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GROUPS OF COMPANIES IN INSOLVENCY PROCEEDINGS - ROMANIAN AND INTERNATIONAL PERSPECTIVE

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Abstract

Insolvency proceedings in case of groups of companies are no longer a surprise but a reality that concerned in the last period of time the Romanian and also the European law-makers. Although at an intuitive level the understanding of this construction must not raise many questions it is proven that not always what you see is what you get, especially when insolvency proceedings are opened in case of groups of companies. The aim of this article is to offer a global image on the effort made on national and international level to codify and harmonize the insolvency law provisions in the field.

Keywords: *groups of companies, Romanian Insolvency Law, Council Regulation (EC) no.1346/2000, UNCITRAL texts*

Introduction

The economic crisis has generated an increasing number of companies that have experienced failure of businesses. As the Communication no. 742/12.12.2012 from the Commission to the European Parliament, the Council and the European Economic and Social Committee "A new European approach to business failure and insolvency" revealed, from 2009 - 2011 an average of 200, 000 companies went bankrupt per year in the Union and about a quarter of this cases have a cross-border element. In this context it was clear for the European legislator that changes need to be made in domestic insolvency legislation in areas with potential to hamper the establishment of efficient insolvency legal framework and also at the Insolvency Regulation no.1346/2000 level (the latter was presented as a key action in October 2012 when the Commission launched the Single Market Act II). There are some desirable changes in the national legislation to be made such as developing efficient early warning tools for prevention in the field of insolvency; promotion of a second chance to honest businesses and adoption of the measures that permit a clear distinction between honest and fraudulent bankruptcy; granting a discharge period for honest entrepreneurs (Member States agreed on the need to harmonize the period to discharge to less than three years as stated in the Competitiveness Council Conclusion, May 2011, following the launch of the Review of the Small Business Act for Europe); harmonization of different deadlines set by national legislation required for the debtor to declare its insolvency; transparency of the claims filing and verification process; proper regulation for groups of companies; promoting restructuring plans, all aimed to increase certainty of cross-border investments by securing the legal framework and in particular by providing opportunities to recover firms in difficulty, especially small businesses.

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This paper analyses one of the proposed segments of change, groups of companies, aiming to determine whether the changes regarding this subject offer a coherent answer for the difficulties faced in practice and whether the proposed definition and coordination actions in insolvency proceedings referred to insolvency proceedings of a group of companies, in EU provisions and also in national regulation, may conduct to better chances of recovery for the enterprises in difficulty.

1. Group of companies as subject of insolvency proceedings – the present and the future

A subject of the insolvency proceedings can be the group of companies which, in some authors' opinion, in the context of the new view regarding the professional and the enterprise, can have the quality of a professional that is exploiting an enterprise through the controlled companies within the group. As a comment to the expressed position, we mention that the enterprise concept considered by them in the expressed analysis pertains to the Competition Law, as the community jurisprudence confirms that the term enterprise must be understood in the sense of an economic unit, even though legally this unit is made up of several natural or legal entities, a situation which is not particular to Law no. 85/2006, the special applicable law, irrespective of the provisions of art.3 align. 3 of the New Civil Code.

In order to have an overview on this subject, it is required to note the fact that an insolvency procedure is incidental not only to the private law legal entities which are registered with the Trade Register but also for instance to the joint ventures, foundations and agricultural companies; the very item 6 of article 1 align. 1 of Law no. 85/2006 referring to any private law legal entity performing economic activities supports this statement. We can presume the fact that the legislator has considered the hypothesis of the private law legal entities which are registered in registers by means of which advertising is provided (the joint venture and foundations register or the agricultural companies register), whose main purpose is not performing economic activities. Pursuing with the analysis of the debtors categories which can be subject to the insolvency proceedings with a leap in time because it is temporally obvious that, at the time Law no. 85/2006 regarding the insolvency procedure appeared, the occurrence of the monist conception of the New Civil Code could not be considered, we secondly highlight the fact that, considering the appearance of the New Civil Code, it is required to reanalyse their scope. Starting from the definition of the enterprise concept, more precisely the exploiting of an enterprise, as it is proposed by article 3 align 3 of the Civil Code, as an organized activity exerted by one or several persons having or not a lucrative purpose, and of the professional in relation to the enterprise, more precisely to its exploitation according to article 3 align 2 of the Civil Code, as well as from art. 6 and art.8 of Law no. 71/2011 enforcing Law no. 287/2009 regarding the Civil Code, we can state that, at the moment, speaking about professionals, we exceed the scope of the trader and find in this multitude, besides the persons subject to registration in the trade register, also the persons exerting liberal professions, the public institutions exploiting an enterprise, entities without a juridical personality (simple companies or companies without a legal personality, such as pension funds, investment funds) and groups of companies which have been

appreciated by some authors as holders of the enterprise[1].

We shall not insist on the questions raised in light of the new regulations by the enforcement of item 6 within art. 1 align 1 of Law no. 85/2006 under the conditions of art. 194 and the following, as well as of art.1888 of the New Civil Code for the enumerated categories of professionals, but we shall return, after this parenthesis, to the analysis of the group of companies as a subject of the insolvency procedure. *De lege lata*, we would however mention from the very beginning that there is no regulation of it as a debtor within the procedure. The group of companies is regarded by some authors through the companies with a legal personality which make up its structure as being the holder of a complex enterprise, while the exploitation of the enterprise takes place through the companies pertaining to the group, as it is a single economic entity for the creditors and through the single insolvency risk for them[2]. Although we share the need to norm the group of companies as a complex structure, we do not believe that the inexistence till now of such an analysis is due to the hypocrisy of the formalism characterizing the juridical personality of the companies within the group[3], but to a remediable regulation deficiency. Economically, the steps taken in order to determine the operation manner of the group, from the perspective of the consolidated financial reporting, is an important starting model, and we consider here the categories proposed by IASB (The International Accounting Standards Board) 2008[4] the controlling entity model (where the group is made up of the mother-company which controls its subordinated branches), the common control model (where the companies making up the group are jointly controlled by an investor) and the risks and rewards model (which means that the activity performed by an entity belonging to the group affects the fortune of the shareholders of another entity belonging to this group). However, legally, we believe that the attention must be drawn on the details related first of all to the defining possibility as a group having in mind both the shareholders structure of each company, and the transparency of the decision-making policy at the level of the entire group, while removing the control or influence presumptions of a group member on the other companies either by capital sharing, or by decisions imposed in a non-transparent manner by shadow directors/investors). In consideration of the fact that, in the proposal of the European Commission to modify EC Regulation no.1346/2000 on Insolvency Proceedings, a new chapter is included, intended for the group of companies, its implementation into the Romanian legislation is exclusively a matter of time. The Romanian legislator included in the Insolvency Code adopted by the Government through Emergency Ordinance no.91/2013 a chapter regarding group of companies but unfortunately after the complaint filed by the Ombudsman, the Constitutional Court ruled that the law was unconstitutional. Hope did not die in the matter of a new Insolvency Law in Romania, and also in the matter of daring regulation of group of companies having in mind that in the structure of the new Law

[1] Fl.A Baias, E Chelaru, R.Constantinovici ,I Macovei , *Noul Cod civil, Comentariu pe articole*, Ed. C. H. Beck, Bucureşti, 2012, p. 5.
[2] Gh Piperea, *Introducere în Dreptul contractelor*, op.cit., p 343.
[3] Gh.Piperea, *Drept Comercial. Întreprinderea*, Ed C.H.Beck, Bucureşti, 2012, p 367.
[4] P.Ştefea, L.I.Viaşu, D.R. Gabriş, *Consideraţii privind grupurile de societăţi şi situaţiile financiare consolidate*, Studia Universitatis Vasile Goldiş Arad, Seria Ştiinţe Economice, Year 21/2011, Part I, p. 464, www.uvvg.ro

project no. 90/2014 regarding the insolvency and pre-insolvency proceedings[5] , this subject was retained.

Until this modification is made, however, we believe that a solution of the courts of law[6] by means of which a request for joining two files is admitted, where the insolvency procedure has been opened against two different debtors, even though they would belong to a group of companies structure, cannot be received in spite of any legal or opportunity reason, violating art.1, articles 2 and 31 of Law no. 85/2006, as the insolvency procedure is collective for the creditors, and its purpose is to cover the liabilities of the insolvent debtor.

Regarding the group of companies, it is undeniable its need of regulation. The coordination of the procedures opened against the companies belonging to the group in order to maximize the fortune of the group, without imposing successful solutions for a part of the companies to the detriment of other viable companies which shall prove to be 'collateral damage' of these solutions, the permanent cooperation between courts and practitioners involved in the open procedures, adopting an European Safeguarding Plan (the proposal belongs to INSOL Europe) are only a few of the desiderates expressed in practice and in the specialized literature in the field of companies groups. Also, we shall not exclude the possibility of changing COMI (centre of main interests) in the situation of group companies, as this could prove to be an advantage for the effective capitalization of the assets, under the reserve of conciliating the provisions of grounds 4 and 20 of the EC Regulation no.1346/2000. The approach of the centre of main interests of the group of companies is of interest considering the discussions launched in the specialized literature regarding its determination, as the theories debating the differences between the place where companies directly perform their activity and the one where the administrative and decisional control is constantly and transparently exerted on them[7], the place where the central management being designated ECOMI for the group[8], as well as the possibility of implementing an alternative which would offer a choice between the submission of a request for opening the procedure in the state where the centre of the group is located (determined depending on certain criteria, such as identifying the location with the highest level of coordination of the activity performed by the companies of the group, the research of the law applicable on the territory of the state where that location is identified regarding the norms incidental to the reorganization or liquidation procedures, considered convenient at the group level) or the benefit of coordinating the procedures opened in several jurisdictions[9].

[5] PL – x no.90-2014, http://www.cdep.ro

[6] Dismissal of 03.09.2012 returned by the Court of Galați, Civil Section II, file no. 5739/121/2011*, BPI no. 15832/07/11/2012; by decision 796R of 12.11.2012, the Galați Court of Appeal has rejected the joinder request as not grounded.

[7] Georg Friederich Schlaefer, Forum Shopping under the Regime of the European Insolvency Regulation, The International Insolvency Institute, International Insolvency Studies, Germany, 2010, http://www.iiiglobal.org/component/jdownloads/finish/39/5922.html

[8] Hon.Samuel l.Bufford, Revision of the European Union Regulation on Insolvency Proceedings-Recommendations, International Insolvency Law Review, IILR 3/2012, Germany, http://www.arge-insolvenzrecht.de/Speech_Samuel_BUFFORD.pdf

[9] International Insolvency Institute, Guidelines for Coordination of Multinational Enterprise Group Insolvencies, Paris, France, Twelfth Annual International Insolvency Conference, Supreme Court of France, 21-22 June 2012.

2. The Report of the European Commission regarding the enforcement of the EC Regulation no. 1346/2000

Suggestions regarding the need to modify the provisions of the EC Regulation on Insolvency Proceedings have been made as far back as the first years of its enforcement, although it was admitted the extremely beneficial impact of a ruling with a mandatory juridical force among the EU Member States.

Further to the analysis of the comments provided by the specialized literature[10], the main criticism aims at the lack of a clear definition of the debtor's COMI, not treating the groups of companies within the EC Regulation, the missing part of the Regulation including the detailed procedural norms related to mechanisms of the national law of the member states, the weakness[11] of art.3 align 3 which provides the fact that the secondary procedure must be a liquidation procedure[12], the need to establish a manner of cooperation and information among the courts of law and all the bodies qualified to participate in the opened proceedings, the urgency of including regulations which would be incidental in situations exceeding the Union (EU) borders, and last but not least the fact that according to art.45, it is possible to only amend its annexes. The changing proposals, object of the Report of the Committee on Legal Affairs, the opinions of the Committee on Economic and Monetary Affairs and the Committee on Employment and Social Affairs have grouped the problems identified within the analysis period into 4 directions regarding: the possibilities of harmonizing the provisions included in the national legislations, proposals whose object is to modify the Regulation, the themes of the groups of companies, as well as bringing in, at the European level, a register allowing a fast dissemination of the information on opening an insolvency procedure in a Member State, as well as the deadlines for submitting the debt statements. On 15 November 2011, further to these steps, the European Parliament adopted a resolution containing recommendations for the Commission regarding the insolvency procedures[13], while the document preserved the 4 directions contained by the Report of the Committee for Legal Affairs.

In the point of view issued on 08.02.2012 on the Resolution of the Parliament[14], the Commission positively noted the existence of the consensus on the need to make modifications, but also the possibility of harmonizing certain aspects from the national legislations regarding the submission of the debt statements, qualification of the liquidators or that of bringing in the provisions on the groups of companies or an insolvency register, but also drew the attention on the need to deepen other elements included in the resolution, such as defining COMI, harmonizing the

[10] Bob Wessels, Twenty suggestions for a makeover of the EU Insolvency Regulation, 2006, www.bobwessels.nl

[11] Gabriel Moss, Christoph G.Paulus, The European Insolvency Regulation - The case for urgent reform, 2005, http://www.eir-reform.eu/uploads/papers/ Reforms%20EC.pdf

[12] It is interesting to note that, according to annex B of the Regulation, as modified after the accession of the new wave of states to the EU, Romania brings in a liquidation procedure, the bankruptcy procedure, although according to art. 3, item 20 of Law no. 85/2006 regarding the insolvency procedure, the liquidation of the debtor's goods can also take place within the juridical reorganization, and this contravenes the Regulation.

[13] Resolution of the European Parliament of 15 November 2011 containing recommendations towards the Commission regarding the insolvency procedures in the context of the EU law regarding the commercial companies, www.europarl.europa.eu

[14] Follow up to the European Parliament resolution with recommendations to the Commission on insolvency proceedings in the context of EU Company Law, adopted by the Commission on 8 February 2012, www.europarl.europa.eu

content of the reorganization or competition plans of two procedures – main and secondary – in the context of the single market.

In the matter of the group of companies the coordination of the insolvency procedures regarding companies of the same group there is a new approach in the Insolvency Regulation Proposal, unlike the current Regulation which deals with each company differently, ignoring the whole structure. The role of the liquidator is increased, acquiring the capacity to pursue proceedings regarding the other companies of the group, having the right to request the suspension of the open procedure against them or to propose the reorganization plan considered to be the most appropriate for the entire group. Although the proposal is beneficial, one must also highlight the fact that it was not intended to renounce the practice of opening a procedure within one single jurisdiction in the situation of the groups of companies with an increased level of integration, as in the case of the procedure instituted for the telecommunication group NORTEL, in which case the administration procedure was opened in England for all the companies of the group. Moreover, the Proposal establishes at article 42 b) the obligation to cooperate among courts which can directly communicate requesting their mutual assistance, and can also appoint a person or body to act according to their instructions. In the context of the manner of defining the group of companies in article 2, letters i) and j) of the Proposal, the court must appreciate the existence of the group starting from an extremely wide framework of elements and for this reason we believe that the solution for appointing the same liquidator for all the companies in the group would mean a less difficult starting point.

It is to be noticed in fact that, from the enforcement of the EC Insolvency Regulation, i.e. 2002, the legislations of the Member States are in a constant change, either because in some cases the attempts to stabilize the insolvency norms are in the search period, or because conception modifications are required considering the European trends to implement a culture of safeguarding the enterprise and grant new chances to the honest debtor. Under these circumstances, it can be noted that any proposal aiming at the modification of the Regulation is deeply rooted into the practices of the national legislations which have been faced with cross-border insolvency causes and in the policies established by each state in approaching this phenomenon. The permissiveness of the Model Laws and the compromise they offer precisely lies in the fact that they do not have the force of mandatory provisions and for this reason the freedom offered when sometimes adapting or adopting their provisions into the national legislation decreases the pressure of aligning the national concepts to the dispositions contained by such rules, and turns them into such appreciated harmonization means.

From the comparison of the proposals for the modification of the EC Insolvency Regulation with the objectives assumed by the Working Groups at UNCITRAL level, we can easily note that the identified problems are mainly joint (the treatment of cross-border insolvency – definition, categories of debtors, problems raised by the cross-border insolvency in the case of the groups of companies, the stringent need to cooperate and coordinate within the procedures), being anchored in the same concrete realities but, unlike the European legislator that has the duty to conciliate the transposition of these objectives in a unanimously accepted manner, so that the results are visible for a longer time, UNCITRAL can issue model norms without this pre-established mission, the Model Law regarding the cross-border insolvency 1997,

the Practical Guide regarding the cooperation in the cross-border insolvency cases 2009, the Practical Guide regarding the Insolvency Law 2010, the Model Law regarding the Cross-Border Insolvency – The Judicial Perspective 2011, being the most eloquent in this respect.

Regarding the group of companies as a subject of the insolvency procedure, we shall not reiterate its importance because it has already been debated in the content of the work, but we shall focus on other aspects of the construction. It should be emphasized from the very beginning that the jurisprudence has had different approaches of the group of companies from one cause to another, starting from considering through the COMI interpretation that it is required that all the group companies be subject to the law of the state where the center of main interests for the mother-company (*Juzgado de lo Mercantil num.4.4.2009 -Hard Metal Engineering, S.L.U.: The Spanish Court of the First Instance has decided that it is competent to open the insolvency procedure against the three companies forming a group of companies - two of them are headquartered in Span, and one is registered in Hungary, based on the following reasons in order to overturn the presumption included in article 3 of the Regulation – the entire production process taking place within the Hungarian company is managed according to the guidelines imposed by the Spanish company Metasint which owns 100% of the capital; the managers of the Metasint company reside in Spain and all the commercial transactions are also performed and executed on the Spanish territory*[15].) is located, which controls the decisions of the entire group, going through the interpretation according to which the appointment of the same practitioner in all the open insolvency procedures for the companies of the group would offer greater advantages in their coordination (*Nortel Networks Romania LTD part of Nortel Group - the notification announcing the opening of the foreign procedure of administration according to the English Law, was published in Romanian Insolvency Proceedings Bulletin no. 945 on 26 February, 2009; The High Court of Justice of England and Wales, Chancery Division, Companies Court rules that COMI of the group is in England and the administration procedure must be opened by the same Court against all 19 companies belonging to this group, no matter where the registered office is located*) or, in other cases, getting to the interpretation that each entity of the group should be treated separately (*C-341/04 Eurofood in paragraph 36 of the Judgment of the Court about the presumption laid down by EC Insolvency Regulation in article 3(1) :*

"By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation")[16].

The definition of the group of companies brought in by the Proposal of modification of the Regulation is laudably built, but only contains verifiable and formal elements which lead to assessments of an entity as a group: either through the participation of a company (qualified as a mother-company) in building other companies or the control of a company exerted on other companies by means of the owned votes, the right to appoint or dismiss the management bodies, or through the

[15] http://www.insolvencycases.eu
[16] http://curia.europa.eu

contracts signed by the mother-company with its subunit.

We also consider that the treatment applicable to the group of companies would have required a deeper approach because the forms under which they can appear exceed by far the proposed structures in complexity, and the way the cross-border insolvency procedures take place, involving such structures cannot only come down to bringing in articles providing the cooperation and communication obligations (articles 42 a, 42 b, 42 c, 42 d of the Proposal for the modification of the Regulation) and in supporting these statements a few practical comments will be made.

First of all, the constructions of the group of companies, besides the vertical ones, specific for instance to the oil industry in which the mother-company has control over the distribution and service provision companies, the horizontal ones such as those specific to the media trusts in which the mother-company develops companies providing segments of products to be found among the ones provided by it or "kereitsu"[17] type, specific to Japan (vertically or horizontally organized, whose feature is the reciprocal ownership of capital among the members of the group, organized around a bank which provides the financial resources of the group companies), can also appear under the form of entities such as those meant to limit the effects of bankruptcy (Special Purpose Vehicle or SPV also known as SPE, Special Purpose Entity) constituted by a company (sponsor) through the transfer of goods within the SPV, goods which cannot be followed by the creditors of the sponsor firm (although sometimes the courts can characterize the transfer of goods as a guaranteed financing fact, and consequently instruct on reintegrating them in the balance of the sponsor)[18] or under the form of income trusts (many of these companies can be found in jurisdictions such as Bermuda, Bahamas, Jersey which can refuse the repatriation of the goods[19]) meant for isolating the income-producing goods which could be followed within an opening of the bankruptcy procedure, belonging to another company (mechanisms similar to the fiducia contract, recently included into the Romanian legislation by means of the New Civil Code), while such offshore trusts offer, besides the rapidness of constitution, the complete confidentiality, as well as the protection of goods.[20] The connections between the companies which are part of such constructions are often difficult to prove, as the formal criteria enumerated by the Regulations Proposal are not applied.

Second of all, we consider it extremely important to clarify the manner in which the request for opening the insolvency procedure shall be dealt with; from this point of view, in practice, new questions can occur which have different solutions in the legislation of the member states. Part of these questions could regard the following:

- the possibility of submitting a request which would include all the companies in the group (in which case certain courts could state that they cannot give a verdict in this manner for the need to have one single main procedure with several secondary procedures, and in the absence of a group COMI regulation we shall return to the same place of interpreting the national courts

[17] A. Istocescu, Management comparat internațional, Ed.ASE, București, 2005, pag.171.
[18] Gary B.Gorton, Nicholas S.Souleles, Special Purpose Vehicles and Securisation, January 2007, http://www.nber.org/chapters/c9619
[19] Michael Sjuggerud, Defeating the self-settled spendthrift trust in Bankruptcy, Florida State University Law Review, Volume 28, Number 4, 2001, http://www.law.fsu.edu/journals/lawreview
[20] Magdalena-Daniela Iordache, Gruparea de tip trust, Revista română de Drept al afacerilor, ed.Wolters Kluwer, nr.6/2011, pag.83.

aiming at localizing the centre of main interests for all the group companies);

- the issue of extending the procedure also over the companies which are not insolvent or in a period of financial difficulties (such an extension could be beneficial in a reorganization procedure but has several disadvantages such as an inequitable instrumentality of the creditors, application of periods of suspending the executions which could damage the creditors of the company which is not insolvent, the possibility for the mother-company to continue its activity during the period of financial difficulty to the detriment of a solvable company, clearly affected by this action);

- the treatment of the transactions concluded inside the group from the perspective of the actions in annulment of the patrimonial transfers;

- the existence of several creditors' committees or the establishment of their single committee, for all the companies of the group against which an insolvency procedure has been opened; the application of the real consolidation within the group, which implies the consolidation of the goods and debts as belonging to one single entity in the situations in which the separation of the goods is not possible because of the group construction (a fact which would imply a rearrangement of the national and European concepts regarding the identity of the legal entity);

- the appointment of a single insolvent practitioner, an apparently beneficial thing but which also has the disadvantage of the conflict of interests (the Regulation Proposal identifies the possibility of the occurrence of such a conflict within article 42 a, but the reference is made to distinct procedures, applicable to the companies of the group).

In our opinion, the definition inserted within the Proposal should be modified in the sense of defining the group of companies not only as a formal relation, but also as a structure within which the constitutive companies are contractually, financially or economically interdependent, which should be proved at the same time as the request to deal with these companies as a group because several times, this interdependence is not known by the third parties that have the certainty of contracting with separate juridical entities, and in a request for opening the insolvency procedure expressed in such situations, we consider it opportune to solve the mystery of this interdependence to the benefit of the creditors.

The European Parliament adopted a legislative Resolution on 5 February 2014 on the December Proposal of the European Commission suggesting around 60 amendments having regard to the opinion of the European Economic and Social Committee and to the report of the Committee on Legal Affairs (the Committee had 69 amendments). As for groups of companies the EP legislative resolution extended the approach beyond the need for cooperation and coordination of the proceedings related to such a structure. Some of the most interesting proposed changes are[21]:

- a new definition of a group of companies and of the parent company (the controlling criteria of the parent company from the Article 2 point j) was eliminated so that the parent company in the proposed amendment means the company which controls one or more subsidiary companies; also the parent company role is in accordance with the Directive 2013/34/EU of the European Parliament and of the Council);

[21] European Parliament legislative resolution on 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation(EC) No 1346/2000 on insolvency proceedings , www.europarl.europa.eu

- introducing a new 20aa Recital underlining that a group coordination proceedings are meant to strengthen the restructuring through the coordinated conduct of the proceedings and should not have a binding role for individual proceedings;
- an important clarification was also made in case of Article 42 a, paragraph 2, subparagraph 1, point b, so that the exercise of the cooperation referred to in the paragraph 1 of the Article 42 a shall explore, according to the new content of point b, the possibilities for restructuring the group members subject to insolvency proceedings;
- new provisions regulating opening of group coordination proceedings (Article 42da), tasks and rights of the coordinator(Article 42db), court approval of group coordination plan (Article 42dc).

3. The group of companies in national provisions

A new indisputable subject of the insolvency procedure is the group of companies, for which reason we consider it important to assign it some comments which would dedicate it a defined role.

According to article 127 alignment (8) of Law no. 571/2003, the single fiscal group is made up of juridically imposable independent persons, established in Romania, that are in close relations from the organizational, financial and economic point of view; the economic aspect is clarified by item 4 of the methodological norms (GD no. 44/2004) for applying article 127, by owning the capital of these companies directly or indirectly to a proportion of over 50% by the same shareholders. Starting from the structure laid down by the fiscal norms, we suggest that the group of companies be defined as two or several interdependent companies by owning most of the shares by a company in other companies exerting control or dominant influence on them. The interdependence is manifested by one company, called mother-company, owning at least 50% of the capital of another company; the control shall be manifested also by the right to appoint or dismiss the components of the executive or control bodies of the controlled company, while the dominant influence regards the decision-making contribution in the financial and operational policy of another company. It would also be very important to bring in certain dispositions regarding the coordination and cooperation within the procedure as far as the group companies are concerned, for which reason we suggest the regulation of the possibility to submit a joint request for opening a procedure, while all procedures would be opened within the same court, by derogation from the rules provided by article 6 of Law no. 85/2006, on condition that the procedure opening conditions are complied with, while the same proposal is also applicable to an introductory request expressed by the creditor against several companies of the group. Of course, there are situations in which not all the group companies are insolvent, which leads to a new proposal for derogation from the current dispositions of the insolvency law, namely granting the possibility to acquiesce to the joint request of opening the procedure. Moreover, we suggest the coordination of the procedures opened by the court for each company of the group by establishing the same deadlines for continuing the procedure to the extent to which this is possible or at least by avoiding the substantial differences between the deadlines granted in each file. For the cases in which they shall not appoint the same insolvent practitioner for all the companies of the group, we consider it opportune to regulate the manner of cooperation between the appointed practitioners, under the form of regular reports, containing the measures proposed or

performed by each of them within the administrated procedure, the points of view expressed in the assemblies of the creditors, the proposals of the creditors' committees; the reports would be submitted at regular intervals within each of the ongoing procedures.

Conclusions

It is never too late to give the insolvency of enterprise groups the deserved appreciation especially when this construction is quite common and the new tendencies in national and European regulations as presented are the certain proof. What is interesting to observe is that in the case of group of companies, the economic reality was some steps ahead of the legal architecture putting some pressure on the latter so that the debate between entity law on the one hand and the recognition of a structure based on economic facts (enterprise law) on the other hand, is a subject to be followed.

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INVESTMENT FUNDS ON ROMANIAN CAPITAL MARKET

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Abstract

National laws governing collective investment undertakings were updated as a result of European secondary law modernization with a view to approximating the conditions of competition between those undertakings at Community level, while at the same time ensuring more effective and more uniform protection for unit-holders. Such coordination intended to facilitate the removal of the restrictions on the free movement of units of UCITS in the internal market. For the purposes of internal regulation UCITS means an undertaking: (a) with the sole object of collective investment in transferable securities or in other liquid financial assets of capital raised from the public and which operate on the principle of risk-spreading; and (b) with units which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings' assets. The UCITS may be constituted in accordance with contract law (as common funds managed by management companies), trust law (as unit trusts), or statute (as investment companies).Key investor information should be provided as a specific document to investors, before the subscription of the UCITS, in order to help them to reach informed investment decisions. Investment funds enjoy in Romania a new regulatory framework: the contract of common society hosted by new Civil Code and the new Emergency Ordinance regarding UCITS.

Keywords: *capital market, investments, undertakings for collective investment in transferable securities (UCITS), financial supervisory authority, key information*

Introduction

The Romanian Capital Market Act (Law no 297/2004) thoroughly regulated the undertakings for collective investment in transferable securities (UCITS) since 2004 till 2012. Following the amendments made on European level since 2009 (beginning with Directive 2009/65/EC of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)) Romanian legislator has chosen to recast the rules in an independent act, outside of consolidated Capital Market Act intended to comprise all the capital market regulations: GEO no 32/2012. This normative act encompasses many measures designed to rebuild the trust in a capital market continuously shaken by an endless economic crises.

The establishment of a financial supervisory authority (European Securities and Markets Authority, hereinafter 'ESMA', agreed by Regulation (EU) No 1095/2010 of the European Parliament and of the Council) is a strong signal of determination on European stage to coordinate the measures converging to build a uniform and efficient framework for capital market.

One of the new elements of the UCITS regulation is key investors information: the new law requires that an investment company and, for each of the common funds it manages, a management company draws up a short document containing key information for investors. Such information

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is intended to rapidly inform the investors on key information they need to make their investment decision.

The new law introduces specific rules and concepts which need scientific scrutiny in order to crystallize a convergent approach.

1. Undertakings for collective investment in transferable securities (UCITS)

Common forms of investment entities on the capital market are UCITS (Undertakings for Collective Investment in Transferable Securities), represented by open-end funds and investment companies. Although there are "closed" investment companies, too, the law does not use linguistic form of "open" investment company, investment company designation remains to be understood implicitly as open-end investment company[1].

The essential characteristics of the UCITS are underlined by the law: the purpose of the entities (sole purpose pursued is conducting "collective investment", investing of fund money collected in financial instruments under conditions prescribed by law, including the principles of risk diversification and prudential management) and financial instruments issued (units are redeemable continuously to a value determined by reference to net assets value, at the request of holders)[2].

Redeemable character (continuous) of units issued by UCITS is an immanent mechanism, the essential element of the definition of these entities. This feature explains the open-end approach of the UCITS. Issuance and redemption of units, in a continuous manner, is the main mechanism of these investment vehicles.

The units will be issued on the capital market following the favourite principle "delivery versus payment". Symmetrically, withdrawal (redemption) implied payment of the amount of money calculated at the date of application for redemption, using a transparent algorithm designed for price fixing: by determining the net asset value per unit. Payment induced by such repurchases will be made within a "reasonable" time set by law to ten days of the filing date of redemption.

The distinction between investment funds und investment companies resides in the legal form of the entity: civil contract or incorporated company.

The law lays down a principle of non-reciprocity between large species of collective investment undertakings, UCITS and non-UCITS which are close-end funds and investment companies. Thus, UCITS can turn into non-UCITS but vice versa transformation is prohibited[3].

2. Authorization of UCITS

Undertakings for collective investment in transferable securities are regulated entities of the capital market, subject to the approval of the authority of the market, ASF (Financial Supervisory Authority, former CNVM).

Authorization of UCITS is a gradual process that is preceded by the designated administrator authorization (such administrator being a management company), statutory documents authorization - i.e. civil contract and rules for the common fund and articles of

[1] See C. Gheorghe, *Capital Market Law*, Bucharest: CH Beck, 2009, p. 121.
[2] GEO no 32/2012, Art. 2, paragraph 2.
[3] *Ibid*., Art. 2, paragraph 6-7.

association for the company - the choice of Depositary and approval of the prospectus[4].

The undertakings for collective investment are subject to multilevel scrutiny including their establishment, commencing of effective operations (continuous public offering of units) and continuous administrative supervision throughout the period of their existence.

The actual authorization of UCITS is preceded by assessment of reliability and professional experience of the persons in charge within the management company and their ability to impose prudential rules, the reliability of the depositary and its capacity to maintain accurate records of the UCITS's asset.

Operations of investment funds begin with a public offer of their own units. Authorization required for public offer of units implies verifying the legality of the prospectus (available in a plain format and a concise and simplified form, format known as key information). In a general manner it is acknowledged that prospectuses must contain all the information necessary for investors to independently assess units offered for investment, in terms of potential gains and risks involved[5].

3. Investment funds

Investment (common) funds are civil contracts, unincorporated association, directed of a management company, authorized by ASF. Titles publicly offered are fund units, redeemable continuously at a price based on the net asset value of the fund[6].

From the legal point of view the civil contract establishing the fund is an adhesion agreement whereby investors become part (of the contract) by subscribing units and signing a declaration in accordance with article 93, paragraph (3) of GEO no. 32/2014 regarding the prospectus. At present, the new Civil Code extensively regulates the "contract of society" (partnership) and "common society" (common partnership), an unincorporated association[7]. Even such rules cannot regulate entirely the articles of association, the civil contract of the investment fund. Despite contractual principles, the investment fund issues shares (units) continuously (and redeemable) ignoring the consent of the other members of the fund. Free entering and withdrawal from the contract (association) are inappropriate for "contract of society" and contractual matter in general. At their will investors can choose the time of withdrawal from investment fund, without the consent of the other parties, and without the payment of compensation.

4. Statutory framework

Along with the partnership agreement (civil contract), an investment fund has a statutory framework including the fund rules (annex to the prospectus[8]) and the prospectus itself. The Capital Market Act induces statutory limitations for common funds. Units issued by open-end funds shall be of one type, fully paid upon subscription, registered, dematerialized and shall give equal rights to their holders[9]. The holding of fund units is attested by a certificate confirming ownership. These units are

[4] *Ibid*., Art. 63, paragraph 2.
[5] GEO no 32/2014, Art. 93 paragraph 1.
[6] GEO no 32/2014, Art. 71.
[7] Civil Code, Art. 1890-1948.
[8] GEO no 32/2014, Art. 68, Art. 93 paragraph 2.
[9] *Ibid*., Art. 69. Old law prescribed units on material support.

purchased at the issue price and the open-end funds do not issue other financial instruments except for units.

Civil contract. The essence of the common fund rests in its unincorporated nature, in its pure contractual basis. Thus, all subscribers of units shall adhere to civil contract. In this way the legal "contract of society" - a mutually binding promise, a multilateral legal deed - suffers a continuous modification of the parties and its content (related strictly to extinguish or existence of rights and obligations of the parties who withdraw or adhere to partnership). The particularity of the partnership, ignored by the law, is the demand of the parties' consent in order to amend the initial contract. In Contact Law doctrine, concluding, modification or extinction of a contact rests in the parties' consent, any exception being insulated with prudence. Capital market law doesn't pay much importance to that old civil principles and easily removes the unanimity rules, the parties' consent; what remains is the new investor's (subscriber of the fund) consent to statutory framework of the investment fund. Legal innovation is an extreme one, but governed by rules laid down for investment funds[10].

Although the absence of express provision to compensate lack of consent of the parties is embarrassing, we cannot fail to notice that this mechanism ensures a uniform approach of the UCITS. In the case of an investment company, the nature of share raises no question in purchasing or selling company's share. The nature of transferable securities permits the continuous withdrawal and entering the company without the shareholders' consent. Units in investment funds are declared transferable securities, too. Thus explained the functioning of the investment fund is hard to accommodate with the contractual nature of the investment fund. We have to assume that the act of subscription (entering into a civil contract) means consent of the person to future amendments to the articles of association of the fund, regarding the parties, without his express consent. Interpretation should be strictly limited to the parties' person of the common fund because the partnership cannot suffer other material changes, in its content or subject, without all the parties' consent.

The minimum provisions of the partnership of the fund is fixed by the law[11] and concern: the name of the fund, the legal foundation, the duration of the fund, the objectives, the units (definition, description, initial value), the management company and its maximum management fee, the Depositary and its maximum fee, clauses for liquidation and merger of the funds (procedure for investors protection), litigation (method of settlement, competence), termination clause, the rights and obligations of the parties (specifying in principal that investors become part of the contract by signing the subscription form and a declaration confirming that they have received, read and understood the fund prospectus).

All these provisions should be accepted as special contractual arrangements overlapping the common provisions regarding civil contract, "contract of society" from Civil Code.

Fund rules. Besides the partnership agreement investment fund is preparing a document describing its objectives and entities involved in its activities (management company and depositary company). This document is known as the fund rules.

The importance of rules does not end with declaring the management company and the depositary. This document contains

[10] See C. Gheorghe, *Capital Market Law*, Bucharest: CH Beck, 2009, p. 124.
[11] CNVM Regulation no 15/2004; Annex no 4, still in force.

information of the utmost importance for investors represented by financial goals. All financial objectives - as planned capital raised, expected income, investment policies, the main categories of transferable securities suggested for investment, portfolio protection systems (hedging techniques), the minimum recommended duration of investments, risk factors associated with the investments policy of the fund - are elements of distinction among different investment funds on the capital market.

Fund rules reveal the intentions and investment policies assumed by the management company of the fund, containing a reference point for assessing the result that shall be achieved in the future.

Fund rules contain also specific details of the mechanism of determining the net asset value of the fund (asset valuation method, net asset value, the frequency of calculating the net asset value and channel of publication of this value, the initial value of a unit).

5. Financial instruments. Prospectus.

Units in undertakings for collective investment in transferable securities are qualified as financial instruments[12]. Units of investment funds are a type of financial instruments defined by the Capital Market Act. Investment funds, based on civil contracts ("contract of society"), are therefore entitled to issue securities, units of the fund. From the Civil Law perspective this is a notable exception. From the Capital Market Act perspective this situation is totally regulated. The document governing the issue of financial instruments by investment fund is the prospectus, subject to authorization by ASF[13].

Beyond the civil statutory framework of an investment fund, issuing units is a distinct activity of the fund, supervised by ASF. Authorization of the civil contract and the fund rules is followed by prospectus authorization and continuous supervision throughout the life of the fund.

Minimum information covered by the prospectus is laid down by administrative regulation (ASF)[14]. The law organizes provisions in distinctive chapter: Management Company of the fund, Depositary, preparation and distribution of financial statements, rules for the determination and allocation of income and procedure for investors' payments in case of redemption application, channel of disclosure for investment fund reports and papers. In particular, the prospectus includes information relative to fees and other charges (fees borne by investors: purchase fees, redemption fees, fees payable to the management company, the depositary), merger and liquidation of a fund (circumstances in which a fund may merge with another fund or be liquidated, and procedure implied, unit holders' rights), as well as tax system (taxes borne by the investors).

Data from prospectus contain detailed information for investors in order to have a complete picture on risks induced by the purchase of units[15]. The prospectus shall include a clear and easily understandable explanation of the fund's risk profile.

[12] Law no 297/2004, Art. 2 paragraph 10 d).
[13] See C. Gheorghe, *Capital Market Law*, Bucharest: CH Beck, 2009, p. 126.
[14] CNVM Regulation no. 15/2004, Annex no 8. See also Directive 2009/65/EC, Annex 1 Schedule A.
[15] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), Art. 69: The prospectus shall include the information necessary for investors to be able to make an informed judgment of the investment proposed to them, and, in particular, of the risks attached thereto.

Information regarding the fund's auditor and the group of companies - to which the management company or the auditor belong - is also revealed by the prospectus.

The prospectus of the investment fund must prevent potential investors, through a standard formula, that the investment funds "are not bank deposits", that ASF authorization "does not imply any endorsement or evaluation by ASF of securities quality" and that investment funds involve not only their specific advantages, but also the risk of failure of objectives, including losses to investors[16].

Moreover, always when past returns (including advertisements) are revealed, a warning formula, which became almost solemn, is required: "the fund's past performance is no guarantee of future results."[17]

6. Key investor information

Key investor information should be provided as a specific document to investors, before the subscription of the UCITS, in order to help them to reach informed investment decisions. Such key investor information should reveal the essential elements for making such decisions.

Key investor information shall include information about the characteristics of the UCITS concerned, which is to be provided to investors so that they are reasonably able to understand the nature and the risks of the investment product offered to them.

The nature of the information to be found in the key investor information should refer to the identification of the UCITS; a short description of its investment objectives and investment policy; past-performance presentation or, where relevant, performance scenarios; costs and associated charges; and risk/reward profile of the investment, including appropriate guidance and warnings in relation to the risks associated with investments in the relevant UCITS[18].

Key investor information should be presented in a short format. A single document of limited length presenting the information in a specified sequence is the most appropriate manner to achieve the clarity and simplicity of presentation that is required by retail investors.

Conclusions

The European secondary law on UCITS continues a modernization process with a view to approximating the conditions of competition between those undertakings at Community level, while at the same time ensuring more effective and more uniform protection for unit-holders. Such coordination intended to facilitate the removal of the restrictions on the free movement of units of UCITS in the European internal market.

Such regulations should facilitate investment protection and national treatment in order to have a level playing field.

Romanian regulations are intended to facilitate and implement the European legislative guidelines.

[16] CNVM Regulation no. 15/2004, Art. 91 paragraph 3.
[17] Ibid., Art. 170.
[18] GEO no 32/2012, Art. 98. See also Directive 2009/65/EC, Art. 78.

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ADMINISTRATIVE ACTS EXTEMPTED FROM JUDICIAL REVIEW BY ADMINISTRATIVE COURTS

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Abstract

The Romanian legislation, meaning by this Law no. 554/2004, creates in article no. 5 a special regime for some administrative acts which will be considered as exceptions from the "common administrative procedure". These acts are not subject to the review of the courts, the exception being a total one or a partial one as it will be described in this study. The existence of the administrative procedure does not mean an absolute control on the administration. This is in fact the main reason why this article was included in Law no. 554/2004 and all implications will be described in this study.

Keywords: *Constitution, administrative acts, pleas of inadmissibility, Law no. 554/2004, contentious-administrative courts.*

1. Introduction

The administrative control is not and will never be an absolute one, without limits, so that once with the idea of such a control has also arisen the idea of some categories of acts that are to be removed from the scope of the control of the courts.

Traditionally, these acts have been called "pleas of inadmissibility", meaning administrative acts that are exempted from the full or partial review of the contentious-administrative courts.

Owing to the fact that the existence of such acts falls into the category of the exceptions, the importance of the concept and each category analysis involves a great importance for the theorists and practitioners of the administrative law.

2. The analysis of the administrative acts exempted from the judicial review by the courts – theoretical and practical implications

This analysis is based on the current wording of art. 4 of Law no. 554/2004[1], which provides the following:

(1) The following shall not be brought before the contentious-administrative court:

a) the administrative acts of the public authorities concerning their relations with the Parliament;

b) the acts of military command.

(2) The administrative acts for which amendment and dissolutions provided another judicial procedure by an organic law shall not be brought before the contentious-administrative.

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[1] Law no. 554/2004 was amended and supplemented by the G.E.O. no. 190/2005 (Official Gazette no. 1179 of 28.12.2005), Law no. 262/2007 (Official Gazette no. 510 of 30.07.2007), Law no. 97/2008 (Official Gazette no. 294 of 15.04.2008), Law no. 100/2008 (Official Gazette no. 375 of 16.05.2008), Law no. 202/2010 (Official Gazette no. 714 of 26.10.2010) and Law no. 299/2011 (Official Gazette no. 916 of 22.12.2011), Law no. 76/2012 (Official Gazette no. 335/30.05.2012), Law no. 187/2012 (Official Gazette no. 757 of 12.11.2012), Law no. 2/2013 (Official Gazette no. 89 of 12.02.2013)

(3) The administrative acts for the application of the state of war, of siege or of emergency, those relating to national defence and security, or those issued to restore the public order, as well as those to eliminate the consequences of the natural disasters, of epidemics and epizootic diseases, shall be appealed only by abuse of power.

The Constitution of 1923 states that: "*The judicial power does not have the right to judge the government and military command acts.*"

The contentious-administrative law of 1925, enforced based on the wording of the Constitution, has come up with a definition of the governments act, definition that has been criticized by the doctrine.

In general, in the current western doctrine the administrative acts issued in "*exceptional circumstances*" or the acts expressing "*the powers of the executive in case of danger*" are considered within the scope of the plea of inadmissibility.

The Constitution of 1991 contained only art. 4 par. 2, which stated: "*The conditions and the limits of this right (the right to act within the contentious-administrative) shall be established by organic law*", wording that has remained unchanged and has become art. 52 par. 2 by the review of the Constitution by Law no. 429/2003, passed by the national referendum of October 18th-19th, 2003.

The review law, as shown, introduces in art. 126, par. 6 thesis I, the principle of art. 107, final par. of the Constitution of 1967 with the wording: "*The judicial review of the public authorities administrative acts before the contentious-administrative is granted, except those regarding the relations with the Parliaments, as well as the acts of military command*".

Basically, the term "government acts" is replaced by the term "acts regarding the relations with the Parliament", but art. 48 par. 2 that has become art. 52 par. 2 remained in force, so that the problem of their "reconciling" has arisen, especially since the Prof. Ioan Vida brought in the current Romanian legal Doctrine the thesis of the "intra-constitutional antinomies".

Two interpretations are possible:

a) art. 126 par.6 is the only establishment of the matter concerning the scope of the plea of inadmissibility and art. 52 par. 2 concerns other matters; and

b) art.126 par.6 governs the plea of inadmissibility of constitutional "status" and art. 52 par.2 governs the plea of inadmissibility of legal "status" within the limits permitted by art. 53 of the Constitution.

The scope of the plea of inadmissibility

Strictly speaking, the scope of the exempted administrative acts includes only the two categories of administrative acts provided by art. 126 par. 6 of the Constitution.

The traditional pleas of inadmissibility were grouped into two categories:[2]

- the pleas of inadmissibility deducted from the nature of the act;
- the pleas of inadmissibility determined by the existence of a parallel appeal.

Therefore, we can state that there are absolute exceptions, the two situations governed by par. 1 letters a) and b) and the relative exceptions, the situation of the

[2] For more, see E.E Stefan, *Administrative law manual, Part II, Seminar book*, Universul Juridic Publishing, Bucharest, 2012, p. 98.

"parallel appeal" governed by par. 2 of art. 5 of Law no. 554/2004.[3]

It was agreed that for the situations provided by par. 1 to use the term "exceptions to the contentious-administrative" and for the parallel appeal the term "pleas of inadmissibility in the contentious-administrative courts".

The parallel appeal, since it covers the disputes on the administrative act, also represents an administrative dispute, but it is formally settled outside the contentious-administrative courts.

It should be noted that the legislator asked that the "parallel appeal" to be regulated by organic law and to represent a judicial procedure in terms of article 126 of the Constitution.

The category of the ***acts of military command***, category of acts exempted from the contentious-administrative, provided for the first time in the Constitution of 1923 and then in the first special law of the contentious-administrative of 1925, was resumed in the identical wording in Law no. 29/1990 in order to get a constitutional consecration on the occasion of the review of the Constitution of 1991[4].

The justification for the introduction of such categories of acts exempted from the judicial review by the courts is observed in the situations arisen during the First World War, in parliamentarians' and public opinion memory being still actual, in 1923 some negative circumstances related to the command of the troops, the concerns particularly regarding the existing dangers for the technical leadership of the army if the judiciary would have the right to censor such acts[5].

The remove of such acts from the judicial review was based on the need to ensure the spirit of discipline of subordinates reported to the idea of prestige and authority of superiors, as well as to the conditions of the unit, the capacity and speed necessary for the military operations[6].

Therefore, emerged the main idea that in order to be within the scope of this category, there has to be about an act that comes from a military authority, being impossible for such acts to come from the civil or military authorities that "because of their nature or purpose are not commandments, hence the necessity of defining the concept of commandment[7].

The interwar doctrine usually distinguished between the acts of military command, the government acts of military command (those specific to the state of siege, requisitions, etc.) and the acts of military administration. This distinction aimed at the authority acts because it was widely acknowledged that the military authorities, in their capacity of legal entities, may also perform management acts[8].

However, not any act of a military authority was a military command act. While the acts from the first category which included for example acts of appointment of officers, of military rank promotion, of sanction, retirement etc., could be brought

[3] For more, see E.E Stefan, *Administrative law manual, Part II,* Universul Juridic Publishing, Bucharest, 2013, p. 69-70.
[4] D. A. Tofan, Drept administrativ, (Administrative Law, 2nd volume), All Beck Publishing, Bucharest 2004, p. 324.
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[8] A. Iorgovan, Tratat de drept administrativ (Administrative Law Treaty), 2nd volume, 3rd edition, reorganized, revised and supplemented, Editura All Beck, collection of university course, Bucharest, 2002, p.561.

before the contentious-administrative court, the acts included in the second category, no matter if they came from the Head of the State, the Government, the Minister of Defence, could not be brought before the contentious-administrative[9].

For example, the interwar judicial practice ruled that the acts of withdrawal could be investigated and considered illegal by the courts, but could not be canceled; instead the plaintiff had the right to obtain the rectification of pension, by assuming that the maximum years of service would be achieved, as well as the civil damages[10].

During the interwar period, the delimitation of the scope of the military command acts from the government acts was difficult to accomplish due to the vagueness of the contentious-administrative law of 1925.

Most of the authors dealing with this concept have made the distinction between the acts of military command that are involved in the relations between the military authority and the civilian population and the acts of military command that are involved in the military hierarchy. The former were subject to the judicial review by way of the contentious-administrative, except in cases were they were committed during war time[11].

By elimination, only the acts that met the duty of command, of ordering something in what concerned military issues, were maintained within the scope of the acts of military command.

Therefore, the following acts were considered acts of military command during war time: troops changing, their building-up on the attack or defense line, attack, advance or retreat, etc., and during peace time: the establishment, reorganization or dissolution of military units, delimitation of recruitment areas, troops building-up for exercise, maneuvers.

From this perspective maintained for decades, an order of the Minister of National Defense passed in 1990, that set out quite arbitrarily that all administrative acts implemented in the army were included in the category of acts of military commend, which is said of the exempted acts, undeniably represents an illegal order[12].

The including of an actual administrative act within the scope of the acts of military command remains a matter of the court judgment, but also an assessment made by the public law science[13].

In other words, the contentious-administrative courts shall exercise a maximum caution when including an administrative act in the scope of the acts of military command and therefore of those exempted from the judicial review[14].

In relation with all these doctrine elements, the consecration by the new contentious-administrative law of the concept of act of military command is welcome.

Thus, according to art. 2 par. (1) letter j) of the law, the act of military command is defined as the administrative act concerning

[9] D. A. Tofan, Drept administrativ, (Administrative Law, 2nd volume), All Beck Publishing Bucharest 2004, p. 325.
[10] R. N. Petrescu, Drept administrative (Administrative Law), Accent, Cluj-Napoca Publishing, 2004, p. 415.
[11] A. Iorgovan, Tratat de drept administrativ (Administrative Law Treaty), 2nd volume, 3rd edition, reorganized, revised and supplemented, Editura All Beck, collection of university course, Bucharest, 2002, p.562 and the following.
[12] D. A. Tofan, Drept administrativ (Administrative Law), 2nd volume, All Beck Publishing, Bucharest 2004, p. 325.
[13] A. Iorgovan, Tratat de drept administrativ (Administrative Law Treaty), 2nd volume, 3rd edition, reorganized, revised and supplemented, Editura All Beck, collection of university course, Bucharest, 2002, p.565.
[14] V.Vedinaș, Drept administrativ și instituții politico-administrative (Administrative Law and political-administrative institutions), Practical Manuals, Lumina Lex Publishing, Bucharest, 2002, p.205.

the strictly military activities within the military organizations, specific to the military organization involving the right of the commanders to rule in matters relating to the troop control during war or peace time or as the case may be, during the serving of the military service[15].

In what concerns the old categories of acts exempted from the contentious-administrative review, under Law no. 29/1990, due to their nature, they were redesigned and entered into the category of those exempted under the new law of the contentious-administrative, in a particular way, based on the interpretation of art. 126 par. (6) of the republished Constitution, which regulates the pleas of inadmissibility of constitutional status in relation to art. 52 par. (2) of the republished Constitution (the conditions and limits of these rights are set by organic law), which aims the pleas of inadmissibility of legal status, within the limits accepted by art. 53 of the republished Constitution dedicated to the limitation of some rights and freedoms[16].

There is also the expression used by the Law of the contentious-administrative of 1925, in relation to the content of art. 107 of the Constitution of 1923, reason for which the marginal title of the article was changed from the "pleas of inadmissibility", as referred to in the project, in the "acts that are not brought to review and the limits of the review", the first category including the exempted acts of constitutional status and the second category including the exempted acts of legal status.

Thus, according to art. 5 par. (3) of the new regulation, "the administrative acts issued for the implementation of the state of war, siege or emergency regime, those relating to national defence and security, or those issued to restore the public order, as well as the ones designed to remove the consequences of the natural disasters, epidemics and epizootic diseases shall be appealed only by abuse of power".

In disputes involving such acts, the provisions on the suspension of the execution of the acts and on the trial of the appeal in particular situations, are not applicable.

It appears that the administrative acts listed above shall be brought before the contentious-administrative court only under certain conditions, and certain rules of the procedures set by the law are not applicable[17].

It is necessary for the respective acts to be appealed only by abuse of power, with the compliance of the conditions and limits provided by art. 53 of the republished Constitution.

In art. 2 of the law dedicated to the meaning of certain terms and expressions, the abuse of power is defined as representing "the performance of the right of assessment, belonging to the public administration authorities, by violating the fundamental right of the citizens provided by the Constitution or by the law".

In relation to the content of art. 5 par. (3) of the new law aforementioned, the old exempted categories of acts – acts relating to national security; diplomatic acts concerning the Romania's foreign policy; acts issued under exceptional circumstances – are to be reconsidered.

Thus, in what concerns the category of the acts relating to national security, in the opinion of the legislator from the inter war period, they were considered as a type of

[15] D. A. Tofan, Drept administrativ (Administrative Law), 2nd volume, All Beck Publishing, Bucharest 2004, p. 326.
[16] A. Iorgovan, Noua lege a contenciosului administrativ, Geneză şi explicaţii, (New law of the contentious-administrative, Genesis and explanations), Roata Publishing, Bucharest, 2004, p.305.
[17] A. Iorgovan, Noua lege a contenciosului administrativ, Geneză şi explicaţii, (New law of the contentious-administrative, Genesis and explanations), Roata Publishing, Bucharest, 2004, p.307.

government acts, together with the acts concerning the public order, being described as "acts aiming at the internal and external state security", a wording with the same meaning.

In turn, the jurisprudence of that time held that all the government acts that are not specifically listed in the law, in addition to the fact that they shall relate to a general interest in relation to public order or internal and external state security, "they shall be justified by the "existence of a serious and imminent danger that threatens the state".

In other words, as mentioned in the doctrine, the law should exempt them only in those serious moments when the state security was threatened and when the respective acts became governments and ceased to be simple authority acts, of organizing the law execution[18].

This is exactly what the current legislator considers by the express consecration of the abuse power criteria[19].

The first category of exceptions belongs to the political acts, traditionally qualified in the doctrine as "government acts'. Although the legislator has only defined the government acts in art. 2 par. (2) of the contentious-administrative law of 1925, later the doctrine and the jurisdiction have tried to find definitions for the government acts. Currently, the public authorities' acts - in their relation with the Parliament - benefit, under the actual amended and supplemented of Law no. 554/2004 by Law no 262/2007, from a new legal definition in art. 2 par. (1) letter k), according to which public authorities acts are "the acts issued by a public authority in the performance of its duties, provided by the Constitution or by an organic law, in what concerns the political relations with the Parliament.

From this definition would result the fact that it is about the administrative acts of all public authorities in what concerns the political relations with the Parliament. The current doctrine states that, compared with the new constitutional provisions and with the constitutional structure as a whole, in this category of exempted acts are included the political acts issued in the performance of the constitutional duties between the supreme representative body (the Parliament) and the two heads of the executive (the President and the Government) and the acts involved in case of direct relationships, when complex acts arise involving two or more authorities of the executive, of which at least one is in a direct relations with the legislator forum, with special reference hereto to the presidential decrees to be entered by the Prime Minister, and also most decrees that do not require this procedure.

Concerning the acts on the relations between the Government and the Parliament, the acts of the Parliament in the relations with the Government shall not be administrative acts; things are not that simple in what concerns the acts of the Government in its relations with the Parliament, in the board sense of the term. In the doctrine are identified two categories of acts of the Government as public authority of the executive power: government acts (political acts par excellence – motions, declarations etc.) and pure administrative acts (acts that settle technical organizational problems) of the public administration. It is also noted that not any act of the Government is a government act, because there may be decisions of the Government passed by the abuse of power and that violate rights and legitimate interests of persons. These decisions of the Government are normative or individual administrative acts,

[18] Al. Negoiță, Drept administrativ (Administrative Law), Sylvi, Publishing, Bucharest 1996, p.245.
[19] D. A. Tofan, Drept administrativ (Administrative Law), 2nd volume, All Beck Publishing, Bucharest 2004, p. 327.

and when they violate the law or supplement provisions of the law, they may be appealed before the contentious-administrative court under art. 52 of the republished Constitution and under the provisions of the special law in case, Law no. 554/20004, as further amended and supplemented. It was considered that, in case a Government decision violated the constitutional provisions, it might be appealed before the contentious-administrative court, the unconstitutionality being a serious form of illegality.

In order to analyze the acts concerning the relations of the Parliament with the President, the duties of the President in the relations with the Parliament shall be considered. In this category, the administrative doctrine includes: the addressing of messages to the Parliament (art. 88), the calling and dissolution of the Parliament (art. 89), the referendum (art. 90), the promulgation of the law (art. 77), the appointment of the candidate for the position of Prime Minister (art. 85 and art. 103) etc.

Professor Antonie Iorgovan states that when we traditionally distinguish between the decrees as legal acts and the exclusive political acts of the President of Romania, including its messages, we actually distinguish between the administrative law acts and the constitutional law acts that concern the exclusive political relations between the President and other political structures. It is also argued that most of the President's duties are performed by issuing decrees that shall be passed by the Prime Minister, and in this way is performed an indirect parliamentary control on the President by the Prime Minister, who is politically responsible before the Parliament.

Following extensive debates and arguments that took place in the doctrine and in the jurisprudence, it was held that the decrees of the President of Romania passed by the Prime Minister are complex legal acts that state a constitutional relationship between the two heads of the executive, on the one hand, and the Parliament, on the other hand, being included in the categories of the pleas of inadmissibility enshrined in art. 126 par. (6) of the Constitution, republished, meaning the acts concerning the relations with the Parliament[20].

The administrative acts listed in par. (3) of art 5 may be appealed before the contentious-administrative court only under certain conditions, and certain rules of the procedure regulated by the law of the contentious-administrative are not applicable in these cases; thus, it is firstly required that the respective acts to be appealed only for abuse of power, being understood that the concept of abuse of power in terms of art. 2 letter n) of the law is taken into account.

Therefore, in the absence of express provisions in the organic law, the contentious-administrative courts, when settling the disputes concerning the abuse of power, shall apply directly the wordings of the Constitution and firstly art. 53.

Thus, the courts shall determine whether the administrative act which represented the object of the dispute was necessary for the implementation of the regimes, or as the case may be, for the removal of the situations provided in par. 3 of art. 5.

Then the courts shall determine if the act appears to be necessary in a democratic society and if the limitation by the administrative act of exercising the violated right is proportional to the situation that caused the issuance of the act, and if it is somehow discriminatory.

[20] I. Rîciu, Procedura contenciosului administrativ (Contentious-administrative procedure), Hamangiu Publishing 2009, p. 178-181.

3. Conclusions

The specialized literature has widely discussed the issue of these types of acts, but has not excluded the fact that the establishment of some categories of exceptions from the legal review of the contentious-administrative courts would prevent the common law courts to take legal action to defend human rights and freedoms, such as the granting of indemnities, etc., however without having the jurisdiction to cancel or suspend the administrative acts that have caused the prejudice. This is why it should be concluded that the citizens should not remain uncovered by the total lack of a legal control, but this control shall not bear the substance of the act.

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GENERAL ASPECTS ON THE IMPLEMENTATION OF THE EU LEGAL ORDER, UNDER PUBLIC INTERNATIONAL LAW

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Abstract

We believe that achieving a uniform legal order, as the European Union order, is nothing new at international level, as long as at the basis of what today is forming the European Union law, we find several international treaties concluded under the existing regulations of international law. In this respect, we are considering, first of all, the three founding Treaties of the European Communities, which, from the point of view of international law, have at least three fundamental features, namely: firstly, they express the legal bond between member states of the Communities; secondly, they constitute an organized assembly of legal rules; thirdly, documents developed under these treaties, by bodies empowered in this regard, have legal effects in the states parties.

Keywords: *Treaties establishing the European Communities; European Union; international law; Member States*

1. The Founding Treaties, authentic international treaties

The conclusion of international treaties requires a set of procedures that must be fulfilled for the treaty to be constituted, to become binding on the parties and to enter into force. According to Professor Nguyen Quoc Dinh[1], concluding an international treaty, "*is a process involving multiple aspects:*

1) the adoption of the treaty text and its authentication;

2) the consent of the state to be bound through the treaty;

3) the international notification of the consent;

4) the entry into force of the treaty, according to its provisions, in states which have expressed their consent".

The international notification of the state consent to become party to the Treaty and the entry into force of the Treaty shall be subject exclusively to international law, while the consent of the state to be bound by the treaty shall be governed solely by the law of that state. Given this aspect, it is undeniable that the Treaties establishing the European Communities and the European Union have been concluded by sovereign states, by expressing their agreement will. Thus, states have become "*contracting parties*"[2] to three multilateral treaties, before becoming "member states" of some organizations, the main objective of which is the economic integration.

Although, the Community Treaties entered into force over 60 years ago (one of those treaties ceasing even to have legal effects by exceeding the period for which it was concluded), the above mentioned goal has not yet been achieved, and the process of economic integration is still continuing; that is why, we believe that the EU member countries, despite the fact that "*have*

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[1] Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, *„Droit international public",* ediția a VII-a, L.G.D.J, 2002, p 125.

[2] According to the Preambles of the three founding Treaties.

limited, only in some areas, their sovereign rights and have, thus, created, a system of law applicable to nationals and states themselves"[3], are still contracting parties, preserving of course, their sovereignty, aspect highlighted whenever the conclusion of new treaties at EU level comes in question, with the purpose of changing the founding Treaties, by negotiating the mutual rights and obligations.

The founding Treaties contain both obligations and rights for the states parties. As far as obligations are concerned, we observe at a careful analysis of these international legal instruments, that they contain general, but also special obligations.

1.1. Rights of the states parties

The founding Treaties confer upon states, as contracting parties, a number of rights and these rights are, moreover, essential for the functioning of the Union. Thus, we mention: the participation of states to the establishment of common institutions and bodies; the right to bring an action, before the Court of Justice of the European Union, in order to ensure compliance with treaties; the enforcement immunity; the right to decide on the accession of new member states; the right to revise treaties.

A. Under the founding Treaties, states parties have the right to take part, according to certain criteria, to the establishment of the main institutions of the European Communities[4] and later, of the European Union. In this regard, each state has one representative at ministerial level, in the decision-making institution. The governments of member states appoint members of the Commission - the EU's authentic executive. As for the Court of Justice, its members are appointed by the common agreement of governments of the member states.

B. States parties to founding treaties have the right to bring to the Court of Justice in Luxembourg, an action against any contracting party. This action aims at ensuring the compliance with Community law and, more recently, with the European Union law.

C. Another right conferred upon states parties, in the founding treaties, is the immunity from enforcement, resulting from the fact that the Treaties do not contain provisions for the enforcement of states in the case where they do not fulfill their obligations[5]. In this situation, we consider that the enforcement immunity applies under the state sovereignty. It is clear that if the Court of Justice of the European Union gives a sentence against a state which did not fulfill an obligation, that sentence represents, in fact, a principle, because it is not enforceable. This situation has been considered in the literature as "capital for understanding the Community institutional system. Unlike what happens in a federal state where the federal power has the means to reduce the potential resistance of the federal state against the federal order, in the Community, there is no

[3] Decision of the ECJ, July 15, 1964, *Costa v. / ENEL*, 6/64.

[4] Under TCEC: the Special Council of Ministers, the High Authority, the Common Assembly, the Court of Justice. Each Treaty founding EEC and Euratom establishes the following institutions: the Council, the Commission, the Assembly, the Court of Justice.

[5] The situation was different in the case of the Treaty of Paris which initially provided at art. 88, paragraph (3), two penalties for the State failing to perform its obligations, namely the payment suspension by the CECA, to the State concerned and the authorization given by the High Authority of Member States to take, notwithstanding the common market principles, defense or retaliation measures on the State concerned (see http://eurlex.europa.eu/fr/treaties/dat/11951K/tif/TRAITES_1951_CECA_1_FR_0001.pdf).

Community enforcement"[6]. States keep their sovereignty within the Union, and if they refuse to voluntarily enforce their assumed obligations, the exception of non-enforcement is applicable ("*non adimpleti contractus*"). By invoking this exception, a suspension of enforcement of the Union's obligations towards the member state is obtained, until that state fulfills its incumbent obligations.

And still, there is one way to penalize the member state which becomes guilty of failing its assumed obligations. Thus, in the case of failure to comply with an obligation, that State breaches the individual rights and interests and the persons prejudiced can address national jurisdictions and obtain, under certain conditions, the repair of the prejudice caused, under the form of a sentence against the state, for example the obligation of that state to refund the illegally collected taxes.

D. The accession of a state to the European Union requires, among other things, the agreement of all already member states. In other words, any member of the Union has the right to express its agreement or, conversely, to make use of its right of veto on the accession of new member states.

E. The founding treaties contain a clause under which any revision thereof can be made only with the unanimous agreement of all member states. The treaty is revised through a diplomatic treaty subject to ratification. Thus, no commitment can be changed without formal consent.

1.2. Obligations of member states

Naturally, states parties to the founding treaties acquire besides rights, also a number of obligations, which we shall divide into general and special.

- *General obligations* -

Although these obligations are not numerous, they are, however, fundamental and specific to international law.

A. A first general obligation consists in **loyalty to the Union**. Founding treaties contain a clause of loyalty to the Union, according to which states parties must apply treaties in good faith and act in order to ensure the achievement of objectives pursued. This clause is nothing more than a way of expressing the principle of *pacta sunt servanda*[7] from international law. The idea, which results in an obligation to enforce and act in good faith, is found in art. 5[8] of the Treaty establishing the EEC[9], article that states: "Member states shall take all appropriate measures, whether general or particular in order to ensure the fulfillment of obligations resulting from this Treaty or from acts of Community institutions. At the same time, it facilitates the achievement of its mission". Under that same article, member states must refrain from any action "likely to jeopardize the achievement of objectives of this Treaty".

Moreover, the Court of Justice, even in its early decisions, has resorted in its motivations, to this general obligation of cooperation and loyalty to the member states, either by citing articles that enshrines it, or by referring to a more general form, the obligation of solidarity between member states. In this regard, we find several rulings,

[6] Pierre Pescatore, *L'ordre juridique des Communautés Européennes. Etude des sources du droit communautaire*, Presses Universitaires de Liège, A.S.B.L., p. 54.

[7] For modifying Treaties, the Vienna Convention on the Law of Treaties of 1969 has a lot of relevance, stating in art. 26 that: *"Every treaty in force is binding upon the parties and must be enforced by them, in good faith".*

[8] The current art. 4, TEU.

[9] We find similar clauses in art. 192 of the Euratom Treaty, and also in the Treaty of Paris in art. 86, paragraphs 1 and 2.

among which we mention the first ones ruled by the Court, in this area:

- the decision from 1969[10] where the ECJ stated that "solidarity grounds the whole Community system, under the commitment set out in art. 5 of the Treaty";

- in the Case *Scheer*[11], from 1970, the Court stated the following: at the beginning of implementation of the common agricultural policy, when the Commission could not fully assume its role, the member states were entitled and were required to take national legislative measures to facilitate the proper application of EU law;

- the decisions from 1971: *the Commission v./France*[12] and the *Commission v. / Italy*[13]. In the first ruling, the court in Luxembourg talked about a general obligation of cooperation laid down in art. 192 of the EAEC Treaty, under which the parties had to resort to means offered by the Treaty to resolve any legal uncertainty that states were obliged to overcome in order to cover the failure of obligations;

- in the decision from 13 July 1972[14], the Court stated: "the effect of Community law, considered as having *res judicata* authority, by the Republic of Italy, compelled the competent national authorities to refrain from applying a national provision, recognized as being incompatible with the Treaty, as well as to take all necessary measures to facilitate the effect of Community law".

B. Another general obligation is **the coordination of national policy in order to ensure the common interest**, initially enshrined in art. 6 of the Treaty. According to the Treaty, member states commit themselves to coordinate their economic policies in order to achieve the objectives of the Treaty. Unlike the good faith principle existing in all three founding Treaties, this obligation is not provided, in similar terms, in the ECSC and Euratom Treaties. However, in the last two treaties, we find a general clause which gives to the Council of Ministers, the task of coordinating national policies with the action of Communities[15].

C. The financial contribution is another obligation of states parties, provided in the founding Treaties. This obligation is found in the Treaties of Rome, but it is missing from the Treaty of Paris. This is not really a gap, but has a reasonable explanation, in the sense that this Community had its own resources in the form of levies on coal and steel[16]. The obligation of financial contribution no longer exists today because, since 1970, the contributions of member states have been gradually replaced by their own resources[17].

D. The obligation of **responsibility[18] for actions of the Communities / Union towards third countries.** Although not covered by any of the three treaties, we believe that this obligation must be taken into consideration, resulting from the general rules of international law.

- *Special obligations* -

By joining the founding Treaties, member states have undertaken a number of obligations arising from the economic character and the main objective of the

[10] Decision of the ECJ, December 10, 1969, *Commission v. / France*, 6/69.
[11] Decision of the ECJ, December 17, 1970, *Scheer v. / Einfuhr -und Vorratsstelle für Getreide und Futtermittel*, 30/
[12] Decision of the ECJ, March 31, 1971, *the Commission v. / Conseil*, 22/70.
[13] Decision of the ECJ, December 14, 1971, *Commission v. / France*, 7/71.
[14] Decision of the ECJ, July 13, 1972, *Commission v. / Italy*, 48/71.
[15] Article 26 TEAEC and article 115 TCEC.
[16] Art. 49 TEAEC.
[17] Under the Treaty of 22 April 1970.
[18] For more details regarding „responsibility" see Elena Emilia Ştefan, "*Răspunderea juridică. Privire specială asupra răspunderii în Dreptul administrativ*", "Pro Universitaria" Publishing House, Bucharest, 2013, p. 25-39.

European Communities, that of achieving the common Market. It concerns the obligations to do, characteristic especially for the transition period, otherwise told, commitments that states parties have undertaken. We mention the fact that it does not involve rules directly applicable to subjects in the member states. Given the large number of special obligations, further on, we shall only make a list of those that we consider to be illustrative for the achievement of the major objective of the Communities, namely the economic integration. Thus, we mention:

- the obligation to gradually remove, national tariffs and to replace them with a common external tariff;
- the obligation to abolish quantitative restrictions within the Common Market;
- the obligation to establish the free movement of workers;
- the obligation to set out the freedom of establishment and the freedom to provide services;
- the obligation to liberalize the financial services;
- the obligation to renounce at the state aid;
- the obligation to eliminate tax differences etc.

2. Institutional systems set out in the founding Treaties

As known, under international law, one of the constituent elements of international intergovernmental organizations is the existence of a self-institutional system. Treaties founding the European Communities, and later the European Union are not limited only to make mutual legal bonds between the contracting parties, but they also create, inclusively, for each organization that they set up, a self-institutional system. In other words, the founding treaties provide the establishment of a "social assembly organized with a common purpose, which is anything but the result of national interests in attendance. This assembly is provided with bodies invested, to some extent, with autonomy and that are able to work towards achieving a common interest"[19].

A significant part of the content of founding treaties is reserved to the institutions of the European Union.

3. The classic review of constitutive treaties, under international law[20]

Each constitutive Treaty contains a review clause. Thus, in the Treaty of Paris it was stipulated that "after the transition period, the government of each Member State and the High Authority may propose amendments to this Treaty. The proposal will be submitted to the Council. The Council issues, by two-thirds majority, a favourable opinion in a conference with representatives of the governments that will be immediately convened by the President of the Council in order to reach a common agreement on the amendments to the Treaty. Amendments shall enter into force for all Member States after being ratified by all Member States in accordance with their respective constitutional requirements"[21]. Similar provisions are also found in the Treaties of Rome, as follows: The Government of any Member State or the Commission may submit to the Council, proposals on the review of this Treaty

[19] Pierre Pescatore, *op. cit.* , p 56.
[20] This point of the article was published in Knowledge Horizons-Economics, Volume 5, Special Issue 1, „Pro Universitaria" Publishing House, Bucharest, p. 108-110.
[21] Art. 96, TEAEC (the variant from 1951).

(CEEC, respectively TEAEC note[22]). If the Council, after consulting the Assembly and in the cases received from the Commission issues a favourable opinion at the reunion of a conference with representatives of Member States governments, convened by the President of the Council in order to reach a common agreement on the amendments to this Treaty, amendments shall enter into force after being ratified by all the Member States, under the internal constitutional procedures of each Member State[23].

Currently, provisions relating to the revision of Treaties of the European Union are found in art. 48 of the Treaty on European Union. The doctrine states that this article is one of the most important of the Treaty[24]. The text of the new art. 48 TEU, as amended by the Lisbon Treaty replaces the single revision procedure of the Treaties, provided prior to 2009[25]. Thus, under the mentioned article, Treaties may be amended in accordance with an ordinary revision procedure. Also, they may be amended in accordance with some simplified revision procedures: a simplified procedure aimed at internal Union policies and activities and a simplified procedure named "bridging clause".

Regarding the ordinary procedure[26], we briefly mention the following: the Government of any Member State, the European Parliament or the Commission may submit to the Council, proposals for the amendment of Treaties. These proposals may, among other things, either increase or reduce the competences conferred upon the Union, in the Treaties. These proposals shall be submitted to the European Council, by the Council and the national Parliaments shall be notified. If the European Council, after consulting the European Parliament and the Commission, adopts by simple majority, a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, the European Parliament and the Commission. The European Central Bank is also consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt, by consensus, a recommendation addressed to the Conference of representatives of Member States Governments. The European Council may decide by a simple majority, with the approval of the European Parliament, not to convene a Convention if this is not justified by the proportion of changes. In the latter case, the European Council shall define the terms for the Conference of Member States. In order to adopt by common agreement, the amendments to be made to the Treaties, the Council President shall convene a conference of representatives of the Governments of Member States. Amendments shall enter into force after being ratified by all Member States in accordance with their constitutional requirements.

Regarding the simplified review procedures[27], as already mentioned, the first procedure envisages certain treaty provisions, and the second is known as the "bridging clause".

According to the first simplified procedure provided in art. 48 TEU, this

[22] Our note.
[23] Art. 236 EECT and art. 204 TEAEC (variant from 1957).
[24] François-Xavier Priollaud, David Siritzky, *„Le traité de Lisbonne. Texte et commentaire article par article des nouveaux traités européenne (TUE-TFUE)",* La documentation Française, Paris, 2008, pag. 137.
[25] The year when the Treaty of Lisbon has entered into force.
[26] Par. (1) – (6) of art. 48, TEU.
[27] Par. (7) – (8) of art. 48 TEU.

applies only if the total or partial review of the provisions of Part Three of the Treaty on the functioning of the European Union is wanted, i.e. that concerning the internal policies and actions of the Union. The initiative belongs to the government of any Member State, the European Parliament or the Commission. The project of total or partial review is presented to the European Council. The European Council may adopt a decision for total or partial amendment. The European Council shall decide unanimously after consulting the European Parliament and the Commission, as well as the European Central Bank in the case of institutional changes in the monetary area. This Decision shall enter into force only after the approval of Member States in accordance with their respective constitutional requirements.

The second simplified procedure "allows adopting an act by means other than those provided by the founding treaties, without resulting however in a formal amendment of the Treaties. The general "bridging clause" applies in two situations:

• in the case where the Treaties provide that an act must be unanimously adopted by the Council, the European Council may decide to allow the Council to adopt the decision by qualified majority;

• in the case where the Treaties provide that the acts should be adopted under a special legislative procedure, the European Council may decide to authorize the adoption of those acts under the ordinary legislative procedure[28].

In both cases, the European Council shall decide unanimously and must obtain the consent of the European Parliament. Each national Parliament shall have, in addition, a right to object and prevent the activation of the general bridging clause. The bridging clause applies to all European policies, except to the defence policy and to decisions with military implications.

At a careful analysis of the texts presented above, we note that the review procedure envisages a preparatory stage with community character and a diplomatic stage. So, we shall remember that the preparatory phase, which develops at the Union level, is that where the initiative of treaties review may belong to the government of a Member State, the Commission or the European Parliament. The project is then submitted to the European Council that must consult, in its turn, the European Parliament, and where the initiative belongs to one of the governments of Member States, to the Commission. Subsequently, the European Council shall convene a Convention for the review of this Treaty. After making the decision to convene a diplomatic convention, the diplomatic stage follows. The Convention's mission is to reach a common agreement on the total or partial review of an EU Treaty. We believe that under the Convention, nothing happens other than the completion of negotiations on amending the Treaty, the signing by representatives of Member States, because negotiations are held in the preliminary stage. In other words, the amendments are negotiated and agreed by the European Council, and the Convention's purpose is the formalities required by signature. Amendments will not take effect until all Member States have expressed their consent, according to their national constitutional rules.

In conclusion, the EU Treaties may be amended totally or partially, in accordance with rules of the classic international law, under which the amendment of Treaties in force is following the procedure for their conclusion, namely: negotiation, signature

[28] According to http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0013_ro.htm

and ratification by all States parties to the original Treaty.

Conclusions

In conclusion, we note that the Treaties which formed the foundation of the European Communities, and later of the European Union are international legal instruments governed by rules of public international law. The negotiation, conclusion, expression of consent, amendment of Community Treaties, respectively of European Union Treaties are specific stages of entry into force of any international treaties, governed by the same rules of international law.

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THE EXCEPTION OF ILLEGALITY IN CONTENTIOUS-ADMINISTRATIVE

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Abstract

By way of exception of illegality the party of a dispute is entitled to invoke the irregularity of an administrative act. Therefore, this study shall present the regulation of the exception of illegality, respectively the provisions of the Law no. 554/2004 of the contentious-administrative, showing through the doctrine and the jurisprudence the possible weaknesses of the current normative regulations. There will also be discussed case studies from the recent practice of the High Court of Cassation and Justice concerning the exception of illegality. Last but not least, our conclusions will focus on the highlighting of several critical observations on the current state of the subject proposed, our approach considering in this purpose the warnings that come from the practice of the courts.

Keywords: *Law no 554/2004, exception of illegality, liability, individual unilateral administrative act, contentious-administrative*

1. Introduction

The exception of illegality has also been called in the doctrine 'the plea of illegality" and has been known in our legal system prior to the Law no.554/2004[1], of the contentious-administrative, respectively to the Law no. 1/1967 on the courts judgment on the claims of those whose rights have been prejudiced by illegal administrative acts[2].

The doctrine defined the exception of illegality as being: "*a means of defence by which during a process for other grounds besides the illegality of the administrative law act*[3]*, one of the parties threatened to be applied such an illegal act, defends oneself by pleading this defect and requires the act not to be taken into account in solving the case*"[4].

Although it was not expressly regulated in the legislation prior to the Law no. 554/2004, the exception of illegality of the normative administrative acts was accepted as a procedural mean of defence that could be submitted before any court, in a traditional way in the Romanian contentious, both by the parties and by the ex officio court and is settled by the competent court to hear the case in

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[1] Law no.554/2004 of the contentious-administrative, published in the Official Gazette no. 1154/2004.

[2] Law 1/1967 on the judgment performed by the court of the complaints of those whose rights were prejudiced by illegal administrative acts, published in the Official Journal no.67/1967

[3] It can be noticed that the author refers to the administrative acts, being well known in the doctrine the theoretical disputes of the two schools of administrative law in our countries on the concepts, namely the School of Bucharest used the concept of administrative act and the School of Cluj which exponent was the professor Tudor Draganu, the concept of administrative law. But essentially the disputes were only theoretical, the concepts being similar.

[4] Tudor Drăganu, *Actele de drept administrativ* (Administrative Law Acts), Ed.Ştiinţifică, Bucharest, 1959, p.260. For the same purpose, see şi Antonie Iorgovan, *Tratat de drept administrativ* (Administrative Law Treaty), vol.II, 4th edition, Ed.All Beck, Bucharest, 2005, p.677, Verginia Vedinaş, *Drept administrativ (Administrative Law)*, 3rd edition reviewed and updated, Ed. Universul Juridic, Bucharest, 2009, p.187.

question[5]. Nowadays the exception of illegality is expressly regulated in art. 4 of Law no.554/2004.

1. Normative regulation of the exception of illegality

The legislation in the field of the administrative law is distinguished by the lack of administrative coding, which means that from the point of view of the legal procedure, the scope of the legislative acts is restricted to the contentious-administrative and to the Civil Procedure Code.

We shall briefly present below the way the exception of illegality was reflected over several time periods.

a) Prior to the law no. 554/2004 of the contentious-administrative.

This exception was not regulated prior to the law no. 554/2004 of the contentious-administrative, neither in Law 1/1967 on the judgment of the courts on the claims of those whose rights were prejudiced by illegal administrative acts and neither in law no. 29/1990[6]. After the enforcement of law no. 1/1967 and especially after the enforcement of law no. 29/1990 when the persons whose rights recognized by law through an authority administrative acts are prejudiced may appeal to the competent court for the repeal of the authority administrative act and the remedy of the case, the exception of illegality can only be submitted for defence, either by statement of defence submitted by the defendant or by response to the statement of defence submitted by the plaintiff[7].

b) Law no. 554/2004 of the contentious-administrative

It is well known that the exception of illegality was regulated for the first time by law no. 554/2004 of the contentious-administrative, consisting of 4 articles and four paragraphs. The law editors are liable for the express insertion of the exception of illegality in the content of the contentious-administrative law.

Therefore, in accordance with art. 4 of the law: par. (1) *The legality of a unilateral administrative act may be at any time investigated during a law suit, by way of exception, ex officio or upon the request of the interested party. In this case, the ascertainment that the administrative acts depend on the settlement of the disputes, the court notifies the contentious-administrative court by explanatory statement, in this way suspending the case. (2) The contentious-administrative court rules in public session after the emergency procedure by summoning the parties. (3) The decision of the contentious-administrative is subject to appeal, which is stated within 48 hours from the decision and is judged within 3 days from the registration, by summoning the parties. (4) If the contentious-administrative court observes the illegality of the act, the court before which the exception was submitted settles the case without considering the act whose illegality was observed.*

However, the Constitutional Court held the provisions of par. (3) as unconstitutional due to the imprecision and ambiguity resulting from the running of the appeal term from the decision or from the notifying of the set short terms, as well as

[5] Gabriela Bogasiu, *Justiţia actului administrativ* (Administrative act justice), Ed. Universul Juridic, Bucharest, 2013, p. 264.

[6] Law no.29/1990, published in the Official Gazette no.122/1990 that represented the law of the contentious-administrative until its repeal by law no.554/2004.

[7] Valentin Prisăcaru, *Tratat de drept administrativ român.Partea generală* (Romanian administrative law treaty. General Part) 3rd edition reviewed and supplemented, Ed.Lumina lex, Bucharest, 2002, p. 624 and the following.

in terms of the mean of summoning that is contrary to art. 21 and 24 of the Constitution and to art. 6 of the Convention for the protection of human rights and fundamental freedoms[8].

c) Law no. 262/2007

Law no. 554/2004 of the contentious-administrative was amended and supplemented by Law no. 262/2007[9]. Art. 4 has basically undergone several amendments: on the one hand, the exception of illegality may be submitted only on individual unilateral administrative acts and not on normative acts, on the other hand, the suspension of the case is not disposed any more, the exception of illegality being submitted before the competent contentious-administrative court to settle it. Another amendment refers to the fact that the submitting of the exception may not be reported on the date of issue of the individual act. These amendments represented the scope of an exception of unconstitutionality that was rejected[10].

On the other hand, the High Court of Cassation and Justice also held that the provisions of law no. 554/2004 of the contentious-administrative, as further amended and supplemented by law no. 262/2007 violate the principle of the legal security and the right to a fair law suit provided for by art. 6 of the ECHR and 47 of the Charter of Fundamental Rights of the European Union to the extent that they allow the censoring of the legality of the individual administrative acts issued prior to the enforcement of the law[11].

Therefore, by the enforcement of the provisions of art. 20 par. (2) and of art. 148 par. (2) of the Constitution in relation with the ECHR and the Court of Justice from Luxembourg, the enforcement of the provisions of art. 4 of law no. 554/2004 as further amended and supplemented by law no. 262/2007, on the individual administrative act issued prior to the enforcement of this law and which illegality was called by way of exception, was properly removed.

d) Actual state-Law no. 76/2012 for the enforcement of Law no. 134/2010 on the Civil Procedure Code, as well as the amendment and the supplementing of other normative acts.

For reasons mainly related to the necessary shortening of the law suits terms, Law no. 76/2012 radically modified the regime of the exception of illegality restoring its settlement by the court vested with the substance of the dispute, before which it was submitted[12].

Nowadays, the exception of illegality provided for by art. 4 of Law no. 554/2004 par. (1) has a different wording compared to the original one, respectively: *„the legality of an individual administrative act, regardless the date of its issuing, may be at any time investigated during a law suit term*, by way of exception, ex officio or at the request of the interested party". If in the past the setting of the jurisdiction to settle the exception of illegality in favour of the contentious-administrative court represented the main novelty element of art. 4 entered by Law no. 262/2007, unlike the

[8] The Decision no. 647/2006 of the Constitutional Court of Romania on the exception of illegality of the provisions of par. (3), art.4 of law no. 554/2004, published in the Official Gazette no.921/2006.
[9] Law no. 262/2007 on the amending and supplementing of Law no. 554/2004 of the contentious-administrative, published in the Oficial Gazette no.510/2007.
[10] The Decision no. 404/2008 of the Constitutional Court of Romania on the exception of illegality of the provisions of art.4 of law no. 554/2004, published in the Official Gazette no.347/2008.
[11] The High Court of Cassation and Justice, contentious-administrative and fiscal Department, Decision no. 4785/2008, http://www.iccj.ro/cautare.php?id=46601, accessed on 15.04.2014.
[12] G.Bogasiu, *op.cit.*, p. 265.

previous situation when the court notified by the dispute also settled the exception[13], in 2013 the novelty element is represented by the fact that any court has the jurisdiction to settle the exception[14].

Par. (4) also expressly stipulates that the normative administrative act may not be the scope of the exception of illegality, its control being exercised only by the action for annulment, which is indefeasible[15].

3. Jurisprudence

The High Court of Cassation and Justice ruled in its jurisprudence on whether the Regulations of the Romanian Football Federation are administrative acts in terms of art. 2 par. (1) letter c) of the law no. 554/2004 of the contentious-administrative.

Therefore, in one of the cases the High Court of Cassation and Justice held that the provisions of art. 4 par. (1) and (2) of law no. 554/2004 of the contentious-administrative, on the date in force of the calling of the exception of illegality, do not expressly provide that the normative administrative acts, respectively the regulations of the Romanian Football Federation, are excluded from the legality control based on the special procedure of the exception of illegality[16]. As an undeniable fact, the court determines that the Romanian Football Federation is a public authority assimilated in terms of the provisions of art. 2 par. (1) letter b) of law no. 554/2004 of the contentious-administrative, being a legal entity of private law declared public by the special law of the physical education and sport, justified by particularity of the activity performed.

In the same context it is stated that the disputed acts under art. 4 of law no. 554/2004 of the contentious-administrative issued by the Romanian Football Federation assimilated to a public authority share the nature of normative administrative acts, being issued under the actual performance of the provisions of the general law no. 69/2000[17] . The fact that they were issued under and in compliance with the international regulations of FIFA and UEFA for the regulation of a sport activity shall not remove the regulations nature of normative administrative acts. Therefore, the court considers that the regulations rule the sport activity in a similar way to the regulations of the cults, namely in a general and abstract way.

In another case, the High Court of Cassation and Justice had to settle the legal issue on whether the Decision of the General Director of the Prison Administration is a normative act. The exception of illegality in this case was submitted within a pending dispute before the Court of Appeal from Craiova. The court observed that: the normative administrative act may be subject to the legality control in the exception procedure of illegality, by virtue of the principle of law according to which the law is construed in terms of producing legal effects, with no doubt that if the legislator has created a mean of defence on the way of the exception of illegality for the individual authority act, all the more such a mean of defence has to be provided to the subjects of law in connection with the normative acts.

Indeed the legislator in art. 4 par. (1) refers to the analysis of the legality on individual administrative acts which may lead to the conclusion that the possibility of calling

[13] D. Apostol Tofan, *Unele consideraţii privind excepţia de nelegalitate* (Some considerations on the exception of illegality), in RDP no. 4/2007, p. 28.
[14] Elena Emilia Ştefan, *op.cit.,* pp. 85-86.
[15] G.Bogasiu, *op.cit.*, p. 267.
[16] High Court of Cassation and Justice, contentious-administrative and fiscal, decision no. 5465/28 May 2010, unpublished, p.13.
[17] Law no. 69/2000 of physical education and sport, published in the Official Gazette no. 200/2000.

the exception of illegality on the individual administrative act might be limited, but in par. (2) of art. 4 the term unilateral administrative act is used without the distinction between the normative and the individual, being obvious that the legislator's omission on the exception of illegality on the normative acts do not represent the plea of inadmissibility of the exception for these acts. Thus, the court concludes that the normative administrative acts may be subject to the legal control, provided for by art. 4, as further amended, the amendment having the role to include the individual acts in the area of the general acts, and not to exclude the normative acts. Furthermore, the principle of the legislative consistency requires the solution of the admissibility of the exception of illegality both for the individual and for the normative acts, with the purpose of keeping the function for which this means of defence was created. If the legislator intended to provide for the individuals a means of defence by way of exception for the individual acts, based on the judgment of *a fortiori* legal reason, such a means of defence should also be provided to the parties on the normative acts which target audience is general and which effects may occur or may be observed not only immediately after the issuing, but also prior to it.

The High Court of Cassation and Justice also ruled on the acts exempted from the legal control[18]. According to art. 5 par. (2) of law no. 554/2004 the administrative acts for which amendment or dissolution is provided another judicial procedure may not be challenged by way of the contentious-administrative, which leads to the conclusion that the exception of illegality was not regulated by the legislator in order to create a way of avoiding special judicial procedures. In this case the object of the exception is the notice of assessment that represented the basis of a notification and of an enforceable title; therefore, the taxation decision may be appealed in accordance with art. 205 and the fiscal procedure by way of a fiscal complaint submitted before the fiscal competent body and only the settlement decision of the complaint may be appealed before the contentious-administrative court, according to art. 218 par. (2) of the fiscal procedure code.

In the specialized doctrine, as well as in the jurisdiction of the contentious-administrative and fiscal department of the High Court of Cassation and Justice was observed that from the corroboration of the art. 4 and 5 of law no. 554/2004 results that the administrative acts exempted from the legal control by way of the direct action are also exempted from the legal control by way of the exception of illegality. In other words, the jurisdiction of the contentious-administrative of verifying by way of exception the legality of an administrative act cannot be drawn by invoking the art. 4 of law no. 554/2004 when it comes to an administrative act for which the amending or dissolution requires a special judicial procedure.

Conclusions

This study was focused on the description of the exception of illegality in the Romanian legal system and took into account a threefold approach: the normative state, the doctrine point of view and the jurisprudence phase. The exception of illegality has received regulation at the normative acts level within the content of law no.554/2004 of the contentious-administrative. Compared to the actual wording of the exception, we consider that problems generated by the fact that at this moment the exception may not be submitted

[18] High Court of Cassation and Justice, decision no.5925/2013, http://www.iccj.ro/cautare.php?id=94557

within any law suit shall not arise in practice, making extremely difficult to solve such a procedural incident due to the particularity of the administrative acts, which are essentially acts of power. Therefore, we consider that only the contentious-administrative judge has the power to knowingly consider the analysis of the illegality of an administrative act. From this point of view, we consider that the actual wording of the provisions of art. 4 of law no. 554/2004 of the contentious-administrative is unsuccessful.

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OLD AND NEW LEGAL TYPOLOGIES

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Abstract

The existence of legal constants does not preclude the process of legal change, of its permanent evolution. Thus, the legal doctrine emphasizes that there is no legislation valid for all times, the legal progress mentioned by Turgot being ubiquitous. Multiple forces drive to diversification or to approach the national legal systems. Analysing the history of law, we distinguish the existence of overlapping legal systems, fact that raises the question of legal typologies. Different criteria and different names have been proposed by the legal comparatists. In the present study, we shall address some of the most important and famous criteria, with emphasis on a new legal typology that has arisen - the European Union law.The present study is part of a more complex research on this theme and it is meant to approach certain important points of my Ph.D. thesis.

Keywords: *comparative law, diversification, European Union, legal systems, typology*

1. Introduction

Conceived as a multidisciplinary study combining elements of general theory of law, with elements of comparative law and European Union law, this paper aims to answer the questions: what are the legal typologies and is the EU law a new type of law, with specific qualitative determinations?

We are currently witnessing exciting challenges concerning the European Union – there are discussions about the integration in a legal order above the Member States legal order, about connecting supranational interests, about the reconfiguration of sovereignty, about the intertwining of national values with the European Union and about the harmonization of legislation.

Thus, we ask ourselves if the European Union law, characterized by multilingualism and *multijuridism*, can be considered a new type of law, emerged in the panorama of the world's legal systems? We believe that, just as far as the EU is based on an autonomous legal will and on principles and values that are within the eternal law, "unity in diversity" is possible and so the existence of a new legal family.

In law, because the legislator cannot exhaust all legal situations that may arise in society and that have to be regulated, he selects certain current *types* out of the diversity of possible relationships, excluding the others. Using simplification methods, the legislator chooses sometimes typification, and other times classification.

The typological or typological-classificatory method is used from ancient times by legal sciences (e.g. from Roman law we find out about the type of *pater familias*). In general, legal typologies are used in law by considering the real elements and relationships in legal life in order to know more precisely what mechanisms or structural relationships have been established in a range of legal issues[1].

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[1] Nicolae Popa, *Teoria generală a dreptului*, 4th edition, C.H. Beck Publishing House, Bucharest, 2012, p. 58.

We consider that typologies involve the analysis of typical features between different types of objects, phenomena, processes and people. However, any typology face a particular problem – the *selection of the criteria* underlying the classification of the phenomena studied. Because the typology represents a *partial synthesis*, the social sciences use very often the typological method, providing valuable results.

2. Paper Content

Humans are social beings, but they are also juridical beings - *homo juridicus*, who, wishing to regulate and develop the human society, understood that it is necessary to create the law. Equipped with consciousness and will, humans act in order to meet their needs and interests, whether by respecting their values protected by law, whether by breaking them.

Law is conditioned by time and space, and its history is lost in the mist of time. Thus, using the historical method of legal phenomenon research, we find out that law appeared in the Ancient East. We note here the *cosmogenetic conception* that encompasses several philosophical ideas crystallized in China and Ancient Greece, ideas which constitute the basis of law.

An impressive feature of the entire universe is diversity. Like there are not two snowflakes alike, two leaves alike, two trees alike, two people alike, two souls alike, there are not two legal systems alike. But having no unity around us, can we dream of knowing the law of other societies?

Law is connected to the social environment, being influenced by various legal and extra-legal factors. Because of this connection, the law evolves with the society, and as Ihering said, law is not always and everywhere the same. But people do not live isolated. Since ancient times, they felt the need to gather in communities. Today more than ever, in this globalized world, people come in contact with each other. This requires an understanding of the rules governing legal systems. It requires a common understanding of people's rights and obligations. This thirst for knowledge is *watered* by the science of comparative law, which explains the institutions and legal concepts in the context in which it occurs, in their dynamics, analysing the concrete social conditions in which they arise.

The existence of legal constants changes law, its permanent evolution. Thus, there can be no legislation which would be valid for all times, because in the natural process of becoming law the legal progress, that Turgot was mentioning about, intervenes.

Multiple forces drive diversification or the closeness of the national rights. Some of these forces are not legal (e.g. geography of the respective states, religion, politics, economics, language). Others are legal because even the law can be "an accelerator of its own diversity". The comparatists do not just try to establish the existence of these forces, but they try to group them into systems.

Analysing the history of law, we distinguish the existence of overlapping legal systems, fact that raises the question of legal typologies. As I have underlined above, the typological method is widely used in the social sciences (especially in law), and it supposes "not considering individual differences insignificant for the given goal, since any typology is subject to some research purposes, especially in terms of establishing uniformity and explanatory value"[2].

[2] Nicolae Popa, *op. cit.*, p. 57.

In order to group the national legal systems, task of the comparative law, different criteria were used and different names were proposed.

The first legal classifications were based on the genetic criteria: natural-ethnological, cultural, legislative, legal-genetic. These genetic criteria fell into two streams: genetic-racial and genetic-historical.

From the *genetic-racial stream*, we mention the legal orders typologies by Adhémar Esmein and James Bryce. At the beginning of the last century, Adhémar Esmein proposed, with great accuracy, the need to classify the laws of different nations "by reducing them to a small number of families and groups, each of them representing an original legal system"[3]: the Latin group (France, Belgium, Italy, Spain, Portugal, Romania and the Latin Republics of Central and Southern America), the German group (the Scandinavian nations, Austria, Cisleithania[4], Hungary), the Anglo-Saxon group (England, the United States of America and the English-speaking colonies), the Slavic group, the Muslim law group.

As regards the typology of legal orders proposed by James Bryce, we emphasize that he was discussing about the Teutonic, Roman, Hindu, Mohammedan legal orders.

For a long time, the racial-genetic stream has been vexed because this criterion was doomed to failure, the concept of race being uncertain and imperceptible.

As regards the *genetic-historical stream*, we note that some comparatists noticed the importance of history in determining the legal orders. Before 1880, Ernest Glasson classified the legal systems from this point of view, revealing three types of legislation: one in which the Roman law prevails (Romania, Portugal, Italy, Spain, Greece), one in which the customary law prevails (England, Russia, Scandinavia) and one in which the Roman element merged with the barbaric element (France, Switzerland, Germany).

This classification has been criticized for incompleteness and inaccuracy, its author only making a micro-comparative study at Europe's level. The classifications of Nobushige Hozumi, Bevilaqua and Martinez-Paz come also under this category. Enrique Martinez-Paz's classification is interesting because it improves Glasson's classification, distinguishing: the customary-barbaric group (English law, Swedish law, Norwegian law), the barbaric-Roman group (German law, French law, Austrian law), the barbaric-Roman-canonical group (Portuguese law, Spanish law) and the Roman-canonical-democratic group (Latin American countries law, Switzerland, Russia). This work is also criticized for the same reasons as Glasson's theory especially that classifying the Russian law as democratic in 1934 is unbelievable.

At the end of the genetic stream, classifications designed by Lévy-Ullmann

[3] Leontin-Jean Constantinesco, *Tratat de drept comparat*, vol. III – *Ştiinţa dreptului comparat*, All Publishing House, Bucharest, 2001, p. 83 (*op. cit.)*.

[4] According to wikipedia.org, *Cisleithania* was a common yet unofficial denotation of the northern and western part of Austria-Hungary, the Dual Monarchy created in the Compromise of 1867 - as distinguished from Transleithania, *i.e.* the Hungarian Lands of the Crown of Saint Stephen east of ("beyond") the Leitha River.
The Cisleithanian capital was Vienna, the residence of the Austrian emperor. The territory had a population of 28,571,900 in 1910, it reached from Vorarlberg in the west to the Kingdom of Galicia and Lodomeria and the Duchy of Bukovina (today part of Poland, Ukraine and Romania) in the east, as well as from the Kingdom of Bohemia in the north to the Kingdom of Dalmatia (today part of Croatia) in the south. It comprised the current States of Austria (except for Burgenland), as well as most of the territories of the Czech Republic and Slovenia (except for Prekmurje), and parts of Italy (Trieste, Gorizia and Trentino-Alto Adige/Südtirol), Croatia (Istria, Dalmatia) and Montenegro (Kotor Bay). Information [on line] available at http://en.wikipedia.org/wiki/Cisleithania

and Sarfatti appear, which focus on the encoded, religious or customary character of legal systems. Although superficial, these classifications *predict* the typological method.

There were also modern attempts to classify, as Leontin-Jean Constantinesco called them, among which: the *Arminjon-Nolde-Wolfe* classification (distinguishing seven families of legal systems: French, German, Scandinavian, English, Islamic, Hindu, Soviet), Grisolia's classification contesting Arminjon-Nolde-Wolfe classification (distinguishing five legal systems: the codified, the Anglo-American, the religious, the socialist), the Spanish doctrine classifications (Sola Canizares's classification, Eichler's classification, and José Maria Castan Vazquez's classification).

After the Second World War, the comparatists abandoned the historical criteria and search criteria among the *typological elements*. It is interesting what Leontin-Jean Constantinesco underlines as being characteristic at the beginnings of the typological classification: "the classification proposed by an author is rejected by the objections of another author"[5], without any scientific dialogue. "The merit of the comparatists who were part of this new stream is to have grouped legal orders in systems, not because they were genetically, genealogically or historically related, but because they presented common typological structures"[6]

The best known comparatist falling under this stream is René David, who noted that, like religions, legal systems can be reduced to a few fundamental types. He used two criteria in order to determine the affinity or the typological mismatch: the ideological point of view and the technical point of view.

As regards the ideological point of view, David said that "legal systems oppose each other because they express different conceptions about justice, which relate, of course, with all factors organizing the respective society; legal systems distinguish between them because the communities to which they apply maintain different religious or philosophical beliefs or because they have different political, economic or social structures (...) the legal systems oppose each other, even when they reflect the same conception of what is just, by the technique developed by their lawyers and that they use to make this conception triumph"[7]. It is evident that even this typology can be criticized.

The panoramic analysis of legal systems did not stop at René David, existing other classifications according to the style theory (Konrad Zweigert) based on cultural and ideological element (Silva Pereira's classification, Castan Tobenas's classification), according to the Marxist doctrine (although a general reluctance of Soviet lawyers towards the comparison can be observed).

Thus, in time, lawyers have attempted to classify these types of law, taking into account the law content and the specific features of the means of expression of this content, but also some criteria such as the dependency of social organization systems typology (criterion proposed by Poirier) or the affiliation to a legal civilization pool (criterion proposed by David). It is interesting that the terminology used to represent the group result of national legal systems is: *great legal systems, legal families, legal types*.

All the classifications mentioned above show that the legal systems typology is not entirely solved. Why? As Leontin-

[5] Leontin-Jean Constantinesco, *op. cit.*, p. 105.
[6] Leontin-Jean Constantinesco, *op. cit.*, p. 105.
[7] René David, *Traité élémentaire de droit civil comparé*, Paris, 1950, p. 223.

Jean Constantinesco pointed out, "[t]he first thing that hits you when you deal with this problem is the dilettantism, superficial analysis or even the absence of any scientific examination of the matter. Comparatists who addressed this matter seem rather keen to demonstrate the flaws criteria proposed by other authors, being eager to propose their own classification, which does not really worth more"[8].

There are several reasons we mention here: the lack of a serious examination of the issue regarding the legal systems classification, the fields examined in order to make groups were not determining, any partial and unfounded classification is necessarily false, the spread of civil codes in the world cannot represent a classification criterion, the heterogeneity of the proposed criteria. One of the most important reasons is the inability to provide the criteria necessary to the micro-comparison classification (eventually only micro-results could be obtained!), the macro-comparison being necessary.

Over time, there have been various attempts to define and classify legal systems, with existing various criteria, out of which the most important: the dependence on systems of social organization, the affiliation to a legal civilization pool, the role of law as means of social organization. We shall further length these three criteria.

The colourful words of Leontin-Jean Constantinesco come back to our mind: "[t]o develop legal systems means to know and to have conscience of the exact position of the legal systems in the legal universe. This means, simultaneously, to exit the legal national ghetto and to understand that national legal systems, linked by their determined elements derived of other legal systems, form larger assemblies"[9].

A. The legal typology based on the dependence of social organization systems (Poirier)

Using the typological method and this criterion, the famous analyst Jean Poirier ascertains the historically overlapping legal systems (historical legal types): slave law, feudal law, bourgeois law, socialist law.

It is interesting to note that although these types of law present specific features in the content of fundamental institutions, legal constructions or in share of sources, "such typology does not cancel the specific differences of the various individual systems coexisting in the same historic space"[10].

The *slave law* had as major objectives "to defend the property of the slave owners and the exclusion of slaves from the category of the persons and their location in the one of things"[11]. Roman law is part of this category. But there were also differences, such as the province of Dacia which received the Roman law, and where there were observed features of the acquisition of property, marriage and kinship.

The *feudal law* defended the land ownership, its legal rules being designed to prevent the division of large estates, the primogeniture rule playing an important role.

The *bourgeois law* proclaimed human rights (e.g. freedom of the individual, equality of citizens).

[8] Leontin-Jean Constantinesco, *op. cit.*, p. 141.
[9] Leontin-Jean Constantinesco, *Tratat de drept comparat*, vol. I – *Introducere în dreptul comparat*, All Publishing House, Bucharest, 1997, p. 43.
[10] Nicolae Popa, *op. cit.*, p. 58.
[11] Luminița Gheorghiu, *Evoluția sistemelor juridice contemporane. Privire specială asupra tipologiei dreptului comunitar*, Universul juridic Publishing House, Bucharest, 2004, p. 23.

The *socialist law* arose through reception of the Soviet law in states with a political system like the Union of Soviet Socialist Republics (USSR). Based on dialectical and historical materialism, such legal system considered the entire legal order as public law. In the countries that had adopted this legal system, the economy was centralized, the commercial law being virtually non-existent, and the purpose of law being distorted, because politics could ever taint the law application by calling frequently "to the law and regulation, especially in critical situations of social system functionality, forcing the law to be what it cannot be - a panacea"[12].

However, "[t]he events occurred in 1989 in the countries of Eastern Europe, which left the Soviet model of development, the collapse of the totalitarian system, drove to the atomization of the «great socialist legal system» to powder, the reminded states turning back to their traditional principles, attached to the great Romano-Germanic legal system"[13].

B. The legal typology based on the affiliation to a legal civilization pool (David)

In the legal doctrine, René David is considered as being "certainly the comparatist who has devoted the greater part of his work to the description of the legal systems and, thus to the classification of legal systems"[14], his analysis being the most comprehensive.

The criterion of law affiliation to a legal civilisation pool determined the comparatists to acknowledge the existence of *legal families*, which differentiate through legal language, legal concepts, legal institutions and philosophical features; therefore, René David retains the following legal families (which represent the major contemporary legal systems): Roman-Germanic, Anglo-Saxon, socialist, Muslim, Hindu, Chinese, Japanese (the Far East) and black Africa and Madagascar.

The development of legal systems in Europe and in the British Isles took place in parallel for several centuries, creating two different legal environments.

The Roman-Germanic family or legal system (the civil law) is the result of reception of Roman law in the XIV-XV centuries; it integrates the Italian legal system, the French legal system and the related national systems (Romanian, Spanish, Portuguese, Belgian, Latin America), as well as the German legal system. This system is opposed to the *common law* system.

Although some authors believe that in this legal system there are two distinct groups [(a) the Latin group represented by Romania, Spain, Italy, Portugal, and (b) the Germanic group represented by Germany, Austria, Scandinavia, Switzerland), we agree with those who argue that, in fact, the systems "left from the same background, and they evolved differently depending on their previous customs, religion, culture"[15], namely the common legal background sprang from the reception of the Roman law.

The name is conventional, "because a large number of national legal systems included in this area, can not find its origin in any of these two systems (i.e. Roman law and German law), but it represents the result of the legislation export practiced by states that once held colonial empires, like France,

[12] Ion Craiovan, *Tratat de teoria generală a dreptului*, Universul Juridic Publishing House, Bucharest, 2007, p. 73.
[13] Ion Craiovan, *op. cit.*, p. 73.
[14] Leontin-Jean Constantinesco, *op. cit.*, p. 105.
[15] For more details, please see Philippe Malinvaud, *Introduction à l'étude du droit,* 13th edition, LexisNexis Publishing House, Paris, 2011, p. 13.

Spain, Portugal and, to a lesser extent, Italy"[16].

This legal family is characterized by the following features: it is a written law, based on a hierarchical system of sources of law, is codified and, knows a great division into public and private law, which determines the structure of its branches and institutions.

By origin and characteristics, it is clear that Romanian law is part of the Roman-Germanic law.

This system has been criticized in the *Doing Business* reports published by the World Bank on the grounds that it would be less economically efficient than common law. In the 2004, 2005, 2006 reports, the economists concluded that French law, and generally the countries that are part of the civil law system are economically counterproductive, unlike common law. Of course that there were many reactions and counterreactions from the civil law lawyers.

The *common law* family, the second largest legal system of our times, is originally from England and is opposed to the civil law system. While "Europe was separated from the British Isles by a slap of water, the legal communication was almost non-existent"[17], two legal systems developing in parallel and creating two different legal pools. Currently, this system is found in England, Ireland, USA (except Louisiana), Canada (except Quebec), Australia, New Zealand.

This system consists of three components: *common law* (judicial precedents), *equity* (rules of law given before the unification of the English courts by special courts, to mitigate the asperities of the common law rules) and *statutary law* (rules of law created by statutes). Equity represents a "corrective background brought to the common law, in so far as this law based on precedents loses ground, becoming unreceptive to social impulses. Given that *equity* became a parallel legal system concurrently with the *common law* and not infrequently in conflict with it, in 1873, it was established by a special statute that if a conflict between *equity* and *common law* arises, the former will prevail"[18].

Among its features, we underline the following: written law has more lex specialis character, special structure, legal sources system, legal conceptualization and legal language are different from those of other families, legal branches are not structured due to the lack of division in public law and private law, law creation is not necessarily the result of the work of the legislator based on the legislative technique principles. In the "jurisprudence's thicket"[19], the statute is a secondary source of law and its provisions are incorporated in the legal system of judicial precedents.

The differences between these two legal families are well established in the legal doctrine. Even the concepts are different (e.g. the concept of fraud).

It is interesting that English law does not recognize the implied repeal and the desuetude, therefore many statutes which have been abolished, last for centuries. Thus, in order to facilitate knowledge of the statutes, over time, collections of statutes have been compiled.

Nowadays, we discover that many common law contractual techniques (e.g. know-how contracts, factoring, leasing, franchising) penetrated the entire international law, which leads us to support

[16] Victor Dan Zlătescu, *Panorama marilor sisteme contemporane de drept*, Continent XXI Publishing House, Bucharest, 1994, p. 28-138.
[17] Mihail Albici, *Despre drept şi ştiinţa dreptului*, All Beck Publishing House, Bucharest, 2005, p. 54.
[18] Victor Dan Zlătescu, *op. cit.*, p. 153.
[19] Ion Craiovan, *op. cit.*, p. 153.

the idea that in the near future "elements of interference between the two major legal systems will increase"[20].

The "socialist" great system was born as a result of receiving more or less massive Soviet law in states with a political system like the Soviet Union[21]. This system should be investigated especially because there are countries that have not abandoned the socialist political and economical system, although there is a trend towards the market economy. The ideology of the dialectical and historical materialism is the foundation of the "socialist" law. This historic law inspired by the Marxist ideology, has disappeared with the end of communism and it was found especially in the eastern countries (e.g. the USSR and its satellites). Opposed to the capitalist law, the socialist law meant socialization of all means of production, their owner being the State or the political party , except for goods of personal use. Since the fall of communism and the USSR breakup, the socialist states adopted the Roman-Germanic legal system, with all the legal implications arising from this fact.

The "*religious and traditional legal systems*, although the product of past eras, adjusting sometimes with great difficulty to the modern social relations, govern hundreds of millions in the contemporary era"[22]. The religious origin of certain systems (Hindu, Islamic or Jewish) must not lead us to the conclusion that all legal norms are religious. Moreover, there is a tendency to modernize the traditional legal systems, although in the beginning, it was organically integrated in the religious doctrine of Islam, such as China, Japan and Turkey which have adopted fully modern legislation[23].

In the category of religious and traditional legal systems, the *Muslim law* has wide application in all Arab countries (e.g. Pakistan, Bangladesh, Iran, Afghanistan, Indonesia). In the concept of Islam, the Muslim law is the fruit of the divine revelation, as a result of its rules revelation by God to the Prophet Muhammad, through the archangel Gabriel"[24].

Muslim law has several sources. The *Qur'an* is the holy book of Islam, comprising 6,342 verses, 500 referring to law. *Sunna* is all that is attributed by tradition to the Prophet Muhammad. *Idjima* records the consensus of legal counsels on legal matters, *idjitihad* representing the jurisprudence. *Sharia of Islam* are fundamental principles of Muslim law enshrining the right solutions for law branches.

Specialists in Islamic law emphasize that today, it is subject to reforms, being modernized; this change is "a natural step, dictated by a rapidly changing world"[25], some countries resorting to codification, procedure or judicial organization.

Hence the problem of adapting people moving from a Muslim country or in a Muslim country because that person may feel subject to inconsistent rights, *Sharia* and the civil law of the other country.

Hindu law is a preservative law, not representing the Indian law, but the law of the community that adheres to Hinduism. It is based on the caste system, based on the four castes: Brahmins, Satria, Vaisala and

[20] Mihail Albici, *op. cit.*, p. 58.
[21] René David, *Grands systémes de droit contemporains*, Dalloz Publishing House, Paris, 1978, pp. 155-313 (*op. cit.*).
[22] René David, *op. cit.*, p. 163.
[23] Ion Craiovan, *op. cit.*, p. 164.
[24] Ion Craiovan, *op. cit.*, p. 164.
[25] Mihail Albici, *op. cit.*, p. 61.

Sudra. Therefore, in theory, India is also called "melting pot of legal systems"[26].

Traditional Japanese law still has importance, because some principles and rules have been kept by the Japanese legislator in modern legislation adopted (e.g. the matter of persons and family relations) or provided to other countries. This legal system was inspired by Chinese Confucianism, one of the sources of *Shinto*. Although for many centuries, Japanese regulations regarded the division of rice fields by the number of each family members (*ritsu-ryo* regulations) and the formation of Japanese feud proved as inviolable areas (*shó* regulations), we notice that with the blossoming of the samurai military caste (the twelfth century – to its members being applicable the customary law), the ritsu-ryo and sho rules have been abandonned. Like in China, "[i]nstea of the legal rules, in the society giri was acting, behaviour rules similar to the Chinese rites"[27] , because ideas about law and justice were considered to disturb the social peace. Subsequently, Japan went through the *Meiji era* (roughly 1868-1912), when European legislation was received and the first legal codes were drafted, thus entering into the Roman-Germanic legal system.

The African customary law has been described as a peasant law by the colonial powers who colonized Africa[28]. We can not speak only about one system of law, because each ethnic community had its own customs. The African law was dominated by the tribal religion, with many agrarian rites, according to which the earth is divine property entrusted to their ancestors, humans being only simple holders. This system of law was based on orality. It is interesting that orality was also applicable to the community head edicts, age castes or of the various associations that could legislate under an empowerment from the king or chief[29]. This system of law was enriched by the colonial metropolis rules, therefore we find now in Africa, the common law or the civil law system.

C. The legal typology based on the law role as a social organization mean (Mattei)

An interesting analysis in comparative law was made recently by the Italian researcher Ugo Mattei. Although Mattei entitled his study *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, we believe it is a new conception of legal typology. Motivating his study on the need of transferring knowledge between different legal systems, he argues that a global taxonomy that would "allow legal systems to learn from each other"[30]. In a world where right is exported and imported, this kind of typologies is needed.

The author stresses out that René David's legal typology should be revised because the world map is different nowadays. The first major difference is the fall of communism in Central and Eastern Europe, which questions the socialist legal family. The second difference is the "success" of the same political system in China and thus "the increased importance of legal sinology among comparative disciplines"[31]. The third difference is the

[26] Mario Losano, *Marile sisteme juridice. Introducere în dreptul european şi extraeuropean*, All Beck Publishing House, Bucharest, 2005, p. 421.
[27] Victor Dan Zlătescu, *op. cit.*, p. 233.
[28] Ion Craiovan, *op. cit.*, p. 166.
[29] Ion Craiovan, *op. cit.*, p. 167.
[30] Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, The American Journal of Comparative Law, no. 1/1997, vol. 45, p. 6, available at http://works.bepress.com/ugo_mattei/19/ (15.03.2014).
[31] Ugo Mattei, *op.cit.*, p. 10.

increased importance and progress of Japanese law in the last decades. The fourth difference is related to the increasing consciousness in the Islamic world about cultural and legal particularities. The fifth difference is related to the independence of the states from the African continent.

Thus Mattei proposes a new legal typology based on the role of law as a means of social organization in the Weberian sense, using the assumption that the most primitive social structure is a legal structure so that the existence of a legal order is independent of the presence of the legislator, magistrates and lawyers. The basic idea is that "in all societies there are three main sources of social norms or social incentives which affect an individual's behavior: politics, law and philosophical or religious tradition"[32]. According to these sources, Mattei provides a tripartite scheme. He points out that every legal system assumes a plurality of legal patterns. Moreover, he stresses out that the legal systems are "the result of a layered complexity that stems from the accidents of legal history and from legal transplants"[33] - an interesting example being the Latin American countries where public law is based on common law, while private law on the continental law. These ideas lead to the idea, according to Mattei, that "the legal systems never *are*. They always *become*. And what determines the becoming is the variable role of different patterns within legal systems. Hence the difference between a patern and a system of law"[34].

The truth is that all three legal patterns are found in all legal systems of the world, the only difference being their share. This leads to the "hegemony" of one of the two remaining - of course they do not disappear, but they have a more blurred role. It is very interesting the example of Italy[35] offered by Mattei, which is a legal system classified by him as a professional one.

On August 1st, 1996, Italy was rocked by the acquittal of a Nazi criminal, Eric Priebke, by a court of Rome, and later acquittal, the Minister of Justice (an eminent professor of criminal law, professor Flick) ordered the police to arrest Priebke in order to stop people's revolt. Clearly illegal under the umbrella of the theory of rule of law, that decision was justified on the grounds of the extradition request made by Germany, being proved later that the request was filled after the Minister's order. Even arguing that he was aware of the intentions of the German authorities, his order was illegal because Article 716 of the Italian Code of Criminal Procedure only attributed this right to prosecutors, who, in Italy, are independent of the Ministry of Justice. In this case, it is an obvious example that politics had an advantage over the law, even if the political decision was contrary to the Italian court verdict.

According to Mattei's typology, national systems may belong to professional rule of law, political rule of law and traditional rule of law.

Of course that this division is dynamic because legal transplants can change the direction of a national system, because of the influence of a predominantly legal pattern. The author does not deny the possibility that a legal system be part of two categories at once (e.g. family law related to traditional, while commercial law to professional and criminal law to politics). He stresses out that this division "in three major families of law allows considerable flexibility and recognizes clearly that classifying legal

[32] Ugo Mattei, *op.cit.*, p. 12.
[33] Ugo Mattei, *op.cit.*, p. 14.
[34] *Ugo Mattei, op.cit., p. 14*.
[35] Ugo Mattei, *op.cit.*, p. 14-15.

families is a means to better understand and not an end in itself"[36].

Legal systems that fall within the *rule of professional law* entrusts major decisions (i.e. political decisions) to the political world (which must, however, comply with the law) and the decisions less important to the legal world. Legal systems that fall into this category are: United Kingdom of Great Britain, United States of America, Oceania, Western Europe, Scandinavia national systems, some "mixed" systems (Louisiana, Quebec, Scotland, South Africa). The author doubts whether Israel and India should be placed here. Basically, there are states where the legal process is not very influenced by alternative social structures. Currently, this category is legitimized by democracy.

The *rule of political law* requires that all political systems in this class cannot separate the legal process of the political process, since they are not autonomous. Political relations are crucial in these systems, being very important "who's who" in the political world. From the need to preserve stability and power, governments in these countries do not respect the law. It is interesting to note that "when men rather than law govern, people usually find it more prudent to seek a powerful human protector than to stand on legal rights against the State"[37]. In this category, the important and less important decisions are taken by the political power. This includes the vast majority of socialist law states except certain states ("maybe" Poland, Hungary and the Czech Republic), the least developed countries in Africa and Latin America, with the exception of the Islamic states in northern Africa, as well as Cuba. The author excludes from the list of socialist states China, Mongolia, Vietnam, Laos and North Korea, the former Soviet republics in Asia.

The *rule of traditional law* is found in systems where law and religious or philosophical tradition are not clearly delineated. In this category would fall the Islamic states, states that are governed by the Indian or Hindu law, other countries in Asia governed by Confucianism conceptions of law (e.g. China, Japan).

D. The appearance of a new legal typology – the European Union law

The analysis of the European Union law leads to the conclusion that we are in the presence of a *particular type of law*, different from the national law of the Member States and from the international legal system.

Due to the sovereignty of the Member States, each State is entitled to determine the applicable law, with the feeling that this law must be designed at national level, as well as the national and social policy of the country.

EU law is a law under construction, evolving, not being "the incarnation of an eternal and metaphysical idea"[38]. Certainly, the European Union is a progressive realization of a political project without precedent.

The recognition of its own legal order means that EU legal norms form a complex structure of legal norms which have a well-defined set of legal sources, while the EU institutions have well-established procedures to apprehend and punish violations and deviations.

Moreover, the existence of the institutional law, substantive law and procedural law of the European Union confirms the existence of a new legal typology – the type of EU law.

We also stress out that the procedural law of the European Union is not suspended,

[36] Ugo Mattei, *op.cit.*, p. 17.
[37] Ugo Mattei, *op.cit.*, p. 29.
[38] Mario Losano, *op. cit.*, p. 25.

because the substantive law of the European Union exists, and although it is somewhat disparate, it is not (yet) codified.

Codification is a topic increasingly discussed, existing a growing concern regarding the contractual side. The realities of the past century have led to a desire to unify private law, like this being born the European contract law. The efforts of the doctrine "codification" were supported by the EU institutions (e.g. the rules of harmonization from the directives on consumer protection, the uniform rules on cross-border contracts under Regulations Brussels I and Rome I, the resolutions of the European Parliament on European contract law, the Common Frame of Reference.

But we must not be tempted to believe that the desire to "codify" would only occur in private law, because we find first steps in criminal law (e.g. such as the European arrest warrant, the convention on drugs, the convention on trafficking in persons, the fight against money laundering, aspects regarding the use of European funds.

Moreover, EU's legal order is inherent, being independent of the international legal order and relatively independent of the national legal order of the Member States.

Moreover, the EU legal order is integrated to the legal system of the Member States and it is imposed to their courts due to the direct, immediate and priority applicability of EU law.

But which are the features that should meet European Union law in order to be considered a new legal typology?

According to the legal doctrine, in order to discuss about a new typology in terms of legal theory, we should establish the existence of:

1. autonomous will to control the legal decision making;

2. fundamental principles steering the essential directions of erecting and developing the respective legal order.

1. Autonomous will of the European Union

EU's legal will represents the very essence of the EU law. This autonomous will, which controls the legal decision making, should not be seen as the simple arithmetic sum of the individual wills of the Member States, but as a separate legal will. Precisely because of this, Nicolae Popa points out that the "European Union combines, in a specific dialectic, the supranational with national in an order with new qualitative determinations"[39], stressing that it is less important "the reference to classical types of social-state organization". Therefore, the European Union is not just a sum representing the number of the Member States, but a whole having a stable structure and presenting distinct features in relation to the characteristics of its parts. This is normal, because we are talking about an Union, so the problem is the typical features, even if there are peculiarities.

According to the legal doctrine, the EU law is composed mainly of two types of legal sources: *primary law* and *secondary law*. The primary law includes the legal rules comprised in the founding treaties of the European Communities, as well as the conventions and protocols attached to the founding treaties, the amending treaties. The secondary law comprises the rules contained in the acts adopted by the EU institutions. However, there are also other specific sources of law, such as the unwritten legal rules applicable in the EU legal order: the general principles of law common to the legal systems of the Member States, the case law of the Court of Justice of the European Union,

[39] Nicolae Popa, *op. cit.*, p. 63.

the rules resulting from the EU's external commitments or the complementary rules arising from conventional acts concluded by Member States in implementing the treaties.

To this list of legal sources, Ion Craiovan adds another one - the national law, which sometimes, can be a source of the EU law by reference either express or implied.

The European Union has a functioning legal status which allows it to fulfil its mission and to achieve its goals. In this sense, it is endowed with legal personality, enjoys privileges and immunities, and its decision making is very complex and well developed.

Regarding the legal personality of the European Union, it is well known that before the entry into force of the Lisbon Treaty, only the European Communities had legal personality (Article 281 TEC, Article 184 of the Euratom Treaty). Since then, the Union replaced and remained the successor of the European Communities [Article 1(3) TEU], the full legal personality being recognized (Article 47 TEU). It is a limited functional legal personality, which exists only to help to achieve the objectives of the Union. This aspect is confirmed by Declaration no. 24/2007 on the legal personality of the European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Lisbon Treaty.

The Conference confirms the fact that if the European Union has legal personality will not in any way authorize the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties.

The legal personality of the European Union is *domestic* and *international*.

Based on the text of Article 47 of TEU which explicitly recognises the legal personality of the European Union and of Article 335 TFEU ("[i]n each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission"), we notice that the European Union is thus treated as a legal person of public law, having its own legal personality, distinct from that of the Member States. We find interesting the recognition of the internal legal personality of the Union, and not only of its institutions (even if the Commission is authorized by the above mentioned Article), because this recognition allows it to perform all acts necessary for its operation in each Member State (e.g. acquisition or alienation of assets, conclusion of contracts, court appearances). Other institutions and bodies of the Union still enjoy a legal personality distinct from that of the Union (e.g. European Investment Bank or the European Central Bank - Articles 308 and 282 TFEU).

However, like the European Community, the European Union has an international legal personality, even in the absence of any express mentioning in the treaties. The Court of Justice upheld in the A.E.T.R. judgment that independent of the powers expressly provided in the TFEU, the European Community (therefore, nowadays the Union!) is competent, even in the absence of express provision, to conclude external agreements in all areas in which the Community is competent to meet a specific objective according to the Treaty and in which the adoption of an international commitment appears to be necessary for achieving that objective.

Thus, we can conclude that the EU is a subject of international law, having the right of representation in third countries or around the international organizations, with an active and passive right of legation, being able to stand alone in court, with the possibility of entailing the international liability and concluding international agreements, as well

as adopting economic sanctions or becoming member in international organizations.

Just because it has a special legal status, the European Union shall enjoy in the territory of the Member States such privileges and immunities necessary for performing its mission.

Union shall enjoy in the territories of the Member States such privileges and immunities necessary for the performance of its duties, according to the conditions laid down in the Protocol concluded on April 8th, 1965 on the privileges and immunities of the European Union. The same regime applies in the case of the European Central Bank and the European Investment Bank.

These privileges and immunities profits the members of the Union institutions and their staff, being fixed by the Protocol no. 7 on the privileges and immunities of the European Union, annexed to the Treaties. Among the privileges and immunities enjoyed by the Union we mention: inviolability of premises, buildings, archives and official communications, immunity execution, tax exemptions, customs exemptions.

Unfortunately, not all consequences were drawn from the recognition of the legal personality of the European Union by the Treaty of Lisbon.

2. Principles of the EU law

The legal principles represent those guiding ideas, fundamental precepts that orientate the development and implementation of legal rules, either at the level of the whole legal system, or at the level of a law branch. The doctrine emphasizes that they are a factor of stability, adaptation and integration in the legal order, filling the legislative gaps, correcting excesses and anomalies in the moment of accomplishing the law.

In legal theory, the principles of law are not addressed in terms of each state, such as the principles of the Romanian law, the principles of the Indonesian law, the principles of the Polynesian law, but about the principles of law, of any kind of law, regardless of space or time.

In the complex process of development and enforcement of the EU law, the general principles of law occupy a very important place. The plurality of general principles of law is not enshrined in the EU law, but in some cases we find references in the treaties. The reference to these principles can only be made when the EU law is incomplete, because, if there are provisions in this regard, their application is mandatory.

If in the settlement of any case, the Court of Justice must send or apply general principles of law derived from the national legal order of the Member States or from the international legal order, the reference or the application may be made only if those principles "are compatible with the principles of the Community and with the specific of the legal order arisen from the Community texts".

As the general principles of the EU can make the object of a future extended research, we will not insist on their analysis in the present study.

We shall only mention that the number of these principles is not agreed in the doctrine, since the European construction is in a continuous process of evolution, and that they can be divided into four main groups:

- ✓ the public international law and its general principles inherent in any organized legal system (e.g. principle of legal certainty, general principles derived from procedural rights);
- ✓ the domestic law of the Member States by identifying the general principles common to the Member

States (e.g. principle of equality before the economic regulations, principle of access to legal procedures, principle of confidentiality between lawyer and its client);

- ✓ the EU law by deducting the general principles derived from the EU nature (e.g. principle of direct effect, principle of priority of EU law, principle of representative democracy);
- ✓ the fundamental human rights (e.g. property right, freedom of speech and religion, principle of fair trial).

Conclusions

We have started our research from defining the term "typology". We have also tried to emphasize the difference between "typology" and "classification", with which is often confused. Summarizing the above said in this regard, the classification is used when the distinction between elements can be achieved by a *single criterion*, while the typology occurs when using multiple criteria, typologies being a *particular form of systematization*. Furthermore, the classification is complementary to division.

Regarding the typologies, it is interesting that they have in common the fact that they fail to comprise all the variety of types. We cannot find the "pure type" in any typological system, especially that the idea of type is abstract, it is a mental construction that meets our logical desire to "order" natural phenomena which, by their nature, are not "ordered". Thus, we will never find the perfect typologies. In order to achieve a real typology, it takes *a lot of work synthesis*.

Moreover, Twining noted that today, "in a globalized, cosmopolitan world, even the general studies on law science and those of comparative law should become cosmopolitan, as a pre-condition for a revival of the general theory of law and a reconsideration *in extenso* of comparative law"[40].

By using the typological method, we notice that a legal family or a legal system "represent the grouping of national legal systems, in relation to certain common features of them"[41]. Thus, each legal system knows the combination of typical general features with intrinsic ones. Of course that these have been marked by the social, economic and cultural conditions from each historical period.

As previously mentioned, analysing the history of law, we distinguish the existence of overlapping systems of law, which raises the question of their typology.

Unfortunately, all the classifications mentioned in this study show that the legal systems typology is not entirely solved. As pointed out Leontin-Jean Constantinesco, "[t]he first thing that hits you when you deal with this problem is the dilettantism, superficial analysis or even the absence of any scientific examination of the matter. Comparatists who addressed this matter seem rather keen to demonstrate the flaws criteria proposed by other authors[42], being eager to propose their own classification, which does not really worth more".

There are several reasons we mention here: the lack of a serious examination of the issue regarding the legal systems classification, the fields examined in order to make groups were not determining, any partial and unfounded classification is necessarily false, the spread of civil codes in the world cannot represent a classification criterion, the heterogeneity of the proposed criteria. One of the most important reasons

[40] Nicolae Popa, *op. cit.*, p. 11 apud W. Twining, *Globalization and Comparative Law*, apud *M.-F. Popa*, *Sistemul juridic englez. Tendinţe actuale de evoluţie*, Ph.D. thesis, 2008, p. 60.
[41] Luminița Gheorghiu, *op. cit.*, p. 30.
[42] Leontin-Jean Constantinesco, *op. cit.*, p. 105.

is the inability to provide the criteria necessary to the micro-comparison classification (being able eventually to obtain only micro-results), macro-comparison being necessary.

Currently, we are witnessing a mutual forthcoming and influence of legal systems from all over the world, this fact being obvious right from the existence of the European Union, which gave rise to a new type of law - *European Union law*.

Compared by Jacques Delors to an "unidentified political object", the European Union is largely a *sui generis* construction, borrowing from different models of institutions.

No matter how we perceive typologies, we note that, currently, they are widely used and appreciated together with classifications, regardless of the science. Moreover, some authors consider that typologies are a simplification. As a shaping or a theory, it is false by definition, modelling or theorizing, it is false by definition, using the contradiction.

As A.-E. Bottoms stated, in the conclusion of a report presented to the Council of Europe, "we must recognize that a classification, whatever it may be, shall not necessarily entail all the richness of human individuality and there might be a risk very easily to create a distorted image of human overall and of his life in the community. Our classification work required to improve our knowledge will result in a failure if, in our effort to understand, we lose sight of these truths"[43].

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THE PRE-TRIAL CHAMBER JUDGE

Edgar Laurenţiu DUMBRAVĂ*

Abstract

The importance of this work lies in important changes in the new Code of Criminal Procedure, amendments justified by the new realities of a democratic society in which criminal procedural rules must be adapted according to the daily realities in the achievement of justice. The purpose of the paper is given by the need of approaching at a theoretically level the institution of The Pre-Trial Chamber Judge, given that so far there have not been developed any works on the subject. This paper addresses both practitioners and litigants.

Keywords: *judge, Pre-Trial Chamber, legality of sending trial ordered by the prosecutor, the legality of evidence and to perform procedural acts of the criminal investigation, complaints against non-traceable solutions or not to proceed in judgment*

1. Introduction

For reasons of simplification and systematization of the trial, the Romanian legislator has introduced in the new Code of Criminal Procedure , art. 3, providing the principle of separation of judicial functions. Judicial body exercising the verification of the legality of the arraignment or exculpation is the Pre-Trial Chamber Judge.

In the old criminal procedure law, between 1953 and 1957, there was the institution "preparatory meeting" governed by art. 269-280 of the Criminal Procedure Code adopted in 1936, amended by the Decree no. 506 of 1953, published in Official Gazette no. 53 of 14 December 1953. Preparatory meeting held at the end of the examination phase, while in the first instance to go to trial only those cases in which evidence was necessary, sufficient and legally produced. Article 272 established the judge who was to preside over the preliminary hearing required to study previously, detailed, the case file in the light of the above. The panel of preparatory meeting was stiffing broader than pre-chamber judge having the power to order the prosecution, to return the case for prosecution or completion or restoration of disposal and termination dismissal of criminal proceedings, if it set one of the causes that prevented the beginning or continuation of criminal proceedings. With the arraignment, the court was ruling also over taking, maintaining, replacing or revoking of preventive measures, over taking the insurance measures, over any requests made by the parties, was fixing the place of trial and summon the parties, witnesses, experts and interpreters.

In the system of the Criminal Procedure Code of 1968, in force until 31 January 2014, there wasn't a separate procedure for verifying the legality of the arraignment or exculpation, procedural acts necessary for such checks being made by the first instance judge or judge resolve the

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complaint against solutions of exculpation under art. No. 278[1].

The Pre-Trial Chamber Judge is a judge at the court competent to hear the case in the first instance according to the rules of substantive, territorial and personal jurisdiction established by law, without ruling on the merits of the case, verifies the legality of the procedure carried out by bodies prosecution and the legality of this data solutions to end criminal prosecution, on concerning the arraignment or the exculpation. These verifications are made to eliminate the vicious criminal acts, to comply with the fairness of the trial and to give a thorough and legal judgment.

Functional competence of the Pre-Trial Chamber Judge is provided by art. 54 Criminal Procedure Code, he fulfils the following tasks:

a) verifies the legality of sending trial ordered by the prosecutor;

b) verifies the legality of evidence and conduct procedures documents by the prosecution;

c) solves complaints against non-prosecuting or exculpating solutions;

d) resolves other cases provided by law.

The composition of the pre-trial chamber panels is established by the Law no. 304/2004[2] on judicial organization, as amended and supplemented. Thus, according to art. no. 54, cases given by law in the jurisdiction of first instance of the court, the court of law and the court of appeal shall be heard by a panel of one judge, and appeals against judgments in criminal matters of Pre-Trial Chamber Judges from the courts and the courts of law shall be resolved by a panel of one judge. Article 31 para. (1). b) shows that for the complaints lodged against the decisions of the Pre-Trial Chamber Judges in the Courts of Appeal and the Military Court of Appeal, the panel consists of one judge.

According to art. 31[1], in the cases given, by law, in the jurisdiction of first instance of the High Court of Cassation and Justice, the pre-trial chamber procedure is carried out by one of the three judges who form competent tribunal to hear the case in the first instance. Appeals against the decisions of the Pre-Trial Chamber Judges at the High Court of Cassation and Justice shall be settled in full by 2 judges, as art. 31 para. (1). d) says.

The pre-trial chamber panel is composed with a registrar, the procedure being carried out, usually without the prosecutor. The Code requires obligatory participation of the prosecutor in the situations when the judge decides on preventive measures, on the provisional application of safety measures of medical nature, on taking measures to protect a witness or the resolution of the appeal falls within the competence of the Pre-Trial Chamber Judge.

Unless incompatibility attracted the facts set out in art. 64 para. (1) Criminal Procedure Code we find that he is incompatible to judge in the pre-trial chamber the person who served, in the same case, as the prosecution or served as a judge of the rights and freedoms. The Code provides, however, in the Article 3 para. (3) and Art. 346 para. (7), that the Pre-Trial Chamber Judge is incompatible with the function of law in case[3], unless he has

[1] Law no. 135/2010 on the Code of Criminal Procedure, published in the Official No. 486 of 15 July 2010 and amended by O.U.G. No. 3/2014 and Law no. 255/2013.

[2] Law no. 304/2004 was published in the Official No. 827 of 13 September 2005.

[3] Prior to the amendment of the Code of Criminal Procedure Law. 255/2013, art. 64 para. (4) provides that "The Judge of Rights and Freedoms and the Pre-Trial Chamber Judge cannot participate in the same case, the judgment on the merits or remedies." Article 3. (3) show that the same criminal conduct, exercising judicial disposition of fundamental human rights and freedoms is compatible with the Legality reference of sending or not sending to court.

resolved the complaint against non-prosecuting or exculpating solutions, ruling under art. 341 para. (7) point 2 letter c). Moreover, as a rule, the Pre-Trial Chamber Judge begins performing the function of law in question, according to art. 346 para. (7). However, the Pre-Trial Chamber Judge is incompatible to resolve the appeal brought against the decision given by himself, as shown in the art. 64 para. (6). Instead, he is compatible to conduct the pre-trial chamber works again when case gets back to court after it returned at the prosecutor because he, under art. 346 para. (3), failed to adjudicate.

Abstention or recusal of a Pre-Trial Chamber Judge shall be settled by a Pre-Trial Chamber Judge from the same court, in accordance with art. 68 para. (1), but the panel in front of which the objection was made with the participation of the challenged judge, decides on preventive measures.

The Pre-Trial Chamber Judge operates during trial, at his onset, being notified by the prosecutor who ordered the prosecution by indictment. He shall operate outside the trial phase, when hearing the complaint against filing solution or waiver of prosecution, arranged by order or indictment. The Pre-Trial Chamber Judge can be approached by the administration of the detention in order to establish termination of law and the immediately release of the person remanded, by the specialist doctor to raise the measure obliging the defendant to medical treatment or by the doctor physician to commission an expert forensic psychiatric hospital care to raise interim measure. At the request of the civil party may take measures in order to repair the damage caused by the offense and the enforcement of the legal costs.

These ways of investing a court judge are the primary modes by which the Pre-Trial Chamber Judge is being seised, but he can be seised also on derived paths through the controller to the jurisdiction or competence. The Criminal Procedure Code contains conflicting provisions on the transferring of the case during the Pre-Trial Chamber procedure, art. 72 para. (1), following the completion brought by Law no. 255/2013, which provides that in the course of the pre-trial chamber no one can apply for resettlement. Instead, art. 75 para. (2) and (3) show that the displacement can be ordered in this proceeding, these inconsistencies will be rectified at the next change.

Although the Pre-Trial Chamber Judge is starting the judgment, the court is not seised by him through his decision, but by the indictment issued by the prosecutor. As an exception, the court judge is seised with the conclusion of the Pre-Trial Chamber Judge when he, addressing the complaint against filing solutions or waiver of prosecution, according to art. 341 para. (7) point 2 letter c) Criminal Procedure Code, admits the complaint, dissolves the solution and starts the trial on the facts and persons in the criminal investigation has been made criminal action when administered legally sufficient evidence to prosecute case.

The Pre-Trial Chamber Judge is solving, not judging. He does not rule on the merits, the power to decide on penal action only returning to the court. He cannot move, extend or extinguish the criminal action or civil action cannot solve.

Verifying the legality of sending trial ordered by the prosecutor, the Pre-Trial Chamber Judge examines the formal conditions of the indictment, the jurisdiction of the body that drafted a complaint, and if it was started the prosecution for the accused person. On the legality of evidence, he verifies whether the samples were taken during the trial, after the prosecution, whether the principle of loyalty of evidence was respected or whether they have complied with the provisions concerning

mandatory legal assistance of the accused or the suspect. In relation to the lawfulness of procedural documents by the prosecution, he takes into account the compliance of the competence of the criminal investigation and the conditions of the form of procedural documents. The Pre-Trial Chamber Judge decides preliminary issues raised by both the prosecutor and the parties and the issues that he raised in the motion.

Following these verifications, the Pre-Trial Chamber Judge gives the following solutions:

- returns the case to the prosecution if the indictment is issued irregularly, and no irregularity has been remedied by the prosecutor in the term that was given for this purpose, if the irregularity attracts the impossibility to establish the boundaries of the object or judgment or if excluded all evidence gathered during the investigation or prosecutor himself sought restitution case or does not respond within the time limit to remedy irregularities act of referral.

- opens the trial, in all other cases in which he found irregularities document instituting ruled one or more samples taken or sanctioned by absolute nullity relative or criminal acts carried out in violation of the law.

Exercising the verification of legality of the exculpation, according to art. 341 para. (6) Criminal Procedure Code, in cases where it was not ordered the initiation of criminal proceedings, the Pre-Trial Chamber Judge may order one of the following solutions:

a) dismisses the complaint, as late or inadmissible or, as applicable, as unfounded;

b) admits the complaint, appeal and send dissolved solution, sends the case to the prosecutor motivated to start or complete the prosecution or, as applicable, to bring criminal action and full prosecution;

c) admits the complaint and under the law of the solution changes the classification appeal, if this does not create a situation worse for the person who made the complaint.

In cases in which it was ordered the initiation of criminal proceedings, the Pre-Trial Chamber Judge, in accordance with art. 341 para. (7) Criminal Procedure Code:

1) Rejects the complaint as late or inadmissible;

2) Verifies the legality of evidence and criminal prosecution, exclude evidence unlawfully taken or, where appropriate, sanctioned by nullity criminal acts carried out in violation of the law and:

a) dismisses the complaint as unfounded;

b) admits the complaint, appeal and sends dissolved solution before the prosecutor motivated to complete prosecution ;

c) admits the complaint, dissolves the solution and starts the trial on the facts and persons in the criminal investigation was set in motion proceedings, when given sufficient legal evidence, sending the file to the random distribution;

d) allows the complaint and under the law of the solution changes the classification appeal, if this does not create a situation worse for the person who made the complaint.

The Pre-Trial Chamber Judge also holds adjacent merits following activities:

1. Settles abstention or recusal Registrar participating in the pre-trial chamber procedure (art. 68 par. (4));

2. Automatically or on the notification of the prosecutor orders witness protection measures referred to in art. 127, if the state of danger arose during the pre-trial chamber procedure (art. 126 par. (7));

3. Takes preventive measures of judicial review, judicial review on bail , house arrest and arrest (art. 203 par. (2) and (3)) and issues the warrant;

4. Verifies, by default, the legality and validity of the preventive measure taken against the defendant prosecuted by indictment (art. 207 par. (2));

5. Automatically, verifies periodically, but not later than 30 days that remain grounds for the preventive arrest and house arrest (art. 207 par. (6));

6. Revokes remand and release the defendant, if not arrested in another case (art. 207 par. (5));

7. Decides over a preventive measure to replace judicial or judicial review on bail with house arrest or detention, if the duration of the measure, the defendant breached in bad faith his obligations or there is a reasonable suspicion he intentionally committed a new crime for which he was the initiation of criminal proceedings against him (art. 215 para. (7) and art. 217 para. (9)). In some cases, has to replace house arrest with detention (art. 221 para. (11));

8. Decides on imposing new obligations on the defendant who is serving a preventive measure judicial or replacement or termination of the initial ordered (art. 215 par. (9)). May order during house arrest defendant to permanently wear an electronic surveillance (art. 221 para. (3));

9. At the motivated request of the accused under house arrest, he permits him to leave his estate to be able to present in some places (art. 221 par. (6));

10. Can order the provisional medical treatment of the defendant, if in case provided by art. 109 para. (1) of the Criminal Code (art. 245 par. (1)) and the lifting of the measure;

11. Takes precautionary measures, consisting of unavailability of movable or immovable property, by establishing a lien on them to avoid concealment, destruction, disposal or removal of tracking goods may be confiscated or extended confiscation or which serve the enforcement of the fine or court costs or to repair damage caused by the offense (art. 249 par. (1));

12. Requires competent organ notation mortgage on property seized (art. 253 par. (4) and (5));

13. Decides to return the things lifted from the suspect, defendant or any person who has received them in order to keep them, if they are shown to be the property of others or have been taken unjustly from its detention (art. 255 para. (1));

14. Heads obvious clerical errors in the content of procedural documents that we prepared (art. 278 par. (1));

15. Applies judicial misconduct penalty during the pre-chamber procedure (art. 284);

16. At the prosecutor notification, in case of filing, takes special security measure of forfeiture and decide on the total or partial dismantling of a document (art. 315 par. (2) letter c) and d));

17. Decides on the legality and validity of the ordinance ordering the reopening prosecution, confirming or infirming it (art. 335 par. (4));

18. Appoints a mandatory for legal person among insolvency practitioners authorized by law, where the same act or acts related to criminal action set against the legal representative of the legal person, and this has not appointed a trustee to represent (art. 491 par. (3));

19. Can take preventive measures against the legal person (art. 493);

20. Establishes unlawfulness of imprisonment, to repair the damage caused by unlawful deprivation of liberty in criminal proceedings (art. 539 par. (2));

21. Enforces rulings that ordered safety measures, precautionary measures and preventive measures (art. 553 par. (4));

22. Appoints a lawyer in cases of mandatory legal assistance provided in art. 91.

The Pre-Trial Chamber Judge operates in the in the council chamber in a closed hearing and just the resolution of the appeal

against his judgment takes place in a public procedure, as required by art. 425¹ par. (5).

The Pre-Trial Chamber Judge operates in the beginning phase of trial proceedings expeditiously, the law imposing a maximum period of 60 days from the date of registration of the case to the court, to determine whether proceedings can begin. If the defendant is serving a preventive measure, the Pre-Trial Chamber Judge shall submit the matter to the court at least five days before the expiration of the preventive measure, according to art. 208 para. (1) Criminal Procedure Code.

In carrying out his duties, the Pre-Trial Chamber Judge has the right to know the true identity of the undercover investigator and contributor to professional secrecy, as required by art. 149 para. (2) Criminal Procedure Code.

The Pre-Trial Chamber Judge rules by a motivated conclusion, but we consider that he resolves the jurisdiction by sentence, according to art. 370 para. (1), as it is an act by which the court is disinvesting without hearing the case.

Against a decision given by a judge in the pre-trial chamber procedure, the prosecutor and the defendant may appeal on how to handle requests and exceptions raised by them, and against the solutions given at the end of the procedure, in accordance with art. 347 of the Criminal Procedure Code. The procedure for resolving the complaint against non-prosecuting or exculpating solutions ordered by the prosecutor, the prosecutor and the defendant may appeal only against the conclusion in which the complaint is accepted, he dissolves the solution and starts the trial in the requirements of art. 341, para. (7), point 1, letter c), of how to handle exceptions on the legality of evidence and criminal prosecution, according to art. 341 para. (9). Instead, it cannot be appealed the decision through which he declined jurisdiction, the conclusion ordering a witness protection measures or the conclusion which dismissed the complaint in accordance with Art. 340 or the conclusion which admitted the complaint with the consequence of sending the case to the prosecutor.

Conclusions:

We consider useful the work done by the Pre-Trial Chamber Judge, given the fact that it will avoid prolongation of the trial due to the illegality of acts of criminal conduct or violation of evidence during the criminal investigation, which hindered judicial investigation, leading to delays of criminal cases and violations of the right to a fair trial.

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STUDY ON THE COMPULSORY BRINGING OF PERSONS IN FRONT OF THE JUDICIAL AUTHORITIES IN CRIMINAL MATTERS[1]

Radu - Florin GEAMĂNU[*]

Abstract

The study will try to perform an in-depth analysis of the measure of compulsory bringing, assessing both the national legislation and the legislation of some European countries, namely: Austria, Bulgaria, Poland and the Netherlands. Due attention will be granted to the provisions of the current Criminal Procedure Code, which entered into force on the 1st of February 2014, as this piece of legislation brings some important changes regarding the compulsory bringing, some of them being the consequence of the convictions of Romania in front of the Strasbourg Court. Also, the paper will focus on case-law established by the European Court of Human Rights regarding articles 3 and 5 relating to the compulsory bringing.To close with, the study will give some conclusions regarding the conformity of the current Criminal Procedure Code of Romania with the standards imposed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the case-law of the European Court of Human Rights..

Keywords*: Compulsory bringing, ECHR, case-law, Criminal Procedure Code, trial, pre-trial, Romania, police*

I. Introduction

Over the last years, Romania has undergone a structural legislative reform, the essential pieces of legislation (the Codes) in criminal matters being drafted and adopted.

The adoption of the new criminal Codes represented for Romania a necessity and a consequence imposed by the evolution of the Romanian society and economy during the more than two decades that have passed since the December 1989 Revolution. Furthermore, the evolution of the Romanian society was significantly influenced by the accession to a number of international organisations, especially the Council of Europe and the European Union.

As a result new Codes entered into force on the 1st of February 2014, replacing the old ones (in force since 1969), namely *the new Criminal Code (Law No. 286/2009)*

[1] This paper is based on the expert report presented at the Compulsory bringing of persons to judicial authorities Workshop on 24th – 26th of October 2013, in Sofia (Bulgaria), as part of the "*Capacity building of General Directorate Security staff in line with international standards to achieve a more effective judicial system*" Project, General Directorate "Security", Ministry of Justice (Bulgaria), implemented under the *Norwegian financial mechanism* (NFM 2009-2014), Program area 14 Judicial capacity building and Cooperation, in a partnership with the *Directorate General I – Human Rights and Rule of Law of the Council of Europe*.

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– N.Cr.C.[2] and *the new Criminal Procedure Code (Law No. 135/2010) – N.Cr.P.C*[3].

The package that made up the reform in criminal matters also required the elaboration and adoption of 5 new pieces of legislation, alongside with the new Criminal Code and the new Criminal Procedure Code, which were meant to facilitate the implementation of the two codes, but also covered aspects concerning the enforcement of custodial and non-custodial sanctions or measures and last, but not least, the organization of the probation system.

The following laws were elaborated and came into force on the 1st of February 2014:

- Law No. 187/2012 on enforcing the application of the new Criminal Code[4];

- Law No. 252/2013 regarding the organization of the probation services[5];

- Law No. 253/2013 on the execution of penalties and educative measures implying deprivation of liberty[6];

- Law No. 254/2013 on the execution of penalties, educative measures and other measures ordered by the judicial body during the criminal trial, which do not imply deprivation of liberty[7];

- Law No. 255/2013 on enforcing the application of the new Criminal Procedure Code[8].

A presentation of the existing legislation in Romania, a brief analysis of the legislation of certain European states and an overview of the European Court of Human Rights (ECtHR) case-law will help us to assess more accurately the current situation regarding the order of appearance (compulsory bringing)[9] and the enforcement of such order, consequently allowing us to look at the whole picture, having all the elements, thus drawing the best fitting solutions regarding the order of appearance (compulsory bringing), in full compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms[10] (ECHR) standards.

I. National legal framework regarding compulsory bringing of persons in front of the judicial authorities in Romania

1. The fundamental law of the Romanian state, the Constitution[11], contains certain provisions which refer to the limitation of the individual freedom by stipulating, in art. 23, the principle according

[2] Published in the *Official Journal of Romania*, Part I, No. 510 of 24th of July 2009, as subsequently amended and completed.

[3] Published in the *Official Journal of Romania*, Part I, No. 486 of 15th of July 2010, as subsequently amended and completed, which abolished Law no. 29/1968 regarding the Criminal Procedure Code (*Cr.P.C.*), republished in the *Official Journal of Romania*, Part I, No. 786 of 30th of April 1997, as subsequently amended and completed.

[4] Published in the *Official Journal of Romania*, Part I, No. 757 of 12th of November 2012, as subsequently amended and completed.

[5] Published in the *Official Journal of Romania*, Part I, No. 512 of 14th of August 2013.

[6] Published in the *Official Journal of Romania*, Part I, No. 513 of 14th of August 2013.

[7] Published in the *Official Journal of Romania*, Part I, No. 514 of 14th of August 2013.

[8] Published in the *Official Journal of Romania*, Part I, No. 515 of 14th of August 2013.

[9] Also named *"warrant to appear".*

The terminology is not unitary. *"Order of appearance"* is used in the ECtHR *Case of Ghiurău v. Romania*, 20 November 2012, final: 29.04.2013, p. 17, while the *"warrant to appear"* is used in the ECtHR *Case of Creangă v. Romania*. Grand Chamber, 23 February 2012, final, p. 9.

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

[11] Republished in the *Official Journal of Romania*, Part I, No. 767 of 31th of October 2003.

to which the "*individual freedom and security of a person are inviolable*". However, the fundamental law, as it is normal, focuses on cases in which the person's individual freedom is very severely affected, namely those situations in which the person is deprived of his/her liberty, be it during the criminal investigation, as a preventive measure, or later, following the issuing of a final court decision which imposes imprisonment (or life imprisonment). Romania's Constitution does not provide for specific norms concerning the enforcement of orders of appearance.

The right to life, as well as the right to physical and mental integrity of persons is guaranteed by article 22 of the Romanian Constitution, which also provides that no one may be subjected to torture or to any kind of inhuman or degrading punishment or treatment. Death penalty is prohibited.

So, in this context, considering the compulsory bringing as a form of limitation or even deprivation of liberty in the sense of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitution provides for safeguards regarding the protection against torture and inhuman or degrading treatements.

2. Although the study will focus on criminal matters, it is important to stress out that in Romania there is no unitary reglementation regarding compulsory bringing of persons in front of the judicial authorities; instead there are specific provisions regarding criminal matters, civil matters and mental health matters. Furthermore, none of the legal provisions contain a legal definition of the compulsory bringing, but rather some principles concerning orders of appearance, the institutions in charge and practical issues on the enforcement of these warrants.

The legal framework regarding the compulsory bringing is to be found in: the new Criminal Procedure Code (Law No. 135/2010); the Civil Procedure Code (Law No. 134/2010); Law No. 487/2002 on mental health and protection of people with mental disorders.

II. Compulsory bringing of persons in front of the judicial authorities in criminal matters.

1. *Sedes materiae. General remarks. To date* the order of appearance is provided for both as related to the defendant and other parties in the new Criminal Procedure Code: *art. 108 para. 2.a), art. 120 para. 2.b), art. 184 para. 4 and 20, art. 209 para. 4, art. 258 para. 2, art. 265-267, art. 283 para. 1.b), art. 364 para. 5 and art. 381 para. 8.*[12]

The order of appearance was meant to be in the Romanian legal system an order issued by the criminal prosecution authority or the court to the police or other enforcement authority to bring a person in front of them, at the headquarters of the respective judicial authority, having been labelled initially in a way a compulsory measure due to the fact that the person whose presence is necessary within the

[12] The previous piece of regulation, found in the Law no. 29/1968 regarding the Criminal Procedure Code (*Cr.P.C.*), did not lack in criticism. One possible explanation which emerges from literature is based on the historical and teleological interpretation of the institute of the order of appearance: at the moment in time when it was regulated it was unconceivable for the totalitarian state that one of its citizens does not obey an order of appearance, this being the reason why they did not insist on a detailed regulation of this institute; this is how it became perhaps the most incomplete institute covered by the Criminal Procedure Code, even though it actually should be a legislative work with mathematical logic and accuracy. [Ghe. Neacşu, *Consideraţii privitoare la emiterea şi executarea mandatelor de aducere (Considerations regarding the issuance and enforcement of the order of appearance) (I),* Dreptul Magazine, No. 9/2003, p. 173]

criminal procedure is brought in front of the judicial authority[13].

Before analysing the provisions which refer to the order of appearance, mention should be made of the fact that *the law does not provide for a legal definition of it.*

In accordance with the provisions of *art. 265 para. 1-2 N.Cr.P.C.*, a person can be brought in front of the criminal prosecution authority or in front of the court by virtue of an order of appearance if, having been previously subpoenaed, the person did not appear without reason in front of the judicial body and it is necessary for the person to be heard or present or if the proper subpoenaing has not been possible and the circumstances indicate unequivocally that the person is absconding the reception of the subpoena.

The suspect or the defendant can be brought by virtue of an order of appearance even if it was not subpoenaed, if this measure is needed for settling the case.

In spite of the fact that the legal text does not provide for a legal definition, the specialist literature agrees that it offers enough elements to allow for the determination of the legal nature of the order of appearance, namely *"a compulsory measure which resides in the obligation imposed to a person to let itself being brought in front of the judicial authority which issued the measure, accompanied by the person who was vested with the enforcement of the measure."*[14]

It should be mentioned that the legal provisions regulating the order of appearance have been looked at by the Constitutional Court quite frequently, both in relation to the provisions of the Fundamental Law and to the provisions of the international conventions and treaties concerning human rights to which Romania is a party, being found in compliance with these instruments[15].

By Decision No. 885/2007[16], the Constitutional Court decided that the legal provisions invoked were not in breach of the Constitutional standards for the following reasons: "*The Court acknowledges that the procedure rules stipulated in art. 183 and art. 184 Cr.P.C. [corresponding to art. 265-266 N.Cr.P.C.] are meant to ensure the good functioning of the criminal proceedings, without delays caused by the absence or refusal of the persons whose hearing or presence is considered by the court to be necessary. By the criticised provisions there is no violation of the individual freedom because the institution of the order of appearance is not equivalent with the institution of the custodial measures, as erroneously the claimant asserts. As a matter of fact, the exercise of some rights and freedoms can be limited for the accomplishment of the criminal instruction, so that the coercion of a person to appear in front of the court when the latter considers it necessary, does not affect in any way the principles of the rule of law.*"

For the reasons shown in the decision, the Court concluded that "*the provisions of art. 183 para. 1 and 2 Cr.P.C. [corresponding to art. 265-266 N.Cr.P.C.] are in accordance with the provisions of art. 23 para. 1 and 2 of the Constitution, of art. 5 para. 1 and 4 of the European Convention*

[13] N. Iliescu in V. Dongoroz, C. Bulai, S. Kahane, N. Iliescu, G. Antoniu, R. Stănoiu, *Explicaţii teoretice ale Codului de procedură penală român. Partea generală (Theorethical explanations of the Romanian Criminal Procedure Code. General part), Vol. I*, Romanian Academy Publishing House, Bucharest, 1975, p. 378.

[14] I. Neagu, *Tratat de procedură penală. Partea generală*. *(Criminal procedure treaty. The General Part.)*, Universul Juridic Publishing House, Bucharest, 2010, p. 368.

[15] Although the analysis was made on the basis of the previous Criminal Procedure Code (*art. 183 – 184)*, the findings of the Consititutional Court are equally applicable to the new legal framework: *art. 265-266 N.Cr.P.C.*

[16] *Constitutional Court Decision No. 885/2007*, published in the *Official Journal of Romania*, Part I, no. 750 of 5th of November 2007, concerning the incident of constitutionality of the provisions of art. 183 and art. 184 Cr.P.C.

on Human Rights, of art. 9 of the Universal Declaration on Human Rights, as well as with the provisions of art. 9 para. 1 and art. 14 para. 3.g) of the International Pact on Civil and Political Rights."[17]

Mention should be made of the fact that this measure *is different from the right of the police to detain (hold) a person for up to 24 hours for investigative purposes*. This is a general administrative measure that can be taken by the police on the basis of Law no. 218/2002 (on the organisation and functioning of the Romanian police) only if the person cannot be identified in another way; it is not taken with the aim of investigating a criminal offence[18].

As regards the deduction of the time necessary for the enforcement of the order of appearance and the remand, unlike the previous regulation which led to inconsistent practice and literature, the N.Cr.P.C. expressly provides that, if a suspect or defendant has been brought in front of the criminal prosecution body or in front of the prosecutor in order to be heard, by virtue of a legally issued order of appearance, the term of the custody (24 hours at the most) shall not include the time period in which the suspect or the defendant were under the power of that warrant. *(art. 209 para. 4 N.Cr.P.C.*)

It should be stressed out that the legal framework does not expressly provide for the possibility of deprivation of liberty of a person as a precautionary measure for ensuring its appearance in front of the judicial authorities, so the order of appearance remains the only possibility to compel a person to appear in front of the judicial authorities.

It is worth mentioning the fact that by virtue of art. 271 N.Cr.C. – *obstruction of justice*, justified by the realities of the judicial practice which often times is faced with a lack of cooperation from the part of the persons who are requested to lend their support to the judicial authorities, so that the refusal of one person to appear in front of the judicial authorities in spite of having been subpoenaed to or to obey to the enforcement of an order of appearance can make up the elements of this crime.

2. The body that issues the order of appearance. Conditions. As with the previous Criminal Procedure Code, the current Code provides that the order of appearance is issued only by the *criminal prosecution body (criminal investigative body[19] - the judicial police; special investigative bodies – and the prosecutor) or by the court*.

The order of appearance as any order can be issed only within a current criminal proceeding (no matter if this is part of the criminal prosecution or the trial), not during the preliminary phase, when a criminal proceeding is not commenced[20].

The order of appearance is issued following a *resolution* (in case of the criminal prosecution authorities) or *court minutes* (in case of the court)[21]. Subsequently the procedural act is also used – the order of appearance as such, drafted

[17] *Constitutional Court Decision No. 1401/2009*, published in the *Official Journal of Romania*, Part I, no. 855 of 9th of December 2009.

[18] A.M. van Kalmthout, M.M. Knapen, C. Morgenstern (editors), *Pre-trial detention in the European Union*, Ed. Wolf Legal Publishers, Nijmegen, The Netherlands, 2009, p. 798.

[19] For the opinion according to which criminal investigative bodies (police) cannot issue order of appearance see Ghe. Neacşu, *op. cit.*, p. 167.

[20] See the Constitutional Court Decision No. 210/2000, published in the *Official Journal of Romania*, Part I, No. 110 of 5th of March 2001.

[21] Although the N.Cr.P.C. introduced an intermediate phase between the pre-trial stage and the trial stage, namely the preliminary chamber, an order of appearance cannot be issued, since this stage is an *in camera* procedure.

according with strictly regulated requirements.

To date, in order to be able to enforce an order of appearance against the suspect or defendant or any other person, the following conditions shall be met:

- there has to be an enforceable legal obligation to appear before the court;
- there has to be an order of appearance issued by the competent authority;
- the order of appearance has to have the contents provided for by law;
- the person has been previously subpoenaed. By way of derogation, the suspect or defendant can be compulsory brought even before being subpoenaed based on one simple condition – this measure is needed for settling the case.
- despite having been subpoenaed, the person did not appear on the date and at the place indicated in the subpoena;
- the hearing or the presence of the person is needed;
- the measure must not be unproportional in relation to the significance of the matter;
- the measure has to be carried out with a minimum of interference in terms of intensity and duration.

According with the general provisions, the resolution issued by the criminal prosecution body can be contested with the chief prosecutor in observance of the provisions of art. 370 para. 3 N.Cr.P.C.; the court minutes can be contested on the same occasion as the subject matter of the trial[22].

Having regard to the fact that the enforcement of an order of appearance implies a maniphest limitation of the person's individual freedom, in 2003 (by virtue of Law No. 281/2003) two provisions were introduced in *art. 183 para. 3-4 from the previous Cr.P.C.* with the role to ensure that no abuse is committed by the state agents on occassion of the enforcement of these warrants. This means that persons compulsory brought cannot stay at the disposal of the judicial authority longer than the time which is strictly needed for their hearing, except the case in which the arrest or pre-trial detention of these persons was ordered. Similarly, the person who has been compulsory brought shall be heard immediately by the judicial body.

Unlike the previous regulation, *art. 265 para. 11-12 N.Cr.P.C.* expressly provides that compulsory brought persons shall stay at the disposal of the judicial body only for the time needed for their hearing or for effecting the act that made their presence necessary, however *not longer than 8 hours*, except the case when their arrest or pre-trial detention was ordered. The judicial body shall hear the compulsory brought person immediately or, as case may be, it shall effect immediately the act that made the person's presence necessary.

- In ***Austria***, the enforcement organs are the *security police forces* and concerning the performance of the compulsory bringing *art. 47 of the Austrian Security Police Act* stipulates that it has to be carried out with respect to the human dignity of the concerned person in a most lenient way.

The enforcement organs are the security police forces who act on the grounds of *court or prosecution authority orders*[23].

[22] According with *art. 370 para. 3 N.Cr.P.C.*, in the Romanian legal system the court minutes are court decisions rendered during the trial by which the subject matter of the case is not judged or settled, but rather incidental matters; they can also mark the ending of a court hearing, etc, the rule being that they can be challenged with the next upper court only with the subject matter of the case *(art. 408 para. 2 N.Cr.P.C.).*

[23] See *„Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective",* Dr. G. Walchshofer, p. 14, expert report presented at the Compulsory bringing of persons to judicial authorities Workshop

In view of the performance of the compulsory bringing (and other coercive measures encroaching the right of personal freedom) the Supreme Court of Austria repeatedly held that the measure must be implemented in a way that the interference with the right to personal freedom is kept to the necessary minimum in terms of intensity and duration. Therefore it would be considered a violation of the right to personal freedom, as guaranteed by art. 5 ECHR, if a person were brought with considerable time prior to the fixed hour of the court session (at least in the absence of justifying organisational circumstances)[24].

The conditions under which compulsory bringing may be conducted lawfully are as follows:

- there has to be an enforceable legal obligation to appear before the court;
- the person has to be duly subpoenaed and cautioned about the consequence of compulsory bringing in case of non-obedience;
- the compulsory bringing must use the most lenient means to achieve the intended result;
- it must not be unproportional in relation to the significance of the matter;
- it has to be carried out with a minimum of interference in terms of intensity and duration[25].

➢ In ***Bulgaria***, in criminal proceedings, the failure of a defendant or of a witness to appear before a judicial system body or an investigating pre-trial authority (for the purpose of the court proceeding or the pre-trial proceedings) is ensured by compulsory bringing[26].

The competence for issuing an order of appearance in criminal matters rests upon the judicial system bodies, namely, the court during the trial or the prosecutor and the investigating bodies (investigating magistrates and investigating police) during the pre-trial stage.

The preconditions for issuing an order for compulsory bringing are as follows:

- the person whose testimony or appearance is requested has been duly summoned by serving of a writ of summons;
- the person fails to appear before the judicial system body;
- the person has been warned about the consequence of not complying or not appearing;
- the person fails to provide good excuse for not making a show, thus obstructing justice.

➢ In the ***Netherlands***, a court order for the transfer of a person to a court session can be issued by the presiding judge if the conditions set out in the law are met.

In the Dutch criminal system the measure of compulsory bringing is considered a coercive measure and it implies deprivation of liberty, being used for the establishment of the truth, ensurance of a fair trial and compliance with the adversarial procedure rules[27].

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on 24th – 26th of October 2013, in Sofia (Bulgaria), as part of the "*Capacity building of General Directorate Security staff in line with international standards to achieve a more effective judicial system*" Project, General Directorate "Security", Ministry of Justice (Bulgaria).

[24] See *„Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective"*, Dr. G. Walchshofer, op. cit., p. 12.

[25] See *„Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective",* Dr. G. Walchshofer, *op. cit.*, p. 12-13

[26] It is considered that the implementation of compulsory bringing constitutes a lawful limitation of the freedom of movement (Art 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms).

[27] See *„Court orders for the transfer of persons to court sessions",* R. Steinhaus, p. 3-4, expert report presented at the Compulsory bringing of persons to judicial authorities Workshop on 24th – 26th of October 2013, in Sofia (Bulgaria), as part of the "*Capacity building of General Directorate Security staff in line with international*

➢ In ***Poland***, the competent legal authorities which can issue a compulsory bringing order[28] are high ranking legal authorities: during the trial - *the court* conducting proceedings in a given case and - during the stage of pre-trial penal proceedings - *the public prosecutor*, the form of their decision being the order (issued by the court) or the ruling (issued by public prosecutor)[29].

The measure of compulsory bringing is considered as a kind of deprivation of liberty for a short period of time of a person who, after being correctly subpoenaed and warned about the legal consequences of not appearance, failed to perform his/her procedural duty, namely to be physically present in due time in the place indicated in a subpoena and who didn't provide reasonable excuse. This kind of deprivation of liberty, aiming to force the person's appearance at the place of performing the procedural activities with his/her obligatory presence, shall be treated as ultima ratio, and is always based on competent legal authority's written decision which can be a subject of an interlocutory appeal and which is executed by the police or another legal enforcement agencies[30].

The conditions provided by the Polish law are as follows:

- the accused was correctly cautioned in writing about his duties;
- the accused was dully subpoenaed and warned that his/her presence is mandatory;
- the accused failed to appear;
- the accused failed to provide excuse or the excuse was not accepted by the court[31].

3. Persons against which the order of appearance can be issued. In the Romanian legal system (*art. 265 N.Cr.P.C.),* the issuance of the order of appearance in criminal matters can be effected against *any person* who has been previously subpoenaed, has not appeared without reason in front of the judicial body and whose hearing or presence is needed. Also, the Code provides for a new situation in which the person can be brought by virtue of an order of appearance – if the proper subpoenaing has not been possible and the circumstances indicate unequivocally that the person is absconding from the reception of the subpoena.

Concluding, it can be said that the issuance of an order of appearance is not restricted to witnesses only. From this point of view the order of appearance can be issued for witnesses, but also for experts, interpreters, aggrieved parties or damaged third parties etc.

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standards to achieve a more effective judicial system" Project, General Directorate "Security", Ministry of Justice (Bulgaria).

[28] Special regulations concerning immediate compulsory bringing during the trial are provided for in *art. 276§1 of the Polish Criminal Procedure Code (*immediate compulsory bringing to the trial of the accused who, after giving testimony, left the trial without permission of the presiding judge) and *art. 282 of the Polish Criminal Procedure Code (*immediate compulsory bringing to the court of the accused who did not attend the trial - within the competence of the presiding judge).

[29] See *„Compulsory bringing of persons to judical authorities on the ground of Polish legal system",* D. Mazur, p. 10, 14, expert report presented at the Compulsory bringing of persons to judicial authorities Workshop on 24th – 26th of October 2013, in Sofia (Bulgaria), as part of the "*Capacity building of General Directorate Security staff in line with international standards to achieve a more effective judicial system*" Project, General Directorate "Security", Ministry of Justice (Bulgaria).

[30] See *„Compulsory bringing of persons to judical authorities on the ground of Polish legal system",* D. Mazur, *op.cit*., p. 5.

[31] See *„Compulsory bringing of persons to judical authorities on the ground of Polish legal system",* D. Mazur, *op.cit*., p. 14.

The wording „*any person who has been previously subpoenaed*" employed in the law text allows for a broad interpretation of the persons who can be brought by virtue of an order of appearance in front of the judicial authorities, the issuing authorities having to decide on the need of ordering the compulsory bringing of a person, whereas the need and the justification for the issuance of the order of appearance have to be found in the document by virtue of which the order of appearance is issued (prosecutor's resolution or the court minutes).

By way of derogation from the general rule, the suspect or the defendant can be brought by virtue of an order of appearance even if he/she was not subpoenaed, if this measure is needed for settling the case, as it is provided for in *art. 265 para. 1 N.Cr.P.C.* If the judicial body considers that the presence of the suspect/defendant is needed, it can also order his/her bringing *by virtue of an order of appearance even in those cases in which* the law allows for the representation of the suspect/defendant according with *art. 96 N.Cr.P.C.*

Also, the Code contains a more than welcome provision, namely the obligation of the judicial authority to notify the *suspect/defendant* about his/her obligation to appear in front of the judicial bodies, being warned that in case of default of appearance an order of appearance can be issued against the person and that in case of absconding from justice the court can order the person's arrest *[art. 108 para. 2.a) N.Cr.P.C.]*.

During the trial, the court can order the bringing of the defendant by virtue of an order of appearance, if it considers that his presence is needed (*art. 364 para. 5 N.Cr.P.C.*).

The Romanian law does not provide for any derogation from the common law of the civil law systems concerning the compulsory bringing of underaged children. However, the Code provides for some special rules which regulate the behaviour of the underaged child who is a suspect or a defendant.

When the suspect/defendant is an underaged *child who is younger than 16*, on occasion of any hearing or appearance of the underaged child in front of the criminal prosecution authority, it shall subpoena the parents and, if case be, the legal custodian, guardian or the person who is in charge with the upbringing or monitoring of the underaged child, as well the General Direction for Social Assistance and Child Protection from the town where the hearing takes place. When the suspect or the defendant is an underaged child older than 16, these persons shall be subpoenaed if the judicial authorities consider this appropriate. In any case, the fact that the persons who have been legally subpoenaed to assist at the hearing or confrontation of the underaged child do not appear, does not hinder the performance of these acts. (*art. 505 N.Cr.P.C.*)

Similarly, *during the trial*, except to the parties, subpoenas shall be sent to the Probation Office, the underaged child's parents or, as case be, the legal custodian, guardian, the person who is in charge with the upbringing and monitoring of the child, as well as other persons who have the right and are obliged to give explanations, come up with requests and proposals concerning the measures which shall be taken. The fact that the persons who have been legally subpoenaed do not enter the proceedings does not hinder the judgment. (*art. 508 N.Cr.P.C.*)

With regard to the *witness*, similary to the provisions set out for the suspect or defendant, the judicial body must inform him/her about the obligation to appear in front of the judicial authorities, being warned that in case of non-compliance with this obligation an order of appearance can be

issued against him/her *[art. 120 para. 2.b) N.Cr.P.C.]*.

According with the applicable legal provisions which regulate the hearing of the witness, expert or interpreter during the trial - art. 381 para. 8 and 11 N.Cr.P.C., if one or more *witnesses* are not present, the court can order either the continuation of the trial or the postponement of the case. The witness whose absence is not justifed can be brought by enforcing an order of appearance. These provisions apply correspondingly also in case of the hearing of *the expert or the interpreter*.

The order of appearance (as well as the judicial fine) can be ordered against *the representative of the legal person or its mandatary*.

Art. 283 para. 2 and 4.b) N.Cr.P.C. concerning judicial infringements allows for the sanctioning of the unjustified default of appearance of the witness, aggrieved party, civil party or damaged third party with a judicial penalty ranging from 250 lei to 5.000 lei and if the unjustified default of appearance is commited by the expert or the interpreter, the judicial penalty ranges from 500 lei to 5.000 lei.

A fine from 250 lei to 5.000 lei can also be applied for leaving without permission or a justified reason the place where the person is to be heard. (*art. 283 para. 2 N.Cr.P.C.)*

- In ***Austria***, individuals who by law have to appear before the court and fail to do so eventually have to be brought by force. Compulsory bringing, of course, will constitute regularly an infringement of the fundamental right to personal freedom, since this act includes, as the case may be, the application of immediate force and thus the limitation of movement for the concerned person. The legal framework regarding compulsory bringing, indeed, provides for rules where and in which cases compulsory bringing has to be applied, but remains silent on the act (execution of this coercive measure) itself[32].

In principle, *the witnesses and the suspects or defendants* who are on the loose have to be subpoenaed for hearings, which applies both for the pre-trial and the main-trial (*art. 153 of the Criminal Procedure Code of Austria*). Compulsory bringing only is admissible if the duly subpoenaed person does not appear and if he/she was cautioned about the consequences. An exception is made for suspect or accused if there are sound reasons for the assumption that he/she may elude justice by fleeing or in cases of danger of collusion. In these cases the compulsory bringing may be ordered without prior subpoena[33].

Compulsory bringing can be applied also for court *experts and interpreters* in cases of unjustified default of appearance. In this sense, according to *art. 242 of the Criminal Procedure Code of Austria*, if witnesses or experts, despite having been subpoenaed, do not appear at the court trial, the president can order their immediate bringing.

- In ***Bulgaria***, in criminal proceedings, the failure of *a defendant or of a witness* to appear before a judicial system body is ensured by compulsory bringing.

According to *art. 71 para. 1 of the Criminal Procedure Code of Bulgaria*, where the accused fails to appear for interrogation without good reasons, he/she shall be brought in by compulsion where their appearance is mandatory, or where the competent body finds this to be necessary. The accused may be brought in by

[32] See *„Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective”,* Dr. G. Walchshofer, *op. cit.*, p. 1.

[33] See *„Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective”,* Dr. G. Walchshofer, *op. cit.*, p. 15

compulsion without prior subpoenaing[34] where he/she have absconded or has no permanent residence.

- In ***Poland***, a compulsory bringing order can be issued against *the suspect, accused, witness, expert, interpreter or specialist*[35].

Compulsory bringing of the *accused* is done according to the general provision of *art. 75§2 of the Polish Code of Criminal Procedure*, the measure being applied only in respect to the accused who was correctly cautioned in writing about his rights and duties prior to his/her first examination during preparatory proceedings or by the court. Compulsory bringing can be ordered for any kind of procedural action with mandatory presence of the accused at the stage of preparatory proceedings or at the stage of court proceedings[36].

Polish Code of Criminal Procedure introduces a wide range of measures aiming to force subpoena persons to perform their procedural duties or to punish them for wrongdoing in this respect. Those provisions are applicable to *witnesses, experts, interpreters and specialists*. Amongst those measures there is the compulsory bringing measure, applicable to the *witnesses.* Only in exceptional cases it can be applied to *experts, interpreters, specialists.* For example when there is no possibility to replace expert's opinion by opinion of another expert or there is no possibility to hire another interpreter or specialist, than those who were originally subpoenaed[37].

4. Enforcement of the warrant. Concerning the enforcement of the order of appearance, we would like to note that the new Code has a more flexible approach of the institutions competent to enforce them and does not detail expressly these institutions, but merely mentions the fact that they are represented by the *judicial police forces and any other public order authorities [such as the police[38], gendarmerie (riot police) or local (community) police[39]]*. No matter which of these authorities enforce the warrant, the activities carried out on occassion of the enforcement of the order of appearance shall be recorded in a minutes which has to provide information about: full name and capacity of the person who drafts the minutes; the place where it is drafted; mentions about the activities carried out *(art. 266 para. 1 and 6 N.Cr.P.C.*).

The police force vested with the enforcement of the order of appearance goes to the address indicated in the warrant, presents the warrant to the person who shall

[34] According to *art. 178 para. 1 and 2 of the Criminal Procedure Code of Bulgaria*, subpoenas, notifications and papers shall be served by officials of the respective court, the pre-trial authorities, municipality or mayor's offices. Where service cannot be performed in such a way, it shall be carried through the services of the Ministry of the Interior or of the Ministry of Justice.

[35] See *„Compulsory bringing of persons to judical authorities on the ground of Polish legal system",* D. Mazur, *op.cit.*, p. 7.

[36] See *„Compulsory bringing of persons to judical authorities on the ground of Polish legal system",* D. Mazur, *op.cit.*, p. 13-20

[37] See *„Compulsory bringing of persons to judical authorities on the ground of Polish legal system",* D. Mazur, *op.cit.*, p. 21, 23.

[38] Art. 31 para. 1.d) of Law No. 218/2002 concerning the organisation and functioning of the Romanian Police, published in the *Official Journal of Romania*, Part I, No. 305 of 9th of May 2002, as subsequently amended and completed, provides for the obligation of the *police* to enforce the orders of appearance issued in accordance to the legal provisions.

[39] Art. 6.j) of the Local Police Law No. 155/2010, published in the *Official Journal of Romania*, Part I, No. 488 of 15th of July 2010, as subsequently amended and completed, provides for the obligation of the *local police* to enforce only orders of appearance issued by the criminal prosecution authorities and courts within a certain jurisdiction and which refer to persons residing within that jurisdiction.

be brought in front of the judicial authority[40] and accompanies the person to the place indicated in the warrant. The enforcement of the order of appearance involves, as a matter of principle, the actual bringing of the person to the issuing body and in case of refusal, the use of public force[41].

If the person referred to in the order of appearance cannot be brought because of medical reasons and if the person vested with the enforcement of the order of appearance does not find the person referred to in the order of appearance at the address indicated, he shall make inquiries and if not successful, in both situations he has the obligation to draft a record about the impossibility to enforce the order, which is to be forwarded immediately to the criminal prosecution body or to the court[42] (*art. 266 para. 3 and 4 N.Cr.P.C.*).

Finally, *art. 266 para. 5 N.Cr.P.C.* provides for special rules applying to armed forces staff, stating that the enforcement of the orders of appearance concerning military staff is performed by the commander of the military unit, the commander of the garrison and by the military police.

It should be mentioned that, according with the provisions of *art. 283 para. 1.b) N.Cr.P.C.* concerning judicial infringements, non-fulfillment or wrong fulfilment by the judicial police forces or by any other public order authorities of the duty of the personal delivery or service of subpoenas or other procedure acts, as well as the non-enforcement of the order of appearances, during the trial is considered to be judicial infringement and is sanctioned by judicial fine ranging from 100 lei to 1.000 lei.

- ***Austria***. Since court organs do not exert by themselves immediate force for criminal proceedings the Austrian judiciary relies throughout on the *police*. The legal and doctrinal basis for this co-operation between the judiciary and the police is *art. 22 of the Austrian Federal Constitution Law* and *art. 76 para. 1 of the Criminal Procedure Code of Austria*[43].
- In ***Bulgaria***, in criminal proceedings, the failure of a defendant or of a witness to appear before a judicial system body is ensured by compulsory bringing.

The General Directorate *"Security"*, a body which is organised under the Minister of Justice, has the competence to render assistance to judicial system bodies in subpoenaing of persons in cases where the implementation of this obligation has been obstructed, on the one hand and to bring individuals to a judicial system body by compulsion where this has been ruled by a judicial system body, on the other hand. *(art. 391 para. 1 and 3 Judicial System Act of Bulgaria)*

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[40] It should be noted that the place where the person has to be brought does not necessarily have to be the headquarters of the issuing authority, but rather the place where the issuing authority odered the person to be brought (for example a secondary headquarter, territorial office, crime scene, etc.)

[41] Ghe. Mateuț, *Tratat de procedură penală. Partea generală*. *(Criminal procedure treaty. The General Part.)* Volume II, C.H.Beck Publishing House, Bucharest, 2012, p. 783.

[42] The new text is much preciser and clearer, as the previous Code made mention about *„any other reason".* The previous wording was criticized just because of the use of the *„any other reason"* had the order of appearance not essentially different from the subpoena, as the police agent as enforcement authority could not use, except for the situation provided for in art. 184 para. 3^1 Cr.P.C., compulsory means against the person who refused to be picked up and brought by virtue of the order of appearance. (Ghe. Mateuț, *op. cit*, p. 784)

[43] See, *„Compulsory Bringing of Witnesses and Accused Persons from an Austrian Perspective",* Dr. G. Walchshofer, *op. cit.*, p. 2.

Art. 22 of the Austrian Federal Constitution Law: *"All authorities of the Federation, the Länder [federal states] and the municipalities are bound within the framework of their legal sphere of competence to render each other mutual assistance."*

The competence of the General Directorate *"Security"* to enforce compulsory bringing when this measure is ordered by a judicial system body concerns both trial and pre-trial stage.

During the pre-trial stage, the compelled attendance of persons, witnesses and defendants, before the investigating police is ensured by the police.

Military service officers shall be brought in by the respective military bodies.

The procedure for enforcing an order of appearance for the witness is the same as the one prescribed by the law for the accused.

- In ***Poland***[44], the *police and other authorized law enforcement agencies* have the competence to enforce the compulsory bringing of a person, having the right to check the identity of concerned person[45], apprehend persons in cases indicated in Criminal Procedure Code and other statutory regulations[46], conduct a search of persons and premises in cases indicated in Criminal Procedure Code[47] and the right to use coercive measures and firearms[48] in cases indicated in the Coercive Measures Act[49].

5. Use of force. The possibility of entering a person's domicile or company's headquarters. Unlike the previous Code, the N.Cr.P.C. stipulates expressly that the means of coercion can be used against any person: the person vested with the enforcement of the warrant serves the warrant to the person who is the subject of the order of appearance and requests the person to accompany him. In case the person indicated in the warrant refuses to join the person invested with the enforcement of the warrant or tries to flee, the person shall be brought by coercion[50] (*art. 266 para. 1 N.Cr.P.C.*).

The *coercion* that can be used with a view to enforcing the order of appearance can only be physical coercion, the mental coercion being inherent to the voluntary compliance with the enforcement of the order of appearance. The use of force by the enforcement bodies is performed with a clear aim, that is as much as needed for the enforcement of the warrant, namely for bringing the subject of the order of appearance in front of the criminal prosecution authority or in front of the court which subpoenaed or notified him, in compliance with certain limits, as for example those imposed by article 3 of the European Convention[51].

The conventional character of the legal provisions which allow for the enforcement

[44] See *„Compulsory bringing of persons to judical authorities on the ground of Polish legal system",* D. Mazur, *op.cit.*, p. 46-57.

[45] A*rt. 15.1.1 of the Polish Police Act* - Act of 6 April 1997 about the Police; consolidated text published in Official Journal of Law 2011 No 287, item 555 and *§ 1 p.4-7 of* "*Polish Police Selected Powers Ordinance*" - Ordinance of Council of Ministers from 26 July 2005 about way of exercising selected powers by police force, published in Official Journal of Law 2005 No 141, item 1186.

[46] Art. 15.1.2 *of the Polish Police Act.*

[47] Art. 15.1.4 *of the Polish Police Act.*

[48] Art. 16 *of the Polish Police Act.*

[49] Act of 24 May 2013 about the Coercive Measures and Firearm, published in Official Journal of Law 2013, item 628 ["the Coercive Measures Act"].

[50] The new provisions are very much different from the repealed Code. In the previous law, despite the fact that the text stipulated that the order of appearance can be issued against any person, it expressly regulated the case in which the accused, defendant or witness refused to obey the order of appearance or tried to flee; in such cases, the person shall be brought by coercion in front of the criminal prosecution authorities or in front of the court. This means that the Romanian law-maker, despite the fact that it allowed for the issuance of an order of appearance against any person who needed to be heard or to be present within the criminal proceedings, the use of means of coercion for the enforcement of the order of appearance could only be legitimate against the accused or defendant and witness.

[51] Ghe. Mateuț, *op. cit*, p. 780.

of the order of appearance by using means of coercion has been looked at in the specialized literature[52], which noted, on the one hand, that in case the suspect or defendant refuses to enter the hearing or tries to flee, the police or gendarmerie forces can order within the enforcement of the order of appearance the detention of the persons in the sense of art. 5 para. 1 of the European Convention and the compulsory bringing of the persons in front of the criminal prosecution authority or in front of the court. On the other hand, there is a deprivation of liberty, strictly subject to the aim of the hearing by the criminal prosecution authorities or by the court, given that according with *art. 265 para. 11 N.Cr.P.C.* persons brought by virtue of order of appearances are "*at the disposal*" of the judicial body. The author considers that only if the order of appearance is ordered by the court, the measure of the deprivation of liberty complies with the requirements of art. 5 para. 1.b) of the European Convention. Having regard to the fact that by this measure a deprivation of liberty in the sense of art. 5 para. 1.b) can be achieved, the court is obliged to justify the decision by which it orders the issuance of the order of appearance, in order to remove any free will in the field of deprivation of liberty.

Based on the provisions of the repealed Code, the literature[53] has noted, justifiably, some deficiencies in the regulation of the procedure of the enforcement of the order of appearance. If the provisions introduced by Law No. 281/2003 did respond to the practical needs of the compulsory enforcement of an order of appearance, in cases in which the accused or defendant refused to obey the warrant, the situation was not the same when any other person than the accused or defendant or witness refused to obey the warrant or when the subject of the warrant was found at his place of residence or even at another person's place of residence and refused to allow for the police agent to enter the premises[54], thus implicitly defying the warrant, cases in which, according to former regulations, the enforcement of the order of appearance was in practice impossible.

In this sense, *art. 265 para. 4-9, N.Cr.P.C.* solved the difficulties met in the practice concerning the enforcement of the warrant, as it provides for the possibility of entering a person's domicile or company's headquarters without the subject's consent with a view to enforce the order of appearance, which can be ordered during the criminal prosecution stage at the justified request of the prosecutor by the so called „*liberty and custody judge*" (French system: *juge des libertés et de la détention*) from the court which would be competent to judge the case in first instance or from the same level of jurisdiction court where the prosecution office is situated where the prosecutor comes from or, during the trial, by the court.

[52] M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român (European protection of human rights and Romanian criminal trial)*, C.H.Beck Publishing House, Bucharest, 2008, p. 406-407.

[53] Ghe. Mateuț, *op. cit*, p. 785; I. Rusu, *Executarea mandatului de aducere. Opinii ciritice. Propuneri de lege ferenda (The enforcement of the order of appearance. Critical opinions. Lege ferenda amendments) (I),* Dreptul Magazine, No. 6/2004, p. 189-192; T. Hâj, *Executarea mandatului de aducere. Opinii ciritice. Propuneri de lege ferenda (The enforcement of the order of appearance. Critical opinions. Lege ferenda amendments) (II),* Dreptul Magazine, No. 6/2004, p. 192-195.

[54] In this context the text of art. 27 para. 1 of the Romanian Constitution is relevant, saying that *„the domicile or residence are inviolable, so that no one can enter or stay in the domicile or residence of a person without the person's consent".* The exceptions are strict interpretations and are provided for in para. 2 of art. 27 of the Constitution: *a) carrying into execution a warrant for arrest or a court decree; b) removing a risk to someone's life, physical integrity, or a person's assets; c) defending national security or public order; d) preventing the spread of an epidemic.*

The request filed during the criminal prosecution stage concerning the issuance of an order of appearance is looked at in closed session (not public) without having subpoenaed the parties, the judge ordering the admission or dismissal of the request by virtue of a final minutes.

With a view to enforcing the warrant issued by the „*liberty and custody judge*" or by the court, the competent authorities can enter the home or headquarter of any person where there is an indication that the person sought for is likely to be found, in case the person refuses to cooperate, hinders the enforcement of the warrant or for any other grounded reason in proportion with the aim of the warrant (*art. 266 para. 2 N.Cr.P.C.).*

The performance of a house search with a view to catching the suspect is provided for expressly in *art. 157 para. 1 N.Cr.P.C.*

This situation in which there is no information on the suspect or defendant's location has to be distinguished from the order of appearance where there is a suspect or defendant in the case and his domicile or residence is known. The house search can be ordered during the criminal prosecution by the "*liberty and custody judge*" and within the trial by the court *(art. 158 N.Cr.P.C.).*

6. Mandatory forensic expertise. Criminal Procedure Code. *Art. 184 N.Cr.P.C.* provides for certain cases in which the performance of a psychiatric assessment is mandatory and should be done in specialized medical facilities.

In case the suspect or defendant refuses during the criminal prosecution or the trial the performance of the mandatory psychiatric forensic assessment (*art. 184 para. 4 N.Cr.P.C.*) or does not show up for the examination with the psychiatric forensic commission, the prosecutor, the „liberty and custody judge" (at the request of the criminal investigation authority) or the court will *ex officio* issue an order of appearance for the appearance in front of the psychiatric forensic commission.

If it considers that an exhaustive examination is needed, which requires the hospitalization of the suspect or of the defendant in a specialized medical facility and the person refuses the hospitalization, the forensic commission has to inform the criminal prosecution authority about the need for the measure of involuntary hospitalization for a period of maximum 30 days, which can be extended only once, for 30 days at the most. The period in which the suspect or the defendant was hospitalized in a special facility for the performance of the psychiatric assessment will be deducted from the duration of the penalty according with *art. 72 of the Criminal Code*.

As mentioned in the case-law of the Constitutional Court[55] *„the examination of art. 117 Cr.P.C. [currently, art. 184 N.Cr.P.C.] reveals the fact that this does not introduce a criminal law sanction, but a process related measure which judicial authorities have to enforce when there are doubts concerning the mental state of the accused or defendant and when the performance of a psychiatric assessment is considered to be necessary. The need for hospitalization is determined by the fact that the assessment is carried out in specialized medical facilities, (...) and the hospitalization and examination of the accused or defendant are carried out both in his interest and for «the accomplishment of the criminal instruction» referred to in art. 49 para. 1 of the Constitution [which became art. 53 after the republication of the Constitution in 2003]."*

If the person against whom the measure of placing in a medical facility for the purpose of performance of the

[55] *Constitutional Court Decision No. 76/1999*, published in the *Official Journal of Romania*, Part I, no. 323 of 6th of July 1999.

assessment was ordered considers that the measure was ordered illegally or that the hospitalization period exceeded the necessary time and has thus led to harming his legitimate interests, the person can complain against the measure in compliance with *art. 339-341 N.Cr.P.C.* or can go directly to court. In such circumstances, the measure of hospitalization for the time necessary is in compliance with art. 53 para. 1 of the Constitution which says that the exercise of some rights and freedoms can only be restricted by law and only if it is necessary, among other things, for the accomplishment of the criminal instruction. Furthermore, the provisions of para. 2 of art. 53 of the Constitution are also met, the limitation being proportional with the situation which caused it.

Concerning the procedure for placing the accused/defendant in a hospital for the performance of the mandatory psychiatric assessment, the specialized literature[56] considers that this is a deprivation of liberty in the sense of the ECHR and that the *de lege lata* regulation violates the provisions of art. 5 para. 1.b) ECHR because:

- it is not a deprivation of liberty ordered by a judge;
- it has a punitive character and does not aim at executing an obligation which a person has and which the person did not meet, even though it could have met;
- it does not offer any guarantee against the arbitrary, as the custodial measure can extend over an uncertain period of time;
- it does not regulate the possibility of a control of the legality or opportunity of the deprivation of liberty by a judge.

➢ In ***Bulgaria***, according to *art. 337 para. 1 of the Civil Procedure Code of Bulgaria*, the person whose interdiction is sought shall be heard by the court in person and, if necessary, shall be brought by compulsion. Where the person is in hospital and the state of their health state does not permit to be brought in person at the hearing, the court shall be obliged to acquire immediate impression of the person's condition.

The Health Act, in art. 165 para. 2, regulates the execution of a court order for compulsory commitment of a person for treatment or of a court ruling for performance of expert. In this sense, the effective court order for compulsory commitment and treatment, as well as the court ruling to appoint a forensic psychiatric examination shall be implemented by the respective medical facilities, and where necessary with the assistance of the Ministry of Interior.

III. European Convention for the Protection of Human Rights and Fundamental Freedoms. European Court of Human Rights case-law.

1. European Convention for the Protection of Human Rights and Fundamental Freedoms. Human rights protection is of paramount importance in the present days. In this respect, special attention needs to be given to the protection of the persons deprived of their liberty as they are in a fragile position and it is the duty of the state to ensure the full respect of their fundamental rights. The European system established by the Council of Europe constitutes a bulwark in protecting the fundamental rights and freedoms of the persons deprived of their liberty[57].

[56] M. Udroiu, O. Predescu, *op. cit.*, p. 409-410

[57] R.-F. Geamănu, *Use of force and instruments of restraint – an outline of the Romanian legislation in the European context*, The International Conference CKS-CERDOCT Doctoral Schools, Challenges of the Knowledge Society, Bucharest, April 15-16, 2011, CKS-CERDOCT eBook 2011, Pro Universitaria Publishing House, 2011, p. 112,

The unconditional terms of article 3 also mean that there can never, under the Convention or under international law, be a justification for acts which breach the article. In other words, there can be no factors which are treated by a domestic legal system as justification for resort to prohibited behaviour – not the behaviour of the victim, the pressure on the perpetrator to further an investigation or prevent a crime, any external circumstances or any other factor[58].

In assessing some cases of use of force or instruments of restraint, the European Court of Human Rights defined the conditions in which the policemen or prison officers may use these means. On the one hand, it is obvious that the use of a certain amount of force in case of resistance to arrest, an attempt to flee or an assault on an officer or fellow prisoner may be inevitable. On the other hand, the form, as well as the intensity of the force used should be proportionate to the nature and the seriousness of the resistance or threat[59].

In its jurisprudence the ECtHR stressed out repeatedly that persons deprived of their liberty are vulnerable and it is the duty of the national authorities to protect their physical well-being, whereas the use of physical force or other means of restraint have to be strictly necessary and have to be required by the prisoner's own conduct. In other words, in respect of a person deprived of his or her liberty any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in article 3 of the Convention[60].

The use of means of restraint in other circumstances than those provided by the Convention or by the Strasbourg case-law diminishes human dignity and is, in principle, an infringement of the right set forth in article 3 of the Convention. In this sense, Romania was convicted in some cases before the European Court, as the use of force or other instruments of restraint was not legal and proportionate to the nature and the seriousness of the resistance or threat[61].

According to the well-established case-law of the Court, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, *inter alia, Price v. the United Kingdom*, no. 33394/96, § 24, ECtHR 2001-VII). In order for a punishment or treatment associated with it to be "*inhuman*" or "*degrading*", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECtHR 2000-IV)[62].

available at:http://cerdoct.univnt.ro/index.php?option=com_content&view=article&id=54&Itemid=63&dir=JSROOT%2FCKS%2F2011_15_16_aprilie&download_file=JSROOT%2FCKS%2F2011_15_16_aprilie%2FCKS_CERDOCT_2011_eBook.pdf, accessed 01.03.2014.

[58] A. Reidy, *The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights.* Human rights handbooks, No. 6, Directorate General of Human Rights, Council of Europe, 2002, p. 19, available at: http://echr.coe.int/NR/rdonlyres/0B190136-F756-4679-93EC-42EEBEAD50C3/0/DG2ENHRHAND062003.pdf, accessed 25.02.2014.

[59] P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak, editors, *Theory and practice on the European Convention on Human Rights*, 4th edition, Intersentia Publishing House, Antwerpen-Oxford, 2006, p. 426.

[60] ECtHR judgement from December 4, 1995, final, in the case of Ribitsch v. Austria (1), para. 38.

[61] R.-F. Geamănu, *op. cit.*, p. 116.

[62] ECtHR, judgment from November 20, 2012, in the case of *Ghiurău v. Romania*, para. 52-53.

From the *procedural point of view*, where an individual raises an arguable claim that he has been seriously ill-treated in breach of article 3 of the Convention, the member state has an obligation to initiate a thorough, prompt, independent and effective investigation, which should be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible. This means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence etc. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or to identity the persons responsible will risk falling foul of this standard. For an effective investigation into alleged ill-treatment by state agents, such investigation should be independent[63]. In considering all these aspects, the Court found a violation of article 3 of the Convention under its procedural head in several cases against Romania, as the national authorities failed to fulfilll their obligation to conduct a proper official investigation into the applicant's allegations of ill-treatment, capable of leading to the identification and punishment of those responsible[64].

Article 5 of the Convention sets out a fundamental right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty.

Persons deprived of their physical liberty shall mean, in accordance with the ECtHR case-law, persons who are deprived of their liberty in accordance with a procedure prescribed by law by arrest or detention. So, in this sense, all the principles set out by the Strasbourg Court regarding the use of force and instruments of restraint against persons deprived of their liberty will apply in all the cases mentioned in art. 5 para. 1 of the Convention[65].

In proclaiming the *"right to liberty"*, paragraph 1 of art. 5 contemplates the physical liberty of the person; its aim is to ensure that no one should be deprived of that liberty in an arbitrary fashion. Sub-paragraphs (a) to (f) of art. 5 para. 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds. The Court also reiterates that in order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance (see *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 57, 15 March 2012)[66].

[63] ECtHR judgement from January 26, 2006, final, in the case of Mikhenyev v. Russia, para. 107-108 and 110.
[64] *Barbu Anghelescu v. Romania*, ECtHR judgement from October 5, 2004, final, para. 70; *Bursuc v. Romania*, ECtHR judgement from October 12, 2004, final, para. 110; *Dumitru Popescu (no.1) v. Romania*, ECtHR judgement from April 26, 2007, final, para. 78-79; *Cobzaru v. Romania*, ECtHR judgement from July 26, 2007, final, para. 75; *Alexandru Marius Radu v. Romania*, ECtHR judgement from July 21, 2009, final, para. 47 and 52; *Boroancă v. Romania*, ECtHR judgement from June 22, 2010, final, para. 50-51
[65] R.-F. Geamănu, *op. cit.*, p. 114.
[66] ECtHR, judgment from November 20, 2012, in the case of *Ghiurău v. Romania*, para. 76-78

Regarding the deprivation of liberty with a view to guaranteeing the enforcement of a legal obligation[67] the European Court of Human Rights showed[68] that there has to be a violation of an obligation which a person has and which the person could have met and the deprivation of liberty has to be imposed in order to ensure the execution of that obligation and is not of a punitive nature. The obligation has to be a lawful obligation, it has to have a specific and concrete, not a general character, it has to meet the requirements of the European Convention and it must have emerged prior to the date of the deprivation of liberty. Furthermore, there has to be some proportionality between the importance within a democratic society of ensuring the immediate enforcement of an obligation and the importance of the right to liberty, the term of the detention being a relevant factor in establishing this proportionality. Other key factors in this respect are: the nature of the obligation arising from the relevant legislation including its underlying object and purpose; the person being detained and the particular circumstances leading to the detention; and the length of the detention[69].

In the Romanian law, for example, there can be such a *limitation or even deprivation of liberty in case of an order to bring the person in front of the criminal prosecution authorities or in front of the court or in case of hospitalisation with a view to performing the compulsory psychiatric expertise.*

2. European Court of Human Rights case-law. As *regards Romania's convictions by the European Court of Human Rights* we would like to note that they mainly concerned the enforcement of orders of appearance [ECtHR judgement from *23 February 2012, Grand Chamber*, final, in the case of Creangă v. Romania; ECtHR judgement from *20 November 2012*, final, in the case of *Ghiurău v. Romania*].

Of course, the study will also assess other ECtHR judgements given against other Member States on the topic of compulsory bringing in criminal matters (ECtHR judgement from March 27, 2012, final, in the case of *Lolova-Karadzhova v. Bulgaria*).

Further below we will present some of the essential elements concerning subject matters and legal issues considered by the Court in Strasbourg in the cases brought against Romania concerning the violation of art. 5 of the Convention, but also some subject matter related to elements extracted from the communicated cases regarding Romania *(Gabriel Aurel Popoviciu v. Romania. Application no. 52942/09, lodged on 16 September 2009; Iustin Robertino Micu v. Romania. Application no. 41040/11, lodged on 22 June 2011; Valerian Dragomir v. Romania. Application no. 51012/11, lodged on 3 August 2011)*.

- In the case of ***Creangă v. Romania (Grand Chamber)*** the applicant alleged, in particular, that his deprivation of liberty from 9 a.m. to 10 p.m. on 16 July 2003 had been unlawful, as had his subsequent placement in pre-trial detention. He relied in particular on art. 5§1 of the Convention. (*para. 3*)

What is relevant in relation to the present study is the fact that the Court found that there had been a violation of *art. 5§1 of the Convention* on account of the applicant's deprivation of liberty on 16 July 2003, at least from 12 noon to 10 p.m. and, also, on

[67] For details see M. Udroiu, O. Predescu, *op. cit.*, p. 404-406.
[68] See ECtHR, judgment from March 24, 2005, in the case of *Epple v. Germany*, para. 43-45; ECtHR judgement from September 25, 2003, in the case of *Vasileva v. Denmark*, para. 36-37; ECtHR, judgment from February 22, 1989, in the case of *Ciulla v. Italy*, para. 36.
[69] See ECtHR judgement from September 25, 2003, in the case of *Vasileva v. Denmark*, para. 38.

account of the applicant's placement in pre-trial detention on 25 July 2003.

The Court (Grand Chamber) reiterated its established case-law to the effect that art. 5§1 may also apply to deprivations of liberty of a very short length (see *Foka v. Turkey*, no. 28940/95, § 75, 24 June 2008) and noted that in the instant case, it is not disputed that the applicant was summoned to appear before the National Anti-Corruption Prosecution Service headquarters (NAP) and that he entered the premises of the prosecution service at 9 a.m. to make a statement for the purpose of a criminal investigation. (*para. 93, 94*)

The Court noted further that the applicant was not only summoned but also received a verbal order from his hierarchical superior to report to the NAP. Subsequently, the Court stated that, while it cannot be concluded that the applicant was deprived of his liberty on that basis alone, it should be noted that in addition, there were other significant factors pointing to the existence of a deprivation of liberty in his case, at least once he had been given verbal notification of the decision to open the investigation at 12 noon: the prosecutor's request to the applicant to remain on site in order to make further statements and participate in multiple confrontations, the applicant's placement under investigation during the course of the day, the fact that seven police officers not placed under investigation had been informed that they were free to leave the NAP headquarters since their presence and questioning was no longer necessary, the presence of the gendarmes at the NAP premises and the need to be assisted by a lawyer. (*para. 97*)

Concluding, the Court found that the applicant did indeed remain in the prosecution service premises and was deprived of his liberty, at least from 12 noon to 10 p.m. (*para. 100*) and at least from 12 noon, the prosecutor had sufficiently strong suspicions to justify the applicant's deprivation of liberty for the purpose of the investigation and that Romanian law provided for the measures to be taken in that regard, namely placement in police custody or pre-trial detention; however, the prosecutor decided only at a very late stage to take the second measure, towards 10 p.m. (*para. 109*)

Finally, the Grand Chamber considered that the applicant's deprivation of liberty on 16 July 2003, at least from 12 noon to 10 p.m., had no grounds in domestic law[70] and that there has therefore been a violation of *art. 5§1 of the Convention. (para. 110)*[71]

[70] For comparison, see the ECtHR judgement from June 24, 2008, in the case of *Foka v. Turkey*, para. 86 – 89: The Court was of the opinion that the applicant was deprived of her liberty in accordance with a procedure prescribed by law *"in order to secure the fulfilment of any obligation prescribed by law"* within the meaning of *art. 5§1.b) of the Convention* and reiterated that in this case nothing proved that the deprivation of liberty at stake exceeded the time necessary for searching the applicant's bag, imposing a fine on her and fulfilling the relevant administrative formalities. It accordingly found no appearance of arbitrariness.
Finally, it was to be observed that both at the Ledra Palace crossing point and at the police headquarters, the applicant was clearly requested to give her bag to the police officers who declared that they wanted to search it. Even assuming that the applicant was not given any other oral or written explanation, under these circumstances, the reasons of her arrest should have been clear to her.
Accordingly, the Court ruled that there had not been a violation of *art. 5§1 and 2 of the Convention* in the case.

[71] The ruling of the Court was the same as the one of the Chamber. In this sense, the Chamber noted in that, having been issued on the basis of a prosecutor's order in accordance with domestic law, the warrant for pre-trial detention could cover only the same period as that specified in the order. In the instant case, although it did not indicate the time from which the measure took effect, that warrant could not constitute a legal basis for the preceding period, which was not mentioned in the order. Consequently, *the Chamber considered that the applicant's deprivation of liberty from 10 a.m. to 10 p.m. on 16 July 2003 had had no basis in domestic law and that accordingly, there had been a breach of art. 5§1 of the Convention. (para. 66, 67)*

The conclusion was the same regarding the applicant's placement in pre-trial detention on 25 July 2003: the Court agreed entirely with the Chamber's conclusions that the applicant's deprivation of liberty on that particular date did not have a sufficient legal basis in domestic law, in so far as it was not prescribed by "a law" meeting the requirements of *art. 5§1 of the Convention*. For the reasons given by the Chamber, it considered that there had been a violation of that provision. (*para. 121*)

- A similar situation was acknowledged by the Court in the case of ***Lolova-Karadzhova v. Bulgaria***, where the applicant alleged, in particular, that her detention from about 10 a.m. on 18 October to 3 p.m. on 19 October 2006 had been in breach of *art. 5§1 of the Convention. (para. 3).*

The District Court observing that it was necessary to complete the proceedings within a reasonable time held that the applicant should therefore be brought before it for the next hearing with the assistance of the police. It did not specify any legal ground for this order. It scheduled the next hearing for 19 October 2006 at 3 p.m. Since the applicant's lawyer was present at the hearing, the applicant was considered duly informed of the order. (*para. 13*)

Around 10 a.m. on 18 October 2006 the applicant was detained[72] by the police and taken to Sofia Prison, where she remained until the next morning. In the morning of 19 October 2006 the applicant was escorted by train and car from Sofia to Asenovgrad (160 km), attended the hearing at 3 p.m. and made submissions, after which she was released. In a judgment of the same date the District Court acquitted her. (*para. 14, 15*)

The Court held that it was not disputed that the applicant remained under the constant supervision and control of the police authorities from about 10 a.m. on 18 October until 3 p.m. on 19 October 2006, or twenty-nine hours, and that she spent a considerable amount of that time in Sofia Prison. The Court was therefore satisfied that she was "deprived of her liberty" within the meaning of *art. 5§1 of the Convention. (para. 27)*

The Court noted that the domestic court did not specify the legal grounds for its order and did not state expressly that the applicant's attendance was necessary for establishing the truth pursuant to *art. 269 (2) of the Criminal Procedure Code of Bulgaria* but rather justified it with the need to secure her own procedural rights. Furthermore, the application of *art. 71 (2) of the Criminal Procedure Code of Bulgaria* also appeared problematic since the applicant neither absconded nor was without a permanent address. (*para. 31*)

The Court observed that the applicant was arrested on the day before the hearing and remained in custody for almost thirty hours. The distance between her home town and the town where the hearing was held, 160 km, was not such as to justify such a long period of detention. The Court was not persuaded that the authorities could not have taken less radical measures in order to secure the applicant's attendance in court. Moreover, by arresting her one day earlier they did not even give her a chance to show good faith and comply with the court order of her free will. In view of these circumstances, the Court considered that the authorities failed to strike a fair balance between the need to ensure the fulfilment of the applicant's obligation to attend a court

[72] According to *art. 71 of the Criminal Procedure Code of Bulgaria*, if the accused party fails to appear for interrogation without good reasons, he/she shall be brought in by compulsion where his/her appearance is mandatory, or where the competent body finds this to be necessary. The accused party may be brought in by compulsion without prior subpoenaing where he/she has absconded or has no permanent residence.

hearing and her right to liberty, thus it considered that there has been a violation of *art. 5§1 of the Convention. (para. 32, 33)*

- In the case of ***Ghiurău v. Romania*** the applicant alleged, among other matters, that he had been subjected to ill-treatment in violation of art. 3 of the Convention and that the authorities had not carried out a prompt and effective investigation of that incident. Relying on *art. 5§1 of the Convention*, he claimed that he had been unlawfully held in police custody between 4 p.m. on 27 November 2006 and 2 a.m. on 28 November 2006. *(para. 4)*

The compulsory bringing of Mr. Ghiurău raised allegations regarding the eventual violation *of articles 3 and 5§1 of the Convention.*

Regarding the alleged violation of *art. 5§1 of the Convention*, the Court concluded that the measure complained of started at about 4 p.m. on 27 November 2006 and lasted until 1.52 a.m. the following day. Further, it noted that the applicant was guarded by police officers continuously and that at no point during the journey from Borş to Cluj was the applicant allowed to leave of his own free will. It also notes that the applicant was guarded by the police officers also while in hospital and in the ambulance transporting him from Huedin to Cluj Hospital. The Court therefore considered that the applicant was under the authorities' control throughout the entire period, and concludes that he was deprived of his liberty within the meaning of *art. 5§1 of the Convention. (para. 79, 80)*

The Court observed that the prosecutor's order of 27 November 2006 issued on the basis of art. 183§2 of the Romanian Code of Criminal Procedure did not contain any reason justifying the measure. The Court therefore concluded that by omitting to specify the reasons on which it was based, the prosecutor's order failed to conform to the rules applicable to domestic criminal procedure. Furthermore, the Court doubted whether the applicant's deprivation of liberty and his transport to a city located 200 km from his home, escorted by ten police officers, was necessary to ensure that he gave a statement and considered that the above circumstances disclosed that the applicant was not deprived of his liberty in accordance with a procedure prescribed by domestic law, which renders the deprivation of the applicant's liberty between 4 p.m. on 27 November 2006 and 2 a.m. on 28 November 2006 incompatible with the requirements of *art. 5§1 of the Convention. (para. 85 - 88)*

Concluding, the Court found that there has therefore been a violation of *art. 5§1 of the Convention*.

Regarding the alleged violation of *art. 3 of the Convention*, the Court noted that the applicant was in possession of two medical certificates attesting that he had sustained injuries while in police custody. He lodged a criminal complaint against the police officers whom he accused of subjecting him to degrading and ill-treatment, but the complaint was twice dismissed by the prosecutor on the grounds that there was a lack of evidence that the offences in question had been committed. Furthermore, the Court observed that essential evidence was not gathered or was gathered with delay by the prosecutor, despite clear instructions in this respect from the Ploiesti Court of Appeal, which had twice remitted the case to the Prosecutor's Office[73]. *(para. 59, 65)*

[73] In particular, the Court noted that the prosecutor questioned the police officers and the applicant's lawyer who had been present at the scene of the incident, but no other witnesses. There is no explanation as to why the medical staff and/or patients of the two hospitals where the applicant was hospitalised, the driver of the ambulance, or the nurse who accompanied him from Huedin to Cluj, had not testified before the domestic authorities. Also, the Court was concerned about the way the prosecutor disregarded the statements made by the applicant's lawyer, who was

Having regard to the mentioned deficiencies identified in the investigation and to the fact that after more than five years since the applicant had lodged his criminal complaint not a single final judicial decision had been taken on the merits of the case, the Court concluded that the State authorities failed to conduct an effective investigation into the applicant's allegations of ill-treatment, thus there has accordingly been a violation of *art. 3 of the Convention. (para. 69, 70)*

Short key elements need to be addressed regarding some of the ***communicated cases against Romania*** dealing with the compulsory bringing measure in criminal matters.

In this sense, in the ***Valerian Dragomir v. Romania*** case (application no. 51012/11, lodged on 3 August 2011), invoking *art. 5§1 of the Convention*, regarding the compulsory bringing order, the applicant complained that there was no legal basis for his detention from 9.30 p.m. on 8 February 2011 to 10.30 a.m. on 9 February 2011. In this respect he claimed that a person deprived of liberty on the basis of an order to appear should be immediately brought before the investigation body and heard.

On 8 February 2011 police officers belonging to the National Anticorruption Directorate carried out a search at the applicant's home[74]. The search started at 6 a.m. and lasted about three hours. At about 9 a.m. the police officers informed the applicant that an order to appear before the National Anti-Corruption Prosecution Service had been issued on his behalf, at 9.15 a.m. he was taken to the headquarters of the Timiş County Police Inspectorate, at about 2 p.m., he was embarked with one hundred other police and customs officers on a bus trip to the National Anti-Corruption Prosecution Service headquarters in Bucharest (he alleged that during their trip to Bucharest he could not get off the bus and could not use his mobile phone or contact his lawyer) and at about 9.30 p.m., after a trip of almost 600 km they arrived in Bucharest, at National Anti-Corruption Prosecution Service headquarters.

After almost thirteen hours, at 10.30 a.m., on 9 February 2011, he was taken to the prosecutor's office and he was informed in the presence of his lawyer about the charges against him.

At about 10.55 a.m. he was informed of the prosecutor's order to remand him in custody for twenty-four hours, subsequently being kept standing in a corridor until 8 p.m., when he was taken to the Bucharest Court of Appeal for the examination of the prosecutor's request concerning his pre-trial detention; the hearing started at 10.30 p.m. and lasted almost one hour and the court granted the prosecutor's request and ordered the pre-trial detention of the applicant for twenty-nine days, namely from 9 February until 10 March 2011.

Conclusions

As it can be noted, after drafting a short overview on the Romanian legislative reform in criminal matters, the study makes an extensive analysis of the institute of compulsory bringing, looking at the problem both on national level (with focus on the Romanian system, but also providing relevant information about Austria,

present when the events of 27 November 2006 occurred and noticed that the prosecutors did not explain why her statements would be less credible than those of the police officers. *(para. 66, 67)*

[74] The applicant was a customs officer at the Moravița border checkpoint at that time and was considered to be part of the criminal group by the investigation authority. On 3 February 2011 a criminal investigation was initiated against him for suspected adhering to a criminal group and bribery.

Bulgaria, Poland and the Netherlands) and on international (European) level.

In this sense, the paper focuses on the presentation of the national legal framework regarding the compulsory bringing of persons in front of the judicial authorities in Romania, followed by the compulsory bringing of persons in front of the judicial authorities in criminal matters.

To close with, the paper dwells on the standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms, providing some ideas about relevant judgements given by the European Court of Human Rights.

Having a look at the national legislative provisions in the context of the case-law of the Strasbourg Court, one can note that the previous provisions comprised in the Criminal Procedure Code did not lack criticism. Moreover, the same provisions created difficulties into day-to-day practice, as the institute of compulsory bringing had quite a few shortcomings (e.g. no maximum length of the measure provided in the law, there was no possibility to enter someone's home in order to enforce the bringing order).

In assessing the current legal provisions, it can be noticed that the new Criminal Procedure Code has indeed overcome the gaps and difficulties encountered by the previous Code, as the new one contains some clarifications and also some new provisions (some of them imposed by the difficulties encountered in daily practice, some demanded by the convictions of Romania in front of the Strasbourg Court – as it was the case with establishing a maximum length of the measure).

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