, the applicant may present its point of view*."
[21] C.Duvac, C.R. Romitan, *Penal and legal protection of drawings and patterns*, Universul Juridic Publishing House, Bucharest, 2009, p 137.

drawings and patterns, the period during which the applicant may submit its views with regard to the opposition filed be two months.

3. Challenge

3.1. Introductory matters

The challenge, in the analysis of the matter, is a mean of appeal available to the applicant for the registration of the drawing or pattern, to challenge the decision of the Examining Commission of OSIM on application for the registration of a drawing or pattern.

The procedure for settling the challenge is provided both in art. 24 and art. 25 of Law no. 129/1992 on the protection of drawings and patterns and in art. 45-50 of Government Decision no. 211/2008 approving the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns. We must also mention that the provisions of art. 45-50 on the procedure for solving challenges is properly supplemented by the provisions of Code of Civil Procedure[22].

From the analysis of the legal provisions laid down in the special law and the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns[23], we find that people that have the right to file challenge against decisions on applications for registration of a drawing or pattern are persons who by law were communicated these decisions, namely:

– applicants whose application for registration of a drawing or pattern was rejected;

– applicants whose application for registration of a drawing or pattern was partly accepted to the record.

Therefore, from the above it results that the challenge procedure is not *inter partes.*

Concurrently, the legislation in force reveals that the report of Opposition Examining Commission prepared under art. 21 par. (4), last sentence, of the Law no. 129/1992 on the protection of drawings and patterns cannot be attacked by formulating a challenge by a third party - opponent.

Under the provisions of art. 21 par. (4), last sentence of Law no. 129/1992 on the protection of drawings and patterns and art. 23 par. (12) and art. 26 par. (6) of the Regulation for the implementation of Law no. 129/1992, the Opposition Examining Commission issues the report referred and submits it to the Examining Commission for further examination in terms of the fulfilment of conditions on the matter and is forwarded to the applicant and to the opponent. The decision of the Commission examining the drawings and patterns shall be based on the report prepared by Opposition Examining Commission.

The third party - opponent which is dissatisfied with how the opposition was settled, may, under art. 42 of Law no. 129/1992 on the protection of drawings and patterns[24], apply for the cancellation of the certificate of registration of the drawing or pattern in question at the Bucharest High Court.

[22] Art. 51 of the Regulations for the implementation of Law no. 129/1992 on the protection of drawings and patterns.
[23] Art. 46 par. (10) of the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns.
[24] According to art. 42 par. (1) of Law no. 129/1992 on the protection of drawing and patterns, "*drawing or pattern registration may be cancelled, in whole or in part, at the request of an interested person, for the reasons set out in art. 22 par. (3). Cancellation may be required throughout the duration of the certificate of registration and is judged by the Bucharest High Court*"[par. (2)].

Likewise, the legal literature following the adoption of the special relevant law[25], stated that the defence the law makes available to the third party – after the opposition settlement is the action for annulment of the certificate of registration of the drawing or pattern.

As far as we are concerned, we agree with this solution and appreciate that in this way the remedies are fair and equal to those of the applicant, i.e. the other party involved. In this way the provisions of Part III (Means of enforcing intellectual property rights), Section II, entitled "Civil and administrative procedures and remedies" are also observed.

3.2. The procedure for filing a challenge

Challenges shall be made in writing and filed with the General Registry of OSIM within 30 days of the communication of decisions on applications for drawing or pattern registration, made by the OSIM Commission examining the drawings and patterns. As shown, following amendments to the special relevant law in the Law no. 280/2007 amending and supplementing Law no. 129/1992 on the protection of drawings and patterns, the time to file a challenge has been reduced from 3 months to 30 days, which should be appreciated because it is assumed that this will speed up the processing of applications for registration of the drawing or pattern.

Challenges shall be in Romanian language and, according to art. 46 par. (4) of the Regulations for the implementation of Law no. 129/1992 on the protection of drawings and patterns shall include: name, surname and domicile, residence of the individual or, if applicable, name and address of the legal entity filing the challenge; OSIM deposit and contested judgment number; object of the challenge; the factual and legal grounds underlying the challenge; power of attorney, if any; attaching proof of payment of the prescribed fee for the examination of a challenge[26]; signature of the applicant or of the authorized representative, as appropriate. If documents are written in a foreign language, certified translation thereof into Romanian shall be submitted.

The challenge may be made in person, by representative, attorney or legal counsel. Foreign natural or legal entities may file challenges and may bring conclusions before the Commission only by representative, according to art. 13 of Law no. 129/1992 on the protection of drawings or patterns[27].

3.2.1. Registering challenges

Challenges are recorded in chronological order in the Register of challenges. Record of challenges is kept on annual basis, starting each year from the serial number 1 (one). Challenges will be reviewed within 3 months from the filing of the challenge by the Commission of Challenge of OSIM Department of Appeals.

The Commission of Challenge of the State Office for Inventions and Trademarks *exercises special administrative jurisdiction*

[25] Y. Eminescu, *Protection of industrial drawings and patterns*, Lumina Lex Publishing House, Bucharest, 1994, p. 131, V. Ros, *Intellectual property law, works cited*, pp. 516-517.

[26] The challenge examination fee is 150 euros, equivalent, according to point 11 of Annex no. 5 of GD no. 41/1998 on charges of industrial property protection and rule for their use.

[27] According to art. 21 par. (1) of Law no. 129/1992 on the protection of drawings and patterns, "*In proceedings before OSIM the applicant of the registration or its successor in title may be represented by an authorized industrial property counsel. For persons who are not resident or located in Romania, representation under par. (1) is mandatory, except for application filing*" [par. (2)].

and can be regarded as a court[28] within the meaning of art. 6 par. (1)[29] with marginal name "The right to a fair trial ," of the Convention for the Protection of Human Rights and Fundamental Freedoms[30].

As mentioned above, special administrative jurisdiction is defined as "activity carried out by an administrative authority which has, according to special relevant organic law, the jurisdiction to hear a dispute concerning an administrative act by a procedure based on adversarial principles, ensuring the right to defence and independence of jurisdictional administrative activity.[31]"

The registry of challenges that records the challenges must contain, according to art. 50 par. (2) of the Regulations for the implementation of Law no. 129/1992 on the protection of drawings and patterns, the following items: the date the challenge was filed and the number under which the challenge was registered, surname, first name or the name of the appellant, subject of the challenge, the time limit for resolution of the challenge, the judgment of the Commission on challenge filed, number of receipt or payment order proving the payment of the fee for the examination of the challenge, the Commission decision number, the number and the date the judgement was communicated.

3.3. Procedure for challenge settlement

Settlement of challenge is made by the Commission of Challenge on drawings and patterns that is organized and operates under art. 24 of Law no. 129/1992 on the protection of drawings and patterns.

Commission of Challenge on drawings and patterns consists of the chairman and two members. The chairman is the CEO of OSIM or, by delegation of responsibility, Head of Department of Appeals. The two members of the Commission of Challenge are in the Department of Appeals, one of which is a legal counsel. The members of the Commission shall be approved by the CEO of OSIM. Commission secretariat is provided by an adviser in the Department of Appeals.

By analysing the special legislation specific for invention patents, we note that Government Decision no. 547/2008 approving the Regulation for the implementation of Law no. 64./1991 regarding invention patents[32] stipulates that „The members of the re-examination commissions cannot take part in resolving any challenge or requests for revocation if they have a personal interest in the challenge at issue or if they have participated, as examiners or members of an examination commission, in the invention patent examination application subject in the challenge”[33].

[28] C. Birsan, *European Convention on Human Rights*. *Comments by articles*, Volume I, 2nd edition, C.H. Beck Publishing House, Bucharest, 2010, pp. 487-503.
[29] According to art. 6, par. 1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, "*Any person has the right to a fair trial of the case, publicly and within a reasonable time by an independent and impartial law court judging whether on his/her civil rights and obligations infringement or on the merits of any criminal charge against him/her*."(...).
[30] The Convention was adopted in Rome on November 4, 1950 and entered into force on September 3, 1953. Romania ratified the Convention by Law no. 30/1994, published in the Official Gazette No. 135 of May 31, 1994.
[31] Art. 2 par. (1) letter e) of Law no. 554/2004 - Administrative Litigation Law, as amended and supplemented, republished in the OG no. 751 of November 6, 2007.
[32] Published in the Official Gazette no. 456 of June 18, 2008.
[33] Art 55 par. (4) of Government Decision no. 547/2008 approving the Regulation for the implementation of Law no. 64/1991 on patents.

Although the special relevant legislation on drawings or patterns does not include a regulation regarding a state of incompatibility, the literature[34] states that, in order to ensure decisional autonomy, the specialists within the challenge commission should not have been involved in the examination proceedings.

Therefore, we hereby propose *de lege ferenda* adopting provisions by which an application to recuse be filed in the procedure of challenge against decisions regarding the application for registering a drawing or pattern, against a member of the examining commission who exerted a personal interest in the challenge at issue or if he/she participated, as examiner or member of an examining commission in the examination of application for drawing or pattern the challenge refers to.

Pursuant to art. 47 par. (1) of the Regulation for the implementation of Law no. 129/1992, the chairman of the challenge commission shall set the appeal session time and decide on summoning the parties. In this regard, the secretary of the challenge commission shall summon the parties at least 14 days prior to the date set for the settlement of the challenge, by mail, with acknowledgement of receipt. If the summoned party fails to appear at the date and time set, the procedure before the commission may be carried out by default.

The presence of parties at the challenge resolution term covers the irregularities regarding the summons procedure. The parties may appear before the challenge commission in person or represented by an authorized patent counsel or attorney. Legal entities may appear before the commission through a legal representative or legal counsel with a delegation.

The opinion of the commission examining the drawing and pattern, drawn up by an examiner within the Drawing and Pattern Service, authorized by the chairman of the commission examining the drawings and patterns, shall be attached to the case file at least 5 days prior to the term set for resolving the challenge. The opinion shall include the response to the pleas de facto and de jure provided by the appellant in support of his challenge[35].

Compliant to art. 47 par. (8) of the Regulation for the implementation of Law no. 129/1992, the files for drawings and patterns registration applications, shall be provided in original copy, upon request, to the challenge commission by the drawings and patterns service, upon request.

The session is public. The challenge commission may decide on a secret session if a public dispute affects one of the parties or public order. The session opening, suspension or closure is called by the commission chairman.

The secretary of the commission shall verify if the procedure is complete and if the challenge examination fee was paid and informs the chairman of the aforementioned. Upon the term set, if the parties are present or if the summons procedure was duly effected, the chairman initiates the dispute and gives the floor to the party who brought the challenge.

The law entitles the chairman to question the parties[36], in order to clear the aspects shown in the appeal. The chairman is entitled to dispute any situation de facto or de jure in order to resolve the case even if such are not included in the challenge.

[34] E. Stoica, *Settlement of challenges on drawings and patterns* in RRPI no. 4/2008, p 37.
[35] Art. 47. (6) and (7) of the Regulation for the implementation of Law. 129/1992 on the protection of drawing and patterns.
[36] Art. 48 par. (5) of the Regulation for the implementation of Law. 129/1992 on the protection of drawing and patterns.

Moreover, under art. 48 par. (6) of the Regulation for the implementation of Law no. 129/1992, members of the challenge commission can also question the parties, but only through the chairman. The latter may allow members of the challenge commission to directly address questions.

Subject to the duly justified request of the parties or to the necessity of providing new evidence implied by the disputes, the challenge commission may grant a new due date, the parties being informed of the latter.

Upon dispute closure, the challenge commission shall deliberate in the absence of the parties and pronounce a decision on the same day during the session or, in special cases, may postpone the pronouncement for up to 3 weeks. The chairman listens to the commission members' opinions and finally pronounce a decision.

The session disputes and the commission decision are recorded by the secretary in the session registry.

Upon making a decision, the commission shall draft the operative part of the judgment, recorded in the session registry for each case, and the rapporteur shall draft the decision. Divergent opinions of the commission members are recorded in the operative part of the judgment under signature and are motivated separately.

We may conclude that the examination request subject in the appeal, *„is a graceful request that only in exceptional cases and when confronted with opposition may be resolved as a result of a procedure riddled with jurisdictional elements"*[37]. Therefore, the examination commission within OSIM (State Office for Inventions and Trademarks), invested with an application for registering a drawing or pattern, *becomes a jurisdictional administrative body* as the dispute resolution is rendered according to a procedure based on the adversarial principle, ensuring the right to defend and independence of administrative-jurisdictional activity[38].

3.4. Decisions of challenge commission

The commission decisions are made with majority of votes and shall be drafted in a single original copy, submitted with the commission decision folder and kept within the secretariat thereof. The decisions are signed by the chairman and members. If one of the members is unable to sign a decision, the Commission chairman shall record such situation within the decision.

The commission decision shall be recorded within the Decision Registry of Challenge Commission and must include the following information: decision number; last name and first name or names of the appellant, of the authorized proxy or of the attorney, as the case may be; decision content; number of commission file, number from the commission session lists[39].

According to the provisions of art. 49 par. (6) of the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns, the Drawing and Pattern Challenge Commission may decide, in the settlement of the challenge on the matter on trial:

– to admit the challenge and forwarding the case to the Drawing and Pattern Service in order to implement the decision;

– to dismiss the challenge and uphold the decision against which the challenge was filed.

[37] Cr. Clipa, *works cited*, pp. 26-27.
[38] *Ibidem*, p. 498.
[39] Art. 50. par. (4) of the Regulations for the implementation of Law no. 129/1992 on the protection of drawings and patterns.

3.4.1. Withdrawal of challenge

If necessary, the Drawing and Pattern Challenge Commission may take note of the challenge withdrawal, through session closure, according to the provisions of art. 523 of the New Code of Civil Procedure, according to which "The appeal may be withdrawn at any time until its resolution. Once withdrawn, the appeal cannot be reiterated[40]". The possibility to withdraw an appeal is the expression of the principle of availability in the civil trial[41].

3.5. Ways of appeal against the decisions of a challenge commission

According to art. 25 par. (1) of Law no. 129/1992 on the protection of drawings and patterns, the decision of the challenge commission shall be communicated to the parties, in original certified copy, within 30 days from decision delivery.

Within 30 days from communication, the decisions of the Challenge Commission *may be contested* with the Bucharest High Court. The decision is only subject to an appeal with the Bucharest Court of Appeal[42].

The final decisions of the Drawings and Patterns Challenge Commission shall be published in BOPI – Drawings or Patterns Section, within 60 days from decision delivery[43].

Considering the aforementioned:

– against a decision pronounced by the Challenge Commission within the Directorate of Judicial, Contestation, International Cooperation and European Affairs of OSIM[44], the Romanian legislator *established distinguished means of appeal, namely the challenge*;

– the challenge *must be promoted with the Bucharest High Court*, a court with an exclusive material jurisdiction;

– against the first court decision of the Bucharest High Court, the interested party may only submit *an appeal within the competence of the Bucharest Court of Appeal*;

– The Bucharest Court of Appeal *shall resolve the appeal and deliver a final decision.*

Since the enactment of Law no. 129/1992 on the protection of drawings and patterns to the present day, provisions regarding the judicial control of decisions pronounced by the challenge commission have changed, the legislator noting, that the establishment of a jurisdiction of the Bucharest High Court to resolve appeals against the decisions of the Drawings and Patterns Challenge Commission of OSIM *was incorrect*.

Moreover, the establishment of this jurisdiction for the Bucharest High Court was repeatedly criticized in the literature. Thus, one highlighted that the appeal resolution was incorrect *„because the appeal is a devolutive remedy which may be exercised against judicial decision. Its extension to decisions pronounced by authorities with jurisdictional activities distorts the nature of the remedy of appeal,*

[40] Ban on reiterating an appeal is appreciated by Professor I. Deleanu "*that it does not correspond to the nature of the specific ways of appeal*." For details, see I. Deleanu *New Code of Civil Procedure, Comments by articles*, Vol. I, Universul Juridic Publishing House, Bucharest, 2013, p. 714.

[41] *Idem*.

[42] According to art. 25 par. (1) of Law no. 129/1992 on the protection of drawings and patterns, as in force on February 1, 2013. To date, the text of art. 25 par. (1) reads as follows: " *The decision of the Challenge Commission shall be notified to the parties within 30 days from delivery and may be appealed to the Bucharest High Court, within 30 days of notification*."

[43] Art. 25 par. (2) of the Law no. 129/1992 on the protection of drawings and patterns.

[44] Structure of OSIM management, according to GD no. 573/1998, was updated on July 30, 2013.

as well as the function exercised by the court of appeal"[45].

Another author[46], shows that the notion of *„appeal",* although *„suggestive in terms of full control, de facto and de jure, exercised by the court with regards to the decision of the jurisdiction authority within OSIM, was used inadequately, as, in this case, no judicial control was exercised so that a court was informed for the first time on verifying the legality and soundness of a decision pronounced by a jurisdictional activity authority, outside the court system".*

On the same lines[47], one mentioned that *„the decisions issued by the re-examination commission cannot be contested by appeal before a court of law, only as an action representing the main issue of the matter on trial, compliant to the law. The appeal is a devolutive remedy of appeal specific to civil procedure by which a decision by a court of law, and not by an administrative authority, is censored, whether the latter is granted following a remedy procedure similar to the one carried out before a court of law".*

In conclusion, considering the aforementioned, we appreciate the changes made by the legislator to art. 25 of Law no. 129/1992 on the protection of drawings and patterns through Law no. 76/2012 for implementing Law no. 134/2010 regarding the Code of Civil Procedure, since the establishment of a jurisdiction for the Bucharest High Court to resolve appeals against the decision of Drawings and Patterns Challenge Commission within OSIM was incorrect.

3. Conclusions

The main directions discussed in the article aim at drawings and patterns protection in terms of national administrative law and through this proposed paper the author desired to identify the administrative law means aiming at and ensuring the recognition of the right during the procedure of drawings and patterns registration and the procedure for releasing the registration certificate for drawings and patterns. Without this procedure the desired result would not be achieve, namely the recognition of legitimate ownership of the invention (intellectual products) made. The expected impact is to understand the importance of this segment, better saying this element in the whole ensemble the intellectual property represents. For future research, my suggestion is to find common elements between domestic and international administrative law, namely those which are applicable to international regulations and conventions and which apply in the field.

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NEW REGULATION OF THE GRADUATES OF HIGHER EDUCATIONAL INSTITUTION'S PROBATION PERIOD

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Abstract

Romanian Labor Code – Law no. 53/200[1] has stipulated from its modification in 2011 (operated by the Law no. 40/2011), in art. 31, that the persons who had graduated a higher educational institution shall be considered in probation period during the first months after their debut in profession. Those professions in which the probation is regulated by special laws shall be exempted. The Labor Code did not developed the regulation of this kind of probation period, but it mentions that the modality of performing the probation period for the graduates of higher educational institutions shall be regulated by a special law. After almost three years after the Romanian Labor Code had been modified and begun to be applied the new normative content, the legislator enforced the regulation of the special law having object the probation period of the graduates of higher educational institutions (Law no. 335/2013 regarding the execution of the probation period by the graduates of higher educational institutions[2]). The present paper represents a juridical analyze of the probation period for the graduates of higher educational institutions' normative framework.

Keywords: *probation period, probationer, mentor, probation period contract, employer, evaluation, evaluation commission*

Introduction

It is a specific of the labor market that the persons who entered in a specific profession have to go through a specific probation period. This probation period has specific main purposes consisting in the graduate's accommodation at the professional activities he is going to perform and the verification by the employer of the graduate's abilities.

The Romanian Labor Code – Law no. 53/2013, republished in 2011 – is regulating two form of probation period: (1) the principal form of probation period, which represents the first stage of the individual labor contract's execution, for every employee [art. 31 paragraphs (1) – (4), art. 32-33]; (2) the specific probation period for the graduates of higher educational institutions [art. 21 paragraphs (5) and (6), correlated with Law no. 335/2013 regarding the execution of the probation period by the graduates of higher educational institutions).

We are referring in the present paper only to the specific probation period of the higher educational institutions' graduates who go through this probation as employees. The Labor Code exempts the probation period for those professions which are regulated by special laws (as specific professional statutes).

The Romanian Labor Code's provisions having object the probation

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[1] Republished in the "Official Gazette of Romania", 1st part, no. 345 of 18 May 2011.

[2] Published in the "Official Gazette of Romania", 1st part, no. 776 of 12 December 2013. The regulation will come into force after 90 days from its publication.

period of higher educational institutions' graduates are few and extremely generally. The Code mentions only the following aspects:

- the duration of the probation period is 6 months;
- the employer has the mandatory obligation to issue a certificate at the end of the probation;
- the attribute of the territorial labor inspectorate within the territorial jurisdiction of the employer's headquarter to endorse the certificate;
- the exemption from the Labor Code probation period's regulation of those professions in which the probation is regulated by special laws and
- the normative solution consisting in developing the graduates of higher educational institutions probation period's regulation through o special law.

This special law is Act no. 335/2013 regarding the execution of the probation period by the graduates of higher educational institutions. The law had been publishes in the Official Gazette in December 2013, but the regulation will come into force at the beginning of March 2014 (after 90 days after the law was published).

The Law no. 335/2013 regulates the following aspects:

- the general provisions having object the purpose of the probation period for the graduates of higher educational institutions and the significance of the specific terms and expressions used by the legislator;
- the probation period contract;
- the rights and the obligations of the probation period contract's parts;
- the organization of the probation period;
- the probationer's evaluation procedure at the end of the probation period;
- the ways of the probation period's funding;
- the juridical liability for the inobservance of the law provisions.

We assume that is important to correlate properly Labor Code's provision regarding the conclusion and the execution of the individual labor contract with the specific provisions of the probation period's regulation in order to determine in a correct manner the status – rights and obligations – of the parts and the specific relation between the individual labor contract and the probation period contract, which are concluded by the same parts.

1. *Romanian Labor Code's provisions having object the general regulation of the probation period*

a) In order to check the abilities of the employee, on the conclusion of the individual labor contract, a trial period of 90 calendar days at the most may be established for executive positions, and 120 calendar days at the most for management positions [art. 31, paragraph 1][3]. The check of professional abilities when employing disabled persons shall be based only on a trial period of 30 calendar days at the most[4].

[3] For the exhaustive analyze of the trial period, see I.T. Ştefănescu, Theoretical and Practical Paper for Labor Law, Second edition, Universul Juridic Editor, Bucharest, 2012, p. 275-285; Al. Ţiclea, Paper for Labor Law, Sixth Edition, Universul Juridic Editor, Bucharest, 2012, p. 421-425; Ş. Beligrădeanu, I.T. Ştefănescu, The Labor Code's regulation of the trail period, in "Dreptul" no. 8/2003, p. 24-32; C. Belu, The new Labor Code's regulation of the trial period, in Romanian Labor Law Magazine no. 2/2004, p. 27-31; Ş. Beligrădeanu, Probation period – recantation clause and its consequences regarding the individual labor contract's cessation, in "Dreptul" no. 9/2007, p. 67-69.

[4] We mention that the art. 83, paragraph 1, subparagraph d) from the Law no. 448/2006 regarding the protection and the promotion of the disabled persons (republished in the "Romanian Official Gazette", part I, no. 1 of 3rd January 2008) the duration of the trial period is 45 days. Taking into account that the Law no. 448/2006 is a special regulation

Throughout the trial period or at the end of it, the individual labor contract may be terminated exclusively by a written notification, without notice, following the initiative of either party, without being necessary its motivation [art. 31, paragraph 3].

During the trial period, the employee shall benefit from all the rights and have all the obligations stipulated in the labor legislation, the applicable collective labor contract, the internal regulations, as well as the individual labor contract.

b) For graduates of higher educational institutions, the first 6 months after their debut in profession shall be considered probation period. Those professions in which the probation is regulated by special laws shall be exempted. At the end of the probation, the employer shall mandatory issue a certificate, which shall be endorsed by the territorial labor inspectorate within the territorial jurisdiction of its headquarters.

The modality of performing the probation mentioned above shall be regulated by special law.

c) During the progression of an individual labor contract, there may only be one trial period [art. 32, paragraph 1].

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

The trial period shall represent length of service.

The period when successive trial hiring of more persons for the same job may be made shall be of maximum 12 months [art. 33].

d) The contractual clause referring to the probation period (the one which is regulated by art. 31, paragraph 1 from Labor Code) represents also a mandatory element of the employer's obligation to inform [art. 17 from Labor Code]; the person selected for employment or, as applicable, the employee, shall be informed about the length of the trial period [art. 17, paragraph 3, subparagraph n)].

The trial period is an employer's right. So, it is possible that the employer to inform the person selected for employment or the employee (who shall perform another kind of work) that the length of the trial period is shorter that the one stipulated by art. 31, paragraph 1 from Labor Code, or even that the employer renounces to the trial period.

2. The trial period of the high educational institution's graduates. Purposes and specific terms

a) Art. 1 paragraph (2) from Law no. 335/2013 stipulates that the specific purposes of the probation period are:

- to assure the higher educational institutions' graduates transition from the educational system to the labor market;
- to consolidate the professional competences and skills in order to adapt the graduate to the workplace's practical demands and requirements;
- to assure a quicker integration in the labor process;
- to allow the probationers the conditions to acquire experience and length of service or of specialty.

b) The law mentions in art. 2 the main terms and expressions which are specific for this regulation:

- *the probationer* is the debutant in profession, hired on the individual labor contract, excepting the persons who prove that they had practice a professional activity in the same field, previous their graduation;

in relation with the Labor Code, its provisions are first applicable. See I.T. Ştefănescu, op. cit., p. 282. For the opposite interpretation, see Al. Ţiclea, op. cit., p. 422.

- *the probation period contract* is the contract signed by the employer and the probationer, annex to the individual labor contract concluded by the same persons;

- *employer* is the person who has this status based on the Labor Code's provisions;

- *mentor* is the person indicated by the employer who coordinates the probationer during the probation period and participates at the evaluation procedure (at the end of the probation period);

- *evaluation* is the procedure to finalize the probation period and which is accomplish by the evaluation commission;

- *the probation period* is the interval between the moment of probationer's employment and the moment of the probation period's finalizing, which ends with issue of a certificate signed by the employer;

- *evaluation commission* is the commission constitutes on members designates by the employer and which evaluates and issues to each probationer an evaluation report at the end of the probation period.

3. The probation period contract

a) The probationer is an employee. In order to obtain this status, he needed to conclude an individual labor contract. Based on the provisions of art.16 from the Law no. 335/2013, the probation period contract is concluded at the same time with the individual labor contract.

b) The length of the contract is 6 month. Are exempted those cases regulated by special laws in which there are stipulated other lengths for the duration period.

We assume that the probation period length stipulated by art. 31, paragraph 5 from Labor Code and art. 16, paragraph 1 from Law no. 335/2013 represents a maximum. The employer and the employee (which could be also probationer) have the right to diminish the length of the duration period and also to renounce at his right to verify the professional competences and skills of his new employee through probation period. As we mentioned above, the duration period is a right of the employer and the renounce to it is legally possible[5].

c) The form of the contract is the written one. The obligation to conclude the probation period contract in written form belongs to the employer.

The parts' rights and obligations regarding the performing of the probation period are stipulated in the probation period contract and, in addition, in the collective labor agreements and/or in the internal regulations.

The monthly base wage of the probationer is determined through the individual labor contract, based on regular work duration of 8 hours per day and 40 hours per week (full time work).

d) The probation period contract shall be suspended (art. 19, paragraph 1 from Law no. 335/2013):

- if the individual labor contract is suspended;

- if the probationer is on sick leave for more the 30 days.

The probation period contract can be terminated as follows (art. 22 from Law no. 335/2013):

- rightfully;

- based on the parties' consent, on the date agreed upon by them;

- as a result of one of the parties' unilateral will, in the cases and under the limitation terms stipulated by the law.

If the probation period contract is terminated for the reasons which are not imputable to the probationer, he can

[5] Only for the employee Labor Code prohibits the renounce or diminishing of a right. Art. 38 stipulates: "Employees may not waive the rights acknowledged to them by the law. Any transaction the aim of which is to waive the rights recognized by the law to employees, or to limit such rights shall be null".

continue the probation period till the accomplish of the 6 month length if in a term of 60 days he concludes a new individual labor contract (and a new probation period contract) with another employer.

After the termination of the probation period contract, the employer can employ only once another probationer on the same workplace.

4. The rights and the obligations of the probation period contract's parts

a) The probationer has the following rights:

- to benefit of the mentor's coordination and support;
- to be set a program of activities suitable for his workplace, which difficulty level and complexity to gradually increase during the probation period;
- to benefit of an objective evaluation;
- to be assured the necessary time for individual training, the access to the sources of information necessary for his improvement and which allow him to consolidate his knowledge;
- to participate at the professional training organized by the employer for probationers;
- to receive the evaluation report or the certificate issued at the end of the probation period;
- to contest the evaluation reference issued by the evaluation commission, if appropriate.

b) The probationer has the following obligations:

- to prepare his professional skills and competences on the field he perform the probation;
- to organize and manage an own evidence for his professional activities;
- to observe the tasks provided by the mentor and by his superior;
- to consult the mentor in order to accomplish the tasks allocated by the compartment's leader;
- to respect the confidentiality regarding the entire aspects of his activity, observing the internal regulations issued by the employer;
- not to perform during the probation period activities which is competing with the one performed for his employer;
- to participate at the evaluation procedure.

c) The employer has the following rights:

- to set on the probationer, through his job description, the attributions in the field the probation period is performed;
- to harness the theoretical and practical probationer's knowledge in the work process;
- to exercise the control over the way in which the job duties are carried out;
- to find whether departures from discipline have taken place and to apply adequate sanctions, under the law.

d) The employer has the following obligations:

- to designate a mentor who will coordinate an support the probationer to achieve the specific objectives and the level of performance settled on the probation period's program;
- to set on a work program in the field of activity in which the probation is performed;
- to assure a proper endowment – logistic, technical and technological – necessary to harness the theoretical and practical knowledge received by the probationer during the probation period;
- to evaluate the probationer's level of knowledge at the termination of the probation period;
- to issue the probationer a certificate proving the period of probation, the

competences and the skills acquired during the probation period.

- not to use the probationer in activities which are not stipulated in the probation period contract.

5. The organization of the probation period

a) The probation period is performing based on a program of activities approved by the employer, at the proposal of the department's leader where works the probationer.

The program of activities on the period of probation period has to include:

- the objectives and the quantifiable level of performance based on the evaluation shall be accomplish;

- the planning of the activities which the practitioner shall held, depending on the level of competences and skills needed to be achieved during the probation period.

b) The mentor is designated by the employer, based on the proposal of the department's leader where the probationer will work. In order to be mentor, the person has to fulfill the following demands:

- the mentor has to be an employee;

- the professional experience of the mentor, in the field of probation activity, is minimum 2 years;

- not to be disciplinary punished by the employer;

- the mentor can coordinate the activity of at most 3 probationers.

The mentor has the following obligations:

- to coordinate the probationer's activity on the entire probation period;

- to propose to the employer ways to accomplish the probationer's tasks;

- to supervise the manner of accomplish the specific demands of the probationer's workplace;

- to be member in the evaluation commission;

- to prepare a report regarding the probation period, if his individual labor contract ends before the termination of the probation period or the mentor is disciplinary punished by the employer (and its status ends because of that punishment);

- to prepare the probation period report, 10 days before the termination of the probation period.

6. The probationer's evaluation procedure at the end of the probation period

a) The evaluation commission has the obligation to prepare an evaluation report 5 days before the termination of the probation period. The evaluation report has to include the following elements:

- the description of the activity performed by the probationer;

- the degree of achievement by the probationer of the objectives and the level of performance set on by the activities program;

- the competences and the skills achieved by the probationer, the way of fulfillment of the specific attributes and the contractual clauses;

- the probationer's behavior and degree of implication during the probation period;

- conclusions regarding the probation period;

- other mentions.

The employer issues the certificate of probation period's termination based on the commission report in 15 days after the receiving of the report. The certificate has to be endorse by the territorial labor inspectorate within the territorial jurisdiction of the employer's headquarter.

b) The evaluation accomplished by the commission has to be based on the following elements:

- the analyze of the objectives and indicators' degree of fulfillment;

- the assessment of the competences' level of consolidation and practical skills needed for the exercise of the occupation in the specific field of the probation;

- the probation period's report.

If the result of the evaluation is negative, the employer shall issue an attestation recognizing the completion of the probation period. The probationer can contest the negative evaluation and if the result is also negative, he can address to the court.

Conclusion

The actual legal framework of the probation period allows distinction between the probation period of the employees who are at the beginning of the activity for their new employer and the probation period of the graduates of higher educational institutions.

The probation period in case of the graduates of higher educational institutions is regulated by Labor Code – art. 31, paragraph 5 – and Law no. 335/2013.

The Law no. 335/2013 is a necessary regulation because the act contains the development of the principal aspects of the probation period in case of the graduates: the general provisions having object the purpose of the probation period for the graduates of higher educational institutions and the significance of the specific terms and expressions used by the legislator; the probation period contract; the rights and the obligations of the probation period contract's parts; the organization of the probation period; the probationer's evaluation procedure at the end of the probation period; the ways of the probation period's funding; the juridical liability for the inobservance of the law provisions.

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QUALIFYING LEGACY BY PARTICULAR TITLE – A DIFFICULT TASK

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Abstract

The current Civil Code in force, unlike the previous one, succeeds into making a clear and natural distinction between will – as a whole – and legacy – as the main testamentary provision. Unfortunately, it does not also provide flawless regulations in terms of the categories of legacies, which are classified according to their object (universal legacies, legacies by universal title and legacies by particular title). In what the legacy by universal title is concerned, the Civil Code in force contains some controversial provisions at article 1056 paragraph (2) letter c), which interfere also with the correct qualification of legacy by particular title. Then, the regulations of the legal regime applicable to the legatee by particular title also evince flaws, for instance at article 1114 article (3) letter b) of the Civil Code, so that it becomes more and more difficult to qualify certain legacies, as being by particular or by universal title. The current work aims to point out the provisions of the Civil Code mentioned before, which generate or can generate potential controversies, but also to propose certain remedies.

Keywords: *universal legacy, legacy by universal title, assets determined according to their nature and origin, legatee by particular title, legacy upon an inheritance collected and not liquidated yet.*

1. Introduction

1.1. The field covered by the theme of the study

The present work will discuss a topic of interest for hereditary law, more exactly for the transmission of an inheritance by will. Traditionally, the issue regarding the legacy by particular title, which constitutes the theme of this study, is approached within the context of the main testamentary provisions.

1.2. The importance of the study proposed and the objectives targeted

Legacy represents one of the provisions which a will can contain, actually the main testamentary provision. Its qualification as being universal, by universal title or by particular title is, in our opinion, a difficult task, because the Civil Code currently in force contains some contradictory provisions on this matter. These are the provisions of article 1056 paragraph (2) letter c) of the Civil Code and of article 1114 paragraph (3) letter b) of the Civil Code. Considering that a legacy can be classified, according to its object, within one or another category from the ones mentioned above, has both a theoretical and practical advantage. After a legacy is included in the category of universal legacies, legacies by universal or particular title, it will become subject to the legal regime applying to the category to which it belongs.

The present study aims to point out the specific features of the legacy by particular

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title, but also its characteristic elements, so as to correctly classify it and, in consequence, establish the legal regime which is applicable to it. Moreover, the main legacies by particular title will be listed and followed by some proposals *de lege ferenda*, so as to remove the contradictions existing at the moment within the current Civil Code, which make the classification of a legacy a difficult task.

1.3. How the author will be responsible for the objectives taken upon

Given the provisions of the Civil Code in force, having incidence in the field of legacy, and the few opinions expressed within legal literature up to this moment, in relation to the topic herein analysed, there will be subsequently identified the specific elements of the legacy by particular title. In this context, we express our conviction that all these elements should guide us in our attempt to classify a legacy, according to the criterion of its object, even in the case when (and unfortunately, we are in this situation) the incident legislation has rather the role to confuse us, than to shed light upon the issue. On this ground, we will continue by enumerating the legacies which we consider to be by particular title. We will also try to propose some remedies, which we consider fit for the issue discussed and which should maybe be considered by the lawmaker, on the occasion of a future republication of the Civil Code.

1.4. How much the topic discussed is known, by referring to the contributions already existing within specialized literature

Specialized literature[1], has pointed out the contradiction between the provisions of the Civil Code regarding legacy (by universal and by particular title), but this issue has not been very much looked into and, consequently, no solution for its resolution has been proposed. This is in fact understandable, as from the entry in force of the current Civil Code only two years have passed, in which the experts could not identify all the controversies contained by this complex normative act and, consequently, propose the most appropriate remedies. We ourselves have dealt with this topic in a restrictive manner, in two previous works[2] (as their nature was demanding). Now we aim to provide a greater extension to the issue on the qualification of the legacy by particular title and to prove both the controversial character of the provisions of the Civil Code, already discussed, and the justness of the suggestions we will make in this context.

2. Content

2.1. Introductive considerations

According to the provisions of article 986 of the Civil Code, "*Legacy constitutes the testamentary provision by means of which the testator states that, upon his death, one or several legatees shall acquire his entire patrimony, o portion of it or certain determined assets*".

It can be thus noticed that the lawmaker has resolved several of the issues raised by legacy, through the legal text

[1] Codrin Macovei and Mirela Carmen Dobrilă, "Cartea a IV-a, Despre moştenire şi liberalităţi", in Noul Cod civil. Comentariu pe articole, ed. Flavius Antonius Baias et al. (Bucharest: C.H. Beck Publ. House, 2012), 1092.

[2] Bogdan Pătraşcu and Ilioara Genoiu, "Despre noţiunea şi felurile legatului", in *Noul Cod civil. Studii şi comentarii,* ed. Marilena Uliescu (Bucharest: C.H. Beck Publ. House, 2013), 807-832 and Ilioara Genoiu, *Dreptul la moştenire în Codul civil* (Bucharest: C.H. Beck Publ. House, 2013), 157-159.

mentioned above. He consequently defined legacy, by describing its essence (testamentary provision regarding the deceased's patrimony), he correctly established the relation between legacy and will (legacy is a testamentary provision) and he also indicated the core of the main types of legacies, in connection to their object (the universal legacy entitles the inheritance of the whole patrimony, the legacy by universal title entitles the inheritance of only a portion from the patrimony, whereas the legacy by particular title entitles to the inheritance of certain determined assets).

In our opinion, legacy benefits from an accurate definition coming from the Civil Code currently in force, which makes amends for a great flaw of the former Civil Code which, at article 887, was making a confusion between the will, as a whole, and legacy, which is the main provision of the will. The former Civil Code was stating the following: *"The will can be used to make provisions for the whole or only a part of someone's patrimony, or for one or several determined objects"*. In fact, the former Civil Code was regulating legacy and not will on that occasion. But legacy represents only one of the testamentary provisions, admittedly the most frequent one (and, consequently the main one). Still, the legal literature of those times, by acknowledging the flaw of the legal text mentioned above, has defined legacy in a particular accurate manner. Therefore, according to specialized doctrine before October 1st 2011, legacy represented the testamentary provision by means of which a testator nominated one or several persons who, upon his death, were to acquire, by free title his entire patrimony, a portion of them or certain determined assets[3]. Thus, the current Civil Code takes up the former and correct definition existing within legal doctrine, at article 986.

When defining the will, the Civil Code currently in force does not bring into discussion the confusion made by the previous Civil Code (although a certain discussion could also be raised about how this normative act defines will) and, moreover, at article 1035, which is called "The content of the will", it clearly shows that legacy is the only one (but the main) provision of the last will act and enumerates, as an example, some other provisions which a will can comprise[4]. This represents a strong point of the current way in which legacy is regulated. Unfortunately, we won't be subsequently able to make such appreciations, but on the contrary, we shall put under question the controversial provisions of the Civil Code in force.

2.2. The contradictory legal regulation of the legacy by universal title – a cause for the difficulty and unjustness of qualifying the legacy by particular title

In our opinion, the correct qualification of the legacy by particular title depends, in a considerable manner, from the way the lawmaker has regulated the other two categories of legacies, resulting by considering their object: the universal legacy and the legacy by universal title. This happens due to article 1057 of the Civil Code, stating that: "*Any legacy which is not universal or by universal title is a legacy by particular title".* Thus, the legacy by particular title represents the result (the difference) of a subtraction operation in which the subtrahend (multiple, in this case) is represented by the universal legacy and by the legacy by universal title, whereas the

[3] Francisc Deak, *Tratat de drept succesoral*, II edition, updated and completed (Bucharest: Universul Juridic Publ. House, 2002), 208.
[4] On the new definition of legacy, see also Mircea Dan Bob, Probleme de moşteniri în vechiul şi în noul Cod civil (Bucharest: Universul Juridic Publ. House, 2012), 120-126.

minuend is represented by the totality of legacies, considered according to their object. Thus, the justness and correctness with which the other types of legacies are regulated determines the quality of regulating the legacy by particular title.

In our opinion, the regulation of universal legacy is just, so that it does not interfere at all with the correct qualification of some legacies as being by particular title. Not the same applies for the way in which the lawmaker has regulated the legacy by universal title. In fact, it is precisely the improper regulation of the latter which produces negative consequences in terms of qualifying the legacy by particular title, making this task difficult.

For the reasons mentioned above, it is useful to bring into discussion the provisions of article 1056 of the Civil Code, meant to insure the legislative background applicable to legacy by universal title. According to them, *"The legacy by universal title is the testamentary provision which provides vocation to a portion from inheritance to one or more persons"*. "Portion from inheritance" signifies, according to article 1056 paragraph 2 of the Civil Code, the following:

- either the property upon a share from the inheritance;

- either a right of property upon all or a share from the inheritance;

- or the property or a right of property upon a share from the universality of assets determined according to their nature or origin.

We would like to mention that we have no comments regarding the provisions of article 1056 paragraphs (1) and (2) letters a) and b), as we consider them appropriate. Moreover, by containing these provisions, the Civil Code currently in force resolves the issue (which was controversial in the context of the former Civil Code) of the legacy involving a right of property on the whole inheritance or only a share of the latter, including this type of legacy in the category of legacies by universal title.

Still, we will provide some considerations on the legacy having as object the property or a right of property upon the whole or a share from the universality of assets determined according to their nature and origin [regulated by article 1056 paragraph (2) letter c) of the Civil Code]; according to the Civil Code currently in force, this kind of legacy is a legacy by universal title. It seems that we encounter here, at least partially (in relation to the legacy having as object the property or a right of property upon the whole or a share from the universality of assets determined according to their *nature*) the equivalent of article 894 of the former Civil Code, according to which the legacy by universal title is the one having as object all the movable or immovable assets of the deceased, or a portion of the movable or immovable assets of the inheritance. Consequently, the lawmaker has not taken over the opinion expressed within legal doctrine before the current Civil Code entered in force, namely that all (or only a part) of the deceased's movable or immovable assets should constitute the object of a legacy by particular title on the occasion of a future regulation, as they do not constitute a legal universality (but only a universality de facto), missing liabilities.

Since the Civil Code in force contains such provisions as those mentioned above, it should be pointed out what "universality of assets determined according to their nature and origin" means. Thus, it is obvious that the term "universality" used by the Civil Code, at article 1056 paragraph 2 letter c) is different by that of "legal universality", of patrimony, the latter representing all the rights and duties with a patrimonial character belonging to a person. The text under discussion involves a universality de

facto, which, unlike, the legal one, does not presuppose the existence of liabilities. But the legacy by universal title means precisely that the beneficiary of a liberality bears also the liabilities of the inheritance, within the limits of the share received from the inheritance. So how could the two aspects be reconciled?

Recent specialized literature[5], has pointed out that, in the context subject to our analysis, the term of "universality" must be perceived in a broad meaning, so that is considered legacy by universal title also the legacy upon all (or a share of) movable or immovable assets from inheritance, the legacy upon a fraction of the surplus or the share available or the legacy of all (or a share from) the movable or immovable assets from inheritance, situated in a certain place.

Continuing our analysis, we believe that is useful to quote also the text of article 541 of the Civil Code, having the indicative title of "Universality de facto", according to which "*(1) A universality de facto is represented by all the assets belonging to the same person and having a common destination, established through that person's will or by law. (2) The assets composing the universality de facto can, together or separately, be the object of some acts or distinct legal relations".*

According to specialized literature[6], universalities de facto can be represented by the books reunited in a library, by art or numismatic collections, by herds of animals, commerce fund, and so on. Thus, in order to speak about universality de facto, the following conditions must be met:

- the assets reunited to belong to one and the same person;

- all the assets mentioned above must have a common destination, determined by the person's will or by law.

In respect to what has been mentioned before, we consider that the term "universality" can have a broad meaning, to include both universality by law and universality de facto, but this does not mean that the two types of universality have the same legal regime.

Continuing to analyse the text of article 1056 paragraph (2) letter c) of the Civil Code, we mention that, *according to their nature*, assets can be movable or immovable[7]. It would therefore emerge that all the movable assets of the deceased or, according to the case, all the immovable assets of the deceased can be qualified as the universality of assets of *de cuius*, determined according to their nature, and that they constitute the object of a legacy, qualified by the lawmaker as a legacy by universal title.

Then, according to recent specialized literature[8], the term of assets *origin* should mean, for instance, that these assets belong to the deceased's own assets (being those which he obtained before marriage or which he obtained during marriage with this legal regime, and, consequently, others than those resulting from liquidating the community of assets) or that the same assets come from an open inheritance, not liquidated yet.

Regarding the second variant of what has been stated above, there can be invoked the provisions of article 1114 paragraph (3) letter b) of the Civil Code, according to which the *legatee by particular title* "*…is, by exception…accountable for the liabilities of the inheritance, but only in relation to the asset or the assets constituting the object of*

[5] Macovei and Dobrilă, "Cartea a IV-a", 1092.
[6] Eugen Chelaru, "Cartea a III-a. Despre bunuri, Titlul I. Bunurile şi drepturile reale în general", in *Noul Cod civil. Comentariu pe articole*, ed. Flavius Antonius Baias et al. (Bucharest: C.H. Beck Publ. House, 2012), 587.
[7] Gabriel Boroi and Carla Alexandra Anghelescu, *Curs de drept civil. Partea generală* (Bucharest: Hamangiu Publ. House, 2012), 75 and the following.
[8] Macovei and Dobrilă, "Cartea a IV-a", 1092.

the legacy, if:…the right bequeathed by legacy has universality as object, such as an inheritance obtained by the testator and not liquidated yet…". It consequently results that the legacy upon an inheritance obtained by the testator and not liquidated yet, but not only (as the legal text in question does not contain a limitative enumeration, but only an exemplificative one) evinces a particular character[9]. So should it be understood that the legacy upon an inheritance obtained but not debated is a legacy by particular title? If so, what could then mean "universalities of assets determined according to their *nature*", which constitute the object of a legacy by universal title? Which should be the criteria on the basis of which the legacy upon an inheritance obtained and not liquidated is qualified as legacy by particular title, whereas the legacy upon a universality of assets determined according to their nature or origin is a legacy by universal title? The lawmaker himself, at article 1114 of the Civil Code, shows *in terminis* that the inheritance which is obtained by the testator but not liquidated has a universal character. So what does it mean the universality referred to by article 1056 of the Civil Code?

Alternatively, we ask ourselves the following question: if we take into account an additional consideration of the universality of assets (other than the nature of assets and their origin, considered by law), such as all (or half and so on) of the movable assets of the deceased from the apartment owned in place "X" or all (half, and so on) the immovable assets of the deceased from the country "Y", would that legacy still be by universal title? Since an additional element to particularize assets interferes here, namely the place where they are situated, wouldn't perhaps be more just to qualify that legacy as a legacy by particular title?[10]? As pointed out before, the lawmaker refers at article 1056 paragraph (2) letter c) of the Civil Code to the criteria regarding the nature and origin of assets. But in the example provided above, the second individualization criterion regards the place where assets are situated and, together with it, assets are individualized in an additional way in our opinion and could constitute the object of a legacy by particular title.

Comparing the text of article 1056 paragraph (2) letter c) of the Civil Code currently in force with that of article 894 of the 1864 Civil Code, which seem to have the same finality overall, namely that of considering that the totality of movable or immovable assets of the deceased can constitute the object of a legacy by universal title, we consider that the second legal text mentioned above has been more advisedly drafted. This statement continues to be valid only if the current lawmaker intended to establish, by means of the expression "universality of assets determined according to their nature or origin" the totality of movable or immovable assets of the deceased, at least in part. And it seems that this exactly what the lawmaker mainly wanted to consider. Consequently, we ask ourselves whether it wouldn't have been more appropriate for the current Civil Code to maintain the expression used by the former Civil Code. It is true that, if that had been the case, the criterion regarding the origin of assets would not have been taken into account by the civil legislation currently in force, within the context subject to our analysis.

Finally, we consider that the issue subject to discussion is difficult to be handled, as the texts of the Civil Code, previously mentioned, are obviously contradictory. On the other hand, we

[9] See for that matter also Dumitru C. Florescu, Dreptul succesoral (Bucharest: Universul Juridic Publ. House, 2011), 89.

[10] For the contrary opinion, see Macovei and Dobrilă, "Cartea a IV-a", 1092.

consider that it can continue to be upheld the opinion within legal literature, according to which the totality (or a fraction) of the movable or immovable assets of the deceased should constitute the object of a legacy by particular title, being individualized and not constituting legal universalities.

The correct solution seems to be the correct qualification of the categories of legacies considered, according to the acknowledged definitions of legal universality and universality de facto. We can't see the use in not stating the type of universality and only consider the notion of universality in a generic way. This is also due to the fact that, even when is generically expressed, the term of universality cannot eliminate the different legal nature of the two categories to which is subject, nor the consequences related to the legal regime which emerge from here. Thus, legal universality, by law, constitutes all the rights and duties on the whole, whereas the universality de facto represents only a group of assets, lacking the liabilities side. Without doubt, the notion of universality de facto is useful within the legal field, but not for characterizing the object of a legacy by universal title. The latter has to involve a fraction from a legal universality, and to be correlated with some liabilities for which the legatee by universal title is accountable in a proportional way. If these liability items are absent, the solution is, in the case of a wrong legal qualification, to make o proposal *by lege ferenda* capable to insure a correct legal nature, according to which, in the case discussed, the legacy having as object the property or a right of property upon all or a share of the assets determined according to their nature or origin should be considered a legacy by particular title[11].

2.3. The current regulation of the legacy by particular title – the difference (result) of a subtraction operation, in which the subtrahend has a wrong value

As pointed out before, according to article 1057 of the Civil Code, any legacy which is not universal or by universal title is a legacy by particular title. Thus, out of all legacies (which in mathematic terms represent the minuend of our subtraction operation), we remove the legacies which are universal and by universal title (which constitute, as pointed before, the subtrahend) and we obtain the legacies by particular title (that is the difference). Yet, as we have tried to prove up to this point, this difference does not represent the correct result of the operation in question, because one of its components – the subtrahend (more precisely legacies by universal title, given that the regulation of the universal ones is exempted from criticism) is erroneous, as according to law, are considered legacies by universal title also some legacies which, through their specific elements, would rather fit in the categories of legacies by particular title. As pointed before, we are taking into account at this point the legacies concerning the property or a right of property upon all or a share of the assets determined according to their nature or origin.

We will continue by pointing out the specific features of the legacy by particular title and making a list of the legacies belonging to this category.

Thus, the legacy by particular title is that legacy which provides the right to inherit one or several determined assets, unlike the universal legacy and the legacy by universal title, which provide the right to inherit a universality or a fraction from a universality. Moreover, unlike the universal legatee and the legatee by universal title, the legatee by particular title is not accountable,

[11] Pătrașcu and Genoiu, "Despre noțiunea și felurile legatului", 891.

in principle, for the liabilities of the inheritance [article 1114 paragraph (3) of the Civil Code]. In consequence, the difference between the legacy by particular title, on the one hand, and the universal legacy and legacy by universal title, on the other hand, is a qualitative one. The element of interest in this case too is the vocation to the inheritance and not the actual emolument obtained, as the value of the asset or of the assets constituting the object of the legacy by particular title can be bigger than the value of those constituting the object of the universal legacy or of the legacy by universal title.

Taking into account the provisions of the Civil Code currently in force, we consider the following legacies to be legacies by particular title[12]:

a) the legacy having as object movable or immovable assets, tangible assets, determined individually or according to their type;

By means of a legacy by particular title, it can be bequeathed the right of exclusive or common property (ideally only one share), the bare ownership or some rights of property (such as usufruct or homestead right).

b) the legacy having as object intangible movable assets, such as debt title (*legatum nominis*);

The testator can reward the legatee by particular title with a debt title, which has against a third person, or with other patrimonial rights, such as intellectual property rights or rights upon dividends or benefits.

c) the legacy by means of which the testator-creditor forgives the legatee-debtor of debts (*legatum liberationis*);

In this case, the debt of the legatee is extinguished from the moment the inheritance is opened.

d) the legacy upon a fact (possible and licit), by means of which the universal heir or the heir with universal title is bound to do or not to do something, on behalf of the legatee by particular title (for instance the universal legatee is bound to pay the debt of the legatee by particular, in respect to a third party).

e) the legacy having as object the inheritance obtained by the testator, as universal successor or successor by universal title, not liquidated until his death (article 1114 of the Civil Code);

We mention that the inheritance obtained by the testator has a universal character only within the relation between him and the one leaving the inheritance. After receiving the inheritance, the latter can be transferred to someone else, even by means of acts *mortis causa*, representing only a particular group of assets[13], such as real rights, and not something universal. Thus, *de lege lata*, an inheritance obtained by the testator and not liquidated yet can constitute the object of a legacy by particular title.

f) the legacy of bare property upon one or several assets individually determined;

g) the legacy upon a property right involving one or several assets individually determined. *De lege lata*, qualifying the legacy upon bare ownership and usufruct is no longer controversial issue.

In conclusion, the legacy upon bare property shall be qualified as universal legacy, legacy by universal title or legacy by particular title, according to its object: the whole hereditary patrimony, only a part of the latter or only an asset or several singular

[12] The list does not include all the types of legacies by particular title encountered in practice and only aims to identify the main varieties of this type of legacy.

[13] Constantin Hamangiu, Ioan Rosetti-Bălănescu and Alexandru Băicoianu, *Tratat de drept civil român* (Bucharest: 1929), 949.

assets. The legacy upon an usufruct (to which we assimilate the legacy upon any other property right), having as object all the hereditary assets, a share from the inheritance, all or a share from the universality of assets determined according to their nature or origin represents a legacy by universal title, whereas the legacy involving assets individually determined represents a legacy by particular title. Thus, the legacy upon a property right can only be by universal title or by particular title. This is the conclusion to which leads the interpretation of the provisions of article 1056 paragraph (2) letters b) and c) of the Civil Code.

We mention that the current Civil Code regulates (in some cases, even as novelty elements) some types of legacies by particular title, which evince certain specific elements. Such legacies are represented by: the legacy upon a life annuity or a maintenance debt title; the alternative legacy; the legacy upon someone else's asset; the conjunctive legacy[14].

Finally, we consider that, for the reasons expressed within the current study, the following types of legacy should also be considered legacies by particular title:

- the legacy upon all the immovable assets from a certain country or locality;
- the legacy upon all the movable assets from a certain place;
- the legacy upon a fraction from all the immovable assets within a certain country or locality;
- the legacy upon a fraction of all the movable assets from a certain place.

Then, we hope that some future civil regulations will qualify as legacy by particular title (and not by universal title, as it currently is) the legacy involving all (or a share of) the movable assets or immovable assets, as the case may be, of the deceased.

3. Conclusions

Our present study has dealt with the issue of qualifying the legacy by particular title (belonging to hereditary law), which we see as a task, a mission, an initiative evincing a certain degree of difficulty, particularly due to the fact the current Civil Code does not regulate another type of legacy appropriately, as it should, namely the legacy by universal title. As pointed before, the way that a legacy by universal title is regulated influences decisively the correct qualification of a legacy, as being one by particular title. But it is precisely this aspect (regulating legacy by universal title) which the lawmaker fails to accomplish accurately. Consequently, unfairly in our opinion, some legacies are qualified, *de lege lata*, as being by universal title and not by particular title (the legacies having as object all the deceased's movable or immovable assets and, respectively, a fraction of the deceased's movable or immovable assets); in regard to the classification of other legacies (for instance the legacy upon all or a fraction of all the deceased's movable or immovable assets, from a certain country or locality or the legacy upon a universality, such an inheritance obtained by the testator and not liquidated yet), there are at least some shadows of doubt.

In conclusion, the present work has pointed out the features of the legacy by particular title, so that, guided by what it has been presented, we could make a correct qualification of a testamentary provision regarding the deceased's patrimony or assets, make a list of the main legacies belonging to this category and indicate and appreciate in a critical manner those texts of the Civil Code with incidence in the field of legacies, which evince a contradictory character or, at least, could generate controversies. We have included also some

[14] For more details regarding these types of legacies, see Genoiu, *Dreptul la moştenire în Codul civil*, 159-161.

proposals *de lege ferenda* in our work (mainly that the legacies having a universality *de facto* as object are considered legacies by particular title), aimed to represent viable solutions for the issue regarding the legacy by particular title and, implicitly, the legacy by universal title, hoping that they will be taken into account by the lawmaker on the occasion of modifying the Civil Code.

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REMUNERATION PAYABLE TO PERFORMERS FOR THE BROADCASTING OF PHONOGRAMS. TYPES OF PHONOGRAMS

Mariana SAVU[*]

Abstract

The institution of copyright and related rights, as regulated in our system by Law nr.8/1996, deals with the protection of literary, artistic and scientific works and their creators. By a definition that has a tradition in our doctrine, the legal institution of copyright (generally speaking) means all the legal rules governing social relations that arise from the creation, publication and use of literary, artistic or scientific works. The moral and patrimonial rights of the author and neighboring rights stakeholders are protected both by the special law, mentioned above, and also by the common law provisions. Among them is included the Decree no.31/1954 concerning individuals and legal entities but also the Civil Code. One argued problem during the arbitrations, which take place at ORDA headquarters, institution that provides the Secretariat, also in the courts of law, when setting claims was promoted by Collecting Societies against bad payers users, was to analyze the two phrases commercial phonograms and phonograms published for commercial purposes.

Keywords: *commercial phonograms, phonograms published for commercial purposes, Collecting Societies moral and patrimonial rights moral and patrimonial rights protection*

1. Introduction

The institution of copyright and related rights, as regulated in our system by Law nr.8/1996, deals with the protection of literary, artistic and scientific works and their creators.

By a definition that has a tradition in our doctrine, the legal institution of copyright (generally speaking) means all the legal rules governing social relations that arise from the creation, publication and use of literary, artistic or scientific works.

The special Law (Law no.8/1996[1], hereinafter referred to as the Law) aimed not only to harmonize the national legislation with the one in the European Community Member States but also to create a reliable protection system for the copyright and related rights by creating the necessary tools in order to prevent and punish the rights violation.

The international legal frame for copyrights and related rights protection is particularly important as it also has an impact on the Romanian legal regulations in this field. However, given *the international vocation of the intellectual creation*, it is necessary to ensure an effective protection of the rights of authors and their creations,

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[1] Published in the „Official Gazette of Romania", Part I, no. 60 dated March 26th, 1996, as supplemented and amended by the Law no. 285/2004, published in the „ Official Gazette of Romania", Part I, no. 587 dated June 30th, 2004, as amended and supplemented by Government's Emergency Ordinance no. 123/2005, published in the „ Official Gazette of Romania", Part I, no. 843 dated September 19th, 2005, as amended and supplemented by the Law no. 329/2006 regarding the approval of Government's Emergency Ordinance no. 123/2005 for the amendment and supplementation of Law no. 8/1996 on copyright and related rights, published in the „ Official Gazette of Romania", Part I, no. 657 dated July 31st, 2006. (All further specifications regarding the Law no. 8/1996 refer to the form as supplemented and amended by Law no. 329/2006).

not only in their home country but equally in other countries where they are used and capitalized. For these reasons, *we consider the need for further harmonization and implementation of legislation* on copyright and related rights both in the Member States of the EU and in the acceding countries and beyond.

The moral and ancestral rights of authors and of related rights holders are protected both by the provisions of the special law, referred to above, and by the provisions of the common law. These include the Decree no. 31/1954 concerning the natural and legal persons, as well as the Civil Code[2].

In the "Copyright and Related Rights" treaty by the Professor Viorel Ros and his collaborators, Dragos Bogdan and Octavia Spineanu – Matei, they show that the object of study "The Intellectual property law" studies "the protection of the authors of the works of mind and the result of their creative activities, namely the form creations (protected by copyright and related rights, and more recently by sui-generis rights) and the background creations (protected by industrial property rights), as well as the protection of the most important distinctive marks of trade activity"[3].

The rights related to copyright, or the "neighboring rights", as they were referred to in doctrines and jurisprudence, were regulated in the Romanian law for the first time by the Law no. 8/1996 on copyright and related rights. In the regulation of related rights protection by law no. 8/1996, the Romanian legislator was inspired by the provisions of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, concluded at Rome on October 26th, 1961 and the Convention for the Protection of Phonograms Producers against unauthorized reproduction of their phonograms, concluded at Geneva on October 29th, 1971[4].

For the purposes of the Law no. 8/1996, by performers we understand: actors, singers, musicians, dancers, and other persons who sing, dance, recite, declaim, play, perform, direct, conduct or execute in any other manner a literary or artistic work, a show of any kind, including folk, variety, circus or puppet shows (Article 95).

The rights related to copyright are the intellectual property rights, other than copyright, enjoyed by performers for their own performances or executions, by producers of sound recordings and by manufacturers of audiovisual recordings for their own recordings and by broadcasting and television organizations for their own programs and program services.

An issue debated in arbitrations[5] that take place at the ORDA[6] headquarters, institution also ensuring their Secretariat, as well as to the courts when settling the claims promoted by the collecting societies against non-paying users, is to analyze two phrases, namely the "trade phonograms" and the "phonograms published for commercial purposes."

[2] See, for instance, Gh. Beleiu, op. Cit. 1999 and Fr. Deak , Treaty on succession law.
[3] Viorel Roş, Dragoş Bogdan, Octavia Spineanu – Matei, *Copyright and related rights, Treaty,* All Beck Printing House, Bucharest, 2005, page 1.
[4] Romania acceded to the Geneva Convention for the Protection of Phonogram Producers against piracy of phonograms by the Law no. 78 dated April 8th, 1998, published in the „Official Gazette of Romania", Part I, no. 156 dated April 17th, 1998.
[5] See Order no. 2357/July 8th, 2010 al Minister of Culture and National Heritage, unpublished, for the assignment of the ORDA Referees Body.
[6] Romanian Office for Copyright

2. Paper Content

I. Users[7] claim, without bringing the proof, that the phrases “trade phonograms" and "phonograms published for commercial purposes" used in Articles 1231 letter f) and 1232 letter f) of the Law no. 8/1996 as amended and supplemented, “have a distinct meaning and different legal rules."

In relation to what they claim, it would mean that the nature of the phonogram is given by the way of using it. *For instance: a phonogram communicated to the public (in bars, shops, etc.) and broadcasted by a television station (generic name, according to the statement of the holder - "by cut") is collectively managed, and the same phonogram, if it is broadcasted by a radio station, should be optionally collectively managed.*

The Romanian Radio Broadcasting Company – SRR, argues that there may be "trade phonograms" and "phonograms published for commercial purposes" that can be "non phonograms"[8] or "phonograms that are not intended for sale" 8. *For instance, audio post signals, jingles, TV advertisements, music curtains, social campaigns approved by CNA*[9] *etc. are non phonograms and consequently they were never reported on play lists to collective management organizations, nor was paid any remuneration for these phonograms. This was one of the reasons why CREDIDAM, the collective management organization, addressed the Court. The payment difference to CREDIDAM is represented by this lack of play-lists.*

From discussions with right holders who created phonograms to order and performed them (no matter how they were generically called - promos, jingles etc.), I underline that: the only difference between a promo or jingle and a song fixed on a support that is sold in stores is their duration, the latter having a longer average of 2-3 minutes. In a broadcasted show, music draws attention. There are circumstances where a jingle can bring greater benefits to a radio station than a piece fixed on a support which is sold in stores. Such phonograms are created by order with the aim to be easily recognized and remembered by the listeners. A jingle is easily associated with the sound material, with the name of the show or with the spot. A jingle is also called a musical signature. It is obvious that, when those musical notes are played, we are not required anymore to mention the name of the show or of the station (eg. the EUROPA FM promo - if the musical notes should be played without text, surely that listeners could easily identify the radio station), as the listener just by hearing those sounds he/she knows that a certain show will follow.

As for the advertising and social campaigns that have background music (a pre-existing phonogram or a phonogram created by order), the right holder claims that on the same music two or three commercials totally different can be performed but all of them representing the same product. For instance: the "Real" advertisement has about sixty spots using the same background music (the same phonogram). The rights granted by law were never transferred by their right holders. Therefore, no user has the right to fail reporting these artistic performances on the play-lists sent to the collective management organizations, because radio stations have only the quality of advertisements broadcasters, for an amount of money

[7] Broadcasting Organizations.
[8] See unpublished SRR written notes (file no. 10.141/2/2010, CAB (Bucharest Court of Appeal) Xth Civil and IP Section).
[9] National Audiovisual Council.

(calculated to the value of the advertising second), received for broadcasting such advertisements. Ads that do not have background music are exceptions. Only three commercials per year are created this way.

II. Under the establishment of an optional collective management in case of broadcasting the phonograms published for commercial purpose, the **referees panel** which has determined the final form of the methodology[10] showed that the two concepts, "trade phonograms" and "phonograms published for commercial purposes", are two distinct terms for which the legislature has established different legal regimes. In order to clear up, the referees panel has defined the two notions, that law itself has failed to define, as follows "by the **phrase trade phonogram** we understand that phonogram which is communicated to the public or broadcasted *by that category of users in front of whom it is impossible to individually exercise* the right to an equitable remuneration for the holders of rights related to copyright; by the phrase **phonogram published for commercial purposes** we understand the phonogram which is communicated to the public or broadcasted by *that category of users in relation to whom it is possible to individually exercise* the right to an equitable remuneration for the holders of rights related to copyright.

In this case, we understand that we speak of the right to equitable remuneration for the use of phonograms published for commercial purposes by broadcasting organizations, so that the collective management of such right is optional ..."

These two definitions are taken verbatim from the reasoning of the Civil Judgment no. 23A/February 5th, 2007[11]pronounced by the IXth Civil Section of the Bucharest Court of Appeal and for the intellectual property cases, a decision strongly criticized, both nationally and internationally, because of the confusion it brought regarding the management on the Romanian territory of the right of broadcasting the phonograms published for commercial purposes.

Although the law does not separately regulate the two phrases, we find that for phonograms published for commercial purposes the decision of the referees' panel was to consider the optional collective management solution.

Moreover, although the referees' panel held that "mandatory collective management is justified by the existence of those circumstances in which the using method of works or performances makes it impossible to individually follow the right regarding the equitable remuneration, hypothesis corresponding to the phrase trade phonogram", **does not specify how these circumstances can be determined.**

III. The types of phonograms indicated by the Court in conclusions of the session dated March 15th, 2011[12] are created **independently and without regard** to the so-called "categories" provided by the Law no. 8/1996 on copyright and related rights, as subsequently amended and supplemented. The criterion used to distinguish three types

[10] Methodology regarding the remuneration payable to performers and phonogram producers for broadcasting the phonograms published for commercial purpose or reproductions thereof by the broadcasting organizations, published in the Official Gazette no. 668/2010, by the ORDA Decision no. 284/2010, amended by the Civil Judgment no. 153 A/2011 of the BAC, published in the Official Gazette no. 470/July 5th, 2011, by the ORDA Decision no. 216/2011.

[11] Published in the Official Gazette no. 572/August 21st, 2007.

[12] Unpublished, file no. 10.141/2/2010 settled by BCA, IXth Civil Section and for causes on IP.

of phonograms is a technical criterion consisting of phonograms content and of the purpose for which they were created. Thus, the Court speaks of three types of phonograms, contained in the current methodology[13], namely:

"1. phonograms including performances, or other sound or digital representations thereof, which fixing was mainly done for the purpose of making them available to the public through selling the media on which are fixed such performances;

2. phonograms including performances, executions or other sounds created in order to identify and self-promote a broadcasting station or a program thereof, phonograms which producer is either that radio station or another phonogram producer, which created the phonogram at the order of this broadcasting station;

3. phonograms including performances, executions or other sounds created in order to broadcast them for promoting a product or service belonging to a third party in relation to the broadcasting station, as advertising for that product or service."

Judicial distinctions remove the objective impossibility to include these types of phonograms within the categories established by the Law no. 8/1996, namely in the categories of "trade phonograms" and "phonograms published for commercial purposes ."

ARCA[14] thesis is correct, according to which *"first we must note that we can not define the contents of both concepts, but only of one of them, namely of the - phonograms published for commercial purposes - concept, for which definitions are included in the Rome Convention or in the WIPO Treaty on phonograms, but not of the - trade phonograms – concept, phrase which is currently present only within the Romanian law of copyright, but without being defined here"* (see paragraph 1, page 1 of the written notes[15] submitted by ARCA). In our opinion, the thesis promoted by ARCA defenders is developed by practitioners in this field, who are aware that, technically speaking, the use by the Law no. 8/1996 of various phrases for the same concept (the concept of "trade phonograms" and of "phonograms published for commercial purposes") is incorrect. The European Community law does not know the technical-legal concept of - "trade phonograms" and "phonograms published for commercial purposes." Therefore, we consider that the classification of these types of phonograms judiciary identified – in the so-called two categories of phonograms as provided by Law no. 8/1996 – in order to determine the legal regulations applicable to the management of each type of phonogram, is impossible and unnecessary.

In reality, phonograms broadcasting determines a **mandatory collective management (an extended legal mandate)**.

IV. In relation to domestic legislation as well as to directives and treaties to which Romania acceded, we consider that the two phrases "trade phonogram" and "phonogram published for commercial purposes" are synonyms for the following reasons:

1. According to **art. 103 paragraph 1** of Law no. 8/1996 on copyright and related rights, with subsequent amendments and supplements, a **"sound recording or phonogram shall be considered**, for the

[13] Civil Judgment no. 153 A/2011 of BCA, published in the Official Gazette no. 470/05.07.2011, Desizen ORDA no. 216/2011.

[14] Romanian Association for Audiovizual Communications , an association which has as members companies owning radio and television stations.

[15] See ARCA unpublished written notes (file no. 10.141/2/2010, BCA Xth Civil and IP Section).

purposes of this law, the fixation of sounds coming from a performance or an execution, or of other sounds or digital representation of these sounds, other than in the form of a fixation incorporated in a cinematographic work or in another audiovisual work."

According to the definition, any sound coming from a performance / execution and fixed on an analog or digital support, as appropriate, is a phonogram. There is only one exception defined by law, namely that sound coming from a performance / execution fixed and embedded in a cinematographic work or in another audiovisual work that cannot be defined as a phonogram (that does not mean that its use does not generate remuneration). This exception exceeds users who own radio stations, because they cannot ever use the audiovisual part when they broadcast a phonogram.

Phonogramme (fr)[16]= recording of sound vibrations on photographic paper tape, tape recorder, disc, film etc. by electrical, mechanical means etc.

2. The Law no. 8/1996, with subsequent amendments and supplements, regulates as **a single right to equitable remuneration for both communication to the public and broadcasting, namely only in the case of phonograms published for commercial purposes** (see the provisions of **art. 98 letters g and g[1]** and **art. 105 letter f**, both related to the provisions of **art. 106[5]**), and this right is exercised only through the beneficiary management organizations (**art. 106[5] paragraphs 2-4**).

According to art. 106[5] of the law, for direct or indirect use of phonograms published for commercial purposes, or of a reproduction thereof, by broadcasting or by any methods of communication to the public, performers and phonogram producers have the right to a single equitable remuneration.

Moreover, the provisions of **art. 112[1]** clearly show the consequence of protecting by right to remuneration: ***"If right holders shall, by law, benefit of a mandatory remuneration [if of the remuneration referred to in art. 106[5]], they cannot argue the uses generating it." Per a contrario,*** **since artists can not prohibit the broadcasting of their records/performances, they were compulsory acknowledged the right to remuneration.**

Even if we were to assume, theoretically, that by 'phonogram published for commercial purposes' means the phonogram which is communicated to the public or broadcasted by that users' category in relation to which the right to equitable remuneration can be individually exercised, from a practical point of view, it is impossible to individually authorize and manage such phonograms.

3. Coexistence of the provisions of **art. 123[1] paragraph 1 letter f** (which refers to ***"trade phonograms"***) with those of **art. 123[2] paragraph 1 letter f** (which refers to ***"phonograms published for commercial purposes"***) of the law, which users rely on, leads to a **completely erroneous conclusion,** claiming that performers and phonogram producers would be beneficiaries of two rights to equitable remuneration, one for public communication and broadcasting of **trade phonograms,** which is exercised through mandatory collective management (art. 123[1] paragraph 1 letter f), and another for public communication and broadcasting of **phonograms published for commercial purposes,** for which the collective

[16] Definition by the Explanatory Dictionary of the Romanian Language.

management is optional (art. 123^2 paragraph 1 letter f).

We do not understand what would be the reason why the legislature would admit the existence of two rights to equitable remuneration, since in the whole body of Law no. 8/1996, with subsequent amendments and supplements, **is only mentioned the phrase of phonogram published for commercial purposes and a single right to equitable remuneration is regulated.** If the legislature had intended to make a distinction in order to avoid any confusion, it ought to define the two phrases.

ORDA[17] point of view, as sole regulator, is "*By the G.E.O. no. 123/2005, because of a material error, the remuneration has been included both in the category of rights optionally collectively managed* (art. 1232 paragraph 1 letter f), *and in that of the rights mandatory collectively managed* (art. 1231 paragraph 1 letter f). *In conclusion, the equitable remuneration payable to performers and producers of phonograms for broadcasting the phonograms published for commercial purposes or of reproductions thereof* ***is mandatory collectively managed****, which means that collective management organizations will also represent right holders who have not granted a mandate and it is regulated in* ***art. 1231 paragraph 1 letter f and paragraph 2 of Law no. 8/1996, as amended and supplemented.*** *Therefore, this* ***single equitable remuneration*** *can not be individually managed by a performer or producer of phonograms"*.

ORDA[18] also stated: *"given that for the proper resolution of the case it is necessary to apply* **art. 123^1 letter f)**, *we specify that, because of a material error, the content of this text is also included in the text of* **art . 123^2 letter f).** For the correct interpretation of the law we must point out that the text of art. 123^1 is the accurate one, as it is in accordance with art. 12 of the Rome Convention and with art. 15 paragraph 1 of the WIPO Treaty".

In the technical-legal dispute related to *"trade phonograms"* and *"phonograms published for commercial purposes,"* our point of view is and remains still the same, i.e. the law makes no distinction between the two phrases and the legal regime applicable to phonograms is unique.

Legislation in Romania has transposed the provisions of international regulations, which aimed to the uniformization of standards for the protection of intellectual property at international level.

Phonograms have a single definition in each of these international instruments:

a) Art. 3 paragraph 1 letter b) of the Rome Convention[19] defines phonogram as: "any fixation of a sound reproduction of sounds, either of a representation of a sound or of other sounds."

b) art. 2 paragraph 1 letter b) of the WIPO Treaty[20] on phonograms and public reproduction (WPPT) defines phonogram as fixation of the sound of a representation or of other sounds or of sounds production, other than in the form fixed and embedded in a cinematographic or audiovisual work.

Moreover, art. 12 of the Rome Convention establishes: "when *a phonogram published for commercial purposes,* or a reproduction of such

[17] See ORDA unpublished letter no. 2187/2006, submitted upon the request of the Referees Body, during the arbitration with the television organizations.
[18] See ORDA unpublished letter no. 1442/2007, submitted upon the request of the Court, to the file no. 5313/2006.
[19] Law no. 76/1998 for Romania accession to Convention on the protection of performers, phonogram producers and broadcasting organizations, concluded in Rome on October 26th, 1961, published in the Official Gazette no. 148/1998.
[20] World Intellectual Property Organization.

phonogram, is directly used for broadcasting or for any kind of communication to the public, the one who uses it will pay the performers, or producers of phonograms, or to both of them, an equitable single remuneration".

Art. 15 of the WIPO[21] Treaty establishes that the performers and producers of phonograms shall enjoy the right to a equitable single remuneration for the direct or indirect use of phonograms published for commercial purposes, for broadcasting and for any communication to the public .

We notice that internationally there is no distinction between the concept of "trade phonograms" and of "phonograms published for commercial purposes."

The difference made in the Romanian law is artificial and contradictory, as long as subsequent changes in the law nr. 8/1996 only pursue to implement international regulations where no difference is made in this respect.

According to the provisions of art. 20 of the Constitution where the provisions of international treaties to which Romania is a party prevail, if there are inconsistencies or contradictions between them and the regulations of the national legislation, the Court will hold that the arrangements applicable to phonograms is unique and no distinction is necessary in this field[22].

Courts' opinion is unitary. In this respect we invoke the ICCJ Decision no. 9699/November 27th, 2009[23], the Civil Judgment of the Constanta Court of Appeal no. 287/C/December 4th, 2008[24], the Civil Judgment no. 1195/2010[25] of the Bucharest Court III[rd] section, judgment which is also maintained under this aspect by the Bucharest Court of Appeal, XI[th] Civil Section fot the IP cases, by the Civil Judgment no. 57A/February 15th, 2011[26].

We quote: "The Court holds that a distinction between the phonograms published for commercial purposes and the trade phonograms cannot be sustained, resulting from the combination of the provisions of art.123^1 paragraph 1, letter f and of art. 123^2, paragraph 1 letter f of the Law nr. 8/1996 in the direction shown by the defendant, based on the criteria considered while pronouncing the civil judgment no. 23A/2007 issued by the Bucharest Court of Appeal IXth Civil Section, namely after the effective opportunity of the holder of related right to individually exercise his/her rights.

This interpretation leads to the conclusion that the same phonogram can be described as phonogram published for commercial purposes when it is subject to use as background music, subject to satellite retransmission etc. or trade phonogram when it is subject to radio broadcasting or broadcasting through the TV stations.

This conclusion cannot be accepted as such a distinction of the legal regulation cannot be made only for the reason of an actual possibility of the holder of related rights to individually exercise the rights, as it would remove the existence of a clear, accurate rule known with many particular, exceptional circumstances, which would lead to the violation of the principle of equality and non-discrimination consisting of applying the same legal rules in identical circumstances."

[21] WIPO Treaty on performances, executions and phonograms ratified by Romania by the Law no. 206/2000.
[22] See the unpublished Civil Judgment no. 57A/2011 of the BCA IX[th] Civil Section and for the IP cases.
[23] Unpublished.
[24] Unpublished.
[25] Unpublished.
[26] Unpublished. See also the conclusions dated February 10th, 2011 and March 17th, 2011 in the file no. 28.956/3/2010 in trial at the Bucharest Court of Justice, V[th] Civil Section (unpublished).

In the report entitled "International review of license charges in management companies for music broadcasting' prepared by CAPACENT[27] *in April 2006 for the Ministry of Culture in Denmark, at page 6, there are defined the following terms, we quote:*

"Dividing transmitters in commercial and non-commercial categories was made at the same time with the definitions applied by the so-called AUVIS[28] *publications of Eurostat, as the application of these categories seems to be quite widespread in the 18 countries."*

Definitions:

"The non-commercial radio transmitters (users in the Romanian legislation) are those broadcasters which have a public obligation and which can be fully or partially funded by license fees or by government subsidies."

"The commercial radio transmitters (users in the Romanian legislation) are those broadcasters which are usually funded by advertising or sponsorship."

As it can be seen, the users are divided into commercial and non-commercial ones and not the phonograms. In Romania, the only radio station that can be considered non-commercial, as defined above, is SRR (and all its owned stations)m while commercial radio stations are all the other licensed broadcasters in the Romanian territory.

4. According to **art. 123¹ paragraph 1, letter "f"** of the Law no. 8/1996 on copyright and related rights, with subsequent amendments and supplements, ***"The collective management is mandatory in order to exercise the following rights: ... the right to equitable remuneration acknowledged for the performers and producers of phonograms for …broadcasting trade phonograms or reproductions thereof". The paragraph 2 reads: "for the categories of rights provided in paragraph 1, the collective management organizations also represent the right holders who have not granted a mandate."***

In France, the doctrine is divided between believing that these organisms have the capacity of assignees of copyright holders (such as SPEDIDAM[29]), or they are only the Agents of the latter[30].

Consequently, the right to equitable remuneration acknowledged for the performers and producers of phonograms for the public communication and broadcasting of trade phonograms / phonograms published for commercial purposes or of reproduction thereof is **compulsory** collectively managed and not necessarily regards only the repertoire of that collective management organization, but the **extended repertoire**.

This is the meaning of the provisions of art. 12 of *the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, concluded at Rome on October 26th, 1961 and of art. 15 paragraph 1 of the WIPO Treaty on Performances and Phonograms ratified by the Law no. 206/2000.* For phonograms, the mandate of the collective management organization as the only collector in Romania for the performers, is an extended legal mandate, with the right to collect remuneration for both members and non-members, Romanian

[27] CAPACENT is the institution which drew up the, International analysis of license fees in management companies for music broadcasting", upon the request of the Ministry of Culture in Denmark.
[28] Statistics regarding the Audiovisual Services.
[29] The Collective Management Organization for Performers in France.
[30] See Viorel Roș, Dragoș Bogdan, Octavia Spineanu- Matei, Copyright and related rights, All Beak Publishing House, page 495 and the French doctrine quoted therein. Also see the unpublished Civil Judgment no.57A/2011 of BCA IXth Civil Section and for the IP Cases.

and foreign artists. For non-members, the collective management organization has the obligation to publicly notify the right holders in order to receive the remuneration collected for the use of the phonograms published for commercial purposes or of the reproductions thereof. Thus**, art. 129[1]** of the Law no. 8/1996, with subsequent amendments and supplements, states: ***"In case of the compulsory collective management, if a right holder is not attached to any organization, the jurisdiction lies with the organization in the area having the largest number of members. Claiming by the unrepresented right holders of the payable amounts can be made within three years from the date of notification."***

3. Conclusions

Lex ferenda, by the draft Law amending and supplementing Law no. 8/1996 on copyright and related rights, with subsequent amendments and supplemental, as prepared by the Government in order to be submitted to the Romanian Parliament for adoption, which is currently under debate, it seeks to eliminate material errors which appear in the text of the Law no. 8/1996, including the deletion of the phrase of "trade phonogram" in art. 123[1] paragraph 1 letter f of the Law no. 8/1996, by replacing it with the phrase "phonogram published for commercial purposes" (phrase used throughout the law). At the same time, the letter f of the art. 123[2] of Law no. 8/1996 is deleted in order to remove any doubt regarding compulsory management rules for the broadcasting of phonograms.

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BRIEF CONSIDERATIONS ON THE PRINCIPLES SPECIFIC TO THE IMPLEMENTATION OF THE EUROPEAN UNION LAW

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Abstract

The principles specific to the implementation of EU law have as characteristic that they mark the specificity of EU law in relation to other legal orders, from national or international point of view. These principles include the principle of conferral, with multiple consequences on the entire EU system, but also the principle of subsidiarity, proportionality or of sincere cooperation.

Keywords: *principles of EU law, principle of subsidiarity, principle of loyal cooperation, principle of proportionality*

1. The principle of conferral [1]

Under the provisions of the Treaties, each institution shall act within the limits of prerogatives conferred on it by these Treaties.

The principle of conferral can be understood as a transfer into European Union law, of the specialty principle of international organizations. This stems from the fact that, like all international organizations, the European Union is an entity established by the Member States and does not share with them, the quality of original subject of international law.

Under Article 5 of the Treaty on European Union, "the demarcation of the Union's competences is governed by the principle of conferral". "Under the principle of conferral, the Union can only act within the limits of the competences conferred on it by the Member States in the Treaties to attain the objectives set out in those Treaties". Competences not conferred upon the Union in the Treaties remain with the Member States"[2].

Regarding the importance of the principle of conferral, it is determined by the types of competences covered in the EU treaties. In this respect, the nature and characteristics of competences will influence the process of their conferral. Thus, we can distinguish two situations. In the first case, EU competences do not replace state competences. They remain, but will be framed by rules of law originating in the EU. In this situation, the Union's institutions have the task to exercise a

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[1] Legal basis:

- Statement no. 24: *The Union is not authorized „in any way to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties".*

- Article 5 TEU paragraphs (1) and (2): *„(1) The demarcation of the Union's competences is governed by the principle of conferral. The exercise of these competences is governed by the principles of subsidiarity and proportionality.*

(2) Under the principle of conferral, the Union can act only within the limits of the competences conferred on it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States".

[2] For details, see Augustin Fuerea, *„EU legal personality and areas of competence according to the Treaty of Lisbon"*, ESIJ no. 1/2010 („Lex ET Scientia International Journal").

double action: on the one hand, to prescribe in accordance with Treaties, rules detailing and customizing the limitations set out by them and on the other hand, to ensure compliance with those limitations by Member States. In the second case, the Union's competences were intended to replace state competences. In this situation, the EU institutions have legislative powers greater than those of the Member States due to the Union dimension of actions, accounting in this way, the task to enact common rules in the implementation and enforcement of which, the Member States acquire the quality of Community authorities (such a situation is encountered for example in joint policies).

Therefore, under this principle, the EU institutions carry out only those tasks that are specifically set out. At this level, the fulfillment of implicit, deducted responsibilities is not allowed.

The reason behind this principle is rooted precisely in matters pertaining to the rigor shown in the plan of action, but also to the liability[3] of institutions to whether or not fulfill the tasks / competences.

2. The principle of subsidiarity [4]

The principle of subsidiarity was introduced into the legal order of the European Union for the first time, by the Single European Act in 1986, and was firmly established in Article 3B of the Treaty of Maastricht. Until the emergence of these two conventional texts, the principle was, implicitly, present in the founding Treaties, even before ever being in the case law of the Court of Justice of the European Communities.

Under Article 5, paragraph (4) TEU, actions at EU level will not exceed what is necessary in order to achieve the objectives set out in the Treaties. This means in fact that whatever it can be done at national level by Member States, it should not be done jointly at EU level; however, if this is not possible, collective intervention is required. The competence of common law belongs, therefore, to states. More specifically, it is an acceptance from states to limit their competences in order to grant more competences to the Union. Therefore, the national competence is the rule, and the competence of the European Union is the exception. The doctrine states: "the principle of subsidiarity is a principle governing competences in the Union, and not a principle under which competences are granted"[5].

The principle of subsidiarity involves the following two aspects:

- the first aspect considers the situation in which the Union is competent to work in the areas and to the extent of objectives assigned to it expressly and obviously, being an exclusive competence. In fact, in this case, the implementation of the principle of subsidiarity (for example, in the areas of agricultural, transport,

[3] For details regarding „the liability", see Elena Emilia Ștefan, "*Răspunderea juridică. Privire specială asupra răspunderii în Dreptul administrativ*", "Pro Universitaria" Publishing House, Bucharest, 2013, pp. 40-49.

[4] Legal basis:

- Article 5 paragraph (3)*: „Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action can not be sufficiently achieved by the Member States at central level or at regional and local level, but the dimension and effects of the proposed action, can be better achieved at Union level.*

Institutions of the Union shall apply the principle of subsidiarity in accordance with the Protocol on the application of subsidiarity and proportionality. The national Parliaments ensure the compliance with the principle of subsidiarity, in accordance with the procedure set out in that Protocol".

- Protocol (No. 2) on the application of the principles of subsidiarity and proportionality.

[5] Guy Isaac, Marc Blanquet, „*Droit général de l'Union Européenne*", 10e édition, Dalloz , 2012 , p. 91 .

competition policies or common commercial policies) cannot even be brought into question;

- the second aspect relates to the case where we are in the presence of competing competences, i.e. in areas which do not belong to the Union's exclusive competences (for example, areas of social policy, health and consumer or environmental protection), and Member States cannot, because of the dimension and effects of that action, to attain their objectives. In this situation, the Union will only intervene in the cases where these objectives can be better attained at its level than at the level of Member States.

Thus, considering the two aspects above mentioned, it is obvious that the principle of subsidiarity applies only in the case of shared, competing competences, and not in the case of exclusive competences of the European Union.

3. The principle of proportionality [6]

The principle of proportionality has been jurisprudentially established, being applicable, initially, in the matter of economic operators' protection against damage that could result from the application of Community law. Subsequently, it was codified by the Treaty of Maastricht, as it follows: "the Community action shall not exceed what is necessary to achieve the objectives of this Treaty"[7]. With the entry into force of the Treaty of Lisbon, the content of the principle becomes much more accurate, in the sense that "the Union's action, in content and form, shall not exceed what is necessary to achieve the objectives of the Treaties".

Unlike subsidiarity, which "aims at determining if a competence should be exercised"[8], proportionality occurs "once the decision to exercise a competence was taken, in order to determine the extent of the law"[9]. The principle of proportionality has been designed to avoid excessive regulatory activities of the Union and to find other solutions than legislative in order for the Union to achieve its objectives.

More precisely, proportionality means that, if in the application of a competence, the Union has to choose between several modes of action, it must retain that mode which leaves states, individuals and businesses, the greatest freedom. To this end, the Union must consider whether legislative intervention is urgently needed or other means could also be used, such as reciprocity, recommendation, financial support, encouraging cooperation between states or accession to an international convention. The principle of proportionality implies that, if it proves that it is more than necessary to adopt a rule in the European Union, its content should not be an excess of regulation, in the sense that it is preferable to resort to the adoption of a directive rather than to a regulation[10]. In this respect, there are also the provisions of Article 296 TFEU, namely: "if Treaties do not specify the type of act to be adopted, the institutions shall select it, from case to case, in compliance

[6] Legal basis:
- Article 5 para. (4) TEU: „Under the principle of proportionality, the Union's action, in content and form, shall not exceed what is necessary to attain the objectives of the Treaties. Institutions of the Union shall apply the principle of proportionality in accordance with the Protocol on the application of the principles of subsidiarity and proportionality".
- Protocol (no. 2) on the application of the principles of subsidiarity and proportionality.

[7] Article 5 para. (3).

[8] Jean Paul Jacqué, „*Droit institutionnel de l'Union européenne"*, 7e édition, Dalloz, 2012, p. 183

[9] Idem.

[10] Guy Isaac, Marc Blanquet, *op. cit*., p. 100.

with applicable procedures and with the principle of proportionality".

In turn, the Court of Justice stated in its ruling[11], in *the Queen* case[12], that the "principle of proportionality requires that the acts of the [European Union's] institutions do not exceed the limits of what is appropriate and necessary in order to achieve the legitimate objectives pursued by the regulation in question, in the sense that when there is the possibility to choose between several appropriate measures, it must be resorted to the least onerous, and that the disadvantages caused must not be disproportionate to the aims pursued"[13]. In this respect, the academic literature[14] identifies three dimensions, specific to the principle of proportionality, namely: adequacy, necessity and non-disproportionality.

Therefore, according to the European Commission[15], "proportionality is a guiding principle for defining how the Union should exercise its competences, both exclusive and shared - *which should be the form and nature of EU action?* According to the TEU, the content and form of the Union's action shall not exceed what is necessary to achieve the objectives of the Treaties. Any decision should favour the least restrictive option in this regard"[16].

4. Common aspects of the principles of subsidiarity and proportionality [17]

Under Article 1 of Protocol no. (2) on the application of the principles of subsidiarity and proportionality, each EU institution shall, at all times, provide compliance with the principle of subsidiarity. In this regard, the Protocol establishes a control mechanism for compliance with this principle. Thus, before proposing legislative acts[18], the Commission, under Article 2 of the Protocol, must proceed to extensive consultations involving the regional and local dimension of actions envisaged. From the necessity of consultation, it can be derogated only in case of emergency, but in this case, the Commission must explain its decision in its proposal. Further, the Protocol provides that[19] both the European Parliament and the Commission are required to submit to national parliaments, their draft legislative acts, as well as their amended drafts, at the same time as to the Council. The Council, in turn, is required to submit to national parliaments, the draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, as well as the amended drafts.

In fact, the draft legislative acts must be grounded in terms of compliance with the

[11] ECJ Ruling, 5 Mai 1998.
[12] C-157/96.
[13] Section 60 from the ruling.
[14] Guy Isaac, Marc Blanquet, *op. cit.*, p. 100.
[15] European Commission Report on subsidiarity and proportionality (18th report "Better Regulation" for 2010), COM (2011) 344 final, Brussels, 10.06.2011 (http://eur-lex.europa.eu/LexUriServ / LexUriServ.do? uri = COM: 2011:0344: FIN: RO: PDF).
[16] Ibid, p. 2.
[17] For details, see Roxana-Mariana Popescu, *„Introducere în dreptul Uniunii Europene",* „Universul Juridic" Publishing House, Bucharest, 2011, pp. 84-95 and Mihaela-Augustina Dumitrașcu, *„Dreptul Uniunii Europene şi specificitatea acestuia"*, „Universul Juridic" Publishing House, Bucharest, 2012, pp. 66-72.
[18] Under Art. 3, „In the meaning of this Protocol, "draft legislative act" mean proposals of the Commission, initiatives from a group of Member States, the European Parliament's initiatives, requests from the Court of Justice, the European Central Bank's recommendations and requests of the European Investment Bank on the adoption of a legislative act".
[19] Article 4.

principles of subsidiarity and proportionality. In this sense, Article 5 specifies that any draft legislative act must contain a detailed statement allowing the assessment of the compliance with the principle of subsidiarity. This statement includes "elements allowing the assessment of the financial impact of the draft in question and, in the case of a directive, of its implications on the rules to be implemented by Member States, including on the regional legislation, as appropriate. The reasons that lead to the conclusion that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. The draft legislative acts must consider the need to proceed so that any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimized and proportionate to the aim pursued"[20].

Within eight weeks from the transmission of the draft legislative act, the national parliaments can send to the President of the European Parliament, the Council and the Commission, a reasoned opinion stating why they consider that the draft in question does not comply with the principle of subsidiarity[21]. Once the opinion received, the President of the Council will transmit it further to the governments of states which initiated the draft legislative act, respectively to the Court of Justice, the European Central Bank or the European Investment Bank, if one of these institutions is the originator of the draft legislative act.

In the case where the reasoned opinions on non-compliance of a draft with the principle of subsidiarity represent at least one third of all the votes allocated to national parliaments, or a quarter for a draft referring to the area of freedom, security and justice, the draft must be reviewed. Following this review, the Commission or, where appropriate, the group of Member States, the European Court of Justice , the European Central Bank or the European Investment Bank , if the draft legislative act is issued by them, can decide whether to maintain the draft, to amend it or to withdraw it. No matter what the solution is, it must, however, be reasoned.

Article 7 of the Protocol regulates, including the situation in which the opinion is offered in the ordinary legislative procedure. In this case, the opinions reasoned on the non-compliance of a draft legislative act with the principle of subsidiarity represent at least a simple majority of the votes allocated to national parliaments, the draft must be reviewed. Following such review, the Commission can decide to maintain the proposal, to amend it or withdraw it. If it chooses to maintain the proposal, the Commission must justify, in a reasoned opinion, why it considers that the proposal complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of national parliaments must be submitted to the Council and the European Parliament in order to be taken into consideration in the procedure[22]:

(a) before concluding the first reading, the European Parliament and the Council shall examine if the legislative proposal is compatible with the principle of subsidiarity, taking particularly into account the reasons expressed and shared by the majority of national parliaments, as well as the Commission's reasoned opinion;

(b) if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the

[20] Article 5 of the Protocol.
[21] Under Article 6 of the Protocol.
[22] Under Article 7, paragraph (3) of the Protocol.

Council and Parliament (as legislative institutions) consider that the legislative proposal is not compatible with the principle of subsidiarity, it will not be further examined.

In the case where a Member State or a Member State on behalf of its national parliament notices that a legal act of the Union was adopted without complying with the principle of subsidiarity, it can attack that act, through an action for annulment, the Court of Justice of the European Union being the one that has the competence to rule on such actions. Such actions can be also formulated by the Committee of the Regions against legislative acts for the adoption of which the Treaty on the functioning of the European Union provides that it must be consulted[23].

According to the European Commission[24], "the control and monitoring of subsidiarity issues have played an important role in the agenda of the European Parliament and the Committee of the Regions which adapted their internal procedures to more effectively analyze the impact and added value of the work performed"[25].

5. The principle of sincere cooperation

Under the principle of sincere cooperation, "Member States are obliged to implement EU law, thereby contributing to the mission of the Union, and to refrain from any action that could jeopardize the achievement of the EU objectives"[26].

Under Article 4 TEU, "according to the principle of sincere cooperation, the Union and the Member States shall respect and assist each other in carrying out missions arising out of the Treaties. Member States shall take any general or particular action to ensure the fulfillment of obligations under the Treaties or resulting from the acts of EU institutions. Member States shall facilitate the achievement of the Union's mission and refrain from any measure detrimental to the achievement of its objectives". In this way, three obligations are established in the task of Member States[27]: two positive (the adoption of measures to implement EU law and facilitate the exercise of the Union's mission) and one negative - not to take any action that would jeopardize the objectives of the Union.

In the Union, under the principle of sincere cooperation, the Member States are invited to support the Union's actions and not to hinder its proper functioning, for instance[28] by punishing infringements of EU law, as strictly as infringements of national law or by cooperating with the Commission in procedures linked to the monitoring of compliance with EU law, e.g. by sending the documents required in accordance with the rules etc.

The sincere cooperation is a principle that the Treaty on European Union requires to be complied with by the EU institutions, too. Thus, according to Article 13 paragraph

[23] Article 8, paragraph (2) of the Protocol.
[24] The annual Report of the European Commission for 2012 , regarding subsidiarity and proportionality COM(2013) 566 final, 30.7.2013 (http://eur-lex.europa.eu/LexUriServ/LexUriServ. do?uri=COM:2013:0566:FIN:RO:PDF).
[25] Ibid, p. 11.
[26] François-Xavier Priollaud, David Siritzky, „*Le Traité de Lisbonne. Texte et commentaire article par article des nouveaux traités européens (TUE-TFUE)",* La documentation Française, Paris, 2008, pp. 39-40.
[27] According to *Rapport* de Monsieur Etienne Goethals presented during „Réunion constitutive du comitésur l'environnement del'AHJUCAF. Ecole Régionale Supérieure de la Magistrature de l'OHADA Porto-Novo (Bénin) – Actes", http://www.ahjucaf.org/IMG/pdf/pdf_Actes_Porto-Novo.pdf.
[28] According to: http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l10125_ro.htm

(2), the last sentence is "institutions shall cooperate with each other fairly".

The inter-institutional collaboration principle is found in Article 249 TFEU "that stipulates that the Council and the Commission must start mutual consultation and agree on the modalities of collaboration. Inter-institutional cooperation is organized in various ways, including: exchanges of letters between the Council and the Commission; inter-institutional agreements, joint declarations of the three institutions"[29] etc.

The principle has been often invoked by the Court of Justice in Luxembourg in various rulings over time. Thus, in 1983, the Court reminded in the ruling from the case *Luxembourg v./ the European Parliament*[30], that "when provisional decisions are taken, governments of the Member States must, under the rule which requires states and Community institutions, mutual obligations of sincere cooperation, rule inspired, especially from Article 5 TEC, consider that these decisions do not affect the proper functioning"[31] of the Union's institutions. In 1986, in the ruling in case *Greece v. / the Council*[32] , the Court maintains its position, extending however, the sincere cooperation also to relations between the Union's institutions, saying that in the dialogue between the Union's institutions, "must prevail the same mutual obligations of sincere cooperation (...) that govern also the relations between Member States and Community institutions"[33]. The Court goes back to the principle of cooperation, in 1990 when it specified, in the ordinance ruled in the case *Zwarveld*[34], that "in this community of law, relations between Member States and Community institutions are governed, under Article 5 TEC[35], by the principle of sincere cooperation. The principle obliges not only Member States to take all measures necessary to ensure the strength and effectiveness of Community law, including, when needed, even of criminal nature, but requires equally to Community institutions, mutual obligations of sincere cooperation with Member States"[36].

At a careful analysis of references made by the Court to the principle of sincere cooperation, we can see that, according to the Luxembourg Court, this principle has the following features[37]: it is a guiding principle of relations between Member States and EU institutions; it is a bilateral principle and it is a principle that applies not only to relations between Member States and EU institutions, but also to relations between EU institutions".

6. Conclusions

The principles of the European Union are stemming from specific principles of public international law, on the one hand, and from the principles contained in the legal systems of Member States, on the other hand. To become principles of EU law, these

[29] http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l10125_ro.htm
[30] 10 February 1983, case 230/81 (http://curia.europa.eu/juris/celex.jsf?celex=61981CJ0230&lang1=ro&lang2=FR&type=NOT&ancre=).
[31] Section 37 from the ruling.
[32] 27 September 1988, case 204/86 (http://curia.europa.eu/juris/celex.jsf?celex=61986CJ0204&lang1=ro&lang2=FR&type=NOT&ancre=).
[33] Section 16 from the ruling.
[34] Ordinance from 13 July 1990, C-2/88 (http://curia.europa.eu/juris/showPdf.jsf?text=&docid=95877&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=529108).
[35] Treaty establishing the Economic European Community.
[36] Section 17 of the Ordinance.
[37] According to Guy Isaac, Marc Blanquet, *op. cit*., pp. 101-102.

categories of principles are "communitarised"[38], as they are passed through the "filter of EU objectives, so sometimes, they may stand some limitations in order to comply with EU law"[39].

As we have seen, the European Union Treaties contain only general references to the principles specific to the implementation of EU law because the jurisprudence of the Court of Justice of the European Union was, in fact, the real developer of these principles.

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[38] Jean Paul Jacqué, „*Droit institutionnel de l'Union européenne"*, 7e édition, Dalloz, 2012, p. 530 and the next.
[39] Idem.

POLITICAL PLURALISM AND MULTIPARTY

Erhard NICULESCU*

Abstract

Political parties have made themselves noticed in history by competing for power and over time they have emerged as undeniable and indispensable realities in a political system regardless of its form. The Constitution of Romania recognised the role and historical importance of pluralism and political parties and dedicated them a place of honour in the general principles that establish our state as a democratic and social state of law. This article analyses the constitutional provisions on political parties, depicting the evolution of statutory regulations thereon over more than 100 years, during various political regimes. Last but not least, it also analyses concepts and points of view of the doctrine with respect to the subject matter, while also making references to the relevant constitutional jurisprudence. Finally, as a result of the analysis conducted, we will reveal any weaknesses of the legislation and we will make our conclusions.

Keywords: *pluralism, political party, Constitution, law, multiparty*

1. Introduction

Long considered the "engine of the political life" of a society, political parties are characterised by a fervent activity, in the forefront of political life. The state has an acknowledged relationship with the civil society, relationship that is lost in the mists of time. Thus, it is public knowledge now that civil society works on the state in many ways, while parties, together with the media or trade unions stand out as a major player in rendering the power relations more dynamic. Many times we, ordinary citizens, have witnessed the adoption of various legal acts by the legislative or executive body with the support of the political parties in power.

The French legal doctrine estimates that the state performs three basic functions:

a) Enactment of general rules – legislative function;

b) Application or enforcement of these rules – executive function;

c) Settlement of litigations arising in society – judicial function.[1]

In recognition of the role played by the parties, they have been expressly regulated in the Constitutions of the states of the world. But, since the society has evolved in a dramatic rhythm, some Constitutions are required to be revised and adapted to times.

2. Paper content

2.1 Political parties and their constitutional regulation

On the national political scene, in addition to traditional political parties, such as for instance the Peasant Party or the Liberal Party, a series of alliances operated, such as the Alliance for Justice and Truth (J

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[1] M. Chantebout, *Droit constitutionnel et science politique (Constitutional Law and Political Science),* Dalloz Publishing House, Paris, 1982, p.156.

& T Alliance) or the Social Liberal Union (SLU). Also a political force of the national minorities was noticed – Democratic Union of Hungarians in Romania (DUHR). What does this mean from the point of view of the subject proposed in this study? There is nothing simpler! If we refer to the classification of the system of parties in general, we notice that the best known classification refers to three classes, namely: single party, two-party and pluri-party or multi-party.

We present below, in constitutional terms, how the concept of political party was regulated in the Romanian Constitutions, as a historical analysis of successive Constitutions, starting from 2013, with more than 100 years of statutory regulation.

The *Constitution of 1866*[2] did not regulate anything with respect to the political parties, but stipulated among others the equality before the law or the right of association, which was set out in article 27 and read as follows: *"Romanians have the right to associate, complying with the laws that regulate the exercise of this right".*

The Constitution of 1923, considered a modern Constitution for the time, was superior to the previous one by its much broader vision, but it also failed to include any provision on political parties.

Thus, we find provisions on the freedom of association in article 5, which states that: *"Romanians, regardless of ethnic origin, language or religion, enjoy the freedom of conscience, the freedom of education, the freedom of press, the freedom of assembly, the freedom of association and all the freedoms and rights established by laws",* while article 29^3 *(1) shows that: Romanians, regardless of ethnic origin, language or religion, have the right to associate, complying with the laws that regulate the exercise of this right. It is also stipulated that the right to free association does not imply in itself the right to create legal persons and the conditions under which legal personality is granted shall be established by special law.*

The *Constitution of 1938* replaced the Constitution of 1923 and granted greater powers to the king. King Carol II imposed an authoritarian regime that did not last. The Constitution of 1938 has provisions only on the right of association, such as article 8(3): *no political association on religious grounds or pretexts, or during religious manifestations is allowed to anyone*, while article 25 reads as follows: Romanian citizens have the right to associate, complying with the laws, and the right of association does not imply the right to create legal persons.[4]

On 31 March 1938 the Decree-law for the abolishment of political parties was issued and published in the Official Gazette of 31 March 1938. Article I. stated that: *"all associations, groups or parties currently in existence and established in order to spread or achieve the political ideas are and remain dissolved.* At the time the National Liberal Party was in operation and its roots apparently dated from around 1875, when several liberal groups unified, but the

[2] Ioan Muraru, Gheorghe Iancu, Mona-Lisa Pucheanu, Corneliu-Liviu Popescu, Constituțiile Române. Texte.Note. Prezentare comparativă (Constitutions of Romania. Texts. Notes. Comparative Presentation), "Official Gazette" Government Business Enterprise, Bucharest, 1993, pp. 35-40.

[3] Ioan Muraru, Gheorghe Iancu, Mona-Lisa Pucheanu, Corneliu-Liviu Popescu, Constituțiile Rormâne. Texte.Note Prezentare comparativă (Constitutions of Romania. Texts. Notes. Comparative Presentation), op.cit.,1993, pp.71-76

[4] Ioan Muraru, Gheorghe Iancu, Mona-Lisa Pucheanu, Corneliu-Liviu Popescu, *Constituțiile Rormâne. Texte.Note Prezentare comparativă (Constitutions of Romania. Texts. Notes. Comparative Presentation)*, *op.cit.*,1993, pp.98-101

abovementioned Decree-law[5] dissolved that party. The second largest party that operated in the interwar period, but that worked approximately from 1880 to 1918 was the Conservative Party. Therefore, one could say that in that historical period there were two parties that dominated the Romanian politics. Later the *single party*, the National Renaissance Front, was established and its originator was Armand Călinescu, intimate of King Carol II[6].

The *Constitution of 1948* was no exception to the previous regulations and failed to stipulate anything on political parties, as it only included provisions on the right of association. Article 32[7] stipulates that citizens have the right to associate and organise if the purpose is not against the democratic order established by the Constitution. Any association with fascist or antidemocratic character was prohibited and punished by law. It was also expressly stipulated for the first time that the legislative body of the Republic was the Grand National Assembly.

The *Constitution of 1952* was characterised by a different style, as it was a socialist statutory regulation and this time it included expressions such as: "working people" instead of Romanians, or the "victory over fascism" or "socialist system" etc. What was different in the Constitution of 1952 was the very fact that for the first time it made reference to the notion of party as single party, namely the Romanian Workers' Party. The right of association was the object of article 86, whose content was extremely well-defined and consistent with the socialist thinking of the authors of that Constitution.

According to article 86(1) *"in accordance with the interests of those who work and in order to develop the political and public activity of the masses, the citizens of the People's Republic of Romania are guaranteed the right of association in public organisations, in professional trade unions, cooperative unions, women's organisations, youth organisations, sports organisations, cultural, technical and scientific associations.* The prohibition of fascist or antidemocratic associations was maintained and the participation in such association was punished by law.[8]

The Constitution of 1965 continued the previous conception on the right of association and referred to this in article 27 making use of a new expression, namely: "mass and public organisations". The regulation of 1965 showed that: *The citizens of the Socialist Republic of Romania have the right to associate in trade unions,*

[5] The National Liberal Party was restored after December 1989, with known personalities from various fields acting as leaders.

[6] The text may be seen at the address http://www.monitoruljuridic.ro/act/lege-nr-4-321-din-15-decembrie-1938-pentru-infiintarea-organizatiei-politice-a-frontului-renasterii-nationale-emitent-parlamentul-publicat-n-30588.html, accessed on 9 April 2014

Law no. 4321 of 15 December 1938 establishing the "National Renaissance Fund" political organisation, published in the Official Gazette no. 293/16 December 1938

[7] Ioan Muraru, Gheorghe Iancu, Mona-Lisa Pucheanu, Corneliu-Liviu Popescu, *Constituțiile Rormâne. Texte.Note Prezentare comparativă (Constitutions of Romania. Texts. Notes. Comparative Presentation)*, *op.cit.*,1993, p.125

[8] Article 86 (3) stipulates that: "The most active and most aware citizens of the working class and the other categories of working people unite as the Romanian Workers' Party, the vanguard detachment of the working people in the struggle to strengthen and develop the people's democracy and to build the socialist society", while paragraph 4 states that: "The Romanian Workers' Party is the driving force of both the organisations of those who work and of state bodies and institutions. All the organisations of those who work in the People's Republic of Romania gather around it."

Ioan Muraru, Gheorghe Iancu, Mona-Lisa Pucheanu, Corneliu-Liviu Popescu, Constituțiile Române. Texte. Note Prezentare comparativă (Constitutions of Romania. Texts. Notes. Comparative Presentation), op.cit., 1993, p.156.

cooperative, youth, women's, social-cultural organisations, creative unions, scientific, technical and sports associations and other public organisations.[9] Article 27(3) expressly stipulates that: *mass and public organisations ensure the broad participation of masses in the political, economic, social and cultural life of the Socialist Republic of Romania and in the exercise of the public control – expression of the democracy of the socialist system. Through the mass and public organisations, the Romanian Communist Party establishes an organised connection with the working class, the peasants, the intellectuals and the other categories of working people and mobilises them in the struggle for the completion of the construction of socialism.* Also, article 29(2) prohibits fascist or antidemocratic associations. Participation in such associations and fascist or antidemocratic propaganda are prohibited by law.

The Constitution of 1991 ended the long line of socialist Constitutions and it stood out as a liberal Constitution that established in article 1 that: *"Romania is a democratic and social state of law, in which the freedom of people, the rights and freedoms of citizens, the free development of human personality, the justice and* ***political pluralism*** *are absolute values and are guaranteed"*. Therefore, the Constitution of Romania of 1991 expressly regulated the political pluralism. Also, the political pluralism and parties were enshrined in article 8, which has two paragraphs in its structure and is contained in Title I, entitled *"General principles"*, but references to political parties may be found in other constitutional provisions as well.

According to article 8(1) "pluralism in the Romanian society is a prerequisite and a guarantee of constitutional democracy". Under article 8(2), "political parties are established and conduct their activity under the conditions of the law and they contribute to defining and expressing the political will of the citizens, respecting the national sovereignty, the territorial integrity, the rule of law and the principles of democracy". It should be mentioned that article 8 kept its form as a result of the revision of the Constitution of 2003.

Also, the Constitution of 1991 regulated the right of association in article 37 and this time one could talk about the fundamental rights, freedoms and duties, stipulated in Title II. As a result of the revision of 2003, this article became article 40, following the renumbering of articles, but its content was not changed.

In essence, this article provides that citizens may freely associate into political parties, trade unions and others forms of association, while secret associations are prohibited. Its second paragraph expressly stipulates that parties or organisations that, by their purposes or activity, militate against the political pluralism, the principles of the state of law or the sovereignty, integrity or independence of Romania, are unconstitutional. The analysed text refers to the prohibition according to which judges of the Constitutional Court, ombudsmen, active members of the army, policemen or other categories of public servants established by organic law may not be members of political parties.

Last but not least, regarding the political parties, letter h of the Constitution of 1991, when referring to the powers of the Constitutional Court, points out that it settles

[9] Ioan Muraru, Gheorghe Iancu, Mona-Lisa Pucheanu, Corneliu-Liviu Popescu, Constituțiile Române. Texte.Note Prezentare comparativă (Constitutions of Romania. Texts. Notes. Comparative Presentation), op.cit., 1993, p.170. Article 27(2) stipulates that: "the state supports the activity of the mass and public organisations, creates conditions for the development of the material base of these organisations and protects their property".

the disputes that cover the constitutionality of a political party.

Thus, this is a picture of the Romanian Constitutions during 1866-2013 that shows how the notions of political pluralism or political party were stipulated, whereas the majority of said legal acts failed to provide these two values. The only act that truly dealt with the recognition of the importance of the role played by the political parties in a society was the Constitution of 1991, revised in 2003 by Law no. 429/2003[10].

2.2. Reflections on the Constitutional Court of Romania and its role in the constitutionality of a political party

The Constitutional Court has stood out in the recent years of activity by its undeniable involvement in the protection of fundamental rights of citizens. Its jurisprudence is extremely rich on this matter and the grounds of its decisions directly follow the arguments of the European Court of Human Rights. Thus, in Germany, considering that the fundamental rights are intended to protect the individual against the state, the fundamental law enshrines an objective order of the fundamental rights, establishing a system of values centred on the free development of human personality and the principle of protection of human dignity, a system directly applicable by all branches of the power: legislative, administrative, judicial authorities.[11]

In the realisation of the fundamental rules, law no. 14/2003 stipulates in article 1 that political parties are political associations of Romanian citizens with voting rights who participate freely in the formation and exercise of their political will, fulfilling a public mission, guaranteed by the Constitution. They are legal persons of public law."[12]

As previously shown, according to article 144(1) (i): The Constitutional Court of Romania settles the disputes that deal with a political party. This provision will be put in conjunction with the organic law of the political parties[13], as follows: "The Constitutional Court settles the disputes that cover the constitutionality of a political party, according to the provisions of article 30(7), article 37(2) and (4) and article 144(i) of the Constitution, with the procedure laid down in Law no. 47/1992 on the organisation and operation of the Constitutional Court."[14]

According to doctrine, although it resembles the control of the constitutionality of the law because they belong to the scope of the constitutionality control, there are still aspects that differentiates them: the control

[10] Law no. 429/2003 revising the Constitution of Romania, published in the Official Gazette, Part I, no. 758/2003. Under paragraph 79 of the single article of this law, the Legislative Council caused the publication of the Constitution as amended and completed, with updated names and renumbered texts, in the Official Gazette of Romania, Part I, no. 767/31 October 2003

[11] H.G. Rupp, *Objet et portee de la protection des droits fundamentaux.Tribunal constitutionnel federal alemand*, in Cours constitutionnelles et droits fundamentaux (*Purpose and Scope of Protection of Fundamental Rights. German Federal Constitutional Court*, in Constitutional Courts and Fundamental Rights), Provence, Economica, PUAM, Paris, 1982, p. 245, apud. Bianca Selejan Guțan, *Excepția de neconstituționalitate și constituționalizarea dreptului*, in *Ioan Muraru-Liber Amicorum (Exception of Unconstitutionality and Constitutionalisation of Law*, in *Ioan Muraru-Liber Amicorum)*, Hamangiu Publishing House, Bucharest, 2006, p. 201

[12] Decision of the Constitutional Court of Romania no. 530/2013 on the admission of the exception of unconstitutionality of the provisions of article 16(3) of the law on political parties, published in the Official Gazette no. 23/2014

[13] Law no. 14/2003 on political parties, published in the Official Gazette no. 25/2003

[14] Law no. 47/1992 on the organisation and operation of the Constitutional Court, republished in the Official Gazette no. 807 /2010

of the constitutionality of the law does not settle a conflict of particular interests; the control of the constitutionality of a political party concerns the group interests of the party in question, not in the sense that it does not interest the national community as well, but in the sense that it directly concerns the party in question whose legal existence is denied by the dispute filed against it.[15] The authors of the relevant notice may be the presidents of one of the Chambers of the Parliament or the Government, while the Constitutional Court reviews the substantive fulfilment of the conditions concerning the activity of the political party included in article 40(2) of the Constitution.

The legal effects of the decision of the Constitutional Court on the unconstitutionality of a political party consist in removing the political party from the records of the legally established parties.[16]

3. Conclusions

Throughout the constitutional history of Romania, political parties have had a winding route, marked by two types of situations, despite the fact that in terms of state structure the country was a monarchy and then a republic, more precisely, there was either a democratic regime in which several political parties operated, or a royal dictatorship, referring mainly to the time of Carol II, or a socialist authoritarian regime characterised by the existence of the single party. Today, we can speak of a constitutional democracy and of the existence of several parties.

The Romanian Constitutions, heavily inspired by the European Constitutions, promoted values such as the right to free association, equality before the law, etc., and we refer to the Constitutions of 1866 and 1923, and in 1938 an authoritarian regime was established, which suppressed the liberal democratic regime. It was only in 1991 that there was a traditional resumption of values promoted at first by the authors of the modern Constitutions. Multiparty is the most common form in modern societies.

The existence of diverse and competing interests is the basis for a democratic equilibrium, and is crucial for the obtaining of goals by individuals. A polyarchy – a situation of open competition for electoral support within a significant part of the adult population − ensures competition of group interests and relative equality. Pluralists stress civil rights, such as freedom of expression and organization, and an electoral system with at least two parties. On the other hand, since the participants in this process constitute only a tiny fraction of the populace, the public acts mainly as bystanders. This is not necessarily undesirable for two reasons: (1) it may be representative of a population content with the political happenings, or (2) political issues require continuous and expert attention, which the average citizen may not have.

Pluralism is, in the general sense, the acknowledgment of diversity. In democratic politics pluralism is a guiding principle which permits the peaceful coexistence of different interests, convictions and lifestyles. One of the earliest arguments for pluralism came from James Madison in "The Federalist Papers". He posits that to avoid factionalism, it is best to allow many competing factions to prevent any one dominating the political system. Pluralism in this sense is connected with the hope that

[15] I.Muraru, N.Vlădoiu, A.Muraru, S.G.Barbu, *Contencios constituțional (Contentious Constitutional Matters),* Hamangiu Publishing House, Bucharest, 2009, p. 169.
[16] I.Muraru, E.S. Tănăsescu, *Drept constituțional și instituții politice (Constitutional Law and Political Institutions),* volume II, XII edition, C.H.Beck Publishing House, Bucharest, 2005, p.265.

this process of conflict and dialogue will lead to a definition and subsequent realization of the common good that is best for all members of society. This implies that in a pluralistic framework, the common good is not given a priori. Instead, the scope and content of the common good can only be found out in and after the process of negotiation, i.e., *a posteriori*.

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THEORETICAL AND JURISPRUDENTIAL ASPECTS CONCERNING THE CONSTITUTIONALITY OF THE COURT APPEAL ON POINTS OF LAW

Marius ANDREESCU[*]

Abstract

The institution of the appeal on points of law has the role to ensure a unitary law interpretation and enforcing by the law courts. The legal nature of this procedure is determined not only by the civil and criminal normative dispositions that regulate it. In this study we bring arguments according to which this institution is of a constitutional nature, because according to the Constitution, the High Court of Cassation and Justice has the attribution to ensure the unitary interpretation of the law by the law courts. Thus are analysed the constitutional nature consequences of this institution, the limits of compulsoriness of law interpretations given by the Supreme Court through the decisions ruled on this procedure, and also the relationship between the decisions of the Constitutional Court, respectively the decisions of the High Court of Cassation and Justice given for resolving the appeals on points of law. The recent jurisprudence of the Constitutional Court reveals new aspects regarding the possibility to verify the constitutionality of the decisions given in this matter.

Keywords: *Appeal on points of law, the compulsoriness of the law interpretations for the law courts, The control of constitutionality of the decisions given for resolving the appeals on points of law, Supremacy of Constitution*

1. Introduction

Such as its name is showing and such as results from the legal dispositions in the matter (Article 514-518 Civil Procedure Code and Article 471 - 474 of the new Criminal Procedure Code, respectively Article 4142 -4145 in the Criminal Procedure Code in force), the appeal on points of law is no remedy way with effects on the situation between the parties in the trial, but to ensure the unitary interpretation and application of the substantial and procedural laws throughout the entire country. Such a legal institution would not be required if all appeals shall be heard by the High Court of Cassation and Justice. In such a case the Supreme Court may achieve the unitary interpretation and application of the law. The normative regulations in force however establish the competence of the law courts and appeal courts in solving the appeal, which creates the possibility to have a different interpretation, even a wrong one of the laws. Therefore the legal institution of the appeal on points of law has the purpose to ensure in a unitary mode across the entire country, the observance of the will of legislator expressed within the law spirit and letter.

We consider that the legal nature of the appeal on points of law arises only from the civil and criminal procedural provisions which consecrate it.

In compliance with the provisions of Article 126 paragraph (3) of the Constitution "The High Court of Cassation and Justice ensures the unitary interpretation and

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application of the law by other law courts, according to its competencies". The decisions given in the proceeding of appeal on points of law represents the main means through which the Supreme Court fulfills the constitutional duty to ensure a unitary interpretation and application of the law. That's why, the appeal on points of law is not only a civil and criminal procedural institution, but at the same time, has its legal basis in the constitutional norm named above.

The constitutional nature of the appeal on points of law has two main consequences. The first refers to the obligation of the legislator to regulate in the civil and criminal proceeding, the juridical instrument through which the High Court of Cassation and Justice may accomplish its constitutional prerogative to ensure the unitary interpretation and application of the laws by all law courts. The legislator has at his disposition two possibilities: the first may be to regulate the exclusive competence of the Supreme Court in resolving all appeals and the second, the procedure this is currently regulated, of the appeal on points of law. The constitutional provision contained by Article 126 paragraph 3 of the Constitution represents a guarantee of the fundamental law. Given the principle of conformity of the whole law with the constitutional norms, the legislator cannot regulate the material competence of the Supreme Court without having instituted also the procedural instrument through which this will ensure the unitary interpretation and application of the laws by all law courts.

The second consequence refers to the necessity of compliance of the decisions ruled in this proceeding with the constitutional norms. The decisions of the High Court of Cassation and Justice shall be limited strictly to the interpretation of the law. The Supreme Court may complete, amend or repeal the regulations contained by the law. Otherwise it will be violated the principle of separation and balance of powers in the state, explicitly consecrated by the provisions of Article 1 paragraph 4 of the Constitution, because the law court exceeded the limits of judicial powers and would manifest itself as a legislative authority. We will refer to this consequence in chapter II of the present study.

2. Paper Content

One of the most important aspects of the legal regimes that is specific to the appeal on points of law is the compulsoriness of law interpretation by the courts.

The constitutionality of the regulations that consecrates in the civil and criminal matter the obligation of the decisions given in the proceeding for appeal on points of law was contested both in the doctrine[1] as throughout the exceptions of non-constitutionality solved by the Constitutional Court, in relation to the provisions of Article 124 paragraph (3) of the Constitution, which establishes the principle of judge submission only to the law. The Constitutional Court in its jurisprudence has constantly stated that the statutory provisions that foresee the courts' obligation of the "law interpretations" given by the Supreme Court through the decisions rendered points of law are constitutional[2].

[1] Ion Deleanu, Tratat de Procedură Civilă, "Civil Procedure Treaty" C.H. Beck Publishing House, Bucharest, 2007,pg. 349; Ion Deleanu, Sergiu Deleanu, Jurisprudența și reverimentul jurisprudențial, "The Jurisprudence and jurisprudential Revival" the Publishing House " Universul Juridic", Bucharest, 2013, pg. 93-97.

[2] See also: the Decision no 1014 /2007 published in the Official Gazette, part I, no. 816 November 29th no. 2007, Decision no. 928/2008 published in the Official Gazette, part I, no. 706 on October 17th 2008, the Decision no. 528

Our Constitutional Court has held that: "The principle of submission to the law, according to Article 123 paragraph (2) of the Constitution (presently Article 124 paragraph (3) n.m.) has not and cannot have the significance of a different applying, or even in contradictory of the same legal provision based solely on the subjectivity of the interpretation belonging to different judges"[3]. However it has been noted that: "The ensuring of the unitary character of the practice of law is imposed also by the constitutional principle of equality of the citizens before the law and public authorities, therefore including before the legal authorities, because this principle would be otherwise severely affected, if in the application of one and the same law, the solution rendered by the law courts would be different or even in contradictory[4]. A topic of interest for our research study and for the substantiation of the constitutional court according to which: "The establishing of the compulsoriness character of the interpretations of the law issues judged by means of appeal on points of law, is only giving efficiency to the High Court of Cassation and Justice, contributing thus to the lawful state's consolidation[5].

In the separate opinion formulated by the Decision no. 221/2010 it is claimed that the normative provisions establishing the compulsoriness for the courts of the decisions rendered on points of law, are contrary to the provisions of Article 124 paragraph (3) of the Constitution. The author of the separate opinion emphasizes: "In this meaning we believe that providing a unitary interpretation has the significance of taking the needed actions for the unitary understanding, interpretation of the norm by each judge, of its letter and spirit, and not of offering/ imposing a certain solution, to the interpretation in a certain sense. The judge cannot be brought in the situation of an obedient executor, in relation to the interpretations given in resolving the appeal on points of law"[6].

From the analysis of the jurisprudence of the Constitutional Court, of the doctrine in the matter, but also of the regulations in the fundamental law, one can conclude that no constitutional text foresees clearly the compulsoriness of the decisions rendered by the High Court of Cassation and Justice, on points of law. Therefore, the compulsory character of such decisions for the law courts is not of a constitutional nature. The compulsoriness is conferred exclusively by the special regulations, to which we referred to in the Civil Procedure Code and, respectively the Criminal Procedure Code. We appreciate that it is necessary to achieve the distinction between the constitutional nature of the appeal on points of law, and on the other side, the constitutional character of the compulsoriness of the decisions ruled for the law courts.

The binding character of the "interpretation of law" given by the High Court of Cassation and Justice cannot be considered as an equivalent with the compulsoriness of the law norm. Therefore, the judge, in the work of interpretation and application of law, will have into consideration, firstly, the regulations with normative character, including the constitutional ones and, in subsidiary, the interpretation and the "clarifications of law" conferred through the procedural decisions

/1997 published in the Official Gazette, part I, no 90 on February 26th 1998, the decision no. 221/2010 published in the Official Gazette, part I, no 270 on April 26th 2010.

[3] Quoted works Decision no 528/1997.

[4] Quoted works Decision no 907/2007.

[5] Quoted works Decision no. 221/2010.

[6] Tudorel Toader, dissenting opinion to Decision no 221/2010.

given in the procedure of appeal on points of law. We appreciate that the procedural provisions that establish the compulsoriness character of such decisions are constitutional related with the provisions of Article 124 paragraph (3) of the Constitution, only in so far as it is interpreted that such an obligation does not prejudice the constitutional principle according to which the judges must grant priority and give efficiency to the law norms applicable in solving the cause and only in subsidiary, to the decisions rendered in this procedure.

At this time a scientific approach of the issue mentioned above would appear useless, having into consideration that the legislator eliminated, at least for the judges, any possibility to reflect upon this topic, because through the Law no. 24/2012 were brought important amendments in the sphere of disciplinary judicial misbehaviours of the judges, so that Article 99 letter s of Law 301/2004, in the form acquired throughout the normative act named above, establishes as a disciplinary misconduct "the non-complying with the decisions given by the High Court of Cassation and Justice in resolving the appeal on points of law". It is regrettable such a brutal intervention of the legislator which, in our opinion, affects not only the scientific approach upon such a delicate matter, but it limits unconstitutionally the independence of the judges. The above named law test raises a concrete practical problem for the judges, namely how will the law court proceed in situation there are contradictions between a decision of the Constitutional Court and a decision of the High Court of Cassation and Justice given in resolving the appeal on points of law, both applicable in a case deduced to the judgment?

In the literature in specialty this problem was indicated previously to amending and completing of Law no. 303/2004 by Law no. 24/2011, having into consideration the concrete situation when the law courts faced such contradictions between the decisions of the Constitutional Courts and the decisions of the High Court of Cassation and Justice given in the procedure of appeal on points of law, both categories of decisions having as matter the same text of law applicable in a case deduced to the judgment[7]. The author of the study which we are referring to concludes in the sense that: "Therefore in the given situation, the law courts, ascertaining contradictions between the decision of the Constitutional Court and the one of the united sections of the High Court of Cassation and Justice, must comply to those stated by the Constitutional Court and remove those decisions decided by the United Sections of the High Court of Cassation and Justice"[8]. The solution we consider as logic and justified as a judicial reasoning but presently inapplicable, having into consideration the law text that sanctions as disciplinary misconduct both equally the non-abiding of the decisions of the High Court of Cassation and Justice regarding the compulsory interpretations given for resolving some law issues, as the decisions of the Constitutional Court. It is obvious that the judge is facing a insoluble dilemma and he is subjected to a constraint that is severely prejudicing his independence, because no matter what solution will be rendered, he will be liable for disciplinary responsibility for failure, as the case may be, either of the decision of the Constitutional Court or of the decision of the High Court of Cassation and Justice. It should be noted that no legal

[7] For development see Cristina Ştefăniţă, Manner to proceed of the law courts that face a contradiction between the decision of the Constitutional Courts and a judgment ruled by the High Court of Cassation and Justice, in the United sections, for the resolving of an appeal on points of law, in "the Law" no. 4/2010, pp. 119-135.
[8] Cristina Ştefăniţă, quoted works p.125.

provision in the procedure for the judicial control is sanctioning the non-abiding of the compulsoriness of the decisions of the Supreme Court that were given in the appeal on points of law.

In the civil matter, there are no legal norms sanctioning the non-observance of the decisions of the Supreme Court given on points of law. By way of interpretation it may be inferred that such a sanction in the regulations of Article 488 paragraph (1) point 8 Civil Procedure Code, establishing as cassation grounds of the appealing decision, the violation or wrong application of the substantive law norms. Nevertheless, such an interpretation of the above named law texts is debatable, as such as emphasized in the literature in specialty, the very interpretation itself of the Supreme Court will be implicitly brought into question, eventually it could be invoked only as argument in supporting the "legal" grounds of cassation. In any case, it by itself does not constitute such grounds[9].

In the Criminal Proceeding Code the cases to which cassation appeal can be done are regulated by the provisions of Article 438. In our opinion neither of these cases can be interpreted in the meaning that it is sanctioning the non-observance of the compulsoriness of decisions given by the High Court of Cassation and Justice, through which was solved an appeal on points of law. In the actual criminal trial regulation, only by the interpretation way is possible to reach to the conclusion of sanctioning by the appeal court of non-abiding such a decision of the High Court of Cassation and Justice. Having into consideration the provisions of Article 3859 paragraph (1) point 171 Criminal Procedure Code according to which the decisions are subject to cassation, if they are contrary to the law or when through the decision it was done a wrong application of the law. It worth mentioning that such dispositions were abrogated by Article 1 point 185 of the Law no. 356/2006, but by Decision no. 783 / 2009 the Constitutional Court declared such regulations as unconstitutional. For our research topic the arguments of the Constitutional Court are of interest, according to which, Article 146 letter d of the Constitution does not exempt from the constitutionality control the abrogation legal provisions and, in case it is ascertained their unconstitutionality, they cease their legal effects within the conditions foreseen by Article 147 paragraph 1 of the Constitution, and the legal provisions that constituted the substance of abrogation, keep producing effects.

Another aspect we wish to emphasize is that the Supreme Court has no legitimacy in conferring the force of an authentic interpretation to the legal norms. Such an interpretation is of the exclusive competence of the legislator. In the procedure of appeal on points of law, the High Court of Cassation and Justice makes a synthesis of the decisions given in relation to a certain law issue, ruling on its correctitude, conferring at the same time, a compulsory interpretation" of the law aspects solved differently by the law courts[10].

The question arises if the decisions handed down by the Supreme Court in this procedure are formal springs of law. Constantly, in the literature in specialty the notion of spring of law is defined as "the form of expressing the judicial norms that are determined by their enactment or

[9] Ion Deleanu, Sergiu Deleanu, , "The Jurisprudence and jurisprudential Revival" the Publishing House " Universul Juridic", Bucharest, 2013, pp. 92-94.
[10] For developments see Ion Deleanu, Sergiu Delenau, quoted works p.95.

sanctioning by the state"[11]. In our opinion, the decisions rendered by the High Court of Cassation and Justice cannot be springs of the law because they cannot contain law norms. Moreover, in our legal system the jurisprudence is not a formal spring of law. In this respect, the Constitutional Court stated: "The interpretative solutions given in the appeal on points of law named "interpretations of law" cannot be considered springs of law, in the usual meaning of this term[12]. Such interpretative solutions, constant and unitary, that do not concern certain parties and have no effect on the prior given solutions that entered the res judicata, are invoked by the doctrine as a judicial precedent, being considered by the legal literature "secondary springs of law" or "interpretative springs". In relation to the foregoing, we express our opinion that these decisions can be considered as sources of law, but not formal springs of law, opinion consistent with the Constitutional Court jurisprudence.

Another aspect we consider relates to the time at which the decisions given in the resolution of the appeals on points of law, start enforcing judicial effects. According to the procedural provisions "the decisions are published in Romania's Official Gazette – Part I, and on the internet page of the High Court of Cassation and Justice. These are brought to the knowledge of the courts also by the Ministry of Justice". From the interpretation of the legal dispositions results that such decisions cannot produce judicial effects with their ruling and their effects are only for the future. The decisions' publishing on the internet page of the High Court of Cassation and Justice and their communication to the courts by the Ministry of Justice cannot be considered as moments since when they start producing effects because the legislator did not foresee expressly this fact, and much more, neither of the above named procedures has presently in the Romanian Law the judicial value of the act of communication or publishing. We consider that the moment since when the decisions ruled in the procedure of appeal on points of law start producing judicial effects is the one of publishing in the Official Gazette. This solution is imposed by the general binding character of the decisions, and also by their quality as source of the law, which clearly distinguish them in terms of legal nature from other types of judgments.

The Civil Procedure Code, by Article 518, comes to clarify, at least in the civil matter, the issue of the effect of decisions on points of law. The normative regulations state that: "the decision on points of law ceases its applicability since the date of amending, abrogation or finding unconstitutional the statutory provision that made the object of the interpretation". The Criminal Procedure Code does not contain such regulations and therefore, in the criminal matter, remains opened the problem of applicability of the decisions on points of law in the hypothesis of abrogation or finding unconstitutional the statutory provision that made the object of the interpretation. It is necessary that the legislator intervenes to regulate in a unitary manner this aspect in the sphere of criminal justice.

Before referring to the recent jurisprudence of our constitutional court in this matter, we consider appropriate to our

[11] Ioan Muraru, Elena Simina Tănăsescu, Drept constituţional şi instituţii politice, "Constitutional Law and Political Institutions" C.H.Beck Publishing House, Bucharest, 2003, vol. I, p. 26. For developments see also Radu Motica, Mihai Gheorghe, Teoria generală a dreptului, "The "General Theory of Law" Alma Mater Publishing House, Timişoara, 1999; Nicolae Popa, Teoria generală a dreptului, "General Theory of Law" Actami Publishing House, Bucharest, 1999.

[12] Decision no . 93/200, published in the Official Gazette part I, no. 444 on September 8th 2000.

research topic to emphasize briefly the nature of the relationships between the decisions of the Constitutional Court and the decisions of the High Court of Cassation and Justice ruled on points of law[13]. The first distinctive note is with regard to the effects of the two categories of decisions: the decisions of the Constitutional Court are compulsory in general, therefore not only for the law courts and including for the Supreme Court, but also for any other law topic. In contrast, the decisions of the High Court of Cassation and Justice ruled in the procedure of appeal on points of law are compulsory only for the law courts. Another aspect that distinguishes the two categories of legal acts is represented by the different nature of litigations that are resolved. The decisions of the Constitutional Court are rendered only to resolute a constitutional litigation and have as object the verification and analysis of the consistency or not of the legal norms examined with the Fundamental Law. The decisions of the Supreme Court are exclusively given with the purpose of a unitary interpretation and application of the law by the law courts and they concern the compliance or not of the law courts' practice in the authentic meaning of the legal provisions examined.

The Constitutional Court stated constantly in its jurisprudence that starting with 2000, in the exercising of the responsibilities provided by Article 126 paragraph (3) of the Constitution, the High Court of Cassation and Justice has the obligation to provide the unitary interpretation and application of the law by the law courts, with the observance of the fundamental principle of the separation of powers consecrated by Article 1 paragraph (4) of Romania Constitution. The Supreme Court does not have the constitutional competence to establish, amend or abrogate the judicial norms with law powers, or to do their control of constitutionality. The interpretations given by the Supreme Court to the law matters is mandatory for the other courts in as far as its objective is to promote a correct interpretation to the legal norms in force, and not to elaborate new norms. One cannot consider that the decision rendered by the High Court of cassation and Justice, in such appeals, would represent a task aiming at the law making prerogative, situation in which the named text would violate the provisions of Article 58 paragraph 1 of Constitution.[14]

Starting from a comprehensive jurisprudence analysis, the authors of a recent study[15] emphasize: "The decisions thus ruled have the role to give a correct interpretation to law matters over which they have appeal on points of law; however, proceeding to such an analysis, the High Court of Cassation and Justice is forbidden to violate the competence of the legislative power or executive power or that of the Constitutional Court. Therefore, this instrument is and remains a tool for the law interpretation and application, so like any other court decision, it cannot constitute a spring of law in the Romanian constitutional system"[16]. We share the view expressed.

It is necessary to notice the limits of the control of constitutionality related to the decisions ruled by the Supreme Court in the procedure of appeal on points of law.

[13] For developments see Ion Deleanu, Sergiu Deleanu, quoted works, pp 97-98.
[14] See Decision no 93/2000, published in the Official Gazette part I, no. 444 on September 8th 2000 and Decision no 838/2009 , published in the Official Gazette part I, no 461 on July 3rd 2009.
[15] Mihaela Senia Costinescu, Karoly Benke, The effects of the general compulsory character of the decisions of the Constitutional Court regarding the decisions ruled by the High Court of Cassation and Justice in resolving the appeal on points of law, in the "Law" no. 4/2013, pp 134-162.
[16] Mihaela Senia Costinescu, Karoly Benke, quoted works. p. 135.

Constantly, until recently, the Constitutional Court refused to arrogate such a power, emphasizing the limits for constitutionality control in respect to the decisions ruled by the Supreme Court in the procedure for appeal on points of law. The Constitutional Court stated that a decision rendered on points of law cannot constitute an object of censorship of the constitutional litigation court[17]. Recently the Constitutional Court by Decision no. 854/2011[18] confirmed its previous case law. The Constitutional Court stated that " in regard to the censuring of the provisions of a decision given in an appeal on points of law, it cannot constitute an object of exception of unconstitutionality, being from this perspective, inadmissible , because the constitutional litigation court, in agreement with the provisions of Article 146 of the fundamental law, has not the competence of censoring the constitutionality of the statutory decisions, no matter if they are rule in the interpretation of some common law matters or in view of a unitary interpretation or application of the law". There are some nuance aspects in the constitutional court jurisprudence. Thus, quite recently the Constitutional Court emphasized: "The circumstance that throughout a decision given in an appeal on points of law, a certain interpretation is given to a legal text, is not to be converted in a non-receiving ending that obliges the Court, which despite its guarantor role of the Constitution supremacy, not to analyse the text in question, in the interpretation given by the Supreme Court"[19].

The recent doctrine expresses a similar point of view, in the meaning that the Constitutional Court has the competence to establish the non-constitutionality of the statutory norm in the interpretation given by the High Court of Cassation and Justice: "Having into consideration those mentioned above, it comes out that the High Court of Cassation and Justice, being held by the decisions of the Constitutional Court on the track of a decision rendered in resolution of an appeal on points of law, cannot establish the application of an interpretation which *per se* would give a sense of unconstitutionality to the norm interpreted. Therefore the Court has the competence to establish the unconstitutionality of the norm in the interpretation given by the High Court of Cassation and Justice in the situation in which:

-The Supreme Court by interpreting the norm disobeyed an interpretative decision ruled by the Constitutional Court in regard to that statutory norm;

- The Supreme Court by interpreting the norm exceeded the jurisdiction of the law legislative power (judicial power n. m.);

- The Supreme Court interpreted that norm in a manner capable to breach the fundamental rights and freedoms".

Nevertheless it is acknowledged the jurisdiction of the Constitutional Court to declare the unconstitutionality of the law norm in the interpretation conferred through the decision ruled by the High Court of Cassation and Justice, but not the unconstitutionality in itself of the decision through which was resolved the appeal on points of law.

The Decision no. 206 on 29th of April 2013 of the Constitutional Court[20] represents in our opinion, a legal revival in the matter of the jurisprudence of the Constitutional Court, because it clarifies the relationship between the decisions of this Court, and on the other side, the decisions of the High

[17] Decision no 409 on November 4th 2003, published in the Official Gazette part I no 848 on November 27th 2003.
[18] Published in the Official Gazette, part I, no 672 on September 21st 2011.
[19] Decision no. 8 on January 18th 2011, published in the Official Gazette part I, no. 186 on March 17th 2011.
[20] Published in the Official Gazette part I, no 350 /13th of June 2013.

Court of Cassation and Justice ruled on points of law, and also a reconsidering of the competence of the Constitutional Court to censor under the aspect of this decision's constitutionality.

From considerations of the decision to which we made referral it comes out that the Constitutional Court was informed about the exception of non-constitutionality of the provisions of Article 414^5 paragraph 4 of the Criminal Procedure Code. The authors of the non-constitutionality exception consider the text criticized as unconstitutional, because it establishes the binding compulsory nature of the interpretations given in the law matters, judged by the High Court of Cassation and Justice by means of appeal on points of law, and thus are violated the provisions of Constitutions regarding the separation and balance of the powers in the state, the equality before the law, the free access to the justice and last, the role of the Parliament as a sole legislative authority.

Concretely, the authors of the information towards the Constitutional Court have in consideration the decision no. 8/ 2010 given by the High Court of Cassation and Justice, in the procedure of appeal on points of law, by which it was admitted the appeal made by the General Attorney of the Prosecution besides the High Court of Cassation and Justice with regard to the consequences of the decisions of the Constitutional Court no. 62 / 2007 on the activity of the provisions of Articles 205, 206 and 207 of the Criminal Code. The Supreme Court established that: "The rules incriminating the insult and defamation contained by Article 205 and 206 of the Criminal Code, and also the provisions of Article 207 of the Criminal Code regarding the proof of truth, abrogated by the provisions of Article 1 point 56 of the Law no. 278/2006, provisions declared unconstitutional through the decision no. 62 on January 18th 2007 of the Constitutional Court, are not in force".

At the end of this comprehensive and pertinent argumentation, the Constitutional Court admits the exception of unconstitutionality having as objective the provisions of Article 414^5 paragraph 4 of the Criminal Procedure Code and finds that the "interpretation given to the the law matters, judged by the decision of the High Court of Cassation and Justice - United Sections no. 8 on October 18th 2010 … is unconstitutional, contravening to the provisions of Article 1 paragraphs 3, 4 and 5 and Article 126 paragraph (3), Article 142 paragraph (1) and Article 147 paragraph (1) and (4) of the Constitution and the decision of the Constitutional Court no. 62 on January 18th 2007". In support of this solution the Court notes that it is imposed the sanctioning of any interpretation of the statutory norms criticized for unconstitutionality that regulates the obligation of the clarifications given in the law matters by means of appeal on points of law, in the sense that it would offer to the Supreme Court the possibility that by this way, within the grounds of an infra-constitutional norm, to give compulsory interpretations that contravene to the Constitution and to the Constitutional Courts' decisions. From the contents of the decision clearly results that our Constitutional Court ruled on the constitutionality of the decision of the High Court of Cassation and Justice through which solved an appeal on points of law. It is a radical change of the previous jurisprudence through which constantly were rejected as inadmissible the complaints with constitutionality of such decisions.

The decision no. 206/2013 of the Constitutional Court presents a technical and practical importance for many aspects, of which we remember:

1. The Constitutional Court declared itself competent to rule on the

constitutionality of the decisions delivered by the High Court of Cassation and Justice in the proceeding of appeal on points of law, which fact changes the previous jurisprudence of the Constitutional Court. We appreciate that the solution is correct even if neither the Basic Law nor the special law for the Constitutional Court's organizing foresee expressly such a material prerogative. The legal basis is that any legal act of interpretation of such a judicial norm, mostly when it is about a compulsory judgment of a law court, cannot be dissociated by the judicial norm interpreted. In consequence, the Constitutional Court ruling on the constitutionality of the legal provisions that establish the compulsoriness of the decisions rendered in the appeal on points of law, has the competence to examine concretely any judgment of the High Court of Cassation and Justice, that confers an interpretation to a text of law and establishes a compulsory interpretation of law for the law courts. There is no „non-receiving ending" in the event that the author of an exception of unconstitutionality is invoking the unconstitutionality of a decision rendered by the High Court of Cassation and Justice in the proceeding of appeal on points of law.

2. The Constitutional Court clarifies the relationships existing between the decisions of this law court, and on the other side, the decisions ruled by the High Court of Cassation and Justice. The interpretation conferred to the infra-constitutional law texts and the compulsory interpretations of law of the Supreme Court cannot contravene either to the Constitution or to the decisions of the Constitutional Court.

3. We appreciate that new possibility opens for the notification of the Constitutional Court in the procedure of exception of unconstitutionality. Thus the participants in the civil or criminal suits or court, ex officio, may appeal to the Constitutional Court, a plea of unconstitutionality, having as object the statutory regulations, but with specific reference to a decision of the High Court of Cassation and Justice in the proceeding of appeal on points of law, if appreciated that throughout of the compulsory interpretations of the law, the constitutional regulations or the decisions of the Constitutional Court are contravened. In such a circumstance, the Constitutional Court can ascertain the constitutionality of the legal regulations mentioned in the exception of unconstitutionality, but may rule on the unconstitutionality of the decisions through which is solved the appeal on points of law, to the extent they conflict with the provisions of the Constitution or with the Constitutional Court decisions.

4. This decision, the ideas contained in the motivation constitute an argument for the legitimacy of the common law courts to examine the constitutionality of some legal acts, other than those that are subject to the exclusive jurisdiction of the Constitutional Court. Obviously the examination of constitutionality does not always equate with the right of the courts to rule on the constitutionality of such legal acts.

The recent jurisprudence of some Law Courts confirms such an interpretation regarding the possibility for the referral of the Constitutional Court with the verification of constitutionality of a law text in the interpretation conferred to it by the High Court of Cassation and Justice as a result of a settlement of an appeal on points of law.

The Court of Appeal Pitesti by the Criminal Concluding no. 876/R on December 2013 ordered the referral of the Constitutional Court with the exception of unconstitutionality raised by the Indicted, regarding the provisions of art 86/4 paragraph I in relation to item 83 paragraph

I of the previous Criminal Code, in the interpretation conferred by the decision I/2011 of the High Court of Cassation and Justice, pronounced in solving an appeal on points of law.

Relevant for our research theme are the following aspects arising from the considerations of the court decision. The judicial court held admissible the request for referral to the Constitutional Court in relation to the provisions of art. 29 Law No. 47 / 1992, republished and with referring to decision No. 206/2013 of the Constitutional Court. It held that the referral of the Constitutional Court for the exception of unconstitutionality, having as object a decision of the High Court of Cassation and Justice pronounced in the procedure of appeal on points of law, is admissible, even if the provisions of art. 146 of the Constitution and respectively, those included in the Law no. 47/ 1992 republished, do not expressly regulate such a competence of the constitutional court. The decision of the Supreme Court is an act of interpretation of a judicial norm and therefore, makes one common body with the judicial norm which they interpret. Consequently, the examining of constitutionality of the legal text has as object, implicitly the examining of the interpretative act constitutionality.

The second argument to which the court refers to in justifying the admissibility of the request for the referral of the Constitutional Court refers to the jurisprudence of the constitutional controlling court. The decision No. 206/2013 of the Constitutional Court has the value of judicial precedent in relation to which it can be argued the admissibility of the referral. It is mentioned in the decision of the Court of Appeal Piteşti: "therefore the Constitutional Court returned to its jurisprudence and ruled out that it has competence to adjudicate also over the decisions of the High Court of Cassation and Justice given in the procedure of appeal on points of law".

We appreciate as pertinent the arguments of the Court of Appeal Piteşti having into consideration the mandatory character of the decisions of Constitutional Court, in compliance with the provisions of art. 147 paragraph (4) of the Constitution. Certainly the compulsoriness of the decisions does not transform them into formal springs of law, but can be a juridical source to argue in favor of such a solution.

The case is in pending for solving by the Constitutional Court.

3. Conclusions

In relation to the foregoing, we appreciate that the judge has the possibility to notify to the Constitutional Court, for ascertaining the unconstitutionality of a decision ruled on points of law, certainly by invoking the statutory regulations interpreted throughout the respective decision, with referral to the constitutional norms violated by the High Court of Cassation and Justice through the compulsory interpretation given and, such as the case be, with referral to the decisions of the Constitutional Court whose general binding effect was not observed by the Supreme Court by the judgment ruled in resolving the appeal on points of law.

It is obvious that, under the conditions mentioned before, deduced from the contents of the decision no. 206/2013, the Constitutional Court may find unconstitutional such a decision. Worth mentioning that the decision of the Constitutional Court being binding has as a lawful consequence the cessation of the effects of the decision of the High Court of cassation and Justice for all law courts and not only for the specific case deducted concretely to the judgment. Therefore this is

another termination situation of the effects of the decisions ruled for resolving the appeals on points of law.

In the concept of the Romanian constituent legislator the control of constitutionality done by the Constitutional Court has as objective only the law as a legal act of the Parliament, or the statutory regulations with a legal force equal with that of the law. In relation to this aspect in the doctrine is claimed that the issue of the control of constitutionality does not arise in the same terms for the legal acts with administrative character or the judicial acts of the law courts. The control of lawfulness and implicitly that of the constitutionality of the legal acts issued by the administration authorities or the law courts is performed within a judicial control, in compliance with the material competences of the law courts[21].

Such a legal reality, which is determined by the rules of Constitution, leaves outside the control of legality and implicitly of constitutionality, categories of important legal documents. We consider the decisions of the High Court of Cassation and Justice in solving appeals on points of law. As noted before the decisions ruled by the Supreme Court in this procedure, throughout the solutions adopted, may be unconstitutional at least by exceeding the limits of the judicial powers. The unconstitutionality of these legal acts may consist in the unjustified restraining of the exercising of some rights and fundamental liberties recognized and guaranteed by the Constitution or in violating some of the Constitutional Court decisions.

The lack of statutory regulations that establish the control of constitutionality by means of the Constitutional Court over the decisions ruled in the procedure of appeal on points of law, is likely to allow the excess of power in the Supreme Court's activity with serious consequences on the compliance of the lawful state requirements, citizens' fundamental human rights and freedom.

There are other categories of legal acts that not only that they do not make the subject of the Constitutional reviewing but are also exempted from the judicial review. According to the provisions of Article 126 paragraph 6 of Constitution and Article 5 of the Administrative Litigation Law no. 554/2004, the acts that concern the relations with the Parliament and acts of military Command, cannot be subject to Constitutionality reviewing. This matter requires a separate analysis. In this context we emphasize only the fact the contemporary reality has shown the existence of legal acts of the executive in the relationship with the Parliament that are likely to violate seriously the letter and spirit of Constitution. The Parliamentary control of these acts is not sufficient to ensure the supremacy of Constitution and the requirements for democracy of the lawful state.

For our topic of research it is important to emphasize that there are Constitutions stipulating the competence of the Constitutional Courts to exercise the constitutionality review over other categories of individual and normative legal acts and not only on laws. Thus, the Belgian Constitutional Court is competent to exercise control, when being notified about a jurisdiction regarding the compliance with the rules for the division of powers between state authorities. The German Constitutional Court has the competence to exercise a subsequent specific control over some legal or administrative acts at the notification of the court or the direct notifying from the citizens, by constitutional appeal. Similarly, Spain Constitution on 1978 stipulated the competence of the Constitutional Court, by

[21] Ioan Muraru, Elena Simina Tănăsescu, quoted works, vol I, p. 68.

way of "de amparo" appeal proceeding, to verify the the constitutionality of some final judgments. An illustrative example is Hungary, where the Constitutional Court exercises a posteriori abstract or concrete on delegated acts and on ministerial acts.

All these arguments entitle us to support, along with other authors[22],, the proposal for ferenda law that in the light of revising the Constitution to be provided the competence of the Constitutional Court to exercise the constitutional control on the decisions ruled by the High Court of Cassation and Justice in the appeal on points of law procedure and on the legal acts exempted from the judicial reviewing. The subjects of law that may notify the Constitutional Court in such a procedure may be: the General Prosecutor of the Prosecution besides the High Court of Cassation and Justice, the People's Lawyer and courts.

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[22] See Mircea Criste, Considerations regarding the necessity to revise some texts of România Constitution concerning the Constitutional Court in the "Law" no. .6/2013, p. 152-172. The author emphasizes: "Having into consideration the effects of the decisions ruled by the High Court of Cassation and Justice in the matter of appeal on points of law and more recently of the decisions through which are given solutions in principle of some law matters, related to the experience of some European countries, we believe that should be conferred to the Constitutional Court also the competence of censoring the constitutionality of some of the High Court decisions" p 170.

THE INSTRUMENTS OF THE ENVIRONMENTAL POLICY'S ECONOMIC REGULATION WITH A PARTICULAR REGARD TO THE HUNGARIAN SYSTEM[1]

Zoltán NAGY[*]

Abstract

The paper describes the environmental policy regulation's theoretical basis in economics with a particular regard to the main elements of the theories of Pigou, Baunol and Oates, and Coase. Different analytical methods which play an important role in case of economic instruments of environmental policy are presented. The environmental objectives are going to be reached by the implementation of economic instruments and the essential considerations in the formation of an effective system of assets are also described. The theoretical basis of the implementation of economic instruments of environmental policy in the European Union and the problems emerged, and the implementation of economic instruments in Hungary in respect of the OECD Report are key features. At the end of the paper the system of the economic instruments of environmental policy (environmental taxes, environmental subsidies) are described according to the Hungarian regulations in force.

Keywords: *environmental protection, environmental law, environmental taxes, environmental subsidies, environmental policy, economic instruments of environmental policy, environmental pollution, environmental economics.*

1. The theoretical basis of the environmental policy's regulation in economics

The environmental pollution has been in the focus of the state regulations and these economic regulators act on the sustainable development and the sustainable use of the environment. These environmental problems are the parts of the externalities, which have long been interested the representatives of the economic theory of which some theories are going to be analysed.[2]

Alfred Marshall was the first, who introduced the concepts of external cost and benefits in his work the "Principles of Economics". Arthur Pigou dealt with the problem of the externalities, within this the environmental problems in "The Economics of Welfare" from 1920.[3]

The externality is an unexpected benefit and an extra cost, which is realized for the actors outside of the economic events, whom do not have any influence on these events. Any economic event, economic policy measure, changes in the domestic or the international markets, environmental or health impact can be an

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[2] Nagy Zoltán: Fenntartható költségvetési elvonások rendszere a környezetvédelem területén, Publicationes Universitatis Miskolciensis, Sectio Juridica et Politica, Tomus XXIX/1. Miskolc University Press, Miskolc, 2011. 247. p.

[3] Kerekes Sándor: A környezetgazdaságtan alapjai, Budapest, 1998. www.mek.miif.hu 73. p.

externality.[4] These external economic impacts must be taken into account during the functioning of the market. The result of the market's failure – when the market's operation is unregulated – is that the resulted allocation of factors is different from the socially optimal resource utilization. The decision of the resource user is individually rational, but this decision can be socially harmful or not optimal, which is obvious when they are using the environmental elements of the sources. The literature also highlights the causes:[5]

- the lack of information about the impacts of the use of environmental resources,
- the users of the environmental do not consider the future impact of their acts,
- unclear property rights,
- imperfect price structure,
- the diversity of the cultural and legal regulation.

We can distinguish between the externalities:[6]

- positive and negative externalities;
- production and consumption related externalities;
- reversible and one-way externalities.

The externalities can be positive and also negative, depending on their impact on the stakeholders, but also may occur that the externalities emerge together. The economic impacts can appear in the level of the consumers and also the producers.

The typical cases of the negative externalities are the consumption of the environmental sources, the pollution and the environmental burden. Within the negative externalities financial and technology types can be distinguished, which also have an environmental impact. The other classification of the negative externalities is related to the public and private goods. The externalities linked to the public goods have got more importance, because of their greater economic impact than the ones linked to the private goods. These are e.g. the polluted water and air… etc., because these sources are non-renewable. Their consumption is common and not limited. This is why it is so important to internalise the externalities, thanks to these main features.[7]

The literature also distinguishes the harmful economic impacts that they have got low or dominant ecological impacts. When these impacts are ecologically low, the ecosystem can break down the environmental pollution, irreversible damages are not produced. Contrary the ecosystem damages beside dominant ecological impacts.

The other pair of the externalities is the reversible and one-way externalities. Primarily the reversible economic impacts linked to the problem of the common goods. In this case the participants can pass the costs on each other. In the case of one-way impacts this is not possible, the one-way source consumption endangers the other participants.

According to the literature the externalities can cause significant damages in the unregulated markets and also can disrupt the functioning of the market:[8]

- the activity and the good, which cause the pollution can be excessive,

[4] Kovácsy Zsombor – Orbán Krisztián: A jogi szabályozás hatásvizsgálata, Dialóg Campus Publisher, Budapest – Pécs, 2005. 97. p.
[5] Kovácsy – Orbán (2005.): op, cit. 98. p.
[6] Joseph E. Stiglitz: A kormányzati szektor gazdaságtana, KJK-Kerszöv Kft., Budapest, 2000. 237-238. p.; Kerekes (1998.): op. cit. 74-75. p.; Szlávik János: Fenntartható környezet és erőforrás-gazdálkodás, KJK Kerszöv. Kft., Budapest, 2005. 172-175. p.
[7] Kovácsy – Orbán (2005.): op. cit. 98. p.
[8] Szlávik (2005.): op. cit. 171. p. Kerekes (1998.): op.cit. 76-77. p., Stiglitz (2000.): op. cit. 238-244. p.

- the price of these activities and goods are too low,
- the polluter is not encouraged to use environmentally friendly technologies and goods, because of the external costs of the pollution,
- the lack of the disposal of the environmental pollution inhibits the waste recycling.

Without the internalisation of the externalities the polluters establish and develop harmful activities, which also impact the society and the economy. Nowadays' modern society is not able to fully eliminate pollution, but it can be reduced to a socially, ecologically and economically optimal level. Although there is a view, which considers the optimal level as zero in special cases. For instance the environmental damage is not in proportion with the benefits from the economic activity, when a negative externality ecologically determines and endangers an ecosystem.[9]

The representatives of the economic theory analysed the problem of the environmental pollution.

Pigou gives a theoretical solution.[10] According to him the main cause of environmental problems is that the price of the use of the environment does not appear in the market price. The environmental externality can be internalised with a tax on the production, i.e. the external economic impacts can be conveyed to the ventures with tax instruments. An important aim is the development of the human environment into valued factors of production such as capital or work. As the users of the environmental try to reduce their costs, the competitiveness of environmentally friendly technologies is rising. According to Pigou state aids should be provided for those ventures, which have got a positive external effect. Pigou take a significant step with his theory, but also has got its weak points. The first is he assumes a clear competition, but it does not exist in reality. Then he assumes equality between per unit material consumption and per unit pollution, thus the taxation of the production- with the same tax - is sufficient for maintaining the balance between the consumption and pollution. It clearly shows that this theory is unreality, because the production of a good and with this production the emission of the pollutants depends on the used raw materials, technologies and environmental solutions. From the aspect of the environmental pollution there are significant differences between the alternative technologies. However the tax on the production does not encourage the spread of the technologies, which have got low environmental load.

Defining tax levels is another problem, because this relates to define the size of environmental damages. This fourth problem means a very difficult theoretical and practical problem. Pigou's theory highlights the importance of the use of economic instruments and tries to give a price, which appears in the production's costs.

In 1970s Baumol and Oates – American economists - searched for the solutions of the theory of Pigou[11]. According to them the emission of pollutants have to be taxed and not the production. They give a method for determining the size of the damages, which are caused by the pollution, and this method is suitable for determining the tax rates too. With the use of environmental taxes a minimal cost level

[9] Szlávik (2005.): op. cit. 175. p.
[10] Herich György: Nemzetközi adózás, PENTA UNIÓ Kft., Pécs, 2006. 482. p.; Kerekes (1998.): op. cit. 79-80. p.; Szlávik (2005.): op. cit. 183-186. p.; Fucskó József: A környezeti adózás klasszikus és újabb elmélete Magyar Környezetgazdaságtani Központ, Budapest, 2011. www.makk.hu (date of download: 2012. 06. 16) 1-3. p.
[11] Szlávik (2005.): op. cit. 185. p.

should be pursued. If the environmental aims are not realized, the rates of the taxes have to be modified, until the expected level of environmental quality is realized. However, it is a question, how the permanent changes of taxes impact the economic processes.

An American economist, Coase states against Pigou, that the interventions are unnecessary, because the market itself can reach the social optimum with negotiations.[12] The polluters and the stakeholders will negotiate about reducing pollution and defining the optimal level of polluting activities. With negotiations an automatic tendency is forming to reach the social optimum. So the harmed party must pay to the polluter to reduce his harmful activity. This model also has its theoretical and practical problems. The first one is the parties, because usually in a negotiation there are more than two parties and also the appointment of the parties means a practical problem. In practice it is difficult to clearly define the harmed one and the polluter, because of the lack of information. The costs of the negotiation are high. According to practical experiences the market participants are not willing to bargain or it does not sound as a solution.

However based on Coase's theory new instruments were developed in the field of economic regulators, e.g. voluntary agreements between the states and the ventures, the market of the pollution rights.

The principle of double-dividend was the prevailing conception until the first half of the 1990s.[13] It states that with a properly chosen instrument of environmental policy the quality improvement of the environment can be reached with zero cost. The double-dividend is made up by the improvement of the environment's quality and the fiscal returns. The latter means that the income from the environmental taxes allows the reduction of other taxes' levels, namely the taxation of capital, investment and labour is less desired than pollution. The representatives of this perception think that the fiscal dividend itself can verify the environmental taxation. In practice the second dividend does not always realized, because if the government wants to sustain general tax revenues does not reduce the tax rates of labour to compensate environmental taxation's negative impact on the real wages. The negative tax interaction is often bigger than the revenue recycling effect. However the double-dividend does not have to be excluded if the environmental taxation's conditions are appropriate.

Different types of analytical methods play an important role in the case of economic instruments. Among these, the essential of the cost and risk analysis methods:[14]

- cost-benefit analysis,
- cost-effectiveness analysis,
- cost-consequence analysis,
- cost-utility analysis,
- risk analysis.

During the cost-benefit analysis all of the costs and benefits are calculated and then compared. These rates are produced as the impacts of the regulation. If the social benefit is bigger than the cost, then the regulation should be implemented. The moneterisation of the costs and benefits usually experience difficulty in the field of environmental elements. The damage, which is generated in the ecosystem and the biosphere, is hard to express in cost rates, thus it can't be compared to the benefit.

[12] Kerekes (1998.): op. cit. 81-85. p.; Stiglitz (2000.): op. cit. 241-242. p.; Szlávik (2005.): op. cit. 191-197. p
[13] Herich (2006.): op.cit. 482. p.; Fucskó József – Kis András – Bela Gyöngyi – Krajner Péter – Valené Kelemen Ágnes: Ökológiai adóreform II., Magyar Környezetgazdaságtani Központ, Budapest, 2000. 3-4. p.
[14] Kovácsy – Orbán (2005.): op. cit. 99-110. p.

The cost-effectiveness analysis means the enumeration of the impacts and their costs. The aim of the analysis is to choose a rule, which in order to the impacts can concentrate the resources at the best way. (Defining the costs of environmental elements is also a problem here.)

During the cost-consequence analysis the possible costs and benefits of the alternatives are calculated and then enumerated, i.e. it gives a systematic list of the costs, which are important to know for making a sustainable regulation.

The cost-utility analysis is for comparing different types of impacts. It analysing costs, which is difficult to determine, e.g. environmental damages' cost… etc.; and also can take subjective elements into consideration.

The risk analysis shows a clear and systematic view about the impacts of the regulation, its possibility of occurrence and risks. Because of the change of ecosystem (e.g. global warming) the regulation faces many difficulties, which were not significant before, so in the future the regulation must be updated.

2. The aspects of economic regulation

The economic regulators and incentives are based on legal regulations, such as the directive instruments, but unlike these the economic regulators' incentive effect is based on economic interests.[15]

Basically the environmental beneficially activities have got more importance for the economic operators than other activities. These regulators can estimate the economic operators' benefits and costs in environmental terms. So these economic instruments can encourage the operators to use environmentally friendly solutions when they are using the environment.[16]

To establish an appropriate economic incentive system two criteria should be met:[17]

- the primary aim of the economic instruments is to represent the environmental interests,
- and these are the instruments of market organization so they collaborate in establishing fair prices.

During this process basic requirements have to be taking into account too, such as: static efficiency, dynamic efficiency, the simplicity of monitoring and execution, flexible adaption of changes in economy, social impact and political considerations.[18]

Static efficiency basically means extensive environmental protection. Efficiency is reached by standardised taxes and charges. All of the costs of the emission reduction are taken into account and after this an optimal tax and charge regime is being established.

Dynamic efficiency encourages a preventive source or source-oriented environmental protection with pointing out that the polluters can save money with polluting at a low level. It can be realised with a technological change, resettlement, taxes, charges and tradable permits. The continuous encouragement is very important to minimise the damages and to install environmentally friendly technologies. These instruments are more effective than others in reaching the optimal reduction in pollution.

The monitoring and execution are the instruments of the authorities. They can

[15] Kobjakov Zsuzsanna: A környezetpolitika eszközei, a környezetvédelem szabályozása, In: Kerekes Sándor: A környezetgazdaságtan alapjai, Budapest, 1998. www.mek.niif.hu (2012.06.06.) 98. p.
[16] Szlávik (2005.): op. cit. 175-179. p.
[17] Bándi Gyula: Környezetjog, Szent István Társulat, Budapest, 2011. 277. p.
[18] Szlávik (2005.): op. cit. 229-235. p.

measure how many data is needed to use the instrument. The importance of the criterion is rising when different polluting activities are damaging the environment in different ways. The problem of the monitoring and execution processes depends on the regulation system and the technical condition of the pollution processes.

The flexible adaption of changes in economy means if the processes of the economy changes the adaption with the instruments have to be easily flexible and the principle of environmental policy also have to be realised. In the field of the instruments the taxes and charges are less flexible than others, although the change is easier in them than to review the whole regulation system or to change the whole complex system of pollution.

Finally the social impacts and the political considerations are also important criteria from the aspect of the regulation system, because these are applied to stabilise the ethical, the distributive and the economic system. The costly instruments are less popular than others. If the budget transmits these instruments to separated funds and uses for environmental aims, their whole judgement can improve. The extent and the impact of the pollution raise ethical issues; therefore the social perception has shifted towards the regulators rather than taxes or charges. This comprehension has also changed, because the very restrictive instruments can endanger social welfare. These problems clearly reflect that the application of the economic instruments is a very hard task to do.

The European Union has also dealt with the processes and the consequences of the market-based instruments in the Green Paper.[19] The EU has been setting up ambitious goals in the field of environmental policy, but to reach them an effective system of the instruments is needed:

- climate change,
- environmental sustainability,
- to ensure the dependence on external resources,
- the competitiveness of the European industry,
- to stop the reduction of biodiversity,
- to protect the environmental resources,
- the protection of public health.

These targets can't be realised without the Member States' regulation, but the EU primarily prefers the market-based instruments to others, because of their flexibility and cost-effectiveness. The EU's target is the more intense application of these market-based instruments at national and supranational level.[20]

The economic instruments have got a lot of advantages against the traditional direct instruments:

- thanks to that internalisation of the external costs the operators can change their behaviour, reduce negative environmental impacts and increase the positive environmental impacts;
- the incentives ensure flexibility for the economic activities, so the operators can realise the aims of the environmental policy with lower costs;
- the development of environmental technologies is incited on the long run by these and it can promote the reduction of environmental impacts,

[19] Green Paper on market-based instruments for environment and energy related policy purposes – Commission of the European Communities, Brussels 28.3. 2007. {sec (2007) 388}

[20] Szilágyi János Ede: Környezetvédelem az európai uniós jogban. In: Nagy Zoltán – Olajos István – Raisz Anikó – Szilágyi János Ede: Környezetjog II. – Tanulmányok a környezetjogi gondolkodás köréből, Novotni Alapítvány, Miskolc, 2010. 51-72. p.

- an environmental related tax or fiscal reform means economic benefits in the field of employment.

The market-based instruments give specific practical tools. The Green Paper uses these instruments in a narrower sense than the theoretical system of the economic instruments. The Paper lists taxes, charges and emission-trading systems within this category. Subsidies are not listed here. The conception highlights what kind of impacts can be reached in the environmental policy's sub-areas.

The ecological sustainability, the security of supply and the competitiveness mean a great challenge in the field of energy use, that is why a more effective energy consumption, a cleaner use of energy and new technologies are needed in the future. The tax policy (energy tax) and the EU-ETS (EU Emission Trading System) have got the biggest importance in this field. In the name of efficiency the taxation have to be more linked to the aims of the policies, therefore taxation can help realise the targets of environmentally friendly energy consumption.

The environmental impact of transport is significant, particularly in air pollution, dust contamination, noise pollution and traffic jams. A general and a transparent model is needed to apply the optimal market-based instrument. Basically it helps to rate all those costs, which form the basis of the infrastructural taxes and charges. An impact analysis for all of the transport sectors and a development of a strategy can help to introduce gradually this model with internalising the external costs.

Basically the introduction of the market-based instruments into the sector of transport means the application of different types of taxes and charges, especially taxes on cars, which can incite the car-buyers to choose and buy cars with lower pollutant emission. The EU-ETS is also an applicable market-based instrument. Its application for air and surface transport has also arisen.

The European Union incites the application of market-based instruments in its policies, which is especially true for the protection of the resources and the management of pollution. The supranational harmonisation arises in cross boarder cases and if the national regulation can affect the internal market. The Green Paper mentions two highlighted areas: water and waste management. The water framework directive[21] tries to incite the efficient water-use through the price policy, thus the user has to pay the costs of environmental and resource protection. The Member States can apply taxes and charges (as Hungary does) for the removal of surface and subsurface waters and for the water-consumption. These market instruments can promote the reduction of consumption, seepage and pollution.[22]

In the field of waste management the basic aim is to separate economic growth and waste-generation. The establishment of landfill is the typical solution; therefore the taxation of landfills and waste disposal can incite waste recycling and recovery. In this respect the Member States have to cooperate in order to determine a minimum tax rate to avoid the distortion of competition and the shipment of waste between the Member States and the Regions. One of the exciting issues of waste management is the packaging materials. In this field the market-based instruments incite the sustainable consumption. The majority of the Member States use different kinds of taxes, deposit

[21] 2000/60/EC Water Framework Directive

[22] Raisz Anikó – Szilágyi János Ede: Az agrárjog kapcsolódó területeinek (környezetjognak, vízjognak, szociális jognak, adójognak) fejlődése az Európai Unióban, a nemzetállamokban és a WTO-ban. Journal of Agricultural and Environmental Law, 2012/12. 107-148. p.

and return obligations and tradable permits which are efficient if clearly shows the individual substances' environmental impact (e.g. the Danish taxation system).

Market-based instruments can be efficient in the field of biodiversity's protection. All of the three types (taxes, subsidies, and tradable permits) are used to protect the ecosystem and the individual species. Taxes, charges and permits (hunting, fishing) facilitate the sustainable protection of biodiversity. The fiscal subsidies basically mean payment, e.g. given compensations to the forest and land owners to protect forests and wetlands. The habitat banking and credits related to habitats clearly shows the transformation of environmental duties into sellable instruments.[23]

Finally the market-based instruments are applied in the field of air pollution. Beside taxes and charges on air pollution, the national emission-trading systems have got more and more importance in the reduction of air pollution. The Paper also mentions the disadvantages of the emission-trading systems, which is the critical places from the aspect of pollution.

The OECD's report from 2008 assessed the Hungarian environmental policy's performance and within this the application of the economic instruments and the OECD formulated recommendations for developing these tools.[24]

The OECD stated that Hungary increased the application of economic instruments. The report does not address all of the instruments, only deals with environmental load charge and product fees.[25]

The environmental load charge was introduced in 2004. The Report assessed this step as a positive change in the Hungarian system, because it is important to fully execute the principle of polluter pays.[26] But it also states that the relatively low extent of the charges, the given subsidies and benefits inhibit the system's efficiency. The benefits in the field of air and water pollution incited the polluter to make pollution reduction measures, facilities and technologies.

The duty to pay soil pollution charges incites the polluter to use the available utility infrastructures, so the number of the households, which were attached to the community's sewage system, is on the rise.

The product fees have facilitated positive results in waste management. The underlying reason is the application of these fees and the collection and recycling of packaging waste (e.g. refrigerator, battery). The product fee system firstly was introduced in 1995 and then in 2004 the whole system was reformed. By 2005 the collection and recycling of the waste significantly increased, namely 57 %. The Reports states an extensive development of this system for the future.

The OECD Report draws up different kinds of problems with waste management, e.g. the annual fees paid by the households. The environmental policy has to face a

[23] The Green Paper mentions the habitant banking in wetlands, which is a special, sellable trading instrument. The case of credits is a logical process: a specialized venture creates habitats, then it sells credits related to the created habitat to the developers.

[24] OECD Environmental Performance Reviews: Hungary (2008.) OECD report (date of download: 2012. 07. 10.) www.oecd.hu

[25] Raisz Anikó: Környezetvédelem a nemzetközi jogban. In: Nagy Zoltán – Olajos István – Raisz Anikó – Szilágyi János Ede: Környezetjog II. kötet – Tanulmányok a környezetjogi gondolkodás köréből, Novotni Alapítvány, Miskolc, 2010. 9-24.p.; Raisz Anikó: A környezetvédelem helye a nemzetközi jog rendszerében. Miskolci Jogi Szemle, 2011/1. 90-108.p.

[26] Bobvos Pál – Csák Csilla – Horváth Szilvia – Olajos István – Prugberger Tamás – Szilágyi János Ede: A szennyező fizet elv megjelenése a mezőgazdaságban. Journal of Agricultural and Environmental Law, 2006/1. 29-55. p.

double pressure. On the hand the significant increase of the fees significantly affects the households, i.e. it can be a disincentive force in waste management. The other problem is that the paid fees are only sufficient for the operating costs and not sufficient for the financing of the investments' needs.

The OECD formulated recommendations in the issue of the economic instruments in order to meet the environmental policy's future targets. The recommendations affect important areas. In the field of support policy the energy, source and pollution dependency of the Hungarian economy have to be improved, for this purpose the sustainable production and consumption have to be supported. The harmful subsidies for the environment should be terminated. The environmental policy should be facilitating the application of the EU grants. This requires the development of the economic and professional expertise, especially the cost-benefit analysis, strategic environmental assessment and the application of environmental integration.

The Report mentions, that the development of these instruments is not only a problem for Hungary, but for all of the Member States of the EU. The Report highlights, that the assessment of the economic instruments is a very important issue, because with this the principles of the polluter pays, and the user pays can be achieved. Their wider application means that naturally the economic and the social requirements have to be taken into account (e.g. competitiveness).

Thirdly the Report points out those other factors, which can influence the application of the market-based instruments. These are e.g. the integration of the environmental aims into the sector policies and the institutional cooperation at a national and a regional level.

The implementation review and monitoring systems influence the effectiveness of the instruments, especially the economic instruments. An appropriate scoreboard and publicity can facilitate the operation of the monitoring systems.

Beside the monitoring system, the cost-effectiveness management and enforcement capacity is necessary for the enforcement of the economic instruments. Important parts of this system are the sufficient financing and staff for the environmental management. Taking into account the OECD's Report Hungary created the National Environment Programme (2009-2014). Besides developing the economic regulatory system other important targets were defined:[27]

- development of the product fees' system, prevention of the generation of waste, increasing waste recycle, reduction of administrative burden;
- reform of consumer tariffs (energy sources – natural gas, electricity, drinking water, sanitation, water-cleaning) to incite efficient use and to cover all of manufacturing-service charges;
- reform of the water and sewer charges to prevail cost recovery of water supply and only the needy can get social based support;
- the revision of the toll system is needed to incite the highway use;
- the reform of the public procurement system;
- with reforming the subsidy's system and the traffic engineering tools the public transport has to be more attractive to improve air quality.

[27] III. NEP. 40. p.

3. The economic instruments in the Hungarian system

The economic regulation's instruments are complex and its classification system is incoherent, because as many authors deal with them as many typifying exists. And the legal regulation also does not provide a consistent system.

Our Act on Environment Protection (or shortly as we use it Kvt.) does not organize the instrument systematically and does not give an explanation for the given instrument's role in the regulation:[28]

- subsidies,
- charges to be paid after using the environment,
- procedural costs and fees,
- collaterals and insurance,
- environmental fines.

In the subsidies two types of subsidies exist: direct and indirect. Direct subsidies mean different types of exemptions and benefits on taxes, customs and fees. Direct subsidies are come from the two system of public finances, namely from the central and the local governments' budget. The Act prefers the subsidies financed by the central budget to the local governments' budget, because the Act tries to support the environmental tasks with these subsidies:[29]

- supports the environmental tasks to be performed, which we have assumed in the NEP (these are domestic and international duties);
- supports the environmental protection's measures (especially the establishment and the operation of the information system, the administrative control, the education, the research, the dissemination of knowledge and the social and environment protection activities);
- finances the measures which prevent environmental damages and the recovery-costs, which can't be devolved;
- reimburses the costs of troubleshooting and reconstruction of the environmental damages;
- if it is necessary advances the costs of immediate actions, especially the costs of troubleshooting and reconstruction of the environmental damages.

It is important to highlight that the central budget creates a specific chapter management appropriation for the different types of environmental tasks to be performed. The aim of the appropriation is to incite to create a sustainable economic structure, to prevent the environmental damages, to eliminate the damages caused, to sustain natural values and areas and to facilitate the research on environmental protection.[30]

The efficient use of subsidies can be realised with prescribing basic requirements to be performed. The literature considers the following ones as basic requirements:[31]

- marking resources,
- defining the aim of the use,
- the method of subsidising (tendering),
- proposal evaluation board,
- the criteria of requesting a subsidy,
- decision-making process,
- agreement on subsidies,
- the possibility of public participation,
- the control of use,
- legal consequences of abuse.

The Act considers the costs to be paid after using the environment as sources of financing the reduction of environmental load. The Act defines four types of these costs:

- environmental load charges,

[28] Act LIII of 1995 on the general rules of environment protection, Bándi (2011.): op. cit. 287-294. p.
[29] Kvt. 56. §
[30] Kvt. 57. §
[31] Bándi (2011.): op. cit. 293. p.

- utilization levy,
- product fees,
- deposit and return obligations.

It is important to mention that the Act regulates the charges with a framework character, i.e. other acts define the detailed rules. The Act does not deal with those taxes and charges, which are regulated by other acts, and the Act also does not place them taxonomically within the economic funds. (The Act deals with the benefits on taxes, customs and levies.)

The Act gives top priority to charges within the economic instruments. The legislator defines general rules for defining the charges:[32]

- an incentive effect: the charges' rates have to be defined for inciting the environmental-users for reducing environmental load,
- negotiation and gradual introduction: the legislator defines that charges have to be introduced gradually and have to be defined by time and rate; and the aims and measures of consumption have to be negotiated with the representatives of the interest,
- defining the aim and method of consumption: the protection of environmental elements are primarily against fiscal considerations, as the Act states that a significant part of these charges have to be paid to mitigate the environmental load.

The environmental-user has to paid environmental load charge for loading the environment. The Act defines the charge for those materials and types of energy, which have a valid measurement standard and the measure of emission can be defined technologically.

The legislator does not define detailed rules for this charge, only in special acts. The detailed rules define three types of the environmental load charges:[33]

- air pollution charge,
- water pollution charge,
- soil pollution charge.

The environmental-user has to pay utilization levy for using the environmental elements. The Kvt. does not state the detailed rules as it does before, so other acts contain them. Its rate has to be defined proportionally according to quantity used. The act states the duty of registration, data reporting and notification.

Product fee is a charge specialised on during or after using one of the elements of the environment, the production, the import and the sale of particularly threating and endangering products. The measure of the fee is defined according to the products' per unit quantity. A separate Act states the range of products, the rate of the fee and the duty of registration and data reporting.[34] A specific act exists on the readmission of the used products. If the act obligates the producers, the distributors and the importers for readmitting the products, then the fee on this product has to be paid for financing the product's utilization, the disposal and the investments for realising these activities.

Deposit and return obligations are special charges, because they are not the part of the central budget's income, so in a traditional sense they are not payment obligations. The environmental-loader and the distributor of the product have to take care of the readmission of the used product and to pay the deposit and return obligations to the take-back provider of the product.[35] So the deposit and return obligation is a part of the distributors' revenue, if the distributor does not have to refund it.

[32] Kvt. 59. § Paragraph (2)-(4).
[33] Act LXXXIX of 2003 on environmental load charge.
[34] Act LXXXV of 2011. on product fee.
[35] Government Regulation No. 209 of 5 October 2005 on the use of the deposit and return obligation.

Procedural fees and costs partially mean the administrative service fees of the administrative proceedings conducted by the environmental and nature conservation authorities and the other parts consist of the costs of the investigations during the proceedings and other administrative costs. The Act only specifies the supervision fees; we can find the other types of fees in different acts. The supervision fee is the revenue of the environmental authority, which finances the operating costs of the supervisory activities of the authority. The fee is paid by the environmental-user, whose activity is subject to authorization and notification.

The issue of collaterals and insurance are regulated in the field of environmental liability. The legislator can prescribe the duty of providing collateral when an activity impacting the environmental. We can find these instruments in specific acts, especially in acts on waste management.[36] The aim of the environmental insurance is to ensure the environmental-user's funding, if an unpredictable environmental damage occurs.

The environmental fines are special economic instruments. Firstly from the aspect of the legal consequence the fines have to be classified as direct instruments. The second special feature of them is that they are financial liabilities. Then if we consider the measure of the fine, it can be interpreted as an economic instrument, because with increasing or reducing the rate of the fine it can indirectly influence the management of environmental pollution. The Act also illustrates well its special feature, because the environmental fine is considered as a public debt, which has to be recovered as taxes. If the regulations and limits of the acts, regulatory decisions and community acts are violated, the fine is imposed by the authorities' administrative acts. Naturally the scale of the fine is aligned to the unlawful conduct's weighs, measure, period and recurrence.

The Act on Environment Protection defines the economic instruments of the environmental policy as a framework, but the regulation does not contain all of the instruments and does not also make their transparent scheme. The National Environment Programme (2009-2014) gives a more accurate regulation than the Act, because it divides the instruments to three fields (as it was mentioned before): negative incentives, positive incentives and other special incentives. Taxes and fees are the parts of the negative incentives, direct and indirect subsidies are the parts of the positive incentives. It is obvious, that the indirect subsidies are the parts of the negative incentives, but because of the tax exemptions and reliefs we have to be dealing with them within the taxes. Direct subsidies mean financial subsidies, which source can be the EU, international, the central budget or the municipal budget.[37]

The NEP divided the special incentives into two groups: the trade of pollution rights and the scheme of the collaterals. These instruments cover a wider range than the others and also forming a continuously expanding system.

The negative incentives make an excessively wide range, because besides taxes and fees, other instruments like annuities, fines and other payment obligations are included here. The trichotomy gives a good overview of the system, because this categorise the instruments, illustrates their role in the fiscal and environmental regulation, but does not cover all of the instruments.

[36] Government Regulation No. 181 of 8 July 2008 on taking back the batteries' waste.

[37] Nagy Zoltán: A közpénzügyi támogatási jogviszony a közjogi és magánjogi szabályozás metszetében. Publicationes Universitatis Miskolciensis Sectio Juridica et Politica, Tomus XXX/2. Miskolc University Press, Miskolc, 2012. 339-341. p.

ADMISSION OF GUILT IN THE ROMANIAN CRIMINAL PROCEDURE CODE. A COMPARATIVE LAW PERSPECTIVE

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Abstract

Entry into force of the Law no. 202/2010 regarding some measures to accelerate the settlement of the process, already raises a number of problems of interpretation. According to the Explanatory Memorandum of Law 202/2010 states that: "Unlike the other laws, the Law no. 202/2010 comes into Romanian legislative with the aim of speeding criminal proceedings as well as to prepare the implementation of the new codes, some of the regulations contained in future coding being found in this law." In this respect, in the explanatory memorandum to the bill it was noted that "from the major failures of justice in Romania, the harshest criticism was the lack of celerity in solving cases." As often judicial procedures prove to be heavy, formal, expensive and lengthy it was recognized that judicial effectiveness of justice consists, largely, in the speed with which the rights and obligations enshrined in judgments are part of the juridical circuit, thus ensuring the stability of legal relations to be decided.

Keywords*: simplified procedure, explanatory memorandum, article 320[1] Criminal procedure Code, admission of guilt*

I. Introduction

Entry into force of the Law no. 202/2010 regarding some measures to accelerate the settlement of the process, already raises a number of problems of interpretation. According to the Explanatory Memorandum[1] of Law 202/2010 states that: "Unlike the other laws, the Law no. 202/2010 comes into Romanian legislative with the aim of speeding criminal proceedings as well as to prepare the implementation of the new codes, some of the regulations contained in future coding being found in this law."

In this respect, in the explanatory memorandum to the bill it was noted that "from the major failures of justice in Romania, the harshest criticism was *the lack of celerity in solving cases*." As often judicial procedures prove to be heavy, formal, expensive and lengthy it was recognized that judicial effectiveness of justice consists, largely, in the speed with which the rights and obligations enshrined in judgments are part of the juridical circuit, thus ensuring the stability of legal relations to be decided[2].

The introduction of simplified procedure of **admission of guilt** was justified in the explanatory memorandum,

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[1] Law 202/2010 regarding some measures to accelerate the settlement of the process, OG. No.. 714/26.10.2012
[2] M. Udroiu P*reliminary Explanations of Law. 202/2010 regarding some measures to accelerate the settlement of the process in criminal trial*, www.inm-lex.ro

among others, by article 6 paragraphs 3 letter d) of the European Convention which guarantees the defendant the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses under the same conditions as witnesses against him. This right has a relative character; the defendant may give up his pursuit before an independent and impartial tribunal, and elect to be tried based on the evidence administrated in criminal prosecution. In this respect, the Strasbourg Court stipulated that the defendant has the opportunity to waive the right guaranteed by article 6 paragraph 3 letters d) of the European Convention and, consequently, he cannot claim that this right was violated, if the sentencing court based its decision on the statement made during prosecution of a witness (anonymously) in whose defendant waived hearing[3].

II. The Procedure Admitting Guilt. Romania

It is becoming increasingly clear that the current legislation is no able to face the criminal phenomenon in booming right now. Lately it has increased the number of events seen as crimes, the number of offenders and offenses to be investigated and dealt with too few resources.

Administration of criminal justice requires not only protection against insecurity determined by increasing crime, requiring solutions that result usually in authoritarian policies.

Applying the principle of active role enshrined in article 4 of Criminal Procedure Code, Judicial bodies have an obligation to intervene in criminal proceedings whenever necessary for legal and thorough settlement of the case, both by clarifications and explanations provided by the parties and by filling their inactivity. The active role[4] is also manifested regarding the administration of evidence, the judiciary bodies are required to have, by default, the administration of evidence necessary for a fair determination of the case. The exigencies of this principle during trial requirements are usually completed by immediacy rule, so that the first instance court is required to conduct research according to article 321 of Criminal Procedure Code, by hearing again the witnesses that were interrogated during the criminal prosecution.

Inflexible application of these principles whose violation was constantly punished by the courts for judicial review, led inevitably to the extent of the resolution of criminal cases and thus increasing state spending advanced. Defendant's attitude by recognition facts found in documents instituting the proceedings was not likely to contribute significantly to remedy these shortcomings, since the case law did not recognize a special significance of the statement attributed in relation to other evidence.

The need a retrial regulation applicable to pleading guilty was invoked in the doctrine, both as a form of recognition of a relationship of equality between the accused and the state (first offering statement recognition the second offering a procedural transaction, a second trial) and as a solution for certainty and clarity in the process of conflict resolution[5].

Accepting that the later court proceedings may prove cumbersome, expensive and therefore lack of the required efficiency, the legislator was aware of the

[3] ECHR, judgment of 28 August 1991, in Case Brandstetter v. Austria, para. 49 www.echr.eu
[4] Gheorghe Mateut, *Treaty of Criminal Procedure. General Part*, Vol I, C. H. Beck Publishing House, Bucharest, 2007, p. 174
[5] Diana Ionescu, *Warning procedure. Implications for the validity*, C.D.P. No. 2/2006, p. 40-41.

necessity to take immediate enforcement provisions, which facilitates efficient procedures and prompt resolution processes. At the same time, these legislative changes have been assigned the role to prepare the implementation of the new codes and applying the proposed solutions[6].

Therefore, by Law no. 202/2010 it was introduced in the Code of Criminal Procedure Article 320[1], titled marginal *"Judgment for pleading guilty"* and as follows:

"(1) Until the beginning of the judicial investigation, the defendant may declare personal or by authentic document that acknowledges committing facts retained in the document instituting the proceedings and request that judgment to be made on the basis of the evidence administrated during criminal prosecution.

(2) The judgment can only be based on the evidence administrated in the criminal prosecution only if the defendant states that fully acknowledges the facts established in the document instituting the proceedings and does not require administration of evidence, except that documents in circumstantial can be given at this hearing.

(3) At the time of trial, the court asks the defendant if he requires the judgment to be held based on the evidence administrated during criminal prosecution, that he knows and endorses, and then proceed to hearing the defendant, then the word is given to the prosecutor and other parties.

(4) The court shall settle the criminal action when, the evidence shows that the defendant's actions are determined and is sufficient data on the person to enable establishment a sentence.

(5) If the civil action is required to produce evidence in court, it will have its severance.

(6) Upon settlement of the case by applying paragraph (1), the provisions of article 334 and 340-344 shall apply accordingly.

(7) The court will convict the defendant, who receives one-third reduction of the limits of punishment prescribed by law for imprisonment, and one-fourth reduction limits the penalty provided by law, for the fine. The provisions of paragraphs (1) - (6) shall not apply where the criminal proceedings concerns an offense punishable by life imprisonment.

(8) In case of rejection the application, the court continues the judgment under the ordinary procedure."

With the declared aim of contributing to the establishment the judicial truth with celerity, without sacrificing the quality of justice, the new procedure allows solving cases based solely on evidences administrated during criminal prosecution and a recognizing declaration from the defendant, and possibly taking into consideration some circumstantial documents. Although it contains derogating provisions from the common law, the rule was placed in the chapter regarding the judgment at first instance, before the provisions relating to judicial investigation. Probably justified by the fact that trigger this procedure is conditioned by a statement from the defendant, made prior to the commencement of judicial examination, the questionable option of the legislator has given rise to discussions on both the legal nature of the procedure and the manner in which it will be applied during in the first instance judgment these derogatory provisions. Not surprising, but these effects have put into question the achievement of the goal amendments introduced by Law no. 202/2010, reinforcing the idea that it has to

[6] See Explanatory Memorandum to the Law no. 202/2010, available at www.cdep.ro

expedite the resolution of cases, and not accelerate the settlement process[7].

Shortly after the entry into force of the provisions of article 320[1] of Criminal Procedure Code there were highlighted different interpretations on the stages and effects of trials in this way. Regulation proved inadequate not only in this aspect, as well as the conformity with the constitutional principles on the application of more lenient[8] criminal law and the right to a fair trial in the component on the clarity and predictability of legal rules. Thus, by decision no. 1470 of 8 November 2011[9], the Constitutional Court upheld the objection of unconstitutionality of the provisions of article 320[1] of Criminal Procedure Code and found that it is unconstitutional to the extent that enforcement removes more favorable. It was also found that the final paragraph of article 320[1] is unconstitutional. Through decision no. 1483 of the same date[10], the Constitutional Court upheld the objection of unconstitutionality and found that the provisions of article 320[1] par. (1) of Criminal Procedure Code are unconstitutional to the extent that enforcement removes more favorable.

Surprisingly, the legislator complied with the two decisions. Under Article V of O.U.G.[11] No. 121 of 22 December 2011 amending and supplementing certain normative acts[12], it was ordered amendments to paragraphs (4) and (8) of Article 320[1] Criminal Procedure Code, meaning that they will read as follows:

„(4) The court shall settle the criminal side when, from the evidence administrated during the prosecution results that the offense exists, it constitutes an offense and it was committed by the defendant."

"(8) The court shall reject the application if it finds that the evidence administrated during the prosecution is not sufficient to establish that the act is exists, it constitutes an offense, and it was committed by the defendant. In this case, the court continues the proceedings according to the ordinary procedure".

Juridical nature

The provisions of article 320[1] of Criminal Procedure Code establishes a special procedure itself, having the same object at the judgment at first instance governed by article 313-360 Criminal Procedure Code, namely solving the Fund[13].

Judgment for *pleading guilty* is achieved, in principle, to a single term, only with the statement of recognition of the defendant and the prosecution evidences, possibly taking into account the circumstantial documents filed at that time. Inquiry being so limited, rightly pointed out,

[7] V. Cioclei, *About changes brought to the Penal Code by the Law. 202/2010*, Judicial Courier. no.1/2011, page 3.
[8] For the controversy on this issue see C. Ghigheci *Judgment when pleading guilty*, www.juridice.ro, I. Griga, *Reflections on pleading guilty*, RDP No. 3/2011, I. Narita *Inconsistencies and inaccuracies in the definition and application of more lenient criminal law, Law no. 9/2011*, www.juridice.ro, S. Siserman, *Discussions and reviews on trial for pleading guilty*, RDP No. 2/2011
[9] Published in the Official Gazette. No. 853 of 2 December 2011
[10] Published in the Official Gazette. No. 853 of 2 December 2011
[11] Emergency Ordinance issued by the Government
[12] Published in the Official Gazette. No. 931 of December 29, 2011
[13] A. Zarafiu, *Some questions regarding transitional and final provisions laid down by Law. 202/2010*, C.J. No. 3/2011, p 169; *Law no. 202/2010. Criminal Procedure. Comments and Solutions*, C. H. Beck Publishing House, Bucharest, 2011, p 111. The author takes special classification proper procedures and ancillary special procedures being those who settled mainly the legal criminal procedure (I. Neagu, *Treaty of Criminal Procedur*e. General Part, Universe Publishing, Bucharest, 2010, page 574).

that we are in presence of a simplified (abbreviated) procedure[14].

Procedure reduces demands the active role of the judge, who, noting the conditions and rules of evidence in recognition of criminal prosecution is sufficient to establish that the act is deemed an offense was committed by the defendant, he will not proceed to the administration of other evidence.

From our point of view, although they contain elements of negotiated Justice, the provisions regarding the judgment in case of admitting guilt do not establish a genuine negotiator procedure, which involves an active participation of the defendant interested in exchange for his conduct during the trial to reach an agreement on a solution as favorable as possible. In our case, the defendant's role is limited to recognizing the facts retained in document instituting the prosecution, and the effects of such recognition cannot form the object of negotiation, these effects being prior established by the legislator: reduction the limits of the penalty for a third in case of prison and a one-fourth for the fine. The fact that the defendant, highlighting the benefits of procedural and financial aspects of his behavior (recognition) calls for a sentence in a certain amount and / or a certain way of executing, it doesn't attribute a negotiation character to the procedure as long as the court is not bound by such requests and cannot achieve an agreement.

The defendant has the option to request the simplified procedure proceedings, signifying his recognition of adherence to prescribed conditions of the legislator, which cannot form the subject of negotiations. It is, rather, a procedure of a consensual nature. Defendant waives this right to silence and not incriminating by himself (which is not an absolute right), without that choice affecting the presumption of innocence, since the solution will be based not only on the statement of recognition, but also on the entire evidence administrated in criminal prosecution, censored by the court.

Declaration form and recognition have a meaning of a partial waiver of the right to defense. We cannot withhold a waiver of the right to defense[15], while this right is not only supporting the innocence, but also the circumstances that characterize the offense and the offender.

Conditions of the application of the simplified procedure

I. Defendant should not be charged with an offense punishable by law with imprisonment for life

According to article 320 paragraph (7) the second Thesis of the Criminal Procedure Code, provisions for admitting guilt judgment does not apply where the criminal proceedings concern an offense punishable by life imprisonment. Obviously, it is the punishment provided for the purposes of article 141[1] Criminal Code.: *penalty provided in the text of the law that incriminates the act committed in the form of consumption without considering the causes of the reduction or increase of punishment.* In this regard it is irrelevant that life imprisonment is provided alternative to prison. Therefore, the procedure for pleading guilty judgment is not applicable if

[14] M. Udroiu *Preliminary Explanations of Law. 202/2010 regarding some measures to accelerate the settlement process in criminal trials,* www.inm.lex.ro, A. Zarafiu, *Law no. 202/2010. Criminal Procedure. Comments and solutions*, p 111, I. Griga, *op. cit*., p 53

[15] As pointed out by D. Atasiei, H. Titus, *Little Justice Reform. Law no. 202/2010 commented*, Hamangiu Publishing House, Bucharest, 2010, p 309.

the prosecution regards an attempted murder in the first degree offense since, under article 176 of Criminal Code; the crime of murder in the first degree is punishable by life imprisonment[16].

If, after acceptance of the application, it has change the legal classification of the offense in an offense punishable by life imprisonment, the court shall return on the admission application for judgment, based on the evidence administrated in criminal inquiring, noting the inapplicability of Article 320^1 of Criminal Procedure, with the result of continuing the judgment according to the usual procedure[17].

If the defendant is accused of committing several crimes, of which only some punishable by law with imprisonment for life, the simplified procedure is not applicable[18], since recognition targets all facts described in the indictment. The provisions of paragraph (1) are clear in this regard *("... recognizes committing the facts found in the indictment instituting the proceedings* ..."), so, that is the wrong solution to apply the simplified procedure only for some of the offenses retained in the indictment act, on the grounds that it isn't regulated the procedural situation in the case if just for a part of the concurrent offenses the new provisions are applicable[19].

Applying these provisions, the court rejected defendant's request to proceed to judgment on the basis of the evidence in criminal prosecution and will go to trial under the ordinary procedure. In such cases it must be taken into account possibility that the document instituting the proceedings contain a wrong legal qualification of the act (example: the offense of manslaughter, as provided in article 176 Criminal Code, instead of murder offense, referred to in article 174 Criminal Code.). What would do the court in such situations?

According to an opinion, if it finds that the legal classification of the offense in a crime of aggravated murder is wrong, the classification will be changed according to article 334 Criminal Procedure Code and that will be done before the beginning of trial, to be subject to the provisions of article 320^1 of Criminal Procedure Code[20].

Although this ensures the prompt resolution of the case we do not agree with this solution. From the economy of the provisions disciplining the judgment, in the first instance, it appears that changing the legal classification cannot occur until the beginning of the trial, so that the court can retain the same offense committed retained by indictment[21]. Therefore, the court is forced to dismiss the defendant's request to proceed to judgment based of the evidence gathered during the criminal prosecution and then to distinguish if:

1) The act in its materiality was properly retained in the indictment;

Since the defendant has admitted the offense, under the other conditions imposed by article 320^1 of Criminal Procedure Code, he is not responsible for the extension of the trial, so it is fair to benefit from the reduction of the penalty limits.

2) Evidence outlines the other than the accepted facts in the referral act.

[16] I.C.C.J., Criminal Division, December. No. 250 of 27 January 2012 and 523 of 22 February 2012 (www.scj.ro).
[17] Brasov Court, Criminal Division, sent. No. 168 of 11 May 2011 (unpublished).
[18] M. Udroiu, *op. cit*., C. Celea, The *Judgment in Pleading Guilty* , RDP No. 1/2011, p 91
[19] For such a solution see Tribe. Dolj, Criminal Division, sent. No. 161 of 17 March 2011 (portal.just.ro). In this case, the defendant was indicted for crimes of murder, provided by art. 174 para. (1) Criminal Code., Attempted aggravated murder offense provided for in art. 20 rap. art. 174 para. (1) 176 para. (1). b) Criminal Code. and trespassing, provided by art. 192 para. (1), (2) Criminal Code., All applying to art. 33 letters. a) Criminal Code.
[20] Neamț Court, Criminal Division, sent. No. 63 of 17 June 2011 (portal.just.ro).
[21] Gr Theodoru, op. cit., p 689

In such a case it operates a new distinction:

a) The defendant, insincere, acknowledges wrong retained in the document instituting the proceedings.

Speaking strictly about the provisions of paragraph (1) of the article 320[1] of Criminal Procedure Code, it could be argued that in this case the defendant may plead the benefit of lower the penalty, too. This solution is not acceptable, given that the purpose of the simplified procedure, with all speed and reduce the cost of administration of justice, cannot be other than those referred to in Article 1 paragraph (1) and Article 3 Criminal Procedure Code: finding in time and completely the facts of the crime and the truth of the facts and circumstances of the case, and on the individual offender. As the defendant did not contribute to this goal, he cannot receive the legislator indulgence.

b) The defendant acknowledges as has it occurred in reality.

For the same reasons of fairness set out in point 1), although he has not admitted the offense described in a complaint, the defendant will benefit from reduced limits for punishment under article 320[1] par. (7) of Procedure Code.

The same distinction is to be considered in cases where the legal classification change occurs in remedies.

II. The defendant declare that he recognizes the facts established in the indictment act

The form and content of the declaration of recognition

According to article 320[1] par. (1) of Criminal Procedure Code, recognition may be made in person before the court or an authentic document. Considering the content of recognition, it appears that it must be express and unambiguous and cannot be deducted from a collaborative defendant's attitude with the authorities or from *nolo contendere* plea.

The statement will include both defendant admitted the facts / facts described in a complaint, and request that the trial be held in the evidence administrated in the criminal prosecution, and, therefore, having the meaning of a double act of disposal[22].

Unambiguous character of recognition requires the statement to contain a sufficiently clear expression of will by reference to the facts established by the intimation of the court, requesting that the judgment be made on the basis of the evidence during the criminal investigation, accurate knowledge of properties of these samples and renunciation of administration other evidence except the circumstantial documents that may be filed on time. These conditions must be met cumulatively, considering that defendant statement is not only a formal act, but also a substantial background[23]. If for recognition made in person in court without some of these items it can be complemented by the defendant questions, if performed by authentic document recognition, it should contain all information given above for the trial to take place in the absence of the defendant, under the simplified procedure[24]. If authentic document does not contain all the particulars and the defendant fails to appear in court, the penalty can only be the refusal to adjudicate

[22] A. ZARAFIU, Law no. 202/2010. Criminal Procedure. Comments and solutions, p.112
[23] V. Puşcaşu, *Presumption of innocence*, Legal Universe Publishing House, Bucharest, 2010, p 334.
[24] C. Rosu, A. Fanu-Moca, *A special court procedure governed by art. 320 of the Code of Criminal Procedure*, Law Review no. 8/2011, p 179.

under the provisions of article 320[1] of Criminal Procedure Code[25].

The holder recognized can only be defendant personally and not by proxy[26] (even special mandate provisions of par. (1) - (3) is clear in this regard).

Minor defendant's situation is gentle. If the regulation of the new Criminal Procedure Code is precluded application of the judgment in the case of admission of guilt and plea agreement and juvenile defendants[27], article 320[1] makes no distinction in this respect.

According to some opinions, confessions can be made by the minor defendant with the special provisions relating to the summoning persons called at the trial of minors[28].

The criticism of this view is based, on the one hand, the nature of the declaration provision act of recognition, on the other hand on the impossibility of applying the provisions of the two concomitant special procedures themselves: that governed by Article 320[1] of Criminal Procedure Code and those covered by article 480-493 of Criminal Procedure Code[29]. Consequently, the simplified procedure would not apply to defendants who were minors at the time of committing the offense, even if the recognition would be approved by the legal representatives.

From our point of view, the simplified procedure is applicable where defendants are minors. Article 320[1] defendant is not distinguished as major or minor, and automatically reducing the limits of punishment referred to the cited author does not operate under the provisions of the special procedure in cases involving juvenile offenders, but the basis of the sanctioning regime of the minor contained in the Criminal Code. In addition, the solution of inapplicable simplified procedure might prove unfair to the accused minor compared to the major for the same offense, by the game of mitigating circumstances he could reach the same penalty applied to minors. It might be objected that in such circumstances the court may retain mitigating circumstances in favor of the minor but this operation of individualizing appears forced, since article Criminal Procedure 320[1] of Code expressly provides the solution.

The goal and limits of recognition

Align. (1), article 320[1] of Criminal Procedure Code refers to the recognition of the facts found in the document instituting the proceedings, while the marginal name of the article speaks of the confession. Inconsistent legislator asks whether object recognition is described in the document instituting the act or offense forfeited by this act.

Although marginal name seems to lead to the conclusion that the defendant should acknowledge the offense which it was found by the intimation of the court (offense committed with guilt as required by the text of the indictment), so the content of article 320[1] of Criminal Procedure Code, and the provisions of Law no. 24/2000 regarding the legislative technique for drafting regulations[30] indicate that only object

[25] C. Celea, *op.cit.*,p 93
[26] C. Celea, *ibid*., p 91.
[27] Article 374 refers to a solution of conviction of the defendant receiving a sentence reduction limits, or, in accordance with the minority in the new Criminal Code, against juvenile defendants can only be taken educational measures. The art. 478 para. (6) of the new Code of Criminal Procedure stipulates that juvenile defendants cannot have plea bargain agreements.
[28] M. Udroiu, *op. cit*. p 34
[29] A. ZARAFIU, Law no. 202/2010. *Criminal Procedure*. *Comments and solutions*, p 113.
[30] Republished in OG. No. 260 of 21 April 2010

recognition described in the document instituting deed. Thus, the paragraph (1) - (8) of Article 320[1] refers only to recognize the offense and provide the possibility to change its legal classification and the distinction between tort and crime is clearly stated in paragraph (4). In the name of marginal significance, Law no. 24/2000 states that, although marginal expressing synthetic object names article did not have its own significance in regulating the content of [article 47 paragraph (5)].

We believe that *"the act described in the document instituting"* the legislator has considered both the acts described in the indictment rule and all circumstances that characterize it. This conclusion emerges from the provisions of par. (4), article 320[1] of Criminal Procedure Code which both operated as before amendment by EO No. 121/2011 and in its current form, the criminal settlement conditional on the existence of sufficient evidence to characterize the crime scene, and the purpose of the whole procedure (prompt resolution of criminal cases), whose realization requires, besides a sufficient proof to retain the offense, for the sentence sufficient data. In other words, it demands that the facts described in the indictment. In this regard, it was decided that if the trial was conducted according to the procedure regulated in article 320[1] of Criminal Procedure Code, if the document instituting the proceedings prosecutor withheld mitigating circumstance provided legal challenge in article 73 letters. b) Criminal Code on both offenses for which the defendant was indicted on the basis of the evidence in criminal prosecution, the court cannot invalidate the provisions of article 73 letters. b) Criminal Code for one of the offenses in the absence of judicial investigation showing a change in the status quo retained in the document instituting the proceedings[31].

On the other hand, the fact challenge the judge may be detained even if was not accepted as such by the indictment, the only condition being that the incidence determining the state of the evidence challenge during prosecution[32]. If the defendant's request to be tried under the simplified procedure is merely formal it really challenging circumstances relating to the objective side of one of the offenses for which he is prosecuted, not the provisions of Article 320[1] of Criminal Procedure Code[33].

It follows that, in reality, the contradiction between the marginal and the content name of article 320[1] of Criminal Procedure Code is only apparent, the defendant is held to recognize all the relevant factual circumstances, including those that lead to the determination of guilt. Therefore, we can talk and an implicit acknowledgment of guilt. From this perspective it would not be wrong or the words *"recognition of allegations"*[34].

According to article 320[1] par. (2) recognition covers all the facts found in the document instituting the proceedings. Partial recognition, which may be in recognition of the offense in other circumstances or otherwise[35], be just recognition of facts from those described in a complaint, make inapplicable the simplified procedure, but can be harnessed as a mitigating legal[36].

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[31] I.C.C.J., Criminal Section, Decision no. 2334 of 9 June 2011 (www.scj.ro).
[32] Appellate Court of Cluj, Criminal and Juvenile Division, in December. No. 188 of 24 October 2011, (www.curteadeapelcluj.ro).
[33] V. Văduva, note in December. No. 1115 of 6 June 2012 Bucharest, Criminal Section I, *Judgment for pleading guilty. Jurisprudence commented*, Hamangiu Publishing House, Bucharest, 2013, p 71.
[34] I. Celea *op. cit*., p 167.
[35] C. Celea, *op. cit*. p 92.
[36] A. Zarafiu, Law no. 202/2010. *Criminal Procedure. Comments and solutions*, p 113

For situations where the same indictment has ordered the prosecution of several persons, it was shown that, in relation to article 263 paragraph (1) Criminal Procedure Code, recognition by one of the defendants neither does nor refer to the others[37]. The conclusion is only partially correct because it overlooks crimes ventures, where the defendant recognition should also refer to the contribution of the participants, in order to be possible to establish his own contribution to the commission of the offense.

The defendant is not required to recognize and civil claims brought[38]. In principle this claim is correct, including the offenses of injury. If contesting the amount of damages, it is possible severance civil action under article 320^1 par. (5) Criminal Procedure Code. The provisions of the simplified procedure may however prove difficult to apply in situations where a certain amount of the damage award aggravated nature of the crime when the criminal case settlement itself depends on the determination of injury.

III. The defendant should require the trial to take place only on the basis of the evidence in criminal prosecution, he knows it endorses

Formulating this request, the defendant waives the right to question unambiguously witnesses in court. Quitting is not contrary to Article 6 paragraph 3 letter. d) of the European Convention on Human Rights, the right enshrined in these provisions having not absolute character.

Defendant's request is accompanied by an indication that he knows and adopts the evidence in criminal prosecution. The specification is necessary because waiving the public hearing of witnesses must be made knowingly.

To enable the defendant to make an informed choice option, the indictment must be clear and comprehensive, just respecting the structure shown in article 263 Criminal Procedure Code. Checks on the document instituting must be carried out from the perspective of a possible request to be tried on the evidence given in criminal prosecution.

Alin. (1), article 320^1 clearly requires that the statement of recognition should be accompanied by a request to be tried on the evidence given in criminal prosecution. Consequently, the mere statement of recognition is not sufficient for proceedings under the simplified procedure, in the absence of expressions of the will of the defendant.

Finally, it was noted that the defendant expressly requests payment situation, having previously requested the application of Article 320^1 of Criminal Procedure Code[39]. Supporting the view that these provisions are not automatically compatible with any payment solutions, the author believes that such procedural position of the defendant revokes, cancels the original manifestation of will which should remain irrevocable throughout the process.

The proposed solution is not entirely correct, requiring some clarification. We have shown previously that the declaration of recognition of the defendant aimed facts accepted by the document instituting the proceedings. Return over this lack of certainty recognition manifestation of will for trial based on the evidence given in criminal prosecution as no longer he supports the evidence that the defendant appropriates. All of a return on recognizing it and asks where the defendant was

[37] C. Rosu, A. Fanu-Moca, *op. cit*., p 180.
[38] D. Atasiei, H. Titus, *op. cit*. p 308
[39] F. Radu, *On the compatibility between different confessions and payment cases* (www.juridice.ro).

acquitted on the grounds that contradicts (fully or partially) the facts accepted by the indictment, namely those provided by article 10 letter a), b), c), d) and e) C.pen. Therefore, we can speak of a revocation or cancellation of events that will, with the consequent trial in normal.

IV. Declaration of recognition to intervene before the judicial inquiry

From the wording of paragraph (1), article 320[1] of Criminal Procedure Code results that recognition that the declaration can only be made at first instance and the onset of inquiry. It thus establishes a limitation period[40], whose violation is punishable as a belated rejection of the application to be tried under the simplified procedure[41].

These sanctions will only intervene if it is attributable to the defendant's failure to comply. Therefore, if one of the defendants lacked justified the term at which the co-defendant admitted to adjudicate claims under the simplified procedure, he can still benefit from article 320[1] of Criminal Procedure Code[42].

In light of the considerations and decision no. 1470 of 8 November 2011 the Constitutional Court, the provisions of article 320[1] of Criminal Procedure Code cannot be applied to enforcement appeal procedure. According to article 461 Criminal Procedure Code, the appeal against a final criminal judgment may be enforced when a judgment was not final when implementation is directed against another person, when any doubt arises on the decision that run times any impediment to the execution or when invoke amnesty, prescription, pardon or any other cause of extinction or a reduction in sentence, and any other incident arose during the execution. It follows that in this way cannot invoke merits issues that can be resolved only in the remedies provided by law. 320[1] Code of Criminal Procedure. Article 320[1] establishes a legal cause of lower limits of punishment, but this question concerns the sentence, taking the merits operation that cannot be achieved in an enforcement complaints.

Doctrine and practice have discussed two special cases of when to intervene in the statement of recognition.

1) Judgment set aside or quashed by first sending the case back to court under Article 379 point 2. b) and article 385[15] point 2. c) Code of Criminal Procedure.

In these situations retrial will take place according to the rules governing the court of first instance, so are the applicable provisions of the Article 320[1] of Code of Criminal Procedure., but not in all cases, but by abolishing limits final judgment and procedural act indicated as valid judicial court[43]. Therefore, a retrial could take place under the simplified procedure only in cases where at least the criminal side and was not maintained any procedural act performed on the occasion of judgments. Article 320[1] Code of Criminal Procedure is not applied in cases where the first-instance judgment was closed / disposed only in the civil side.

Note that in this way can benefit from article 320[1] of Criminal Procedure Code persons definitively convicted, to the extent that appellate effects were extended to them.

[40] S. Siserman, *Discussions and reviews on trial for pleading guilty*, Criminal Law Review No. 2/2011, p 81
[41] D. Atasiei, H. Titus, *op. cit.*, p 307; A. Zarafiu, Law no. 202/2010. *Criminal Procedure. Comments and solutions*, p. 112, C. Celea, *op. cit*., p 93.
[42] Appellate Court of Constanta, Department for criminal prosecution and juvenile and family in December. No. 30 of 15 March 2011, presented by V. Văduva, *op. cit*., p 55-56
[43] S. Siserman, *op. cit*., p 81, C. Rosu, A. Fanu-Moca, *op. cit*., p 183.

2) The retrial in the case of extradition or surrender under a European arrest warrant

By a decision of this case, ICCJ retained that the art 320^1 of Criminal Procedure Code shall also apply in case of extradition or surrender under a European Arrest Warrant, provided in article522^1 of Criminal Procedure Code[44].

The solution was separated from the interpretation of article 522^1 par. (2) Criminal Procedure Code., that the provisions contained in article review procedure in article 404-408 of the Code, including the provisions of article 405 paragraph (1) shall apply as appropriate and according to article 405 paragraph (1) Criminal Procedure Code, retrial after acceptance in principle of the request for review is made according to the rules of procedure on the judgment at first instance. However, the rules of procedure for the trial of first instance are contained in Article 313-360 Criminal Procedure Code, who under law shall be applied in a retrial after extradition. The provisions of article Criminal Procedure Code 320^1 are covered by Article 313-360 Criminal Procedure Code and are the rule of procedure of adjudication in the background, not understanding the legislator to exempt from the application of the retrial after extradition proceedings.

V. Reasons administered during prosecution are sufficient to establish that the act is deemed an offense was committed by the defendant

From article 320^1 par. (4) (original form) results that the simplified procedure is applicable only if the evidence gathered during criminal defendant, the facts are established and sufficient data on the person to enable establishment of a sentence. To meet the requirements of clarity and predictability whose lack was notified by the decision of the Constitutional Court no. 1470 of November 8, 2011, the contents of this text was amended by EO No. 121/2011, on the application of the simplified procedure when the evidence administrated during the prosecution results that the offense is deemed an offense was committed by the defendant.

Sufficiency of probation is to be considered as a quantitative and qualitative, of legality. This is because the rule that evidence obtained illegally cannot be used in criminal proceedings applies in any proceedings, without distinction as to whether it is ordinary or special. Renal probation may not be complemented or covered by the statement of the facts the defendant recognition[45].

When this condition is not met, the court will reject the request to be tried on the evidence given in criminal prosecution. Where insufficient evidences are found only on the occasion of deliberation, the case will be relisted and judged in a normal way[46].

There was concern that this solution does not result in unfair treatment for defendants who, although made the declaration and recognizing in the time required by law and calls for judgment to take place under the simplified procedure will not be tried in this case for reasons not attributable to them. According to some authors, this difference in treatment is justified[47] and even if the trial took place following the usual procedure of refusal defendant will benefit from reduced limits of

[44] Decision. Nr. 3369 of 3 October 2011, www.scj.ro.
[45] A. Zarafiu, Law no. 202/2010. *Criminal Procedure. Comments and solutions*, p 113
[46] M. Udroiu, *Explanations*…, p 56
[47] C. Ghigheci, *Judgment for pleading guilty*, www.juridice.ro, S. Siserman, *op. cit*., p 83.

punishment. From our point of view, it might retain discriminatory treatment only if the defendants admitted the facts described in the document instituting proceedings and called on the evidence given during the prosecution (having therefore conduct that would justify simplified procedure), request that was rejected for this analysis, benefit in reducing the final boundaries of punishment. Through rejection does not violate the right to a fair trial or the principle of equality before the law, because it is not the case of similar or even identical situations, the situation on which the evidence of the defendant's criminal prosecution is completely legal and cannot be compared with that given to the defendant for which these requirements are not met. In the latter case the court is required to establish the truth to remove the risk of unfounded or unlawful conviction.

Another issue that should be discussed is the possibility of the defendant to return to his manifestation of will to be tried under the simplified procedure (of course, after acceptance of his application), and if so the terms and timing of the procedure can intervene this "disclaimer".

According to opinions expressed in the case law, the provisions of article 320^1 of Criminal Procedure Code precludes waiver option during trial to trial based on the evidence administrated in the proceedings in the criminal prosecution, since such a possibility is not expressly provided, as if to appeal or waiver[48]. More so could not intervene in the appeal waiver defendant because it would worsen the situation in their appeal.

We do not believe that this solution is correct. The lack of an express provision of abandoning an application not in all cases lead to the inadmissibility of such options relevant in this regard is the decision no. XXXIV/2006 the High Court of Cassation and Justice, United Sections, which established that the court seized of requests for postponement or interruption of the sentence, review and challenge the performance, if their withdrawal, will take note of this manifestation of will, although this is not expressly provided. It might be objected that this waiver would be in defendant who judged the usual procedure, it would not benefit from reduced limits of punishment. The objection, however, cannot be accepted as the basis for simplified procedure can not only be a manifestation of free will and conscious, these conditions can only speak of a benefit to the defendant. It is possible that due recognition to the constraint (exercised, for example, by the true perpetrator of the offense) or perceptions of the consequences of mismanagement trial based on the evidence in criminal prosecution. Insofar as defendant alleges and proves such circumstances, the court is required to establish the inapplicability of article 320^1 of Criminal Procedure Code. The consequences of these findings will be different when the report comes. In the first instance proceedings shall continue according to the usual procedure. On appeal or recourse solution can only be abolished, that sentence quashed by sending the case back to that court, considering that research is lacking in the first instance court and the parties cannot be deprived of this instance.

III. Aspects of comparative law

1. In **the Italian Criminal Procedure Law**, the Code of Criminal Procedure of 1988 introduced the institution of applying the penalty at the request of the parties, regulated by article 444-448, with the last

[48] Appellate Court of Ploiesti Criminal Division for cases involving minors and family in December. No. 29 of 24 February 2012, portal.just.ro.

major changes made by Law no. 134 of 12.06.2003.

The Italian name is *patteggiamento*, translated, in this context, by *agreement, understanding, or a result of negotiations*. The procedure itself takes place between the Prosecutor and the accused, in which the latter is subject voluntarily to the penalty enforced under the terms of the agreement that meets the expressed desire of the prosecution and defense, with no importance regarding who was the initiator of the procedure.

Given the change in 2003, Italian literature[49] notes that there are two types of guilty plea procedures.

The first is an *ordinary patteggiamento*[50] and aims at offenses for which the punishment, likely to be imposed under the agreement, will not exceed 5 years. It also bears the name of *patteggiamento allargato* given the relatively wide field of application.

The second procedure is limited to narrow facts of high gravity or situations involving a higher degree of hazard of the offender. In this case, the punishment applied by way of agreement may not exceed 2 years.

Regarding the first typology, about allargato procedure, the ***field of application*** of the institution is provided by article 444 and requires three ranges: the first is found in paragraph 1 and is given by the maximum sentence applicable to the offense or offenses subject to referral to the court and shall not exceed, reduced by more than a third, five years of imprisonment, whether cumulated or not with a financial penalty. An example of a situation where the legal maximum may be higher and yet it can attract the incidence of this institution is the existence of mitigating circumstances that reconfigure the limits of punishment, and the maximum effectively applied, reduced by one third, shall not exceed 5 years[51].

The following paragraph sets the second limit, an objective one, arising from the categories of crimes that do not support the applicability of the *allargato patteggiamento:* mafia associations, kidnapping for purposes of extortion (whether these facts are consumed or tempted), trafficking and association to traffic narcotics and psychotropic substances, smuggling and terrorist activities (either tempted form or consumed form). If a legal action falls into one of these offenses, allargato patteggiamento application is not possible, but it remains possible to apply the restricted form, the *patteggiamento piccolo*[52], providing only that the penalty imposed after the agreement shall not exceed 2 years. Given in abstract the danger in this type of crime and punishment limits generally high, the presence of mitigating circumstances is required in order to reach, in theory, the actual punishment of 2 years.

The third limit is a subjective one and is governed by the second sentence of the same paragraph, excluding from the applicability domain of the extended procedure the individuals that were declared

[49] F.Peroni – *The new regulation in the matter of enlarged agreements and substitutive sanctions* (original: *Le nuove norme in materia di patteggiamento "allargato" e di sanzioni sostituve*), in *Diritto penale e processo penale*, 2003, pag. 1067

[50] J.Pradel – *The guilty plea. A confrontation of American, Italian and French laws* (original: *Le plaider coupable. Confrontation des droits américain, italien et français*) in *R.I.D.C.* no. 2/2005, pag. 477

[51] M.Maniscalco – *The guilty plea agreement* (original: *Il patteggiamento*), Ed. Utet Giuridica, Torino, 2006, pag. 30

[52] E.Di Dedda – *The consensus of parties in the criminal trial* (original: *Il consenso delle parti nel processo penale*), Ed. Cedam, Milano, 2003, pag. 8

"habitual"[53] delinquents, "professional"[54] delinquents, "per tendenza"[55] delinquents or reiterated recidivists[56]. In literature[57], this limitation is explained by the fact that the Italian legislator had no intention to allow qualified offenders to exploit the provisions that have the character of an award, due to their demonstrated inability to move away from criminal tendencies.

The legal text uses the phrase "*siano stati dichiarati*,"[58] but it must not induce the appearance of a declarative nature of the offender qualification in one of the ways mentioned above, and in this respect, Italian case law recognizes the *constitutive character and not declarative* of the decision on the status of the delinquent[59].

Even for these types of criminals the restricted procedure can operate, as long as the penalty imposed under the guilty plea procedure will not exceed 2 years.

The initiative for starting the negotiations can belong to any party, but in the absence of consensus, an agreement can not be presented to the judge. Given the award nature of this procedure, criminal law literature[60] considers that the Prosecutor's refusal to conclude the agreement, allows the defendant to propose a penalty which he would have been willing to execute, and, after the judge debates, if it considers that the proposal adequate, will render a decision in this regard, according to article 448, paragraph 1, second sentence. Therefore, it can be argued that in the absence of commonly accepted establishment of a penalty, the judge will censor the Public Ministry's refusal to accept the proposal of the accused to the extent it deems appropriate.

Regarding the ***content of the agreement***, an analysis of paragraph 1 of article444 of the Italian Code of Criminal Procedure is necessary.

First, the type and quantum of the sentence applicable must be established, because it regards the main element on which the agreement will be achieved, and failure to establish those coordinates makes it impossible to ask for an alternative or lower sanction, as was decided in Italian judicial practice[61].

Indication of the net amount after reduction by a third of the penalty provided by law generated inconsistent practice in Italian courts in the early entry into force of the current Criminal Procedure Code in 1989. Standardization has occurred through a decision of the Court of Cassation[62], stating that the provision of article 444 shall

[53] This category is regulated by the provisions of art. 102-104 of the Italian Criminal Code, and represents the situation in which an individual commits in an interval of 10 years a new crime of the same nature with others previously committed with the condition that there will be at least 3 or 2 of these type so that habituality will be established by legal provision or by the judge.

[54] This category of delinquent is covered by the provisions of art.105 of the Italian Criminal Code, and represents the situation in which an individual commits a number of crimes of o certain type which provide for his existence or his main means of existence.

[55] Art.108 of the Italian Criminal Code define this category of delinquents as those that do not fit the previous categories, that are not recidivists and that have committed an intentional crime against the life or integrity of an individual and that reveal a special incline toward crimes due to the way of life and behavior of the delinquent.

[56] Perpetrators that were already recidivists due to previous convictions at the moment the crime was committed. This institution is regulated by art.99, paragraph 4 of the Italian Criminal Code.

[57] E. Di Dedda, *op.cit*., pag. 6

[58] In English "that were declared".

[59] The Italian Court of Cassation, United Sections, 28.06.1988 quoted by E. Di Dedda, *op.cit*., pag. 6

[60] M.Mercone – *Criminal Procedure Law* (original: *Diritto processuale penale*) ed. 12, Ed. Simone, Napoli, 2004, pag. 534

[61] Italian Court of Cassation, 3rd Section, 25.02.1993, in M.Maniscalco, *op.cit*., pag. 29

[62] Italian Court of Cassation, United Sections, 24.03.1990, in M.Maniscalco, *op.cit*., pag. 30

be interpreted in the sense that the reduction can not exceed one third of the limits of penalty and not in the sense that the penalty applied will only reach a third of the limits provided by the substantial law.

The decision was altered by subsequent case law[63], recognizing the possibility of reducing the already diminished limits by effects of other institutions (ex. extenuating circumstances or special causes of sentence reduction), therefore, it can lead to a sentence effectively applied close to the general minimum of penalties.

Also, the type of penalty should be established by the agreement, given the possibility of alternative sanctions provided by law for the offense. According to article444, paragraph 3, the content and execution of the agreement may be provided in the form of probation, and if the judge, when presented the agreement, finds non-compliance to suspend, refuses the application.

If multiple offenses are committed on the same occasion or by the same act, Italian literature[64] recognizes a distinction involving the type of concurrence actually achieved. In case of material concurrence for offenses subject to trial in the same process, the accused is allowed to negotiate penalty for each of them or only some, provided that, taken individually, the penalties for all acts are constituted by imprisonment not exceeding five years with or without a financial penalty also applied, the amount of which is not relevant to the special procedure itself. The situation is different if the facts are subject to a continuous crime or formal concurrence, when the accused may request a single penalty for all, up to 5 years without the possibility of settling an agreement only for some of them.

After consensus between defense and prosecution over the content of the agreement, it is brought before a judge, who, if satisfied by the conditions of *eligibility and appropriateness*[65] of the penalty, pronounces a sentence in accordance with the agreement.

The main ***effect of the agreement***, once accepted by the judge is the sentencing to a certain penalty as agreed by the parties in both types of procedure, both the enlarged form and the narrow.

In the latter case, the defendant will be exempted from payment of legal costs for enforcing the sentence and security measures except forfeiture of goods regulated by article 240 of the Italian Criminal Code. Equally, for the restricted form, the institution of *conditionally extinguishing the offence*[66] operates, if the accused does not commit within 5 years, for misdemeanors, and two years, in the case of minor offenses, a new offense.

A common effect of both types of procedure is given by the absence of inclusion of references to the criminal record of the perpetrator[67]. This is due to the nature of the sentence which admits the agreement itself is not a conviction[68], and has no

[63] Italian Court of Cassation, United Sections, 01.10.1991, in M.Maniscalco, *op.cit*., pag. 30
[64] M.Maniscalco, *op.cit*., pag. 5a3
[65] According to the Italian Constitutional Court's Decision no. 313/1990, the judge will not only state on the eligibility of the case for the *patteggiamento* procedure, but will also rule on the appropriateness of the sentence proposed by the two parties.
[66] "*l'estinzione del reato*" is a criminal law institution, regulated by art.167 of the Italian Criminal Code that aims at extinguishing the effects of the misdemeanor if, in a given time period, the perpetrator does not commit another misdemeanor of the same nature.
[67] M.Maniscalco, *op.cit*., pag. 220. Another opinion in J.Pradel, *op.cit*., pag. 481, according to who the provision in art. 445, alin.1bis that states "the sentence is the equivalent of a conviction", implies that there is a need to register the sentence in the criminal record of the convicted person.
[68] J.Pradel, *op.cit*., pag. 481

relevance in case of a civil law trial. Therefore, the criminal sentence pronounced in the procedure of *patteggiamento* does not act as *res judicata* on any items of a civil lawsuit.

Agreement between the Prosecutor and the accused only effects on the criminal side of the proceedings therefore, the civil side can be seized on a separate path, even in the absence of a criminal rulings. The judge, therefore, will not rule on granting civil damages, this being expressly prohibited by article 444, paragraph 2, second sentence. Nothing prevents, however, civil litigation settlement on an alternative route before submitting the agreement to the judge that will acknowledge that the civil action is not promoted.

The sentence pronounced after *patteggiamento* is only subjected to the appeal of the Prosecutor when it did not consent to the agreement, in other cases, this being a final ruling.

Overall, the Italian legislation has undergone a long series of legislative changes in the 24 years of existence, currently reaching a level of procedural maturity which does not eliminate the possibility of criticism and recommendations, but offers at least one example of an operational system likely to be taken, with corresponding adjustments, in other criminal legislations.

2. **In the French system**, by the Law no.204 of 9 March 2004 the procedure of appearance after prior recognition of guilt was introduced. The regulation is found in the French Criminal Procedure Code Section VIII, of Title II of Book II, between article495-7 and article495-16.

The French name is *reconnaissance préalable de culpabilite*, which means *preliminary recognition of guilt*. The procedure itself involves *acceptance* by the accused, of the public prosecutor's proposed penalty for the offense which is the subject of a criminal investigation and *subsequent approval* of the acceptance by the competent judge.

The ***applicability domain*** is regulated in article 495-7, therefore, this procedure can not be used unless the law provides for the misdemeanor in discussion a punishment up to 5 years imprisonment or a fine[69]. Complementary penalties have no bearing on the determination of the applicability domain[70].

There is an objective limit of the applicability of the procedure, namely article 495-16, which excludes offenses under earlier provisions made by the press, unintentional homicide[71], political offenses and those pursued under a special law. Equally, the procedure does not apply to voluntary or involuntary attacks of the integrity of a person and sexual offenses regulated between article 222-9 and 222-31-2 of the French Criminal Code, according to article 495-7.

A subjective limitation is made by article 495-16 prohibiting the procedure for juvenile delinquents given their inability to be part of a commitment that can attract a criminal conviction, without being offered the guarantees inherent to a criminal trial conducted in full. Moreover, judicial

[69] In the French system, the criminal illicit is divided in *crimes, misdemeanors and minor offence*s. Only for misdemeanors the admission of guilt procedure can be applied, because for an act to be qualified as a *crime* the punishment imposed by law should be greater than 10 years, and for minor offences, there is no special provision in art.495-7 of the French Criminal Procedure Code.

[70] The applicability domain is quite similar to that of another special procedure, *the penal composition* (original: *la composition penale*), but the procedure we are analyzing is suited better for misdemeanors with a higher degree of severity - M.L.Rassat - *Criminal procedure (*original: *Procédure pénale)*, Ed. Ellipses, Paris, 2010, pag.383

[71] Intentional homicides are not mentioned because they are punishable by more than 5 years.

practice[72] has stated that people who have been referred to the Criminal Court by order of the judge[73] cannot be subjected to this mechanism, therefore, the accused persons that can benefit from this procedure are the ones that appeared before the prosecutor or have been quoted directly or convened.

There are also certain rules regarding the penalties required by the prosecutor on the proposal. Therefore, if the penalty required is a fine then the limits are prescribed by law for this and there are, thus, no special restrictions. If, instead, the penalty required is imprisonment, it will be limited to two thresholds: cannot exceed one year but also may not exceed half the punishment prescribed by law for that offense[74]. The prosecutor may formulate proposals even regarding the suspending of the penalty or make a proposal on the measures of individualization provided by article712-6 (execution of sentence in semi-freedom, fractionation and suspended sentences, placed under electronic surveillance, parole and conditioned freedom).

Regarding the ***content of the procedure***, as there is no such thing as an agreement between the prosecution and the defense, as result of a negotiation, the effects occur by acceptance of the proposed penalty followed by approval of the judge.

The initiative to start the procedure, as shown in article495-7, belongs to the prosecutor ex officio or at the request of the investigated person or its lawyer.

In particular, there are three steps towards successful completion of the procedure when the prosecutor opted for its initiation. Assuming that he has proceeded *ex officio*, the accused would appear personally and assisted by a lawyer, and on this occasion he will specify if he pleads guilty to the offense he is being charged as a first step. In this regard, the accused will give a written statement accepting. If he does not recognize the facts imputed, the special procedure ends and the process will continue in the normal procedural mechanism. For the procedure to be initiated by the prosecutor to the defendant's proposal, it is necessary for the latter to send a registered letter with acknowledgment of receipt by the Public Ministry, in which he pleads guilty to the offense committed, and calls into question the prosecutor's application of the procedural path. This letter represents the equivalent of the first stage when the prosecutor does not proceed with the initiation of the procedure. Equally, this letter will have probative value of a document that provides a full confession.

The second stage is common, regardless of how the procedure was triggered so since the accused has pleaded guilty, brought before the prosecutor, the latter shall notify the punishment or punishments that the judge will be required for the confessed facts. The object of the notification will be represented by the means of individualization of execution, therefore, the prosecutor may ask either for a conditional suspension of the sentence or for the immediate enforcement or for the sentence to be convened before a judge charged with the enforcement of sentences to effectively determine the manner of execution, according to article 495-8 of the Criminal Procedure Code. Equally, the accused has the right to a cooling off period

[72] Constitutional Council, decision no.492/2 March 2004 in S.Guinchard, J.Buisson – *Criminal procedure (*original: *Procédure pénale)*, ed. 6, Ed. Litec, Paris, 2010, pag. 897.

[73] The order of the judge is a referral document to the Correctional Tribunal which involves the development of larger-scale prior investigations by comparison to other referral documents.

[74] This provision is applied in cases where the maximum of the penalty does not exceed 2 years, therefore, for other situations, the first hypothesis is applicable.

of 10 days in which to indicate whether he accepts or not the penalty proposed. It is important that the accused cannot negotiate the terms of its acceptance. He is only able to fully accept or decline the prosecutor's proposal[75]. The development of this second phase will be recorded in a written document, subject to annulment unconditional of the existence of any procedural harm, according to article495-14 of the Criminal Procedure Code.

The third stage takes place before a judge, nominated by article495-9 as the President of the *Tribunal de Grande Instance* or a judge delegated by the latter to pronounce a sentence of acknowledgement. The presence of the prosecutor is not required, but the presence of the accused person is mandatory[76], because he will face a hearing in front of the judge in open court in order to verify if the facts and legal qualification have been properly established. The defendant cannot give up his right to be assisted by a lawyer.

Subsequently, the judge shall decide by a motivated order on the acknowledgement of the proposed sanctions by the Public Ministry. Provisions of article495-9, paragraph 2, provide that the judge "may approve". French criminal law literature[77], based on a decision of the *Constitutional Council*[78] states that the judge may reject the application only in terms of new clues on how the offense was committed or concerning the offender's personality. Regardless of the outcome, the judge cannot modify the content of the proposal made by the prosecutor, having the functional responsibility to dispose on the manifestation of will of the Public Ministry. The same conclusion is reached as an effect of the principle of judicial functions separation.

One issue discussed in French literature, manifested through legislative change aimed at doubling the recognition of guilt procedure by acts of criminal inquiry simultaneously. In the period immediately following the introduction of the guilty plea procedure in 2004, both jurisprudential and doctrinal orientation were against conducting a criminal investigation during the development of the guilty plea procedure. Arguments for this position aimed at the effective function of the procedure, which subjected to acceptance of the accused and approval of the judge would represent, in essence, a form of criminal pursuit, finishing with the referral to a court to resolve the case. To this end, the prosecutor had to wait for the guilty plea procedure to fail in order to launch a new pursuit[79].

Law no.526 of 12 May 2009, has introduced article495-15-1 allowing prosecutors to cite, by judicial police agent, the accused person, during the guilty plea procedure, in order to conduct the criminal pursuit. Successful completion of the special guilt admission procedure will determine the lack of object of any criminal pursuit acts. The solution itself is not widely appreciated in French literature[80], but its express mentioning is a new element in the studied legislations.

Regarding ***the effects of the procedure***, first, it should be noted that the effect of the order by which the judge accepts the prosecutor's request and approves the recognition of the accused is

[75] M.L.Rassat, *op.cit*., pag. 384
[76] For this reason, French literature specified that this is not a judgment procedure, it is only a special manner to exercise the public action - M.L.Rassat, *op.cit*., pag. 384
[77] S.Guinchard, J.Buisson, *op.cit*., pag. 904
[78] Constitutional Council, dec.492/2 March 2004, *ant.cit.*
[79] S.Guinchard, J.Buisson, *op.cit.*, pag. 898
[80] *idem*

the same as of a judgment of conviction, according to article495-11, paragraph 2 of the Criminal Procedure Code.

The same paragraph states that the decision is immediately enforceable, therefore, if a penalty or restriction of liberty has been approved, according to the prosecutor's proposal, accepted by the accused, the latter will either be imprisoned or be brought before the judge responsible for the enforcement of the sentence in accordance with article 495-8 previously mentioned. In the latter case, the decision of approval will be sent to the judge responsible for the execution without delay.

According to French literature[81], the law does not allow the judge to partially admit the prosecutor's request for approval, not even in order to amend the amount of the penalty or manner of execution. The solution does not seem natural at first sight, the judge not having the prerogative to state on the guilt or the penalty imposed, freely, but only to accept or reject the pronouncement of an order under the admission of guilt by the accused. Equally, the judge may not issue an acquittal or conviction solution for only some of the facts established by the prosecutor.

Although this mechanism is one of adversarial origin and approaching the Anglo-Saxon model, it is not found in the tradition of continental criminal procedure, and raises questions about the principle of separation of judicial functions under this procedure. A view in this matter was given by a decision of the *Constitutional Council*[82] , which states directly that *the provisions under discussion do not cause any prejudice to the principle of separation of administrative functions of the authorities responsible for solving the public action and of judicial authorities*. We appreciate that the provision is declaratory and not necessarily the conclusion that may result from the regulation of the procedure, but if the judge rejects the prosecutor's demand, normal procedure will resume, the accused will be subjected to a criminal trial to provide all related safeguards, consistent with international regulations as well as article6 of E.C.H.R. regarding the right to a fair trial.

Regarding the civil side, it should be noted that there is no such obligation as to solve it for the success of the criminal proceedings, but, according to article 495-13 Criminal Procedure Code, the person whose interests have been harmed, if it declared itself civil party during this procedure, may claim a solution before the judge invested with the special procedure. If, however, the victim could not exercise this right until a sentence was given in the criminal case, it shall have a separate way at its disposal, the ordinary civil action.

If the judge rejects the request of the prosecutor and the case will follow the usual procedure, the statement of admission of guilt by the accused, already given, will no longer be used in that particular trial[83], to prevent self-incrimination, as a strategy of the prosecution to strengthen its evidence.

Whatever the solution given by the judge, it is subject to appeal of the accused and the prosecutor has the incident right to appeal, according to article495-11 Criminal Procedure Code. Literature[84] has considered that by virtue of the principle of equality of arms, the prosecutor has the principal right to appeal, in the same manner as the accused. The civil party may appeal against the order of the judge, but limited to claims arising in respect of its civil action.

[81] S.Guinchard, J.Buisson, *op.cit.*, pag. 904
[82] Constitutional Council, decision no. 492/2 March 2004, *ant.cit.*
[83] M.L.Rassat, *op.cit.*, pag. 385
[84] S.Guinchard, J.Buisson, *op.cit.*, pag. 904

On the whole, the French regulation allows the use of this institution only in cases with a low severity level, where a penalty in a diminished amount will not substantially affect its purpose, therefore the ratio between the length of the criminal trial and the effect of the penalty is a justification for the use of the procedure.

The regulation itself does not bring many new elements compared to the other laws studied, but as a novelty, we find provisions concerning the possibility of conducting a concurrent investigation during the plea guilty proceedings, and about the inability to use a confession made towards this procedure if the trial will follow the usual framework, after a judge rejects the request for approval of acknowledgement. These two solutions specifically provided by the French legislator also were implicit in the regulation, as in the first case there is no provision requiring suspension of the investigation, and in the second case the prohibition for using the confession resulted from the principle of probation loyalty, as a guarantee of the right to a fair trial in the light of article6 E.C.H.R.

3. **The Spanish criminal procedure law**, the original name is *conformidad del acusado* and a rough translation would be *compliance of the accused*. Through this facility, the accused acknowledges the accusations formulated by the indictment and agrees that the trial will take place without debates, even accepting the proposed penalty. The recognition is the result of negotiations between the defense and prosecution, reflected usually by mutual concessions.

Looking from a historical perspective[85], the institution of compliance is not new to Spanish Criminal Trial. Original and essential regulation is found in article655, 688 and 700 of the Code of Criminal Procedure (*Ley Enjuiciamento Criminal*, from now on *LECrim.*) articles whose content was essentially maintained during the last hundred years.

In addition to this "*more than centenary*" provision[86], punctual regulations have occurred both through Organic Law no.7/1988 which created the *abbreviated procedure* or related laws such as the Organic Law no.5/1995 on the Court of Jury.

The latest amendment dates from 2002 (Law 38/2002 and Organic Law 8/2002) which modified the common compliance regime, the abbreviated procedure and introduced the concept of *quick judgment*.

Starting from these types of regulation, Spanish compliance can be classified as *common* and *privileged*. The latter allows for automatic reduction of one third of the sentence requested by the Public Ministry. The other form of punishment does not allow changes, but only facilitates a prompt resolution of the case.

The ***common procedure*** is the usual way of solving criminal cases in Spain and finds application whenever another special procedure cannot be used to achieve the goals pursued through the trial. For this reason, Spanish literature[87], states the subsidiary character of the ordinary procedure.

[85] J. Moreno Verdejo – The compliance in the criminal trial (original: *La conformidad en el proceso penal*), pag.3239 available on line at http://www.cej.justicia.es/pdf/publicaciones/fiscales/FISCAL71.pdf, last accessed on 21.10.2012.

[86] *idem*

[87] J.M. Chozas Alonso - The compliance in the Spanish criminal trial (original:*La conformidad en el proceso penal espanol*), pag.328 available online at http://www.bibliojuridica.org/libros/4/1574/16.pdf, last accessed on 21.10.2012.

Specifically, this involves three stages: a) a preliminary stage, called *sumario*, which runs in front of the judge and is aimed at preparing the judgment, since the cause is apparently likely to be subject to full judicial proceedings[88]. b) The next phase, called the *intermediate phase*, takes place in front of the court that is material and territorial competent to judge in first instance. The purpose of this phase is dual, therefore it aims both at verifying the legality and validity of the inquiry that has already taken place, and if necessary some other activities destined to complete the instruction phase may be ordered and, also, this phase represents the closure of procedural activities for the given cause (*sobreseimiento de la causa*). c) The last phase is called *plenario*, it has a decisive character and is represented by oral proceedings before the competent court.

Regarding the purpose of this paper only the oral phase is relevant for invoking the admission of guilt. Under this, compliance can occur in two distinct procedural moments.

The first moment is regulated by article 655 L.E.Crim. To facilitate the exposure a statement is required: Before the debut of the oral judgment, the acts created in the instruction phase are provided to both prosecution and defense so that each will submit a written provisional qualification act (*escrito de calificación provisional*) in which to formulate claims regarding its adversary and to propose evidence in their support.

Article 655 L.E.Crim. stipulates that by the provisional qualifying act, the defendant may express compliance, without reservation, the corresponding qualification proposed by the prosecution or the most severe qualification presented in it, if the facts are given more legal qualifications. Equally, the defendant must comply with the proposed penalty for the acknowledged facts. The possibility of compliance is, however, limited just to facts for which the law provides a correctional penalty, which is a custodial sentence not greater than 6 years.

For the procedure to be viable, the declaration of compliance should be made also by the defense counsel if it does not consider necessary to continue the ordinary criminal proceedings in order to protect the rights of his client as a guarantee of the right of defense established by the Spanish legislator, given the disposal nature of the act by which guilt is admitted. Specifically, the defendant, although able to bargain on its rights cannot benefit from the provisions of article 655 if his lawyer denies it.

As stated in Spanish literature[89], in this case, the relationship between lawyer and client passes its usual function, that of *"technical director of defense"*[90] and becomes a necessary complement to the manifestation of will, in the lack of which the act shall not be validated.

In accordance with article 655 paragraph 2 of L.E.Crim., the Court, unless deemed necessary to continue the trial, renders, without requiring further ado, a decision based on bilateral accepted qualification of the facts without the possibility of imposing a higher penalty than the one requested. One can see the prerogative of the court to state on the opportunity of the guilty plea procedure, so even though formal conditions are met, it is possible for the Court to disregard the statement of recognition and continue the

[88] Actually, this is phase for collecting evidence, according to art.299 of L.E.Crim., and its purpose is to prepare the judgment of the case, by gathering materials that will prove the existence of the misdemeanor and the guilt of the accused person.
[89] J.M. Chozas Alonso, *op.cit.*, pag.329
[90] *idem*

trial by the usual procedure. Equally, the judge will have the possibility to state on the individualization of the punishment being able to sentence the accused at an amount less than what the prosecutor required.

Paragraph 4 of the same article contained a provision that further proceedings will take place according to the usual procedure, if there are several defendants and not all show their compliance with the charges they are brought. The purpose of this provision is to prevent the possibility of removal from the procedure of defendants who have admitted the facts with the purpose of using them as witnesses in the trial of those who have not opted for the special procedure, creating thus an artifice of the prosecution in matter of evidence.

The second moment in which the accused can plead guilty during the oral trial is situated at the beginning of this phase and the related regulation is found in article 688-700 of L.E.Crim.

If the offense that caused the judgment is imposed correctional penalty[91], the president asks each of the accused persons if they admit to the provisional qualification act, and on the civil side, if they agree to the reestablishment of the situation before the offence and to pay damages in the amount provided for in the previously mentioned qualification.

They can recognize both criminal charges and civil claims brought against them. If alongside the action with the Public Ministry (both civil side and the criminal side) there are other civil actions by private persons injured, the defendant is held to recognize the largest sum of damages to avoid a separate trial only on the civil side.

When the same accused person is brought before the court for at least two offences provided for in the qualification act, he is asked for each act separately, and if there are several defendants, each is asked about the deed attributed.

Just as in the procedure provided for article 655 previously mentioned, if there is one accused concerned and he pleads guilty, the President asks its counsel if deemed necessary to continue the trial. If not, the court will dictate a sentence under article 655. If, instead, the defender does not consent the trial will take place by the ordinary procedure.

If acceptance is reached on the criminal side but on the civil side either guilt is not recognized or the proposed amount is not accepted, the trial will carry on only regarding the civil side, therefore the evidence and subsequent judicial activities will not be able to change the decision on the criminal side.

An analysis of article 696 and 697 will guide us to the same conclusion as set out in the procedure previously presented (article 655, paragraph 4), therefore, if at least one of the accused persons doesn't plead guilty or his lawyer believes that the trial should be continued by ordinary procedure, then the trial will be run by the ordinary procedure for all defendants.

It is interesting to note that Spanish law establishes an obligation for the court to inquire whether the defendant pleads guilty; therefore the judge takes the initiative of the procedure.

Given the fact that the *common admission of guilt* procedure does not offer penalty reduction limits, the main effect is the acceleration of the trial, with the possibility that the judge will take into account the option of the accused, at the time of judicial individualization of the penalty.

The second procedural context in which to study the conformation of the accused is the ***abridged procedure***.

[91] Whose maximum provided by law is less than 6 years.

This concept was introduced by Organic Law no.7/1988 and regards the reforming of the classical phases of a trial as mentioned in the case of the ordinary procedure. These phases remain three in number: an initial phase (*diligencias previas*), an intermediate phase (which takes place before the investigating judge) and a final stage, the oral trial, held before the competent court to judge its merits. Their specific is that in each case, activity is majorly simplified by comparison with the ordinary procedure.

In this context, there are three ways in which the accused can invoke its compliance.

The first way is the possibility provided for by article 784.3 and 787 of L.E.Crim., So, according to the first article cited: *"In its writing, also signed by the accused, the defense can show compliance with the prosecution's demands as provided by article 787. This compliance can be equally achieved by use of the new qualification act signed by both the prosecution and the accused, alongside his lawyer at any time before the opening of the oral judgment phase without prejudice to the provisions of article 787.1"*.

Article787 imposes for the application of the abridged procedure a penalty of imprisonment for not more than 6 years. Itself, the admission of guilt in the abridged procedure involves broadly the same terms and effects as in the common procedure, but a significant difference results from the second sentence of article784.3, as reproduced above: the admission of guilt can be contained in *a new qualification act*, signed by both the prosecution and the defense as a direct result of negotiations between the signatories.

In this case there is no question of unconditional recognition of the qualification and penalty offered by the prosecution, but a new qualification or penalty that both sides can accept. This option causes a high potential for the defendant to comply, favoring an abundance of such agreements[92]. Its applicability is strictly limited to the abridged procedure, given the fact that this provision is only found in the regulation of the latter procedure.

The second way in which the admission of guilt can be invoked is governed by article787.1 L.E.Crim. According to it, at the commencement of the oral judgment, defense, with the defendant present, may request the court to dictate a sentence in accordance with the qualification document of the prosecution, without being able to refer to other works or other qualifications. If the penalty does not exceed six years, and if the judge has no doubts about the free expression of will for compliance, it will issue a decision in accordance with the request submitted.

A third way is called "recognition of facts". Without being technically a compliance with the demands of the prosecution, this procedure speeds up the trial by simplifying its first phase, abolishing the second phase of the trial (intermediate phase) and directly transitioning to the oral trial phase. Its regulation is found in article 779.1.5a and provides that if the accused, assisted by its lawyer recognizes the facts before the court, and these facts constitute offenses punishable by a sentence within the limits provided in article801, the prosecutor is called to be asked if he would formulate an indictment in accordance with the recognition of the accused. If so, then he will initiate the instruction phase in a highly simplified form (*Diligencias urgentes*) and will order the continuation of activities under the terms of article800 and 801.

[92] J.M. Chozas Alonso, *op.cit*., pag. 331

It can be seen that this method of recognition of facts is identical in terms of procedural effects with the privileged compliance provided by article801 L.E.Crim., specific to quick judgments that will be analyzed in the following lines.

Privileged compliance for quick judgments is regulated by article801 L.E.Crim. and it is a relatively new institution in the Spanish criminal proceedings being brought by Organic Law no.8/2002. This new form of compliance is made by a mechanism that reduces one third of the sentence requested by the prosecutor, such a reduction being granted directly by the instruction judge, since compliance is invoked before it.

Due to the automatic reduction of the penalty demanded by one third, this form of compliance is a strong motivation for the accused and a benefit to the celerity of the trial. Spanish legislator has foreseen this possibility only when the requested penalty is imprisonment not exceeding 3 years, or fine regardless of amount, and other penalties not exceeding 10 years.

In addition to the provisions of L.E.Crim., The Spanish procedure law recognizes a ***separate compliance form*** in article 50 of the Organic Law no.5/1995 on the Courts of Jury. The marginal title of the article is "The dissolution of the jury by compliance of the parties".

It provides that the court shall proceed to dissolve the jury whether the accused requires a sentence of compliance with the qualification document containing the highest penalty, or other document signed by all parties, without retaining other facts or other qualifications. To achieve compliance, the penalty may not exceed 6 years in prison, even if it is added to a fine or other penalties restricting rights, regardless of the amount.

The judge will decide the appropriate sentence within the acceptance between the parties, but if there is reason to believe that the facts did not occur or were not committed by the accused, it will not dissolve the jury and will continue the trial.

The compliance of the defendant in what concerns ***contraventions*** (*faltas*)[93] doesn't have a legislative support in L.E.Crim provisions. In none of the articles devoted to this form of criminal illicit, the accused is not given the possibility to show compliance. Although it can be argued in support of the applicability of the institution, in principle, the majority of Spanish literature[94] rejects this possibility.

On the whole, the provisions of the Spanish law are the most detailed of the foreign laws analyzed, representing a model of meticulousness, certified in terms of longevity of regulation and of scale reliability when using this procedure.

On the one hand, at a time when European criminal procedures undergo a series of changes that approach them to a private trial, with the possibility of closing it by agreement, even Spanish literature, with a great tradition in matters of admission of guilt, has its own critics on this institution. In this purpose, it was argued that this practice brings a constant infringement to the principle of legality in criminal proceedings, and creates a principle of opportunity for the Public Ministry, principle not recognized by the Spanish Constitution.

On the other hand, criminal justice, a public service, can not function without an economic dimension and without awareness of the effectiveness of the trial and of

[93] As forms of criminal offences and not administrative offences.

[94] J.M. Chozas Alonso, *op.cit*., pag. 334, J. Moreno Verdejo *op.cit*., pag.3246, M. Aguilera Morales – *The principle of consensus. The compliance in Spanish criminal trial* (original: *El principio del consenso. La conformidad en el proceso penal espanol*), Barcelona, Ed.Cedecs, 1998, pag.72

institutional approach. To achieve the social aims of this service, a balance between the renouncement to several aspects of the ideal model of criminal trial, either adversarial or inquisitorial, and the economic conditions necessary to maintain this public service.

In the present case, the Spanish justice appears not to have exceeded that balance and criticisms regarding the admissibility of such procedures appear to be insufficient opposed to contemporary arguments.

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ID THEFT IN CYBERSPACE

Maxim DOBRINOIU*

Abstract

Obtaining personal data, identification data, including data which allow the use of a electronic payment instrument, or any other data generated in the context of one person's activities in the social, economic or financial life, without its consent or by deceit, if this occurs in computer systems or through electronic means of communications, should be considered as a crime and punished accordingly.

Keywords: *ID Theft, Cybercrime, Social Engineering, Phishing, Computer-related Forgery*

1. Introduction

Like other countries, nowadays Romania need to face, more and more, a exceptionally serious phenomenon, which, unfortunately, haven't got a relevant and comprehensive attention from the legislators.

It is about "Identity Theft" (or ID Theft), with its aggravated form when the action is committed by the use of computer systems or electronic means of communication.

As a notion, the „identity theft" has an improper name, because the identity of a person is not actually stolen, but rather taken over (or assumed, acquired) illegally and further used generally to commit other offences. In other words, we are not dealing with a crime against property, but with a crime against the person (as stated in the New Criminal Code, Title 1, Chapter IX – crimes against the residence and private life of a person).

By „identity theft" one could understand the obtaining, illegally (unauthorized), of personal data or other data related to the social or professional activity of a person or data resulted from the person's interaction with a financial institution, if later on the use of this acquired data is capable to generate legal consequences or to cause a loss of property to that person.

2. Paper Content

From a technical perspective, the „identity theft" could be performed by one of the following methods:

Social Engineering is defined as a collection of means, HW and SW tools and communication strategies by the use of which the victim is deceived related to a situation or a fact and thus manipulated to provide personal data, confidential or financial information, or determined to act in the manner required by the attacker.

The manipulation techniques are used by the attacker in the conversation with the victim (directly, by telephone or through any other electronic mean of communication), while the deceiving is performed with the aim to infringe the victim's psychological „barriers", and make her disclosing data or doing actions that, in other conditions, would have not been done.

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Pharming is a special type of computer-related attack which takes place when the attacker insert certain computer data in a Domain Name System's IP allocation table responsible with routing the victim's personal computer browser requests to fake webpages or to other internet resources controlled by the attacker.

The Domain Name System (DNS) initiates the process which allows a certain user to connect to a webserver (or a webpage) by typing the desired URL (web address) in the browser address area. It is known that, in Internet, computers communicate only based on IP addresses and the equipment in charge with the translation of the domain names into IP addresses and back are the DNS servers. These servers store databases with relevant details like <domain name – associated IP address> of the numerous active networks, and have the capacity to memorize new such connections, in order to facilitate the user's fast access to the needed resources. DNS servers are organized on a hierarchical structure, the most important of them (called root) being generically named from „A" to „M" and hosted by the significant Internet providers from US, Japan, UK and Sweden.

By methods like DNS ID Spoofing or DNS Cache Poisoning, an attacker has the possibility to modify the DNS allocation table records, and, thus, to redirect the victim's web traffic towards a fake resource or to a server he controls.

Phishing is, maybe, one of the most known crime activity. It is used by the cyber-attackers to steal personal data or identification data related to electronic payment instruments. The victim is lured, often by a convincing email message, to click on a provided hyper-connexion (link) and, through it, to access a fake webpage, imitating almost perfectly the genuine one the user expects to find, hosted on a server controlled by the attacker. Once browsing on the forged webpage, the victim is tricked into providing its personal data, identification data or other kind of information used in financial transactions or online shopping.

Skimming to a ATM is that method by which the perpetrators mount and conceal outside of a cash dispenser (Automated Teller Machine) a device especially designed to read and copy the data stored on the magnetic stripe of the credit cards. While at the ATM, the victim doesn't notice the forged surface (cover) attached and uses its own credit card to perform a certain financial operation. Technically, before the victim's card actually enters into the ATM, its magnetic stripe is read by the microcontroller's head (like reading a videocassette or an audiocassette) and the data is then copied to a storage mean (also concealed in the attacker's equipment). After a variable number of such "read & copy" (depending on the capacity of the storage mean), the attacker comes back to recover the equipment and the masking cover.

Over time, many opinions have been expressed in the criminal doctrine related to the correct indictment of such an action (skimming), but only recently, following an „appeal in the interest of the law" from the Romanian General Prosecutor's Office (the Public Ministry) for the unification of the courts' decisions in this kind of criminal cases, the High Court for Cassation and Justice issued the Decision no. 15 of 14 October 2013, published in the Romanian Official Gazette no. 760 of 6 December 2013, stating that the only applicable legal solution is the one generically called *illegal operations with equipment and computer data*, with the provisions of Article 365 2nd alignment of the new Criminal Code, *respectively the detaining, without right, of a device, a computer program, a password, an access code or other computer data, line*

those mentioned in paragraph 1, with the aim to commit one of the offences from Articles 360 to 364.

In this case, the solution issued by the High Court of Cassation and Justice is incomplete, because it doesn't map entirely on the technical reality and ignores the specific link requested by the offence of *illegal operations with equipment or computer programs* (as tool-crime) in connection with another offence (as end-crime or target-crime) which the High Court fails to nominate in its above-mentioned Decision, but which is obvious and it consists of the crime provided by the Article 364 of the Criminal Code, namely the *unauthorized transfer of computer data from a computer data storage* (the credit card).

In this moment, with the exception of the Skimming (which seems to be in a way solved by the High Court Decision), the „identity theft" is legally regarded as a computer-related forgery (Article 325 of the new Criminal Code), and, in some scenarios when the data has been already used, ID Theft is regarded as a crime against the property or a crime of forgery (the acquiring of personal or financial data being just a preparatory act for those crimes) – which is a false conclusion.

In what regards the computer-related forgery, we find that, in Phishing, the perpetrator actually do realize the specific material acts of the crime provided by Article 325 Criminal Code only on the header of the luring email (the header is modified by spoofing in order to trick the victim about the real source of the email) and on the fake webpage (clone). For all that, in order to have an indictment based on Article 325 is strongly necessary that the outcome of the forgery to be able to produce legal consequences.

In the case of email header spoofing (aka *email spoofing*) we could not find any legal consequence, only if the act of taking over another person's identity would occur in dealing with a state authority or an institution among those mentioned in Article 175 Criminal Code. Thus, the legal consequence would be represented by a „identity-related forgery".

Much significant is the legal consequence when faking a webpage, the final place where the victim discloses its personal information. In this case, by cloning the webpage, the perpetrator is guilty of infringing the copyright related to the original (real) webpage, which is the kind of legal consequence requested by Article 325.

In other words, strictly from the perspective of the committed acts, in this very moment, there is no criminal offence to be used against an attacker who, illegally, obtains the computer data related to a person, and seems that this criminal behaviour may be not punishable.

Regarding the activity of the victim while present on the forged webpage, the conclusion is that he/she, misled (tricked, fooled), personally chooses to disclose the information (personal data, financial data, data necessary for the use of an electronic payment instrument and so) „requested" by the attacker. The victim is not constrained in any kind and has the right representation of his/her actions. Misleading (fooling, tricking) is, on one hand, the „fruit" of the attacker's performance as social engineer and as the creator of an almost perfect faked webpage, but, on the other hand, is the result of the lack of education or essential training in security (personal security, computer security etc.) as well as an effect of not knowing or not taking the appropriate security measures the victim knew or had to know.

The victim culpable behaviour related to the protection of its own personal information is not, however, a reason for the Romanian legislator to fail in sanctioning,

by not creating an appropriate legal provision, the attacker's overall criminal activity of misleading, luring or manipulating the victim, followed by obtaining, illegally, the data he was looking for.

A *de lege ferenda* proposal could have the following text[1]:

Obtaining personal data, identification data, including data allowing the use of an electronic payment instrument or any kind of data generated by a person's social or economic activity, without its consent or by misleading, if such an action has been performed in computer systems or using electronic means of communication, shall be punished with imprisonment from „x" months to „y" years or a fine.

Irrespective of the chosen form of criminalisation, shall be absolutely necessary that such a criminal provision exists in a potential future amendment of the Criminal Code.

Is not appropriate, in this context, an amendment to the Law no. 677 of 2001 regarding the protection of personal data, because this legal provision does not regulate the situation when the personal data are processed by an individual (the perpetrator) for its own use and without to be disclosed to third parties.

This analysis only refers to the „essence" of the „identity theft", namely the phase of obtaining, unauthorized, computer data related to a person.

In what regards the electronic storage of the stolen data or the future use (use of identity), these kind of actions are comprised in the materiality of other offences in the Criminal Code, such as: Article 240 – computer fraud, Article 250 – illegal performing of financial operations, Article 251 – the acceptance of illegally performed financial operations, Article 313 – circulating forged values, Article 314 – possession of instruments to perform value forgery, Article 325 – computer-related forgery, as well as Article 365 – illegal operations with equipment or computer programs or Article 388 – the fraud to electronic vote).

3. Conclusion

Taking into consideration that "*nullum crimen sine lege*", the overall conclusion is that the Romanian legislator needs to take, in the near future, certain measures in order to be able to efficiently combat the ID Theft, by creating a comprehensive legal provision, with no or little space for interpretations or different understandings, a real tool for prosecutors and judges. Being a reactive measure, this need to be completed with a proactive one - represented by a Cybersecurity-related awareness campaign, as well as (extra) professional training for all those involved in the prevention, prosecuting, judging or defending in cybercrime cases.

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[1] Similar proposals have been issued in article *Considerations on the Efficiency of the new Criminal Code in Combatting Cybercrime*, Challenges of the Knowledge Society eBook 2013, ISSN 2068-7796, p. 33

THE DISTINCTIVE FEATURES OF EUROPEAN CRIMINAL LAW

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Abstract

This study aims to analyze the case law of the ECJ and ECHR on the nature of administrative sanctions and their relation to criminal law. Also, some important criteria used by different Member States in their own legal systems in differentiating between criminal and administrative sanctions are presented. As it will be shown in this study, in establishing the difference between administrative and criminal offence sanctions, the case law of both the European Court of Human Rights and the Court of Justice of the European Union offer an indirect definition of criminal offence through its penalty. Thus, a certain behavior, if sanctioned in a procedure that could be labeled as 'criminal procedure', is necessarily a criminal offence.

1. Comparative national law analysis

1.1. Preliminary remarks*

In the old Romanian regulations, according to art. 1 of Law no. 32/1968, a *contravention* (administrative offence) was an "act committed with guilt, posing a danger of social crime and lower than is provided and sanctioned as such by laws, decrees or regulations of the bodies referred to in the present law".

The 1864 Criminal Code settled the *contravention* as the offence which the law punishes by imprisonment or by a police fine " (art. 1).

Present national regulations, GO. 2/2001[1] , state that "the *contraventional* law protects social values that are not protected by the criminal law."

We will see how the *contravention* is determined by the national legislator comparative with different other legislators.

1.2. Comparative national law analysis. Romania. Hungary. Italy. The Netherlands.

Romanian legislator made a difference between criminal offence and administrative offence, in the sense that the same conduct cannot be punished in the same time also as criminal offence and contravention. In case that such situation happens, the only punishment will be a criminal penalty.

In the same way, to describe *contravention*, Hungarian legislation settles that contraventions are the lightest type of a criminal offence regarding their weight. In 1955, it ranked a part of the *contraventions* as felonies but classified a bigger part of them under the new type of unlawful act,

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[1] Official Journal no. 268/22 of April 2002.

under the collective notion of *infraction*[2]. Currently, *infractions* are regulated by a separate Act (Act II of 2012), which includes the regulations of substantive law, procedural law and law of execution as well.

Thus, *infractions/contraventions* are not part of criminal law, but they have a *substantial relation to it*.

Social values can be protected by criminal law, administrative law or by civil law, under different aspects[3]. For example, if a professional driver exceeds the accepted speed limit, its act constitutes a contravention and also can be sanctioned by the employer.

In Italy, until 1967, only criminal and civil wrongs were admitted[4]. However, as the legislator thought that some traffic offences where not so serious as to deserve a penal punishment, the Law no. 317/1967 introduced the first administrative offences with the aim to decriminalize the previous criminal provisions.

In Netherlands there is a difference between administrative and criminal offences[5].

Criminal law is at least eligible if the nature of the offence, the seriousness of the offence, its consistency with other offences or the need for an investigation associated with coercive and investigative powers so require. Administrative law is at least eligible if the offence is easy to determine, if there is no need for an investigation associated with coercive and investigative powers and if no severe punishments are necessary, even for deterrence[6]. There is no strict separation of administrative and criminal offences. It is not a question of a uniform defined jurisdiction, but more a partially overlapping jurisdiction.

Romanian specialized literature sets that the administrative law has a subsidiary character in relation to criminal law, because administrative sanctions occur only if the same act is not a criminal offence that would be criminally sanctioned[7].

The lack of qualitative differences between criminal offences and *contraventions* should determine some juridical consequences, as some specialists in this field highlighted. The first one is the consequence of inadmissibility of coexistence between the two types of liability. Second, the inadmissibility of establishing more sever administrative sanctions than the criminal ones.

In Romania, there is an infringement of this rule, since there are administrative sanctions more sever than criminal penalties, such as Law no 297/2004 regarding capital market. Such provisions are violating the principle of proportionality. Indeed, there should be equivalence between the nature and gravity of the offence committed and the corresponding punishment.

In Hungarian legal literature, many standpoints had been formulated regarding the relation between *infractions* (previously: *contraventions*) and crimes[8].

[2] Ferenc Sántha, Erika Váradi-Csema, Andrea Jánosi, Foundations of (European) Criminal Law – National Perspectives, Hungary, in Norel Neagu (Ed.), Foundations of European Criminal Law, C.H.Beck Publishing House, Bucharest, 2014, forthcoming

[3] M.A. Hotca, Juridical regime of contraventions, ed. Ch. Beck, Bucharest, 2012.

[4] Clara Tracogna, Foundations of (European) Criminal Law – National Perspectives, Italy, in Norel Neagu (Ed.), Foundations of European Criminal Law, C.H.Beck Publishing House, Bucharest, 2014, forthcoming

[5] Renate van Lijssel, Foundations of (European) Criminal Law – National Perspectives, The Netherlands, in Norel Neagu (Ed.), Foundations of European Criminal Law, C.H.Beck Publishing House, Bucharest, 2014, forthcoming

[6] This is said about the Law of Prosecutoral Dispusal by the former minister of Justice, P.H. Donner.

[7] Mirela Gorunescu, *Foundations of (European) Criminal Law – National Perspectives, Romania*, in Norel Neagu (Ed.), Foundations of European Criminal Law, C.H.Beck Publishing House, Bucharest, 2014, forthcoming.

[8] Ferenc Sántha, Erika Váradi-Csema, Andrea Jánosi, Foundations of (European) Criminal Law – National Perspectives, Hungary, supra.

According to the positivistic approach, making a distinction between *infraction* and crime is not a question of content, but a decision of the legislator. This means that those acts can be considered *infractions* if they are to be qualified as such by the legislator.

According to the quantitative approach, there is only a quantitative difference between infraction and criminal offence. This means analyzing to what extent the act violates the law, and to what extent is it a threat to the society. The objective weight and the danger of the *infraction* are smaller than that of the criminal offence, and this is the reason for its lighter sanctioning.

According to a third theoretical approach, there is more of a qualitative difference between *infractions (contraventions)* and criminal offences, instead of a quantitative one. While the *infraction* is a morally neutral act against public administration (an "anti-administrative" act), the criminal offence is a (materially unlawful) behavior that violates or endangers common public values.

Italian administrative offences are a separate and autonomous branch of law[9]. However, it rarely happens that a legal provision directly defines the nature of the sanction. As a matter of fact, the main criterion to classify civil, administrative and criminal offences is the formal one, which analyses the kind of sanction provided by law: since the criminal punishment is the only one affecting freedom (even as a result of a non-fulfillment of a criminal - monetary - fine), thus all other sanctions are not criminal. Moreover, an administrative offence differs from a civil wrong in that it affects social and public interests, while a civil wrong is related to private interests.

Romanian general definition of the contravention is found in art. 1 par 2 of the GO no. 2/2001, under which:

> *"a contravention is committed with guilt, established and sanctioned by law, Ordinance, Decree of Government or, where appropriate, by decision of the local Council of the village, town, or municipality of Bucharest, sector of the County Council or General Council of Bucharest".*

Also, according to the explanatory *Dictionary of the Romanian language, slight negligence* shall mean a violation of the provisions of a law, a regulation, which, given a degree of social danger, is sanctioned with a mild punishment.

The preamble of the new Hungarian Act on Infractions (Act II of 2012) calls *infractions* "criminal acts", which violate or endanger the generally accepted rules of social coexistence, but which are not as dangerous as crimes. The Act gives us the definition of infraction. According to this,

> *"an infraction is an act or omission, ordered punishable by the law, which is dangerous for society."* (Article 1 Section 1).

This definition is completed, like the Romanian one, with the provision of the Act regarding the principle of guilt, and thus, *the elements of the legal definition of infraction* are: (1) human behavior; (2) a danger to society, although to a smaller extent than a crime; (3) guilt (intent or negligence); (4) an act ordered punishable by the law.

Based on the above, on the one hand, it can be said that the legal definitions of *infraction* and criminal offence are very similar, the conceptual elements are basically the same, and the only difference is the extent to which the two acts pose a threat to society.

[9] Clara Tracogna, Foundations of (European) Criminal Law – National Perspectives, Italy, supra.

In Romanian criminal law system, *contraventional* law has as sources of law: the Constitution, organic laws and emergency ordinances; ordinary laws and ordinances of the Government; decisions of the Government; decisions of the county councils and the General Council of Bucharest; local councils decisions.

Likewise, the Constitutional Court of Romania, by decision No. 251/2003[10], notes that the "notion of criminal proceedings for the purposes of the Convention is an autonomous one in relation to the meaning given in the national legislation, and for the purposes of art. 6 of the Convention, one must take into account three criteria: 1. the qualification of the offence under national law; 2. the nature of the offence; 3. the nature and the severity of the penalties that could be imposed on the person concerned.

The contraventional sanctions in Romanian law system are main and complementary. Main sanctions are: warning, fine, and community service work.

Complementary contraventional sanctions are: confiscation of goods intended for, used or resulted from the offence; suspension or cancellation, where appropriate, of approval, agreement or authorization for the exercise of an activity; closure of the establishment; blocking a bank account; the suspension of the trader; the withdrawal of the licence or permit for specific operations or for foreign trade activities, either temporarily or permanently; dismantling work and bringing the land to its original state.

Romanian law system stipulates also technical and administrative measures which can be taken in addition to an administrative penalty.

For example, according to the article 97 of OUG no 195/2002, in addition to criminal penalties, "the policeman can apply one of the following technical and administrative measures: retaining driving license and/or registration certificate or, where appropriate, proof of their replacement; the withdrawal of the driving license, registration certificate or registration number plates; the cancellation of the driving license; raising vehicles stationed illegally, etc.

Also, in the Netherlands law system[11], the General Administrative Law Act provides a scheme for administrative fines. In the Act, the administrative fine is described as 'the punitive sanction, containing an unconditional obligation to pay a sum of money'. Other than the administrative order of the cease and desist, the administrative fine is punitive, meaning that it seeks to add suffering. In addition to the fines, there are also other administrative penalties. But as a rule, it cannot be a custodial sentence. In some cases, a favorable decision will be repealed in response to unlawful conduct. The punitive administrative sanctions are also disciplinary sanctions in the sphere of the civil service law. It is possible for a competent institutions official to impose disciplinary punishment. These are sanctions such as a reprimand, a deduction of salary, a fine, a suspension or a dismissal for some time. Just like the administrative fines, the guarantees of article 6 and 7 of the ECHR apply.

In Italy, the consequence of an administrative offence is the implementation of an administrative punishment (except the cases of justifiable defense, case of need, use of a right, comply with a duty). The administrative sanction is issued at first by a written report by the administrative authority in charge and should be immediately and formally notified to the offender. If it's not possible to inform the

[10] Official Journal no 553/31 iunie 2003.
[11] Renate van Lijssel, Foundations of (European) Criminal Law – National Perspectives, The Netherlands, supra.

offender immediately after the fact happened, the report should be notified within 90 days; where else the punishment couldn't be implemented as its relevance expires. Moreover, the authority in charge of the administrative offence is entitled to ask for the payment to any of the co-offenders for the whole amount issued in the sanction.

Afterwards, the offender has 60 days to pay the monetary sanction (when expressly provided, the amount is reduced if the person pays before the deadline) or 30 days to produce defense documents and evidences and to ask for the review of the report issuing the sanction in front of a judge (*giudice di pace* or tribunal, depending on the gravity of the sanction).

The authority dismisses the charges if the offence is not proved; otherwise, it confirms the punishment issuing one (or both) of the two following administrative sanctions: monetary (which is an injunction to pay a certain sum of money) or non-monetary (which can be divided into personal sanctions, such as disciplinary sanctions, suspension, dismissal, disqualification from a profession, or other economic activities etc.) sanctions, and material sanctions, such as seizure and confiscation.

We can observe until now that in all these law systems, these offenses are regulated as distinct ones, that they borrow constitutive elements from criminal offences, maintaining the guilt requirement. The only difference is that an administrative offence can not affect the freedom of the individual, as can happen in case of a criminal offence.

2. European Court of Human Rights and European Cour of Justice case-law

2.1. European Court of Human Rights

The European Court has dealt with the distinction between criminal and administrative procedures in the case **Engel v. the Netherlands**.

The case originated in five applications against the Kingdom of the Netherlands which were lodged with the Commission in 1971 by Cornelis J.M. Engel, Peter van der Wiel, Gerrit Jan de Wit, Johannes C. Dona and Willem A.C. Schul, all Netherlands nationals.

As to the facts presented in this decision, all applicants were, when submitting their applications to the Commission, conscript soldiers serving in different non-commissioned ranks in the Netherlands armed forces. On separate occasions, various penalties had been passed on them by their respective commanding officers for offences against military discipline (unallowed absences, reckless driving of a vehicle, failure to comply with orders received and the publication of articles intended to undermine military discipline.). The applicants had appealed to the complaints officer (beklagmeerdere) and finally to the Supreme Military Court (Hoog Militair Gerechtshof) which in substance confirmed the decisions challenged but, in two cases, reduced the punishment imposed[12].

The applicants complained that the penalties imposed constituted deprivation of liberty contrary to Article 5 of the Convention, that the proceedings before the military authorities and the Supreme Military Court were not in conformity with the requirements of Article 6 and that the manner in which they were treated was

[12] ECHR, Engel and Others v. the Netherlands, 8 June 1976, para.12.

discriminatory and in breach of Article 14 read in conjunction with Articles 5 and 6.

The Court investigated whether the proceedings against the applicants concerned "any criminal charge" within the meaning of Article 6 of the Convention. The Court stated that the Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects.

The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (art. 6) and even without reference to Articles 17 and 18, to satisfy itself that the disciplinary does not improperly encroach upon the criminal.

In short, the "autonomy" of the concept of "criminal" operates, as it were, one way only.

In this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.

The very nature of the offence is a factor of greater import. In evaluating this second criterion, which is considered more important[13], the following factors can be taken into consideration: whether the legal rule in question is addressed exclusively to a specific group, or is of a generally binding character[14]; whether the proceedings are instituted by a public body with statutory powers of enforcement[15]; whether the legal rule has a punitive or deterrent purpose[16]; whether the imposition of any penalty is dependent upon a finding of guilt[17]; how comparable procedures are classified in other Council of Europe Member states[18]. The fact that an offence does not give rise to a criminal record may be relevant, but is not decisive, since it is usually a reflection of the domestic classification[19].

However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be

[13] See *Jussila* v *Finland*, Decision of 23 November 2006, [2007] ECHR, para. 38
[14] See, for example, *Bendenoun* v *France*, Decision of 24 February 1994, [1995] ECHR, para. 47.
[15] See *Benham* v *the United Kingdom*, Decision of 10 June 1996, [1997] ECHR, para. 56.
[16] See *Bendenoun* v *France* case, *supra*, para. 47.
[17] See *Benham* v *the United Kingdom*, *supra*, para. 56.
[18] See *Öztürk* v *Germany*, Decision of 21 February 1984, [1985] ECHR, para. 53.
[19] See, for example, *Ravnsborg* v *Sweden*, Decision of 23 March 1994, [1995] ECHR, para. 38.

appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so[20]. Thus, the third criterion is determined by reference to the maximum potential penalty which the relevant law provides for[21].

The second and third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge[22].

2.2. Court of Justice of the European Union

The ECJ also addressed the matter of differentiating between administrative and criminal law penalties.

The ECJ adopted the ECHR Engel criteria in two recent decisions, cases C-489/10[23] and C-617/10[24] .

In **Bonda case**, as the Advocate General pointed out, as a result of incorrect declarations in an application for European Union agricultural aid, the national administration imposed on a farmer the reductions provided for in a European Union Regulation in the aid applied for. Subsequently, on the basis of the same false declarations, the farmer was charged with subsidy fraud in proceedings before a criminal court.

Consequently, the main issue in this case is the question whether the administrative proceedings were of a criminal nature, with the consequence that criminal proceedings may not also be brought against the recipient of aid, as a result of the prohibition of double penalties (*ne bis in idem* principle).

As legal context, there were mentioned the following provisions:

- Article 50 of the Charter of Fundamental Rights of the European Union:

"No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."

- Article 138(1) of Regulation (EC) No 1973/2004, in the version in force at the time the aid application at issue was lodged (16 May 2005) and at the time of the administrative decision (25 June 2006), stated as follows:

"Except in cases of *force majeure* or exceptional circumstances as defined in Article 72 of Regulation (EC) No 796/2004, where, as a result of an administrative or on-the-spot check, it is found that the established difference between the area declared and the area determined, within the meaning of point (22) of Article 2 of Regulation (EC) No 796/2004, is more than 3% but no more than 30% of the area determined, the amount to be granted under the single area payment scheme shall be reduced, for the year in question, by twice the difference found. If the difference is more than 30% of the area determined, no aid shall be granted for the year in question. If the difference is more than 50%, the farmer shall be excluded once again from receiving aid up to an amount which

[20] Engel, supra, par.81-82.
[21] See *Campbell and Fell* v *the United Kingdom*, Decision of 28 June 1984, [1985] ECHR, para. 72; *Demicoli* v *Malta*, Decision of 27 August 1991, [1992] ECHR, para.34.
[22] See *Jussila* v *Finland* case, *supra*, and *Ezeh and Connors* v *the United Kingdom*, Decision of 15 July 2002, [2003] ECHR.
[23] C-489/10, *Sąd Najwyższy v. Łukasz Marcin Bonda*, nyr.
[24] C-617/10, *Åklagaren v Hans Åkerberg Fransson*, nyr.

corresponds to the difference between the area declared and the area determined. That amount shall be off-set against aid payments to which the farmer is entitled in the context of applications he lodges in the course of the three calendar years following the calendar year of the finding."

Taking into account that on 14 July 2009, as a result of the above incorrect declarations in his aid application, Mr Bonda was convicted by the Sąd Rejonowy w Goleniowie for the offence of subsidy fraud under Article 297(1) of the Polish Criminal Code and sentenced to a term of imprisonment of eight months suspended for two years and a fine of 80 daily rates of PLN 20 each, Mr Bonda appealed against the above judgment to the Sąd Okręgowy w Szczecinie. That court allowed the appeal and discontinued the criminal proceedings against Mr Bonda. It held that as a result of the fact that a penalty had already been imposed on Mr Bonda pursuant to Article 138 of Regulation No 1973/2004 for the same conduct, criminal proceedings against him were not admissible. As a result of the appeal on a point of law lodged by the Prokurator Generalny, the proceedings are now pending before the Sąd Najwyższy, the referring court.

The main issue of the preliminary question is whether Article 138(1) of Regulation No 1973/2004 must be interpreted as meaning that the measures provided for in the second and third subparagraphs of that provision, consisting in excluding a farmer from receiving aid for the year in which he made a false declaration of the eligible area and reducing the aid he can claim within the following three calendar years by an amount corresponding to the difference between the area declared and the area determined, constitute criminal penalties.

The most important aspect that the Court is highlighting based on this decision is that administrative penalties laid down in pursuance of the objectives of the common agricultural policy form an integral part of the schemes of aid, that they have a purpose of their own, and that they may be applied independently of any criminal penalties, if and in so far as they are not equivalent to such penalties.

The Court also settled that the administrative nature of the measures provided for in the second and third subparagraphs of Article 138(1) of Regulation No 1973/2004 is not called into question by an examination of the case-law of the European Court of Human Rights on the concept of 'criminal proceedings' within the meaning of Article 4(1) of Protocol No 7, to which the national court refers.

The Court expressly referred in its analysis to the Engel criteria[25]: legal classification of the offence under national law, the very nature of the offence, the nature and degree of severity of the penalty that the person concerned is liable to incur.

It is shown that the measures provided for in the second and third subparagraphs of Article 138(1) of Regulation No 1973/2004 are to apply only to economic operators who have recourse to the aid scheme set up by that regulation, and that the purpose of those measures is not punitive, but is essentially to protect the management of European Union funds by temporarily excluding a recipient who has made incorrect statements in his application for aid.

An interesting approach regarding the analysis of the third Engel criterion was made by the Advocate General in her conclusions, highlighting that in assessing the severity of the penalty which is liable to be imposed, the assessment may not be based on whether, at face value, a measure

[25] ECHR, *Engel and Others v. the Netherlands*, 8 June 1976, §§ 80 to 82, Series A no. 22, and *Sergey Zolotukhin v. Russia*, no. 14939/03, §§ 52 and 53, 10 February 2009.

ultimately has a financially disadvantageous effect. On the contrary, an evaluator consideration is advisable, which should include whether the penalty adversely affects interests of the person concerned which are worthy of protection. If this must be answered in the negative, there is no severe penalty within the meaning of the third Engel criterion. In making this examination it is conspicuous in connection with the case at issue that the penalty does not adversely affect the current property of the person concerned, as would be the case with a fine. Neither is there any interference with legitimate expectations. By means of the reduction, the person concerned is merely faced with the loss of the prospect of aid. However, with regard to this prospect of aid, there is no legitimate expectation of aid where a beneficiary of aid has knowingly made false declarations: he knew from the start that he would not get any aid which was not reduced if he made false declarations.

So, through the analysis of the Engel criteria, the Court concluded that the sanctions provided for in Article 138 (1) of Regulation No 17. 1973/2004 are not to be qualified as criminal sanctions.

In the second case, **Fransson** (C-617/10), Mr. Fransson was accused of having provided, in his tax returns for 2004 and 2005, false information which exposed the national exchequer to a loss of revenue linked to the levying of income tax and value added tax, and also prosecuted for failing to declare employers' contributions for the accounting periods from October 2004 and October 2005, which exposed the social security bodies to a loss of revenue amounting to SEK 35 690 and SEK 35 862 respectively. According to the indictment, the offences were to be regarded as serious, first, because they related to very large amounts and, second, because they formed part of a criminal activity committed systematically on a large scale.

As legal context, the following provisions were invoked, the most important in our opinion:

- *European Convention for the Protection of Human Rights and Fundamental Freedoms*

- Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms:

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950; "the ECHR"]."

European Union law

- Charter of Fundamental Rights of the European Union

Article 50 of the Charter of Fundamental Rights of the European Union:

"No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."

Article 51:

"1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are

implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."

- Sixth Directive 77/388/EEC
- *Swedish law*

Paragraph 2 of Law 1971:69 on tax offences:

"Any person who intentionally provides false information to the authorities, other than orally, or fails to submit to the authorities declarations, statements of income or other required information and thereby creates the risk that tax will be withheld from the community or will be wrongly credited or repaid to him or a third party shall be sentenced to a maximum of two years' imprisonment for tax offences."

Paragraph 4:

"If an offence within the meaning of Paragraph 2 is to be regarded as serious, the sentence for such a tax offence shall be a minimum of six months" imprisonment and a maximum of six years.

In determining whether the offence is serious, particular regard shall be had to whether it relates to very large amounts, whether the perpetrator used false documents or misleading accounts or whether the conduct formed part of a criminal activity which was committed systematically or on a large scale or was otherwise particularly grave.'

- Law 1990:324 on tax assessment

They addressed to the Court 5 preliminary questions.

Through these questions the Court is requested to determine whether the ne bis in idem principle set out in article 50 of the Charter should be interpreted in the sense that it opposes the deployment of prosecution in respect of a defendant under the aspect of tax offences, since the latter was already a fiscal penalty applied for the same acts of false declarations.

The Court grouped the second, third, fourth and fifth questions focusing on the application of the principle ne bis in idem, embodied in article 50 of the Charter, in the case of administrative and criminal penalties double imposed by Member States.

The first preliminary question which the Court addressed refers to the conditions imposed by the Swedish Supreme Court pursuant to the ECHR and the Charter of the courts of that State.

The most important issue that rises here is if whether or not the prior existence of administrative proceedings in which there is a final judgment imposing a penalty precludes the commencement of criminal proceedings, and a possible criminal conviction, on the part of the Member States.

This shows that article 50 of the Charter does not imply, as the existence of a prior administrative penalties to prevent final definitely switching to proceedings before the Criminal Court and finally apply for a conviction.

Also, it adds, the principle of the prohibition of arbitration, linked to the principle of the rule of law (article 2 TEU), obliges the national legal order permitting criminal court to take into account, in one way or another, the existence of a prior administrative penalties, in order to reduce the criminal penalty.

Most important, the Advocate General concludes that Article 50 of the Charter must be interpreted as meaning that it does not preclude the Member States from bringing criminal proceedings relating to facts in respect of which a final penalty has already been imposed in administrative proceedings

relating to the same conduct, provided that the criminal court is in a position to take into account the prior existence of an administrative penalty for the purposes of mitigating the punishment to be imposed by it.

Analyzing the first preliminary question, the Court understands that the national court asks, in essence, whether a national judicial practice is compatible with European Union law if it makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the ECHR and by the Charter conditional upon that infringement being clear from the instruments concerned or the case-law relating to them

At this preliminary question, the Court settles that European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law

3. Conclusion

We can observe from the three decisions that we've shortly presented, that the issue that arises is if the same act of same person can be punished at the same time also with an administrative and criminal penalty without violating the principle of *ne bis in idem*.

The European Courts solved this problem in two stages.

The first one is to establish whether the administrative penalty applied is in fact a criminal penalty, and this is accomplished by analyzing the three Engel criteria, as we've shown above.

The second stage is to establish if the same act can also be administrative and criminally sanctioned at the same time.

In Fransson case, the last analyzed, the Advocate General and the Court found out that art. 50 of the Charter would not be infringed if the national court consider that there are necessary both of the sanctions at the same time, however, with the condition that where administrative penalty remains final before applying and criminal sanction (or vice versa), should be taken into account in the determination of its amount and intensity of the first.

Only in such a situation, the *ne bis in idem* rule would not be violated.

We believe that the reasoning of the Court is quite clear and effective, but is still a question we think that needs to be clarified. We also can observe that national Courts have adopted the criteria established by the European Court of Human Rights and the European Court of Justice in its case-law.

We appreciate that administrative sanctions are removed from illicit criminal sphere, while having a distinct character of criminal sanctions, but even in this case they are still instruments of punishment. As a result, concurrent application would not be a violation of the principle of ne bis in idem.

So, why the Court sets that criminal penalty should be reduced in case of application by of an administrative sanction? In our opinion, a criminal penalty should be appreciated and reduced only depending on criminal instruments that the legislator of each member-state provides, and not being influenced by an administrative sanction.

The only accepted situation that an administrative sanction could influence in a sort of way, is only when the first applied is the criminal penalty, the only one that can influence other types of sanctions.

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CONFLICT OF INTEREST OFFENCE

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Abstract

The following study aims to analyse the conflict ot interest provisions offence stipulated under Article 301 of the special part of the new Criminal Code. This adjustment aims criminal liability of public officials who, in the exercise of his duty, acquires an unjust material benefit for himself or for some people with whom he shares certain interests. Through this study we want to set a clear limit between this offence and the other service offences, as well as to highlight the need for such legislation.

Keywords: *conflict of interest, public servant, service offence, corruption offences, the Criminal Code.*

1. Introduction

Through the regulation of the conflict of interest offence, the legislator intended to incriminate those situations in which private interests of public servant improperly influence his official duties.

The Conflict of interest offence was regulated for de first time in art. 241 of Carol Code II, Title III „Crime and delicts against public administration", Chapter I "Delicts committed by public officials", Section II" Unfair takings"[1]. With the coming into force of the 1968 Criminal Code, this offence was repealed because it was considered that this was not consistent with the communist system. Subsequently, by Law no 278/2006, the legislator considered it necessary to reintroduce the conflict of interest offence in the Criminal Code.

Provisions relating to conflict of interest are to be found in certain special laws such as Law no. 78/2000, Law no. 161/2003 and Law no. 144/2007.

In the following we are going to perform an analysis of the contents of this crime from the perspective of the current and former Criminal Code. We will examine, among other things, whether the conflict of interest offence is a service offence or a corruption offence, whether this is a crime of public danger or one of outcome and whether the scope of active and passive subjects has undergone changes in the provisions of the new Ciminal Code. We will also try to capture some comparative aspects between the provisions of Article 301 of the Criminal Code and the regulations applicable to conflicts of interest in the criminal law of other countries.

Although the conflict offence was introduced in the Criminal Code by Law no. 278/2006, and we find its detailed analysis in the legal doctrine, we consider that, through the provisions of the new Criminal Code, some substantial changes are made which require a new examination of this crime.

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[1] Carol Code II promulgated by the high royal decree no. 471 from 17.03.1936, published in Official Gazette No. 65, part I, 18.03.1936.

2. Paper Content

2.1. Design and characterization

The conflict of interest offence was introduced by Law 278/2006 from the previous Criminal Code, art.253[1], Chapter I „Service Crimes or related service crimes", Title VI „Offences affecting public activities or other activities regulated by law" and it represented the consecration of criminal responsibility of public officials who meet their personal interests to the detriment of the public ones.

In the explanatory statement of Law 278/2006 it is mentioned that the purpose of incriminating the conflict of interest offence is to make more effective the actions regarding corruption prevention and punishment.

We believe that the legislator has provided this motivation because the provisions of Art.11 of Law no.78/2000 on preventing, discovering and sanctioning corruption, which regulate a particular form of conflict of interest offence are seen as assimilated to corruption offences.

Also, in the legal literature[2] it has been emphasized that the conflict of interest offence is one of corruption because it has some similarities with the crime of bribery.

Other authors[3] have considered the conflict of interest offence is a service offence and that it actually represents a particular form of service abuse as it prejudices the legitimate interests of natural or legal persons by performing duties in a defective way.

The Italian legislature is in agreement with this latter view since Art. 323 of the Criminal Code which regulates the offence of office abuse contains specific provisions for the conflict of interest offence: „the public official or the one responsible for a public function who, as part of these functions or service, by violating the legal rules or regulations, or by failing to refrain when faced with a personal interest or with that of a close relative, or in other cases provided, intentionally procures for himself or for others an undue patrimony or unjustly causes damages to others".

The French criminal legislature also considers that this offence is one of service. Art 432-12 of the Criminal Code incriminates the offence of unlawful acquisition of benefits, an offence which is similar in terms of the legal nature, with the one of the conflict of interest of the Romanian criminal law, in its Book IV- „Crimes and delicts against nation, the state and the public order", Title III – „Crimes of state authority", Chapter II „Interference into government by persons exercising a public function".

Foreign legal literature[4] stated that, although there is a strong relationship between conflict of interest and corruption, in reality, the conflict of interest is a condition in which there is a public official and not an action.

We consider that the conflict of interest offence is a crime of service since it regulates the incompatibility of the public official's private interests with the exercise of public probity duties. In support of this allegation we bring the argument that a public official may find himself in a situation of conflict of interest without acting corruptly.

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[2] Măgureanu llie, *Conflictul de interese* R.D.P 2/2007 p. 127 in the same sense Usvat Claudia-Florina *Infracțiunile de corupție in contextul reglementărilor europene*, Tome 6 BDPenal, Universul juridic, Bucharest, 2010 p. 202.

[3] Tudoran Mihai Viorel, *Conflictul de interese din legea penală română și luarea nelegală de interese din legea penală franceză* R.D.P. no. 3/2008 p. 230.

[4] Ömer Faruk GENÇKAYA, *Conflict of interest*, http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/projects/tyec/1062-TYEC%20Research%20-%20Conflict%20of%20Interest.pdf

The legislature of the new Criminal Code has considered that this offence is a crime of service. The crime of conflict of interest provisions are found in article 301 of Chapter II „Crimes of service", Title V „Crimes of corruption and service".

According to art. 301 para. (1) Criminal Code, it represents a crime of conflict of interest the „public official's deed, who, in the exercise of his duty, has performed an act or participated in a decision which was made, through which he obtained, directly or indirectly, a patrimony for himself, his spouse, a relative or a marriage up to the second degree included, or for another person with whom he was in commercial relationships at work in the last 5 years or from whom he benefited or received services or benefits of any kind". Paragraph (2) provides that „The conditions of paragraph (1) do not apply to the issuance, approval or adoption of normative acts."

2.2. Pre-existing Conditions

The legal object of the crime of conflict of interest is represented by the social values related to the performance of duties by respecting the principles of impartiality, integrity, transparency of the decision and the supremacy of public interest in exercising the high positions and public functions provided for article 70 of Law no.161/2003.

As far as the material object is concerned, we consider that the crime of conflict of interest is a formal offence because by these provisions the deficient performance of duties of a public official is incriminated.

The active subject of this offence is particular as it is represented by the quality of a public servant in the sense of the article 175 of the Criminal Code.

Thus, under this article, the term "public servant" will refer to the person who, permanently or temporarily, with or without remuneration:

a) exercises the powers and responsibilities established by law in order to achieve the prerogatives of the legislative, executive or judicial power;

b) exercises a function or a high position or a public function of any kind;

c) exercises, alone or together with others, inside an autonomous administration, or of another economic operator or of a corporate owned or majority state, tasks related to achieving the object of his activity.

Also, the new Penal Code (article 175, paragraph 2) opted for the assimilation as a civil servant of the person exercising a service of public interest for which he has been vested by the public authorities or who is subject the control or supervision of the fulfilment of that public service.

According to this latter provision, the active subject of the crime of conflict of interest can be represented by the person holding for example, one of the following public services: chartered accountant, legal executor, private detective, pharmacist.

Thus, it can be seen that, unlike the old regulation, the meaning of the term „public servant" has been expanded by assimilating these people.

We consider well founded the views[5] according to which this notion also introduces in its content, the people who, in relation to the positive criminal law hold the position of simple official.

The scope of active subjects was broadened under the provisions of art. 308 Criminal Code, regulating an attenuated form of the crime of conflict of interest. Under these provisions, the crime of conflict of interest can also be committed by the

[5] Antoniu George, *Explicații preliminare ale Noului Cod penal*, Ed. Universul Juridic, 2010, p. 532.

individuals exercising permanently or temporary with or without remuneration, a commission of any kind to the service of an individual as provided in art. 175 paragraph. 2 or in any corporate.

In order to be subject to criminal liability it necessary for these people to have the power to perform any act or to participate in decision making.

Under these provisions the director of a private company who takes the decision to hire his son on a particular position or who acquires a land that belongs to her husband commits the crime of conflict of interest.

We believe that these provisions are beyond the scope of the crime of conflict of interest rules, namely "to create legal preconditions for the conduct of service activities within a framework of integrity and impartiality of exercising public functions and dignities[6]".

These provisions have no equivalent in the previous criminal law because the crime of conflict of interest could be committed only by a public official.

It is true that in other conflict of interest legislations is incriminated committed in private but unlike Romanian regulations, these ones establish more restrictive conditions of application and enforcement. For example, the Italian Civil Code which regulates and sanctions the conflict of interest in the private sector in art. 2391 as well as in art. 2634 exhaustively sets out the categories of persons who violate these provisions.

Lack of the public official quality in art. 301 of the person exercising permanently or temporarily, with or without remuneration a commission of any kind to persons referred to in art.308 leads to the lack of the criminal act from a legal point of view.

The passive subject of the crime of conflict of interest is the public authority, the public institution, or another public legal entity in which public officials operate.

Criminal participation is possible in all forms: accomplice, instigation and complicity.

For the accomplice existence is necessary that all offenders who meet the immediate act or participate in making a decision to obtain a patrimony for themselves or for the persons referred to in the text of the indictment, to be a public servant.

In the legal doctrine[7] it is considered that when a decision is entrusted to the collective body, all the members of this body who knew of the existence of conflict of interest and did not ask the person found in such a situation to refrain from participating in taking this decision or made the decision at the request of incompatible officials, are co-authors of the crime of conflict of interest, even if they have not achieved any material benefit from that act, or that decision.

We express our reservations about this view because that the provisions which incriminate the conflict of interest set the requirement to obtain, directly or indirectly, a patrimony for themselves or for the persons referred to in the Rule of incrimination. Therefore, we consider that in the hypothetical situation described above, the public official who receives economic benefits will be held responsible co-author to the offense of conflict of interest, and the other participants in the decision will be liable for complicity material.

[6] C.C.R. – Decision no.2, 15.01.2013.
[7] Basarab Matei, et. al., *Codul penal comentat vol. II., partea specială*, Ed. Hamangiu, 2008, p.607.

2.3. The constitutive content of crime

2.3.1.The objective side

The material element of the crime of conflict of interest is consists in the in fact of an official who performed an act or a decision in the exercise of duties through which, directly or indirectly, patrimony was obtained.

The conflict of interest is a committed crime with an alternative content that is either in the performance of an act or in the participation in decision making.

By using the phrase "the performance of", we believe that the legislature intended to take into account the performance by a public official of any job responsibilities that yields a patrimony for themselves or for the persons referred to in the incrimination Rule.

Also, we consider that "the participation in decision making" requires the public official's opinion on an issue to be solved by more people in a single decision.

For the existence typicity of the public official deed it is necessary for this one to perform that act or take part in making a decision in the exercise of his duties. If this was not entitled to take these actions, we consider that his act will not constitute the crime of conflict of interest.

Some authors[8] claim that the act also remains typical when the performance of an act or the participation in a decision was not made in compliance with the rules of procedure, which subsequently led to the invalidity of the act. To the extent that the benefit of the public officials or the persons provided by the incrimination rule is obtained a patrimony, even for a short period of time, we also consider that the conditions of incriminating the crime of conflict of interest are met.

By committing the offending actions it is necessary to obtain, directly or indirectly, a patrimony.

We can consider that direct benefit is obtained, for example, if the public official assesses his own brother for employment as a civil servant working in the unit. The benefit is achieved indirectly, for example, where an agreement advantageous is concluded or to a company, legal person, whose director is the wife of the civil servant, in this case the advantage being directly realized in the assets of the legal person and indirectly in that of close relative[9].

As for the condition of obtaining a patrimony, we see that similar provisions are found in art. 323 of the Italian Criminal Code which provides the condition of getting a patrimony for himself or for others to achieve deed typicity scene.

Unlike criminal Romanian and Italian regulations, which limit the benefit obtained only to the patrimony, the French criminal law establishes that the benefit can be of any kind.

Former Criminal Code stipulated as a requirement that the benefit obtained should be only material. Regarding this aspect, the doctrine[10] held that there was a legislative gap as it was considered necessary to distinguish between a rather imprecise material and the immaterial benefit.

We believe that these discussions are no longer current regarding new regulations as well because clear distinction can be made between the patrimony and the non-patrimony and the patrimonial heritage with civil law.

[8] Bogdan Sergiu, *Drept penal:parte speciala* Ed. a 2-a rev.si adaug. Ed. Sfera Juridica, Cluj Napoca, 2007, vol. I p. 293.
[9] Dobrinoiu Vasile and Norel Neagu, *Drept penal: partea specială (teorie si practică judiciară,)* Bucuresti Wolters Kluwer, 2008, p. 449.
[10] Bogdan Sergiu, *op. cit.*, p. 293.

Article 301 of the Penal Code stipulates that the patrimony must be obtained by the public officer, his spouse, a relative or a marriage up to second degree including or by another person who was in commercial relationships or work in the last 5 years or benefited from or received services or benefits of any kind.

By person who was in commercial relationships must understand, a person with whom the active subject of the offence had relationships that typically form between a natural person and a legal entity as a result of the provision of a specific work by the former in favour of the second, who in turn commits to any remuneration and create the conditions necessary for performing that work[11].

To determine the persons with whom the official was in "commercial relations" we appreciate the need to consider "the relationship between professionals as well as the relationships between them and any other subjects of civil law." (Article 3 Civil Procedure Code)

Another category is represented by the person from whom the official has received or is receiving services or benefits of any kind. Receiving services or benefits of any kind means that these ones were offered for free or at preferential prices. Benefit of any kind, unlike the patrimony one required by the legislator in the same rule can be moral, as well[12].

According to art. 301 paragraph (2) of the Penal Code, "The provisions of paragraph (1) do not apply to the issuance, approval or adoption of normative acts". This means, with reference to the text, that the public official's act who in the exercise of duties issue, approve, or adopt a law by which directly or indirectly a patrimony benefit is made for himself, his spouse, a relative or a marriage up to grade II including or for another person with whom was be in commercial relations or employment in the past five years or from whom has he received or receives services or benefits of any kind is not a crime. The legislature chose to establish this exception because a law is impersonal and therefore it can benefit a number of countless people.

The doctrine[13] held that the result is socially dangerous, as shown in the drawing of the incrimination rule, a patrimony benefit was made, directly or indirectly.

Also, we can find in legal practice[14] as well, decisions which consider that the offence is one of result. Thus, the sentence no. 24 of 1 March 2012 the Court of Appeal from Bacau stated that, from the way in which the conflict of interest is settled, it appears that this one is a crime of material result.

Along with other authors[15], we consider that the crime of conflict of interest is a crime hazard because its consumption is affecting the smooth running of the activity of some of the public legal persons by performing acts that yield economic benefits for the public official or a person with whom he has a special relationship as indicated by art. 301 of the Penal Code.

The causal link between the adoption of the act or the decision to which the public officials participate and the material achievement must be conducted and it must result from the materiality of the concrete fact committed by public officials (ex re).

[11] Ţiclea Alexandru, *Tratat de dreptul muncii*, ediţia a 4-a, Ed. Universul Juridic, Bucuresti 2010 p.17.
[12] Basarab Matei et all, *op. cit*., p. 611.
[13] Paşca Viorel *Conflictul de interese* R.D.P. 8/2008 p. 169.
[14] http://legeaz.net/spete-penal/infractiunea-de-conflict-de-interese-24-1-2012.
[15] Dobrinoiu Vasile and Norel Neagu, *op. cit.*, p. 450.

2.3.2. The subjective side

To constitute the crime of conflict of interests it is required that actions stipulated under the rule of criminality should be committed with direct or indirect intention.

2.3.3. Forms / ways

We believe that the crime of conflict of interest is committed when the act or the decision by which the material benefit is achieved takes place.

The attempt is possible because this offence is intended and of slow execution, but the legislature chose not to punish it.

The conflict of interest has two legal ways, more precisely, to achieve an act or the participation in decision making in the service that the active subject fulfils.

As to the enforcement regime, the conflict of interest crime, provided by art. 301 of the Penal Code, is punished with imprisonment from one to five years and disqualification to hold public function.

3. Conclusions

We believe that the provisions governing the crime of conflict of interest are intended to ensure the impartiality of the public official for him to fulfil his duties objectively.

In this paper, we consider that we have been able to argue that the crime of conflict of interest is a crime of service, although it has some similarities with corruption offences. We have also showed that the scope of active subjects was extended both by modifying the notion of public official and the provisions of art.308 Criminal Code.

We propose that the ferend bill should extend the application of these provisions to cases in which the public official gets a non-patrimonial benefit by performing an act or participation in decision making. We also consider that the attenuated form of the offence of conflict of interest provided by art.308 Criminal Code should be repealed.

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