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PROTECTION OF INVENTIONS IN THE PHARMACEUTICAL SECTOR THROUGH SUPPLEMENTARY PROTECTION CERTIFICATE

Viorel ROȘ*

Abstract

The topic of health is nowadays, more than ever in the history of mankind, one that enjoys an entirely special attention. It concerns, albeit at a different level, the sick and the healthy, doctors and patients, the young and the elderly, women and men. It concerns governments and individuals, medicine and herbal medicine researchers, and beneficiaries of the research activity.

The paper below is aimed to present special issues regarding the patent for medicinal products and authorisation of placement on the European market of medicinal products.

Keywords: *health, medicinal products, research activities, supplementary protection certificate, costs, temporary monopoly, territorial monopoly, authorisation procedure.*

1. Health care policies worldwide and health care institutions in the EU

Health is a component of the standard of living that also comprises the health care, enshrined as a universal human right under art. 25 of the Universal Declaration of Human Rights¹, and in harmony with that the **World Health Organization** has stipulated in its **Constitution** that its objective is the attainment by all peoples of the highest possible level of health.

The “**Alma-Ata Declaration**” adopted in 1978 formulated the organization’s disease fighting strategy. The “**Ottawa Charter**” of 1986 formulated the organization’s concept on health and maintaining it through the disease fighting strategy. The organization is responsible for managing certain health risks on a worldwide basis, establishing the health research agenda, offers technical assistance

to the Member States, monitors and assesses the people’s health, and approaches the most complex population health challenges.

Lately, some of the WHO’s actions in the health care domain have been controversial, the organization having even been accused of bioterrorism in the form of the support given to certain manufacturers of vaccines that are actually biological weapons, and of affiliation to international corporate crime syndicates. These accusations must be regarded with reservation, however they cast doubt on the overall activity of this organization and on the efficiency of its actions.

The topic of health, defined by the World Health Organization as a „*state of complete physical, mental and social well-being and not merely the absence of disease or infirmity*”, or as a state that „*should ensure a physical and mental state allowing a person to become productive and useful to society*”, is nowadays, more than ever in

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¹ Adopted at 10 December 1948 by the Resolution no. 217A, in the third session of the UN General Assembly.

the history of mankind, one that enjoys an entirely special attention. It concerns, albeit at a different level, the sick and the healthy, doctors and patients, the young and the elderly, women and men. It concerns governments and individuals, medicine and herbal medicine researchers, and beneficiaries of the research activity.

The international cooperation in the health domain takes most complex forms. Over the past years, a special attention has been paid to the cooperation and promotion of new medical technologies and new (original, innovating, or generic) efficient medicines to be made available to the population, including the poor countries' people for whom the access to generic medicines (much cheaper than the innovator ones) is essential. In 2001, the "**Declaration on intellectual property and public health**" was adopted at the Conference in Doha, which offers an answer to the concerns expressed by the developing countries about the need for a more facile and less burdensome access to a range of essential medicines designed to fight major epidemics, at the same time offering the necessary assurances to the manufacturers of pharmaceutical products on the observance of the intellectual property rights, with a view to encouraging the furthering and development of the research activities.

The European Union has also implemented concrete actions in the public health domain, the health care concerns targeting not only the diagnosis and treatment, but also prevention. The basic principle of the health care policies of the European Union has become, "**health in all policies**", and the Lisbon Treaty has emphasized the importance of the health policy, stipulating that, "*a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities*". In its turn, the Charter of Fundamental Rights of the

European Union proclaims, under art. 35 (Health care), that "*Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national law and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities*".

From the historical viewpoint, the Community health care policy originates from the health and safety provisions, developed pursuant to the free circulation of the persons and goods within the internal market, which has made possible the coordination of the health care activities and actions. The consumption and dependence on drugs, the expansion of serious diseases like cancer, the new diseases like AIDS, the crisis caused by the bovine spongiform encephalopathy (BSE), all these represent major health issues, which in conjunction with the ever freer circulation of the patients and medical personnel within the EU have secured the public health an even more important role on the EU's agenda. Amid the crisis caused by ESB, the Directorate General or Health and Consumers of the Commission (DG-SANCO) has assumed the coordination of all the health related domains, including the medicines, albeit the main responsibility for the protection of health, and in particular of the health systems, further lies with the Member States. The strengthening of the specialized agencies like the **European Medicine Agency (EMA)** and the establishment of the **European Centre for Disease Prevention and Control (ECDC)** evidence the increased commitment of the EU to the health policy.

The European health policy is aimed at:

- (i) Offering all the Union citizens access to high quality health care;
- (ii) Preventing diseases;
- (iii) Fostering a healthier life style, and

(iv) Protecting citizens from health threats like pandemics.

And in order to ensure **the efficiency of its actions, the European Union has created its own instruments of action, both at regulatory and institutional levels.**

Thus, with reference to medicines, the **legislative process**, which started in 1965, **aimed at securing high standards in the pharmaceutical research and industry, harmonizing the national procedure for the grant of licenses for medicinal products, and implementing regulations on publicity, labelling and distribution.** Recent evolutions include the „*pharmaceutical package*”, approved by the European Parliament (EP) in early 2011.

The community research programmes regarding the health care and public health date back to 1978, and refer not only to the main diseases, but also to aspects such as health issues influenced by age, environment and lifestyle, irradiation risks and human genome analysis. As regards the mutual assistance, the Member States have agreed to mutually assist one another in case of disasters and very serious diseases. Many such issues have come into the public eye over the past two decades, for example the bovine spongiform encephalopathy (BSE), swine flu, and more recently the H1N1 flue.

Recently (2012-2013), the European Parliament has defined its position also as regards the enactment of the legislation on the cross border health services, and the **revision of the legal framework concerning the medical devices and advanced therapies.** The European Parliament has consistently promoted and promotes coherent public health policies, also through: **notices, studies, debates, written declarations and reports**, on its own initiative, regarding multifarious aspects such as, *inter alia*: EU health care strategy; radiations; protection of patients

under medical treatment or in under diagnosis process; health information and statistics; respect for life and caring for patients in terminal stages; European charter for children in hospital; health determinant factors; biotechnology research, including the transplants of cells, tissues and organs, and surrogate mothers; rare diseases; safety and self-sufficiency in supplying blood for transfusions and other medical purposes; cancer; hormones and endocrine disruptors; electromagnetic fields; drugs and their impact on health; smoking; breast cancer and in particular women’s health; ionizing radiations; European health card comprising essential medical data readable by any doctor; nutrition and diets and their impact on health; ESB and its consequences, food safety and health risks; e-health and telemedicine; resistance to antibiotics; biotechnology and its medical implications; medical devices; cross border health services; Alzheimer disease and other dementia diseases; alternative medicine and herbal medicines; capacity of response to the H1N1 pandemic flue; and the advanced therapies. The (EU) Regulation no. 282/2014 of the European Parliament and of the Council of 11 March 2014 on the establishment of a third Programme for the Union’s action in the field of health (2014-2020) continues the previous programme. The Regulation is the result of the successful negotiations carried out in the final phases of its preparation between the Commission, Parliament and Council with regard to three main aspects: budget allocation, modes of adoption the annual work programmes, and co-financing of the joint actions designated to create incentives for improving the participation of the less prosperous Member States.

As regards the **institutional framework** required for the attainment of the health care health programmes and

policies, the following have been established in the European Union:

(i) Consumers, Health and Food Executive Agency,

(ii) European Foundation for the Improvement of Living and Working Conditions,

(iii) **European Medicines Agency (EMA)**,

(iv) European Centre for Diseases Prevention and Control,

(v) European Agency for Safety and Health at Work, and

(vi) European Food Safety Authority.

From the viewpoint of the topic discussed hereunder, particularly important are the regulations that **have instituted the supplementary protection certificate for medicinal products and supplementary protection certificate for plant protection products**, and the institution with special competences in the field of medicinal products, being the **European Medicines Agency (EMA)**.

2. Special issues regarding the patent for medicinal products and authorisation of placement on the market of medicinal products.

The connection between the people's health and the research and development activity is so close that we do not exaggerate in the least when stating that without the new medicinal products created pursuant to the research and development activities in the health domain the humankind health would be in great jeopardy. That is why it is natural the concern for this field at global, regional and national level. And the shift to the personalized medicine or precision medicine, recently announced as a political project in the US, will make the research more intense but also more costly, since this medicine will have to treat individually, with adequate medication for each patient. The personalized medicine also entails a surge in

the number of medicinal products in the near future, but also the manufacture of smaller quantities thereof, therefore their prices will be increasingly higher, as the manufacturers can only eliminate the risk of not covering their investments by increasing prices.

Without examining the causes of this phenomenon, we can however say that there is an increased need for new medicinal products, that there is a permanent need in this domain of innovation, new medicines and higher efficiency, and that their manufacture and placement on the market is **conditional not only on the issue of patents**, but also on the **authorisation of their placement on the market, procedure that actually shortens the actual lifetime of a patent**.

However, certain medicinal products exist on the market that are no longer protected by a particular protection title, and these are, and have to be, bioequivalent to the original medicinal products.

The medicinal products protected by patent are also known as „*original*”, „*organic*” or „*innovator*” medicinal products. These are manufactured, as a rule, by large pharmaceutical companies, which in order to achieve these products spend for research and development, and thereafter for preclinical and clinical trials, huge amounts, and even higher amounts for marketing and promotion activities. For example, if in the 70s of the last century the average price of an innovator medicine was 138 million dollars, and in the 80s was 231 million dollars, in 2007 the average cost reached 897 million dollars, and nowadays is over 1.38 billion dollars. As regards the term of achievement of a new medicine, this is 15 years on the average. In Europe, a new medicine is obtained from 5,000 through 10,000 synthesized molecules.

The high costs of achieving original active substances, researching, developing, launching in the market and maintaining

these products, and the need to ensure the recovery of the investments and the manufacturers' profit also justify the concern for extending the duration of the monopoly conferred by the patent through various methods.

Pursuant to the expiry of the practical life span of the patents for inventions, which is shorter than the life span of the patent due to the lengthy procedures of authorisation of the placement on the market of the patented medicinal product, these companies lose the monopoly of exclusive manufacture rights, which allows the placement on the market of medicinal products not protected by patent, called generic medicines, whose prices is much lower.

This class of medicinal products, called “**generic**”, is actually represented by medicines equivalent to the original product, having the same quantity and quality composition of active substances and the same pharmaceutical form, the bioequivalence with the original medicinal product being proven under prior appropriate studies. The various salts, esters, ethers, isomers, mixtures of isomers or derivatives of the active substance are deemed the same as the active substance, inasmuch as they do not vary significantly as regards the safety and/or efficiency characteristics. The various pharmaceutical forms of oral administration with immediate effect are deemed as one and the same pharmaceutical form.

The generic medicine is subject to the same rules regarding the manufacture and pharmacovigilance, and has to present the same quality, efficiency and safety characteristics. The sale price thereof is, however, different from that of the original medicines, being 20% through 90% smaller than that of the original medicines, since their manufacturers do not have to recover the investments in their achievement. Due to their quality and price, generic medicines are

very attractive, their low prices allowing the access to these of sick people with no income or low income, therefore they balance the health budgets of the poor economies and contribute to an increased standard of living of the consumers, stimulating the further innovation. Meanwhile, the therapeutic efficiency of these medicinal products lowers or even vanishes for reasons related to the adaptation and/or modification of the pathogenic agents of diseases, therefore without the research and development activity in the pharmaceutical industry the risks are huge. However, the research and development activity of the manufacturers of generic medicinal products is limited, their profit being generated by the fast placement on the market, and without the costs entailed by the research and development.

In other words, the original medicinal products are expensive because they entail costly research activities, and the expenses have to be recovered, while the generic medicinal products, which are much cheaper, can only be manufactured after the expiry of the term of protection of the intellectual property rights over the original medicinal products and at the expense of those. However, generic medicinal products cannot be manufactured if original medicinal products are not manufactured upstream. This does not mean that generic medicinal products are only manufactured based on original medicines.

3. Medicine patenting, actual lifetime of the medicinal product patent and consequences of its short lifetime

The protection through patent of medicinal products is recent. In France, it was only through a decree of 30 May 1960 that the solution of the French lawmaker of 1844 was invalidated, and the patenting of medicines was admitted, a “special patent

for medicine” being created. The rationale of exclusion stems from the interpretation given to the condition of industrial applicability, and the fact that medicinal products can be found in nature, and these are actually discoveries, the case of penicillin being maybe the best example. Nowadays, however, in truth, pharmacy is considered an industry, and medicines, manufactured.

What is a medicinal product? In a simple definition, the medicinal product is a substance used to prevent, cure, alleviate or treat disease or, in a wider definition, a medication is a substance or a composition which contains curative or preventive properties with regard to humans or animal illnesses for the purpose of medical diagnosis or to restore, to correct or to modify organic functions. According to another definition, a medicine is a preparation used to prevent, diagnose, treat a disease, trauma, or to restore, correct or modify organic functions.

Art. 1 (a) of the Regulation no. 469/2009 defines the medicinal product as *“any substance or combination of substances presented for treating or preventing disease in human beings or animals and any substance or combination of substances which may be administered to human beings or animals with a view to making a medical diagnosis or to restoring, correcting or modifying physiological functions in humans or in animals”*.

Generally, medicines are classified into indispensable, secondary or adjuvant, comfort and placebo type. The general basic law of the medicinal product, which does not take exception, is that medication acts on the functions of the body, modifying them in a positive (stimulatory) or negative (inhibitory) way.

Medicinal products have been prepared for a long time solely based on plants (e.g., alkaloids like digitalin or

morphine), animals (e.g., vaccines) or minerals (e.g., aluminium). Nowadays, medicines are manufactured by the pharmaceutical industry, which offers a higher accuracy and safety of use. In parallel, the pharmacy proposes more and more synthetic products, which copy more or less truthfully natural substances, or are entirely original.

A medicinal product contains one or more active ingredients. Generally, the essential active ingredient gives its name to the medicinal product. Each essential active ingredient is identified in three different ways from the scientific, legal or commercial viewpoint. The scientific denomination is the exact chemical name of the active ingredient. It is typically less used due to its complexity. The international common denomination (DCI) corresponds to the generic name of the active ingredient in medicine. The commercial name is given by the pharmaceutical laboratories, which create new medicines by modifying the molecular structures of the original substances to increase their therapeutic efficiency and reduce secondary effects. One and the same active ingredient may be marketed as medicinal product by two different laboratories, two commercial names may correspond to the same substance, possibly with different presentations and/or doses.

In this domain, patents may also refer to a product or a procedure. No patents are granted for treatment methods, however the products, substances, compositions used in treatments are not excluded from patenting.

Generally, the **medicinal product has an active substance, a molecule and other parts that make the active substance therapeutically usable**, conferring the pharmaceutical form of the medicine, the types of claims encountered in practice in respect of innovator and patentable medicinal products being as follows:

- Product claim, where the claimed substance is new and the result of an inventive activity. The protection granted by the product invention covers all the types of manufacture and use of the substance, even those not related to the pharmaceutical domain;

- Claim to scope as the „first medical indication”, where the claimed substance is technically known but the invention reveals for the first time a medical use thereof;

- Claim to scope as „a second or other medical indication”, possible where the substance is also known as medicinal product but the invention consists in a new use in the medical field, in which case in order to be patentable it should also not be obvious;

- Claim to use for „a second or other medical indication”, possible where the use of a substance already known as medicinal product is new and inventive for the treatment of another affection;

- Claim to a medicinal product preparation process, where the process in itself is new and includes an inventive activity, and not the substance.

Significant for the examined topic are the first four types of claim, which put up for discussion the active ingredient or combination of active ingredients, the only ones susceptible to supplementary protection. At the same time, the Regulation provides for in art. 1 (c) that the basic patent (which must exist for a supplementary protection certificate to be granted) may also protect „*a process to obtain a product or an application of a product, and which is designated by its holder for the purpose of the procedure for grant of a certificate*”.

Similarly to any other domain, the product newly obtained through a creative activity and susceptible of industrial application is protected by patent, the

pharmaceutical product designated for marketing being difficult, impossible even, to protect by secrecy, the modern techniques allowing the reproduction without much difficulty of the medicinal products.

The patent is that protection title conferring its holder a **temporary and territorial monopoly**²: of **exclusive exploitation**, being to manufacture and market the product and prohibit third parties from performing any act of use without his consent on the **territory** in which the protection title is effective, over the period of validity of the patent.

As regards the **term of the exclusive monopoly conferred by the patent**, this is twenty years from the regular filing date (art. 33 of the Romanian patent law, which is consistent with the regulations of other law systems, the community law and the international conventions).

The exploitation monopoly is territorially limited, in principle, since the patent is effective where the law is effective, the protection outside the borders being able to be obtained either based on a patent requested in the country where the applicant has an interest, or through a patent obtained in accordance with the Washington Treaty of 1970 (PCT), or through an European patent.

Mention should be made that the Community law also limits the **effects of the territoriality** of the national patents in the EU. The Treaty on the Functioning of the European Union enshrines the principle of free circulation of goods, which contradicts the territorial nature of the monopoly related to the national patent. In order to eliminate the contradiction between the two legal orders, the Community case law referring to the analysis of art. 30 of the TFEU has evidenced a specific object of the patent right, and a principle of the right exhaustion Community-wide, thus restricting the

² The territorial limitation of the right of exclusive exploitation is, in the EU, contrary to the principle of free circulation of goods (commodities).

exercise of right in the name of the free circulation, but preserving the existence thereof. The specific object of the right conferred by the patent, that the Treaty does not want to affect, is to ensure its holder, in order to compensate the creative effort of the inventor, the exclusive right to use the invention for the purposes of manufacturing and putting into circulation for the first time the industrial products, either directly or through the grant of licenses, and the right to challenge any counterfeiting, infringements of his right. However, once a product covered by patent is put into circulation for the first time in an European Union country, with the holder's consent, the latter can no longer oppose to the product circulation in other Member States by calling forth parallel patent rights (valid in those countries).

Another exception from the exploitation monopoly is, with reference to medicinal products, the so-called **Bolar provision**³, an exception meant to favour the placement on the market of generic medicinal products immediately after the expiry of the protection conferred by patent and supplementary certificate of the original medicinal product. In accordance with this provision of exception, the **manufacturers of generic medicinal products may commence the preparations for the authorisation of the placement on the market of a generic medicinal product prior to the expiry of the period of protection of the original product, and file the authorisation documentation so that the generic medicinal product can be placed on the market immediately after the original product is no longer protected by patent and supplementary protection certificate.**

Obtaining a patent for a medicinal product is possible solely provided that the **claimed active substance benefits from**

novelty, in other words the substance is not known either in the medicine or other domain, therefore is different from the known substances due to its technical characteristics, such as a new formulation, dosage or synergistic combination. The new medicinal product will be patented provided that it also meets the other two conditions imposed by the law, being: the inventive activity (the patent should be granted for ingenious achievements involving an intellectual effort that has to be rewarded) and industrial applicability (that includes besides uses the redundancy of achievement of the medicinal product).

The placement on the market of innovator medicinal products, protected by patent, is however also conditional upon **obtaining the marketing authorisation for medicinal products**, which requires studies, tests, verifications and authorisation formalities, the procedure taking a long time (up to 12 -15 years), which makes the actual lifetime of a medicinal product patent much shorter.

This means that the term of protection of the new achievement through patent is not equal to the actual lifetime of the patent, the latter one being significantly shorter in the case of the medicinal products. However, this short actual lifetime makes the activity of research and development, and of achievement of new innovator medicine unattractive, since the relevant investments cannot be recovered in such a short time. The solution to this problem is to extend the term of protection through the supplementary protection certificate.

However, mention should be made of, and is essential to emphasize, the **absolute independence of the patent from the marketing authorisation for medicinal products**. This means that where any medicinal product may be marketed solely

³ The name comes from the case Roche Products vs. Bolar Pharmaceutical examined by the US Federal Tribunal in 1984 regarding the manufacture of generic medicinal products, Bolar being the manufacturer thereof.

provided that it has been authorized for placement on the market, the medicinal product does not necessarily have to be patented. For example, generic medicinal products are not covered by patent, however in order to be patented their prior authorisation is compulsory. And where there is an existing patent for a medicinal product but subsequently such patent is cancelled or revoked, the marketing authorisation does not have to be withdrawn, the same as the withdrawal of the marketing authorisation will not affect the validity of the medicinal product subject to the withdrawn authorisation.

4. Medicinal product marketing authorisation

The patent for a **new medicinal product** is a protection title for the **patented medicinal product**, and confers its holder an exclusive exploitation right over twenty years from the regular filing date. In order for the medicinal product to be placed in the market, the Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (which has replaced the Directive 65/65/EEC) has instituted the **obligation to obtain an authorisation prior to marketing** in all the Member States of the European Union. With reference to medicinal products for veterinary use, the code was adopted by the Directive 2001/82.

The procedure is lengthy both for the applicant (holder of the patent) and in terms of the formalities to be performed by the latter and of those in charge of the authorities issuing the authorisation. It is a procedure whereby and in the course of which the national authority or, as the case may be, the European one verifies, in order to approve the placement on the market of a medicinal product, its safety, efficiency and quality.

The studies indicate that this procedure involves filling out about 1,850,000 pages of over 4,000 files measuring 230 meters in height and 500 kilometres in length, and lasting sometimes up to 12 -15 years.

The medicinal product marketing authorisation can be obtained on the basis of a centralized procedure, in respect of the whole territory of the European Union, by the European Medicines Agency (EMA), or of a domestic procedure, by the National Agency for Medicines and Medical Devices. The similar body in the US is the US Food and Drug Administration (FDA).

5. Domestic authorisation procedure

In our law, the marketing authorisation for (original or generic) medicinal products is regulated by the Law no. 95/2006 on the health reform, updated in 2013, which transposes the Directive 2001/83/EC, Chapter 3 (Marketing authorisation), Section I (Marketing authorisation for medicinal products). No medicinal product may be placed on the market in Romania without a marketing authorisation (MA) issued by the National Agency for Medicines and Medical Devices, in accordance with the provisions of this law, or an authorisation issued according to the centralized procedure.

Medicinal products that have to be authorized by the European Medicines Agency under the centralized procedure are excluded from the grant of this marketing authorisation. The issued authorisations may enjoy mutual recognition in other Member States of the European Union. As of 1 January 1998, the mutual recognition procedure is compulsory in respect of the medicinal products that are to be marketed in another Member State than the one where the medicinal product has been first authorized. The procedure of mutual recognition of the marketing authorisation

has been introduced by the Council Directive 93/39/EEC, in accordance with the provisions of Directives 65/65/EEC and 73/319/EEC.

6. Centralized procedure of marketing authorisation for medicinal products in the EU

The creation of a single market for medicinal products as well has been a concern of the Communities ever since the establishment thereof⁴. In order to attain the relevant objectives, the centralized procedure of marketing authorisation for medicinal products has been instituted, and the body(ies) in charge of the verification of the conditions established by the Community rules, and of the grant of the authorisation has(ve) been nominated, being the European Commission, the technical procedures being carried out through the European Medicines Agency (EMA) based in London.

The procedure of centralized authorisation of marketing for new medicinal products is currently regulated by the Regulation (EC) no. 726/2004 of the European Parliament and of the Council of Europe 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency. EMA verifies and monitors the safety, efficiency and quality characteristics of the medicinal products for both human and veterinary use.

As regards its scope of application, the Regulation no. 726/2004 provides for that no medicinal product appearing in the annex thereto may be placed on the

market within the Community without a prior authorisation granted by the Commission, which acts in this regard and performs its verification duties through the European Medicines Agency (EMA).

In order to obtain an authorisation, the applicant has to make available to EMA comprehensive data pertaining to the characteristics, safety and efficiency of the medicinal product, in accordance with art. 8.3 of the Directive 2001/83/EC of the European Parliament and of the Council, amended by the Directive 2002/82/EC of 27 January 2003.

EMA has established **two Scientific Committees** (for medicinal products of human use and for medicinal products of veterinary use) and one **(Scientific) Paediatric Committee**, responsible for preparing the notices regarding the medicinal products falling within their ambit of competence, the notices of these committees underlying the authorisation to be issued by the European Commission.

The committees have to present their notices within 210 days from receiving the relevant request, and for these purposes may perform tests on the medicinal product, raw materials or intermediary products, or may perform inspections at the medicinal product manufacturing plant. Each authorisation proposal has to be taken into consideration by the Committee on the basis of the **scientific criteria** regarding the quality, safety and efficacy of the respective medicine. These three criteria allow the assessment of the risk-benefit ratio in respect of any medicinal product. The Committee first verifies the compliance with the conditions of issue of a marketing authorisation. If the authorisation conditions

⁴ Directive 65/65/EEC was the first Community legal enactment concerning the pharmaceutical products. This regulated the regime of the marketing authorizations for medicinal products and data exclusivity. Other legal enactments regulated the pharmacovigilance – Council Directive 75/319, labeling and packaging of medicinal products - Directive 92/27/EEC, while the Council Regulation 1768/1992 created the supplementary protection certificate for medicinal products.

are deemed not complied with, the applicant will be informed thereof, and may submit to EMA within fifteen days a notice re-examination application.

On the basis of the (positive) notice of the EMA Committee, the European Commission prepares a draft decision regarding the application for medicinal product authorisation. The final decision is made pursuant to a procedure of consultation of the EU Member States. If the draft decision of the European Commission is not consistent with the EMA notice, the Commission will attach to its draft decision an annex explaining the reasons of the divergent opinion, which will be submitted to the Member States and the applicant.

The marketing authorisation will be **rejected** if the:

- Applicant has not properly and sufficiently demonstrated the quality, safety and efficacy of the medicinal product;
- Information is inaccurate.

The Commission may impose on an applicant, at EMA's recommendation, the obligation to perform: a post-authorisation safety study and/or a post-authorisation efficacy study.

The authorisation issued by the Commission is valid in all the Member States of the European Union for 5 years, and can be renewed upon request. Once renewed the marketing authorisation will be valid for indefinite term, unless the Commission opts for a new period of validity of five years.

Generic medicinal products are also subject to the authorisation procedure, however in their case, when the active substance is equivalent to a previously authorized medicinal product, the results of the preclinical tests are no longer required. This procedure of authorisation of the generic medicinal products is known as the „**abridged procedure**”, since while the new medicinal products require the submission

of preclinical tests providing data about the product safety, efficacy and quality, article 10 of Directive 2001/83 sets forth that the manufacturers of generic medicinal products may use and rely on the data and results already obtained by the original manufacturer. With reference to the **generic medicinal products** of the medicinal products of reference authorized by the EU, these can be subject to a decentralized authorisation procedure provided that the Europe-wide harmonization is maintained.

With reference to the medicinal products for **veterinary use**, these follow the rules applicable to the medicinal for human use, subject to the specific adaptations.

The refusal to issue a marketing authorisation in the centralized procedure shall be deemed a prohibition to market the medicinal product on the whole territory of the EU.

Any marketing authorisation for a medicinal product not followed by the actual marketing thereof for three consecutive years becomes invalid.

After its placement on the market, in order to ensure the people's protection by preventing, detecting and assessing the adverse reactions of the medicinal products for human use, inasmuch as the safety profile of the medicine cannot be fully known except after its marketing, the supervision of medicinal products (pharmacovigilance) is instituted. In respect of the medicinal products manufactured in the EU, the authorities responsible for pharmacovigilance are the relevant authorities of the Member States that have issued the authorisation. With reference to the medicinal products imported from a third country, the responsible relevant authorities are the issuers of the import authorisation. These will inform the Committee for medicinal products and the Commission about any case where the manufacturer or

importer do not comply with their obligations. The holder of a marketing authorisation for human use or veterinary use is obligated to implement all the necessary changes, taking into account the manufacture methods and technical and scientific progresses, in accordance with the Directives 2001/83/CE and 2001/82/CE.

Whenever urgent action is essential to protect human health or the environment, a Member State may suspend the use on its territory of an authorized medicinal product.

Notwithstanding the legislative efforts of the European Commission and of the Council, one cannot talk as yet about a single pharmaceutical market of all the EU Member States, mainly because the health provisions are the responsibility of each State, and their governments apply differentiated policies in terms of social, ethical values or GDP level. However, inasmuch as nowadays a harmonization has been achieved on large scale in the European Union in respect of the marketing authorisation system and mutual recognition and related formalities, the distortion effects regarding the operation of the single market are created by the regulation of the medicinal product pricing. In the majority of the Member States, the price of the prescribed medicinal product has to be determined prior to its release and based on the social security system, in order to maintain the control of the health budget. Thus, certain national policies encourage the sale of generic medicinal products, by fighting the practices of request and establishment of supply prices, and obligating the pharmacies to offer the cheapest product. Other Member States have instituted medicinal product pricing control measures.

7. Supplementary protection certificate for medicinal products

In all the invention domains the actual lifetime of the patents is shorter than their term of validity (which is 20 years from the regular filing date). However, in the case of the medicinal products, due to their specificity, in particular the long and costly research entailed by them, but also the tests and formalities required for the purposes of their placement on the market (which can last more than twelve years⁵), a compulsory condition for their marketing, the actual lifetime of the patents is shorter than in any other field.

As already mentioned, the expenses incurred to create a new medicinal product and placing it on the market have increased over 40 years by 1,000% (from 138 million to 1.38 billion dollars). However, the protection through patent of the new medicinal products, within the limits of the actual patent lifetime, does not allow the recovery of the investments in the achievement of new medicinal products, and implicitly is not likely to encourage the activity of research and development in this field. That is why all over the world means have been sought for to achieve a balance between the interests of the industry (investment recovery and profit) and people's health interests (new and state of the art medicinal products), respectively solutions likely to make attractive the achievement of new medicinal products for the benefit of the pharmaceutical industry and the consumers.

Similar solutions were adopted in US in 1984, when the intellectual property law was amended to provide the possibility to extend a patent term through a „patent term extension certificate”, followed by Japan in

⁵ In the case of the medicinal product for human use called “Circadin” the obtaining of its marketing authorization lasted more than 15 years. Thus, at the authorization issue date, 28 June 2007, the patent was due to expire within less than five years.

1988, which adopted an extension procedure called the „registration of extension of a patent right term”.

Similar measures were adopted in Europe at the end of the 80s of last century in France, Italy and Germany, which made possible the extension of the patents for medicinal products for human use and veterinary use, and for phytopharmaceutical products in the countries where the longer protection term allowed the recovery of investments and obtaining of higher profits.

However, at the same time the development of certain heterogeneous laws in the European Communities could also create hindrances against the circulation of products within the single market, therefore a new instrument has been created to solve the problem Community-wise: the supplementary protection certificate for medicinal products, and a similar one for plant protection products.

The supplementary protection certificate for medicinal products was instituted by the **Regulation (EEC) no. 1768/92** of the Council of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products (CSPM), the **European Medicines Agency** being established under the same act. This Regulation was repealed by the **Regulation no. 469/2009** of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products, which however did not significantly change the previous text, actually the new act codifying the prior regulation and its successive amendments.

Subsequently, the Parliament and the Council passed the **Regulation no. 1901/2006 on medicinal products for paediatric use** and amending the Regulation (EEC) no. 1768/92, Directive 2001/20/EC and Regulation (EC) no. 726/2004, whereby: a **Paediatric Committee** has been established within the **European Medicines Agency**, and the right to the **extension of the supplementary protection certificate for medicinal products of paediatric use by another 6 months** has been regulated to reward the research, preclinical tests and clinical studies required in respect of this class of medicines, and designed to guarantee their safety, high quality and efficiency for use by the target population.

Four years after the passing of the Regulation no. 1768/92, the European Parliament and the Council passed the **Regulation no. 1610/96 of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products**, designed to ensure a protection level for the innovations in this domain equivalent to that secured for the medicinal products, having regard to the contribution of this class of products to the continuing improvement of good quality food, and with a view to ensuring an effective protection to cover the research investment, and generate the resources required to maintain a high level of such research.

In the Romanian law, provisions regarding the obtaining of such supplementary protection certificates have been included in art. 30 of the Patent Law no. 64/1991⁶, the Law no. 28/15.01.2007, however the text as revised⁷ merely makes

⁶ In the form prior to the amendment brought by the Law no. 83/2014 on employee inventions, the provision referring to the supplementary protection certificate being included under art. 31. Subsequent to the law modification, the texts have been renumbered, and this provision is now included under art. 30 thereof.

⁷ Art. 30 paragraph (3) of the Law no. 64/1991 republished has the following contents: „*In respect of the patented medicinal products or plant protection products a supplementary protection certificate may be obtained in*

reference to the first two regulations (**Regulation (EEC) no. 1768/92**, respectively **Regulation no. 469/2009** and **Regulation no. 1610/96**), without referring as well to the **Regulation no. 1901/2006 regarding the extension of the supplementary protection certificate for medicinal products for paediatric use**. However, even in the absence of any specific reference in the Romanian patent law to this last regulation as well (on medicinal products for paediatric use), such regulation is, like all the other regulations⁸, of direct applicability in the Romanian law. The authority competent to issue the supplementary protection certificate for medicinal products is the State Office for Patents and Trademarks.

Previously, in order to comply with the criteria of accession to the European Union,

the Law no. 581/2004 on the supplementary protection certificate for medicinal products and plant protection products was passed, which was to become effective at the date of Romania's accession to the European Union⁹. However, this law had no effects, and was specifically repealed by the Law no. 107/2007, because as of the date of our country's accession to the EU the aforementioned regulations have become of direct applicability in our country as well, therefore the supplementary protection certificates are granted by the national authority pursuant to the implementation as such thereof.

The basic patent related to the supplementary protection certificate may also be a European patent, granted by the European Patent Office¹⁰. Article 63 of the European Patent Convention referring to the

accordance with the terms of the Regulation (EEC) of the Council of 18 June 1992 concerning the supplementary protection certificate for medicinal products, and of the Regulation (EC) no. 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products." The Guideline no. 146 of the general director of OSIM concerning the supplementary protection certificate for medicinal products and plant protection products was published in BOPI no. 12 of 29.12.2006.

⁸ Art. 288 al. (2) of TFEU provides for that the treaty „shall be directly applicable in all Member States”.

⁹ The Law no. 93/1998 has introduced the „**transitional protection certificate**” for the „inventions having as subject-matter substances obtained by nuclear and chemical methods, pharmaceuticals, methods for diagnostic and medical treatment, disinfectants, food stuffs and spices and new plant varieties, bacteria and fungi strains, new animal breeds and silkworms”, in favor of the holders of patents having a priority date before 21 January 1991, issued in a Member State of the Paris Union for the Protection of Industrial Property or of the World Trade Organization, and not patented in Romania. This transitional protection certificate is subject solely to the regime established by the patent law, and has the same subject matter of the invention, and the conferred rights are identical to those conferred by the basic patent. The transitional protection starts at the date on which an application is filed with OSIM, and ceases at the date on which the validity of the patent for invention expires, or on which the patent is cancelled or at the date of forfeiture of the patent owner's rights, and does not exceed 20 years of the date of the regular filing in the country of origin.

¹⁰ This office was established by the Munchen European Patent Convention of 5 October 1973, effective as of 7 October 1977. Its establishment is the expression of the joint political will of the European countries to create a uniform patenting system in Europe. **The European patent has the same effects in Romania as the national patents issued by OSIM, subject to the compliance with the conditions laid down in art. 6 paras. 2-5 of the Law no. 611/2002 regarding the adherence of Romania to the Convention on the Grant of European Patents.** In pursuance of art. 64 para. (1) of the Convention, „*A European patent shall confer its proprietor from the date on which the mention of its grant is published in the European Patent Bulletin, in each Contracting State in respect of which it is granted, the same rights as would be conferred by a national patent granted in that State*”. Some authors have stated that the „patent thus issued must be validated in each nominated State in order to be effective” (Bernard Rémiche, Vincent Cassiers, *Droit des brevets d'invention et du savoir-faire*. Bruxelles, Larcier, 2010, p. 49), while others are of the opinion that after being issued, in the countries nominated by the applicant, patents are subject to the national law of each State. According to art. 63 of the Munchen Convention, the patent

term of the European patent stipulates under paragraph (2), point b) the **possibility to extend its term**, and confers the contracting parties the possibility to extend the term of a European patent in respect of products requiring authorisation immediately after the expiry of the legal term of the patent¹¹.

8. Subject matter of the supplementary protection certificate

The subject matter of the supplementary protection certificate is the „product”, which means the *„active ingredient or combination of active ingredients of a medicinal product”*. Medicinal product means any substance or combination of substances presented for treating or preventing disease in human beings or animals and any substance or combination of substances which may be administered to human beings or animals with a view to making a medical diagnosis or to restoring, correcting or modifying physiological functions in humans or in animals.

Therefore, there is no full identity between the subject matter of a patent for medicinal protect and the subject matter of the supplementary protection certificate. Unlike the patent, the **supplementary protection certificate does not refer to the entire medicinal product**; it only covers the **product** referred to under art. 1(b), respectively the **active ingredient or combination of active ingredients of a medicinal product, and not the medicinal product as a whole**, the last one also comprising those components that make the

active ingredient therapeutically usable (adjuvants).

The recital 10 of the Regulation explains the **definition of the product** as follows: *„The protection granted (by the SPC) should furthermore be strictly confined to the product which obtained authorisation to be placed on the market as a medicinal product”*. And art. 4 of the Regulation defines the subject matter of the protection through supplementary certificate as follows: *„Within the limits of the protection conferred by the basic patent, the protection conferred by a certificate shall extend only to the product covered by the authorisation to place the corresponding medicinal product on the market and for any use of the product as a medicinal product that has been authorised before the expiry of the certificate.”*

The definition given by the Regulation to the „product” making the subject matter of the SPC demonstrates its double nature: on the one hand basic patent, and on the other hand administrative authorisation of placement on the market of the medicinal product. Furthermore, the Regulation institutes quantity and quality limits as regards the subject matter of the protection conferred by the supplementary certification relative to the subject matter of the protection conferred by the patent.

Quantity limits because if a **granted patent refers to several products**, the certificate may be obtained **solely for those in respect of which a marketing authorisation for medicinal product exists**, but also because if there are **several patents of products with the same active**

thus issued „shall confer its proprietor in each Contracting State the same rights as would be conferred by a national patent granted in that State”. This means that only a patent thus issued may be cancelled in accordance with the law of the State of destination, however we do not believe that the validation is required, or that OSIM may decide to revoke the patent.

¹¹ Romania adhered to this Convention and to the Act revising it adopted at Munchen on 29 November 2000 by the Law no. 611/2002 (OJ no. 844/22.11.2002).

substance a single supplementary protection certificate will be granted, and not as many certificates as patents for products with the same active substance an owner holds¹². However, with reference to **owners of patents for different products comprising the same active substance, as many supplementary certificates as owners of patents for different products** having applied for the protection supplementation will be granted¹³.

Quality limits because the supplementary protection certificate does not have a subject matter identical to that of the patent, respectively of the patented product, but only to the essential part thereof, being the active ingredient or combination of active ingredients, as the case may be. In the case of the combinations of active ingredients, supplementary protection certificates may be obtained as well for an individual active ingredient, if this complies with the basic condition to be deemed an active ingredient.

The case law of the national courts, in agreement with the interpretations given to the provisions of the Regulation no. 469/2009 by the ECJ, has ruled that a combination between an active ingredient and a polymer, when the active ingredient is already known, cannot substantiate the issue of a supplementary protection certificate. The specialized literature also affirms that a substance without its own therapeutic effect, serving only to obtain a certain pharmaceutical form of the medicinal product, cannot be deemed an „active ingredient”, which in its turn allows the definition of the „product”. A substance like that, associated with a substance having its

own therapeutic effects, cannot create a „combination of active ingredients” within the meaning of article 1 point (b) of the Regulation no. 469/2009. The fact that the substance without any own therapeutic effect allows the obtaining of a pharmaceutical form required for the therapeutic efficacy of a substance endowed with therapeutic effects is not of a nature to invalidate this interpretation¹⁴.

The patent claims are important because they determine the subject matter and extent of the patent protection. The claims, in the case of medicinal products, should however refer as well to the therapeutic indications, inasmuch as the medicinal product does not tend to protect a substance in general, but its use as a medicine in the treatment or prevention of certain affections. In that regard, the ECJ has ruled that article 3 point (a) of the Regulation (EC) no. 469/2009 concerning the supplementary protection certificate for medicinal products must be interpreted as precluding the competent industrial property office of a Member State from granting a supplementary protection certificate where the active ingredients specified in the SPC application include active ingredients not identified in the wording of the claims of the basic patent relied on in support of that application¹⁵.

Where the claims in relation to one and the same patent refer to a single active ingredient but entail the grant of several marketing authorisation, a single supplementary certificate will be granted, and its coverage will not be limited by the speciality of either one of the authorisations. At the same time, if two patents have as

¹² Frederic Pollaud-Dulian, *Propriete intellectuelle. La propriete industrielle*, Paris, Ed. Economica, 2011, p. 323.

¹³ ECJ, Case C 482/07, *AHP Manufacturing BV vs Bureau voor de Industriële Eigendom*.

¹⁴ Bernard Remiche, Vincent Cassiers, *Droit des patents d'invention et du savoir-faire*, Bruxelles, Larcier, 2010, p. 197.

¹⁵ Case C-6/11, *Daiichi Sankyo Company c/ Comptroller General of Patents, Designs and Trade Marks*, Order of 25 November 2011.

subject matter (different) processes for obtaining the same active product, only one certificate may be obtained.

Accordingly, the regulation concerning the plant protection products defines under article 1 the „plant protection products” as the active substances and preparations containing one or more active substances, intended to protect plants against all harmful organisms, influence the life processes of plants, destroy undesirable plants, or prevent undesirable growth of plants. The Regulation comprises definitions of the active substance, preparations, plant products, harmful organisms, which have allowed a more clear interpretation of the regulation in these matters, however not entirely unambiguous. The definitions of the „product”, „basic patent” are similar to those under the regulation concerning the medicinal products.

A more accurate definition of the terms of „product” and „active ingredient” would facilitate, however, the establishment of those forms of active ingredients in a medicinal products that may be deemed to represent the product within the meaning of the regulation.

The ECJ has had the occasion to rule in relation to several cases on the meaning of „**active ingredient**”, and it is interesting that the court has referred in its solutions also to considerations of appropriateness of instituting the certificate, and not only to the legal rules and principles and its case law.

Thus, in the case C-631/13, Arne Forsgren c/ Österreichisches Patentamt settled by the judgment of 15 January 2015, the Court ruled under paragraph no. 51, the same as in other occasions, that „*It is appropriate, consequently, to refer to the fundamental objective of Regulation No. 469/2009, which is to ensure sufficient protection to encourage pharmaceutical research, which plays a decisive role in the continuing improvement in public health*”,

concluding that „*In that regard, it follows from paragraph 25 above that the term «active ingredient». for the purposes of applying Regulation no. 469/2009, relates to **substances which produce a pharmacological, immunological or metabolic action of their own** (...)*”, and that „*In the light of the wording and purpose of Regulation No. 469/2009, it must be held that Article 1(b) of that regulation does not permit an «active ingredient» to be categorised as a carrier protein conjugated with a polysaccharide antigen by means of a covalent binding, unless it is established that it produces a pharmacological, immunological or metabolic action of its own*”.

In the case C-210/13, Glaxosmithkline Biologicals SA and Glaxosmithkline Biologicals, Niederlassung der Smithkline Beecham Pharma GmbH & Co. KG c/ Comptroller General of Patents, Designs and Trade Marks, settled at 14 November 2013 by motivated order (considering, therefore, that the answer to a question referred for a preliminary ruling by a British court may be clearly deduced from existing case-law or admits of no reasonable doubt), the court concluded that, „*Article 1(b) of Regulation (EC) No. 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products must be interpreted as meaning that, just as an adjuvant does not fall within the definition of «active ingredient» within the meaning of that provision, so a combination of two substances, namely an active ingredient having therapeutic effects on its own, and an adjuvant which, while enhancing those therapeutic effects, has no therapeutic effect on its own, does not fall within the definition of «combination of active ingredients» within the meaning of that provision*”.

In the case C-443/12, Actavis Group PTC EHF and Actavis UK Ltd c/ Sanofi,

settled by the judgment of 12 December 2013, the ECJ ruled that, „*In circumstances such as those in the main proceedings, where, on the basis of a patent protecting an innovative active ingredient and a marketing authorisation for a medicinal product containing that ingredient as the single active ingredient, the holder of that patent has already obtained a supplementary protection certificate for that active ingredient entitling him to oppose the use of that active ingredient, either alone or in combination with other active ingredients, Article 3(c) of Regulation (EC) No 469/2009 must be interpreted as precluding that patent holder from obtaining – on the basis of that same patent but a subsequent marketing authorisation for a different medicinal product containing that active ingredient in conjunction with another active ingredient which is not protected as such by the patent – a second supplementary protection certificate relating to that combination of active ingredients*”.

In the case C-484/12, *Georgetown University c/ Octrooicentrum Nederland*, settled by the Judgment of 12 December 2013, the ECJ ruled that, „*It should be noted in that regard that, where the holder of a patent obtains an SPC relating to an active ingredient on the basis of the MA for the first medicinal product placed on the market comprising, among its active ingredients, the active ingredient protected by the basic patent (...), such as, in the main proceedings, an SPC relating to HPV-16 on the basis of the MA for Gardasil, the wording of Article 3(c) of Regulation No 469/2009 itself precludes that holder from obtaining, on the basis of that same patent, another SPC relating to the very same HPV-16 as a «product» on the basis of a subsequent MA for another medicinal product which also contains HPV-16, unless, in that other medicinal product, the*

«product» that is the subject of the SPC application relates in fact to a different HPV-16 falling within the limits of the protection conferred by the basic patent relied upon for the purposes of that application (...)”.

In the case C-493/12, *Eli Lilly and Company Ltd c/ Human Genome Sciences Inc* settled by the Judgment of 12 December 2013, the ECJ ruled that, „*Article 3(a) of Regulation (EC) No 469/2009 must be interpreted as meaning that, in order for an active ingredient to be regarded as «protected by a basic patent in force» within the meaning of that provision, it is not necessary for the active ingredient to be identified in the claims of the patent by a structural formula. Where the active ingredient is covered by a functional formula in the claims of a patent issued by the European Patents Office, Article 3(a) of that regulation does not, in principle, preclude the grant of a supplementary protection certificate for that active ingredient, on condition that it is possible to reach the conclusion on the basis of those claims, interpreted inter alia in the light of the description of the invention, as required by Article 69 of the Convention on the Grant of European Patents and the Protocol on the interpretation of that provision, that the claims relate, implicitly but necessarily and specifically, to the active ingredient in question, which is a matter to be determined by the referring court*”.

9. Conditions for the grant of the supplementary protection certificate

The application for the supplementary protection certificate has to be submitted by the holder of a basic patent or his successor in rights to the **intellectual property office of the country that has issued the first marketing authorisation for the medicinal product**. The application for the grant

of a certificate has to comply with the requirements under art. 8 of the Regulation no. 469/2009.

The certificate application has to be lodged within six months of the date on which the first market authorisation was obtained for the respective product as medicinal product. If the marketing authorisation was obtained prior to the grant of a basic patent, the certificate application has to be lodged within six month of the date on which the patent was granted.

The supplementary protection certificate cannot be granted unless in the State where the grant of the certificate is applied for, and at the date of submission of the application for the grant of a certificate:

(a) The product is protected by basic patent in force;

The patent has to be in force in the country where the marketing authorisation for the medicinal product was obtained. The patent may be national, similar to the national one or a European patent. If the same basic patent protects several different „products”, it is possible, in principle, to obtain several SCPs in relation to each of those different products provided, *inter alia*, that each of those products is „protected” as such by that „basic patent” within the meaning of article 3, point (a) of the Regulation no. 469/2009 read in conjunction with article 1, points (b) and (c) thereof, and is included in a medicinal product in respect of which a marketing authorisation has been obtained.¹⁶

(b) A valid authorisation to place the product on the market as a medicinal product has been granted in accordance with Directive 2001/83/CE or Directive 2001/82/CE, as appropriate;

This authorisation has to be granted by the relevant authority in the country where the grant of the supplementary protection

certificate is requested, the competence to grant the supplementary certificate belonging to the intellectual property office where it operates, and which has granted the marketing authorisation.

The medicinal product patent and the marketing authorisation are independent, that is, if any medicinal product may be marketed only if authorized for placement on the market, the medicinal product does not necessarily has to be patented. However, in order for a supplementary protection certificate to be granted, it is required both a basic patent and a valid marketing authorisation for the medicinal product containing the active ingredient or combination of active ingredients in respect of which the supplementary certificate is applied for.

(c) The product has not already been the subject of a certificate;

This condition connects the patent, authorisation and certificate. Only the patented product, in respect of which a marketing authorisation for medicinal product has been obtained, may benefit from a single protection supplement. In other words, this condition is inferred from the unicity of the certificate for the same active product and holder of patent or patents relating to the same product.

In the case of several holders of patents where the active ingredient is the same, each one of them may obtain a supplementary protection certificate. In other words, the unicity of the product or combination of active products is relevant in connection with the holder(s) of the patent(s). Where several patent holders exist, each having a marketing authorisation for his product with the same active ingredient, each patent holder is entitled to obtain a supplementary certificate for the same active ingredient and same product.

¹⁶ ECH, Judgment of 12 December 2013, Actavis Group PTC and Actavis UK, C-443/12, paragraph 29.

In the case of the combination of active ingredients in respect of which a single basic patent exist, the solution to the problem is different. The ECJ has ruled that where, on the basis of a basic patent and a marketing authorisation for a medicinal product consisting of a **combination of several active ingredients**, the patent holder **has already obtained a supplementary protection certificate for that combination of active ingredients**, protected by that patent within the meaning of Article 3(a) of Regulation (EC) No 469/2009, Article 3(c) of that regulation **must be interpreted as not precluding the proprietor from also obtaining a supplementary protection certificate for one of those active ingredients which, individually, is also protected as such by that patent holder**¹⁷.

The ECJ has also ruled that where a basic patent includes a claim to a product **comprising an active ingredient** which constitutes the sole subject-matter of the invention, for which the holder of that patent **has already obtained a supplementary protection certificate**, as well as a subsequent claim to a product comprising a combination of that active ingredient and another substance, article 3, points (a) and (c) of the Regulation (EC) no. 469/2009 precludes the holder from obtaining a second supplementary protection certificate for that combination¹⁸.

(d) The authorisation referred to in point (b) is the first authorisation to place the product on the market as a medicinal product.

The Regulation no. 469/2009 does not specify whether the first authorisation to place the product in the market is that from the Member State or that from the

Community. However, the interpretation given by the specialization literature and the case law in in the sense that, „it follows without doubt from the general context of the Regulation that for the purposes of examining the pre-conditions under art. 3, point (d), the first authorisation to place the product in the market is that obtained in the respective Member State”.

This condition has to be examined solely where multiple authorisations to place the product (active ingredient) in the market exist, no issue arising in the case where a single authorisation exists. The case where the holder of rights over the patent has obtained multiple authorisations for the same product also does not raise any special issues, the first one within the meaning of art. 3(d) of the Regulation 469/2009 being the first one in the chronological order of their granting. Where the authorisation(s) to place a product on the market as medicinal product is required, obtained or held by one of the same person, things are simple. No special issues can arise as well where several holders of patents for medicinal products with the same active ingredient obtain each authorisations for placement on the market of the medicinal product: in respect of each one of them entitled to obtain a supplementary certificate, the first authorisation will be taken into consideration.

However, what happens where an authorisation for a medicinal product for veterinary use is obtained, and thereafter an authorisation for a medicinal product for human use, both medicinal products having the same active ingredient, and consequently supplementary protection certificates are requested for both of them?

Asked to rule on the question: *“Is the grant of a supplementary protection*

¹⁷ ECJ, Judgment of 12 December 2013 in the case C-484/12, Georgetown University c/ Octrooicentrum Nederland.

¹⁸ ECJ, Judgment of 12 March 2015 in the case C-577/13, Actavis Group PTC EHF and Actavis UK Ltd c/ Boehringer Ingelheim Pharma GmbH & Co. KG.

certificate in a Member State of the Community on the basis of a medicinal product of human use authorized in that Member State precluded by a marketing authorisation for that product as a veterinary medicinal product granted in another Member State of the Community (...), or is the sole determining factor the date on which the product was authorized in the Community as a medicinal product for human use?"; the ECJ ruled that, "having in view the fact that the term «product» used in the regulation refers to any active ingredient in the medicinal product, and a certificate may be granted for the product under the authorisation corresponding to a medicinal product, irrespective of its human or animal use (...), it follows, first, that the decisive factor for the grant of the certificate is not the intended use of the medicinal products, and, second, that the purpose of the protection conferred by the certificate relates to any use of the product as a medicinal product without any distinction between use of the product as a medicinal product for human use and as a veterinary medicinal product use." However, in these circumstances the Court ruled that, „The grant of a supplementary protection certificate in a Member State of the Community on the basis of a medicinal product for human use authorised in that Member State is precluded by an authorisation to place the product on the market as a veterinary medicinal product granted in another Member State of the Community (...).

However, recently the ECJ has refined its position, ruling that, "*Articles 3 and 4 of the Regulation (EC) no. 469/2009 (...) are to be interpreted as meaning that, in a case such as that in the main proceedings, the mere*

existence of an earlier marketing authorisation obtained for a veterinary medicinal product does not preclude the grant of a supplementary protection certificate for a different application of the same product for which a marketing authorisation has been granted, provided that the application is within the limits of the protection conferred by the basic patent relied upon for the purposes of the application for the supplementary protection certificate"¹⁹.

The issue of the first authorisation is important for the third parties willing to manufacture generic medicinal products, which are interested in the expiry of the protection term, computed as regards the certificate from the date of the first marketing authorisation. The specialized literature has stated that, „the status of the first authorisation of placement on the market within the Community is necessarily related to the product, and cannot be interpreted as being related to the applicant, since in the case of several authorisations for the same product only one of these can be the «first»”.

Mention: In accordance with art. 10(5) of the Regulation no. 469/2009, the Member States may provide for that a certificate may be granted by the authority referred to in article 9, paragraph (1) without examining the conditions laid down in article 3, points (c) and (d) of the Regulation. Romania has not formulated such a reserve, therefore the compliance with the conditions has to be verified as a whole.

¹⁹ ECJ, Judgment of 19 July 2012 in the case C-130/11, Neurim Pharmaceuticals (1991) Ltd c/ Comptroller-General of Patents. Subject matter: Medicinal products for human use. Supplementary protection certificate. Regulation (EC) no. 469/2009. Article 3. Conditions for obtaining a supplementary protection certificate. Medicinal product having obtained a valid marketing authorization. First authorization. Product subsequently authorized as a veterinary medicinal product and a human medicinal product.

10. Rights conferred by the supplementary protection certificate

In accordance with art. 5 of the Regulation no. 469/2009, the supplementary protection certificate confers the same rights as conferred by the basic patent, and is subject to the same limitations and the same obligations, however such protection "shall extend only to the product covered by the authorisation to place the corresponding medicinal product on the market and for any use of the product as a medicinal product that has been authorized before the expiry of the certificate".

With reference to the duration of the certificate, art. 13 of the Regulation provides for that:

(1) The certificate shall take effect at the end of the lawful term of the basic patent for a period equal to the period which elapsed between the date on which the application for a basic patent was lodged and the date of the first authorisation to place the product on the market in the Community, reduced by a period of five years.

(2) Notwithstanding paragraph 1, the duration of the certificate may not exceed five years from the date on which it takes effect.

(3) The periods laid down in paragraphs 1 and 2 shall be extended by six months in the case where Article 36 of Regulation (EC) No 1901/2006 regarding the extension of the supplementary protection certificate for medicinal products for paediatric applies. In that case, this period may be extended only once.

As regard the expiry of the supplementary protection certificate, except for the cases applicable to patents as well (elapse of period of validity, holder's renunciation, failure to pay the relevant taxes), this becomes invalid also where and as long as the product covered by the certificate is no longer authorized to be placed on the market pursuant to the withdrawal of the corresponding marketing authorisation(s), in accordance with Directive 2001/83/CE or Directive 2001/82/CE. The

authority that has granted the certificate may decide on the lapse of the certificate either of its own motion or at the request of a third party.

In pursuance of article 15 of the Regulation, (1) the certificate shall be invalid if:

(a) It was granted contrary to the provisions of Article 3 of the Regulation;

(b) The basic patent has lapsed before its lawful term expires;

(c) The basic patent is revoked or limited to the extent that the product for which the certificate was granted would no longer be protected by the claims of the basic patent or, after the basic patent has expired, grounds for revocation exist which would have justified such revocation or limitation.

Any person (who has an interest, we believe) may submit an application or bring an action for a declaration of invalidity of the certificate before the body responsible under national law for the revocation of the corresponding basic patent. In the case of Romania, only the courts are competent to declare the invalidity of a certificate.

Article 16 of the Regulation no. 469/2009 regulates the revocation of a certificate extension, possible only in the case of medicinal products for paediatric use. The Regulation no. 469/2009 provides for that the extension of the certificate duration may be revoked if it was granted contrary to the provisions of article 36 of Regulation (EE) no. 1901/2006 regarding the extension of the supplementary protection certificate for medicinal products for paediatric use. Any person may submit an application for revocation „to the body responsible under the national law for the revocation of the corresponding basic patent". Since the revocation can only be declared by the body that has granted the certificate, it follows that this is the relevant authority to order the revocation upon request. However, this solution is valid in our jurisdiction solely

where the act whose revocation is requested has not entered the civil circulation.

In accordance with art. 31 of the Patent Law no. 64/1991 as republished, the protection coverage is determined by the content of the claims, which is interpreted on the basis of the relevant description and drawings.

Throughout the validity thereof its holder enjoys the exclusive monopoly of exploitation on the territory of Romania of the product and/or the process making the subject matter of the certificate, that is, the manufacture, use, offering for sale, sale or import for the purposes of using, offering for sale or selling such product, in its pure form or processed as a medicinal product.

Any deeds committed in breach of the provisions of art. 31 of the Law no. 64/1991 as republished shall be deemed counterfeiting. In respect of any losses caused to him the holder is entitled to damages in accordance with the general law, and may request the courts to order the confiscation or, as the case may be, destruction of the counterfeited products. The same sanction may be imposed as well in respect of the materials or equipment that have directly served to the commission of the counterfeiting deeds. Not only the certificate holder but also the beneficiary of a license is entitled to relief, in accordance with the general law.

However, the fact has to be taken into consideration that albeit the certificate is a protection title granted on the basis of a patent, these two represent different protection titles, and distinct from intellectual property, therefore the rights pertaining to the payment of damages or the confiscation measure granted in relation to an action brought forward by a patent holder cannot be automatically extended to the supplementary certificate. In other words, a distinct action has to be brought forward in court in respect of each of these two titles.

The limitations regarding the rights of the certificate holders refer mainly to the exceptions laid down in article 33 of the Invention Law of Romania, possible in the case of medicinal products, as follows:

- The right to exclusive private and non-commercial use (art. 33, point c);

- Use for experimental, solely non-commercial purposes of the subject matter of the patented invention, that is, in respect of which a supplementary protection certificate has been obtained (art. 33, point e). However, the fact should be noticed that in the case of medicinal products the use for experimental purposes of commercial nature is allowed, since the Directive 2001/83/EC on the Community code relating to medicinal products for human use provides for under art. 10, paragraph (6) that, *“Conducting the necessary studies and trials with a view to the application of paragraphs 1, 2, 3 and 4 and the consequential practical requirements shall not be regarded as contrary to patent rights or to supplementary protection certificates for medicinal products”*. The aforementioned paragraphs refer to the studies and authorisations regarding generic medicinal products, however these **clearly are aimed at marketing these medicinal products**.

Of course, the class of limitation of rights within the meaning of art. 5 of the regulation may also include the existence of certain licenses, which if validly executed in respect of the patent may extend over the certificate, inasmuch as that is stipulated in the agreement. The compulsory licenses (art. 43-45 of the Law no. 64/1991) also apply to the protection certificates. However, it has to be noticed that the time limits provided for by the law in respect of the patents cannot apply to the supplementary protection certificates, the case law having not ruled on the issue of the interpretation of the cases of non-application or insufficient application of the invention.

References

- Bernard Remiche, Vincent Cassiers, *Droit des brevets d'invention et du savoir-faire*, (Bruxelles: Larcier, 2010).
- Frederic Pollaud-Dulian, *Propriete intellectuelle. La propriete industrielle*, (Paris: Economica, 2011).
- European Patent Convention.
- Law no. 83/2014 on employee inventions.
- Law no. 611/2002 regarding the adhesion of Romania to the Convention on the Grant of European Patents.
- Law no. 95/2006 on the health reform, updated in 2013.
- Regulation (EC) no. 726/2004 of the European Parliament and of the Council of Europe 31 March 2004.
- Regulation no. 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products.
- Regulation (EEC) no. 1768/92 of the Council of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products (CSPM).
- Directive 2001/83/EC of the European Parliament and of the Council, amended by the Directive 2002/82/EC of 27 January 2003.
- ECJ, Judgment of 19 July 2012 in the case C-130/11, *Neurim Pharmaceuticals (1991) Ltd c/ Comptroller-General of Patents*.
- ECJ, Judgment of 12 December 2013 in the case C-484/12, *Georgetown University c/ Octrooicentrum Nederland*.
- ECJ, Judgment of 12 March 2015 in the case C-577/13, *Actavis Group PTC EHF and Actavis UK Ltd c/ Boehringer Ingelheim Pharma GmbH & Co. KG*.
- ECH, Judgment of 12 December 2013, *Actavis Group PTC and Actavis UK, C-443/12*.
- Case C-6/11, *Daiichi Sankyo Company c/ Comptroller General of Patents, Designs and Trade Marks*, Order of 25 November 2011.
- ECJ, Case C 482/07, *AHP Manufacturing BV vs Bureau voor de Industriële Eigendom*.
- ECJ, Case C-6/11, *Daiichi Sankyo Company c/ Comptroller General of Patents, Designs and Trade Marks*, Order of 25 November 2011.

THE NOTORIOUS, REPUTED AND FAMOUS TRADEMARKS

Andreea LIVĂDARIU*

Abstract

The owner of a trademark that has a reputation in Romania or in the European Union may request to court to forbid the infringer from using, without its consent, a sign identical or similar to its trademark, but for products or services different from those which are sold or provided under said trademark. According to Law no. 84/1998, the notorious (well-known) trademark is the trademark which does not necessarily have to be registered under the Trademark law protection. The Romanian doctrine sustains that famous trademarks do exist.

In this paper, we shall attempt to find (if it really does exist) the difference between notorious (well-known), reputed and famous trademarks, the criteria by means of which these trademarks shall be distinguished and the evidence by means of which the notoriety, reputation or fame of a trademark may be argued. We shall also present the legal regime and our analysis will be based on the Trademark law, doctrine and case-law studies.

Keywords: *notorious (well-known) trademarks, reputed trademarks, famous trademarks, likelihood of confusion, likelihood of association.*

1. Introduction

The Romanian literature speaks of notorious trademarks, reputed trademarks, famous trademarks¹ (or of the highest repute²), as categories of distinctive signs of commerce benefiting from different legal regimes. Different and somehow preferential, given the fact that, in order to benefit from legal protection, distinctive trademarks must usually be recorded, and thus must pass through the OSIM (*State Office for Inventions and Trademarks*) filter.

But do these types of trademarks really exist or are they just a creation of doctrine? How could they be defined and what differentiates them? What is the legal status

they enjoy and what are their means of protection?

Hugo Boss, Versace, Calvin Klein, Knorr, Lavazza are unregistered trademarks in Romania, which the Romanian law protects. Are they notorious trademarks, reputed trademarks or famous trademarks? What is their legal regime and how can they be protected against usurpers?

These are the questions we aim to answer further below.

2. Are there really famous and reputed trademarks?

According to Law no. 84/1998 (hereinafter referred to as the Trademark Law), the **notorious trademark** is the

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¹ Viorel Roș, Octavia Spineanu-Matei, *Dragoș Bogdan, Dreptul proprietății intelectuale. Dreptul proprietății industriale. Mărcile și indicațiile geografice* (Bucharest: All Beck, 2003), 100-112.

² Yolanda Eminescu, *Regimul juridic al mărcilor* (Bucharest: Lumina Lex, 1996), 83-85.

widely known trademark in Romania, by the audience segment targeted by the products or services to which it applies, without the need for the trademark registration or use in Romania in order to be opposed (art. 3 letter d)). The law also reminds the notorious trademarks when listing and defining the previous trademarks as the trademarks that, at the date of filling the application for registration or, where appropriate, at the date of the claimed priority, are notorious in Romania in the meaning of art. 6bis of the Paris Convention for the Protection of Industrial Property (art.6, para. (2) letter f), and also when listing the criteria according to which the notoriety of a trademark is examined (art.24 para. (1)).

The Regulation for implementing the Trademark Law provides rules for determining and proving the notoriety in art. 19, these being the sole provisions from this legal act that address the notorious trademarks.

However, the Paris Convention admits the existence and the need to provide protection for notorious trademarks, under art. 6bis which provides that the *EU countries undertake, either ex officio if their legislation allows it or at the request of the interested party, to refuse or cancel the registration and to forbid the use of a manufacturer trademark or a commercial trademark that constitutes a reproduction, imitation or translation, capable of creating confusion, of a trademark that the competent authority, from the country of registration or use, will rule that said trademark is notoriously known as the trademark of a person entitled to benefit from this Convention and as being used for identical or similar products. The same procedure shall be followed when the*

essential part of the trademark constitutes a reproduction of any such notorious trademark or when an imitation may be confused with it.

Concerning the **reputed trademark**, the Trademark Law neither defines it nor mentions it in any way, but it does speak of the registered trademarks reputation, namely of trademarks which “have a reputation”, of “the Community trademark reputation” and the “previous trademark reputation” (art. 6 para. (3) and (4) letter a), art. 36 para. (2) letter c), art. 90 para. (2) letter c)). The published literature³, however, defined reputed trademark as being the “*trademark known by a significant part of the audience targeted by the products and services for which the trademark is registered*”, according to the same authors “a significant part of the audience targeted”, meaning something more than insignificant, but less than a “widely known trademark”, such as the notorious trademark.

Not only is **the famous trademark** not defined, but it is not even mentioned in any way by either the Law or the Paris Convention. It is, however, accepted by the doctrine, according to the French model, as the trademark “*known by most of the general public, not only in France, but abroad as well and which acquired autonomous value, independent of the product or service which it usually designates*”⁴.

It was also said that the famous trademark (or of the highest repute) would be the one that gained world fame and this feature would justify the need to be protected, including when an identical or similar sign would be registered for different products or services.⁵

In our opinion, neither the reputed trademark nor the famous trademark have

³ Viorel Roş, Octavia Spineanu-Matei, Dragoş Bogdan, *op. cit.*, 112.

⁴ A. Bertrand, *La propriété intellectuelle. Livre II. Marques et brevets. Dessins et modèles*, (Paris: Delmas, 1995) apud. Viorel Roş, Octavia Spineanu-Matei, Dragoş Bogdan, *op. cit.*, 107.

⁵ Yolanda Eminescu, *op. cit.*, 84.

any independent existence; therefore we cannot classify the trademarks (depending on the degree of distinctiveness) in notorious, reputed and famous trademarks.

We shall present below the arguments regarding the inexistence of the reputed trademark as a stand-alone trademark.

Rigorously analysing the provisions of art. 6 para. (3) and (4) and art. 36 para. (2) letter c), we shall notice that **the Romanian Trademark Law neither establishes, nor protects the “reputed trademark”, but establishes and protects the reputation of the registered trademark, whether it is notorious or not**, as an attribute, a quality, a feature gained through usage and recognition by the audience targeted by the products and services the trademark designates and which distinguishes it from other trademarks.

The law claims that a trademark is refused upon registration or, if registered, is liable to be cancelled if it is identical or similar to *a previous Community trademark* (art. 6 para. (3)) or to *a previous trademark registered in Romania* (art. 6 para. (4)) and if it is intended for products or services which are not similar to those for which the previous mark was registered, when the previous Community trademark/previous trademark registered in Romania enjoys a reputation in the European Union/in Romania and if:

- in the case of the previous Community trademark, an unfair advantage were obtained from the distinctive character or the reputation of the Community trademark, from the subsequent trademark use.

- in the case of the previous trademark registered in Romania, an unfair advantage were obtained from the distinctive character or the reputation of the previous trademark or if the use were detrimental for the distinctive character or for the

reputation of the previous trademark, from the subsequent trademark use.

In relation to the provisions mentioned above, it should be taken into consideration that, according to art. 6 para. (2) letter f), earlier trademarks are trademarks that, on the date of submitting the application for registration or, where appropriate, on the date of the claimed priority, are notorious in Romania, in the meaning of art. 6bis of the Paris Convention.

Also, art. 36 of the Trademark Law, governing the counterfeiting action, entitles the trademark owner to ask the competent court to prohibit third parties from using, in their commercial activities, without its consent, a sign that is identical or similar to the trademark, for products or services different from those for which the trademark is registered, when the latter **has acquired a reputation in Romania and if the unlawful usage of the sign were detrimental to the distinctive character of the trademark or detrimental to its reputation** (para. (2) letter c)).

In conjunction with the legal texts mentioned, we may conclude that the Trademark Law provides protection for the reputation of a trademark, whether it is a notorious trademark in Romania, a Community trademark, a registered trademark in Romania or a different previous trademark, among those provided for by art. 6 para. (2) of the Law.

The Law does not protect the “reputed trademark” as a trademark different from the notorious trademark, but recognizes and protects the reputation of the trademarks, when appropriate, including **the reputation of notorious trademarks!** (and this fact results from art. 6 para. (4) letter a), in relation to art. 6 para. (2) letter f)).

Regarding famous trademarks, this cannot exist as a trademark different from the reputed trademark, as it is not legally regulated under national or conventional law

(namely by the Paris Convention for the protection of industrial property and by the TRIPS Agreement).

Secondly, from a semantic point of view, there is no difference between famous and notorious; on the contrary, the two adjectives are synonyms: according to the Explanatory Dictionary of the Romanian Language, “**famous**” means *renowned, famed, illustrious*, while “**reputed**” (“of repute”) means *famous, famed, renowned, glorious, illustrious*.

Thirdly, but perhaps the most important part, since the jurisprudence did not feel the need to recognize a third category of trademarks, alongside the notorious trademark and the reputed trademark, we may admit that only a false need may boost the recognition and protection of the famous trademarks *per se*.

In conclusion, for the reasons set out above, the famous trademark is a doctrinal creation⁶, whose existence, if accepted, would be ineffective because such a category of trademarks would not find applicability in practice.

Therefore, our opinion remain that there are no notorious, reputed or famous trademarks as trademarks with a different legal regime; however, notorious trademarks exist, as they are recognized by national and conventional law. There are no reputed trademarks, but the “of repute” concept does exist and the Romanian Law makes available, to the trademarks owners, means of protection for these trademarks. There are no stand-alone famous trademarks; the concept of “famous trademark”, should we admit its existence, it is at most a synonym for the notorious trademark.

3. The legal regime of the notorious trademark.

In essence, the notorious trademark is a trademark with a distinctive power, superior to other registered or unregistered trademarks. This is due to the fact that the notorious trademark is the trademark widely known, in Romania, by the audience targeted by the products and/or services to which it is applied/ which it designates.

For that matter, the published literature admits that the notoriety is a way of acquiring the exclusive right of a trademark, in relation with the fact that “the notoriety of the sign chosen as a trademark has the same effects as its registration: the trademark owner is protected in terms of the use and registration of said sign by other parties”⁷.

Concerning its provisions, the Law grants unlimited protection to the notorious trademark, as **even a holder of an unused trademark on the Romanian territory** may subject to national courts an action for annulment or an infringement action against the person who takes over its trademark or may oppose the registration of such trademark to the State Office of Inventions and Trademarks. However, notoriety must be proved according to the criteria and methods set out by the Trademark Law and its Implementing Regulation, namely: the notorious trademark degree of distinctiveness (initial or acquired) in Romania; the notorious trademark duration and extent of use in Romania in relation to the products and services for which a trademark is sought to be registered (if the notorious trademark is used in Romania); the notorious trademark duration and extent of advertising in Romania; the notorious trademark geographical area of use in Romania (only if the trademark is used in

⁶ Andre Bertrand, G.H. Bodenhausen and Yves Saint-Gal are among foreign authors that admit the existence of the famous trademark.

⁷ Viorel Roş, Octavia Spineanu-Matei, Dragoş Bogdan, *op. cit.*, 103.

our country); the degree of knowledge of the notorious trademark on the Romanian market, of the targeted audience segment; existence of identical or similar trademarks for similar or identical products or services, belonging to someone other than the person who pretends that its trademark is notorious (art. 24 para. (1) from the Law).

The trademark notoriety must be proved by its owner, by any evidence, as “acts” may be presented (art. 19 para. (6) of the Trademark Law Implementing Regulation) such as those concerning the marketing/sale of products or services under the known notorious trademark, the import or export of the products on which the notorious trademark is applied, the advertising of products and services under notorious trademark known in Romania.

However, in order to establish that a trademark is notorious, it should be well-known, on Romanian territory, by the Romanian audience segment towards targeted by the products and services for which the trademark is used (art. 19 para. (1) of the Trademark Law Implementing Regulation). The quoted legal text provides for two *sine qua non* conditions ruling the trademark notoriety, conditions that have as reference elements the Romanian territory and the Romanian audience segment targeted by products or services. According to the law, the good or less good knowledge of the trademark is examined in relation to these elements.

The notorious trademarks are recognized by both the Paris Convention (as revised in Hague in 1925) and the TRIPS Agreement. The Paris Convention enforces the Paris Union members (among which Romania as well) to refuse, ex officio or upon request, the registration or to prohibition on using a trademark which constitutes a reproduction, imitation or translation of a trademark which “the competent authority of the country of

registration or use shall consider to be notoriously known as already being the trademark of a person entitled to benefit from this Convention and as being used for identical or similar products”, the same being true where the essential part of a trademark constitutes “a reproduction of a notoriously known trademark or an imitation that may be confused with it” – art. 6bis.

Given the context, it should be noted that the Romanian translation of the Paris Convention (under Decree no. 1177/1968) is slightly unfortunate and likely to lead to “confusions”, given that the terms “well-known” and “noitoirement connues” from English and French were translated into Romanian as “notoriously known”, although the correct translation would have been “notorious”.

According to art. 16 item 3 of the TRIPS Agreement, with respect to art. 6bis of the Paris Convention, the notorious trademark shall also be protected against identical or similar signs which will be registered for products or services different from those designated by the “**registered trademark**”. The published literature granted, to the quoted text, an interpretation according to which the protection imposed on notorious trademarks by means of art. 6bis of the Paris Convention is also extended to the products or services that are different from those sold under the notorious trademark, conditional on the **prejudice of the trademark owner interests**, as well as the **registration of the notorious trademark**: “*TRIPS expands the protection area for the notorious trademark, including products and services that are not identical or similar (...); however, the protection shall be extended only for registered notorious trademarks, and not for unregistered notorious trademarks as well. However, TRIPS does not intend to amend the Paris*

Convention and dispose of the registration of notorious trademarks in all cases"⁸.

4. Civil law means for protecting the notorious trademark

As with other trademarks, notorious trademarks may be protected by owners either under the administrative proceeding, by introducing opposition proceedings (under art. 19 in conjunction with art. 6 and with reference to art. 24 of the Law), or during legal proceedings, the notorious trademark right owner having available, where appropriate, the action of infringement, annulment or unfair competition (as regulated in art. 36 of the Law).

If the action of annulment seeks the annulment of a registered trademark which conflicts with the notorious trademark, the action of infringement tends to force the usurpers to stop using signs meant to cause damage to the notorious trademark right owner and to pay compensation for damages caused.

The action of infringement may also be used by the notorious trademark right owner for defending the reputation of its trademark.

According to art. 36 para. (2) letter c), when a sign identical or similar to a trademark is used for products or services different from those for which the notorious trademark is registered, its owner may bring an action of infringement, if the unlawful use of the sign is meant to cause damage to the trademark reputation. The action is also brought against a notorious trademark owner, under the condition that said trademark had been registered.

The published literature states that the extension of trademark protection (notorious or not) on products and services different

from those for which the trademark was registered constitutes an attenuation of (and not a derogation from) the effects of the trademark speciality rule.⁹

By comparison to the provisions of the Trademark Law analysed above and in relation to the fact that both a registered trademark and a notorious trademark (registered or not) may gain a reputation, we believe that the owner of a trademark with a reputation may bring, if necessary, an action for the acknowledgement of the trademark reputation.

At the same time, we believe that the existence or inexistence of the trademark reputation shall be proved within the action for the reputation acknowledgment, taking into account the criteria for examining the notoriety, as defined and provided for in art. 24 para. (1) of the Law and art. 19 of the Regulation.

5. Conclusions

Neither the provisions of Law no. 84/1998 on trademarks and geographical indications, nor the Paris Convention, nor the TRIPS Agreement do not allow us to classify the trademarks based on their degree of distinctiveness, in notorious trademarks, famous trademarks and reputed trademarks. As stated from the interpretation of the legal provisions, if the recognition and existence of the notorious trademark is certain, the other two categories do not exist.

In reality, the Law, by recognizing the reputation of a trademark, does not protect the concept of "reputed trademark", but the trademark reputation itself, reputation that may coexist with a notorious trademark, registered or unregistered, and also with a registered trademark, according to common-

⁸ Viorel Roş, Octavia Spineanu Matei, Dragoş Bogdan, *op. cit.*, 103.

⁹ Jérôme Passa, *Droit de la propriété industrielle* (Paris: L.G.D.J., 2009), 175. The rule „attenuation” takes place only for the trademark reputation protection.

law. However, what must be remembered is the fact that, in order to have its reputation protected, the notorious trademark must be registered.

However, an interesting problem is the fact that any person that registers a trademark wishes for the sign thus registered to gain reputation among the audience segment targeted by the products or services it designates.

However, if it does not gain reputation, does the trademark still perform its function of differentiating the products and services

and of indicating their origin? May we claim, concerning such a trademark, that it lacks distinctiveness? In essence, could a trademark without reputation be cancelled? What is the boundary between the reputation and distinctiveness required both at the time of submitting the application for the registration and for its survival in the commerce? The answers to these questions, which are interesting, exciting and with practical applicability, shall represent the subject of future endeavours.

References

- Trademark Law no. 84/1998.
- TRIPS (The Agreement On Trade-Related Aspects Of Intellectual Property Rights), Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.
- Paris Convention for the Protection of Industrial Property, 20.03.1883, Paris.
- Yolanda Eminescu, Regimul juridic al mărcilor (Bucharest: Lumina Lex, 1996).
- Jérôme Passa, Droit de la propriété industrielle (Paris: L.G.D.J., 2009).
- Viorel Roș, Octavia Spineanu-Matei, Dragoș Bogdan, Dreptul proprietății intelectuale. Dreptul proprietății industriale. Mărcile și indicațiile geografice (Bucharest: All Beck, 2003).

PUBLIC DOMAIN PROTECTION. USES AND REUSES OF PUBLIC DOMAIN WORKS

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Abstract

This study tries to highlight the necessity of an awareness of the right of access to the public domain, particularly using the example of works whose protection period has expired, as well as the ones which the law considers to be excluded from protection. Such works are used not only by large libraries from around the world, but also by rights holders, via different means of use, including incorporations into original works or adaptations. However, the reuse that follows these uses often only remains at the level of concept, as the notion of the public's right of access to public domain works is not substantiated, nor is the notion of the correct or legal use of such works.

Keywords: *copyright, public domain, exceptions and limitations, innovation, right of access, technological means of protection, TPM, protection system, access to culture, copy control mechanism, Circumvention of TPMs.*

1. Public domain protection?

I mentioned a so-called “protection” of the public domain and it might seem inappropriate that I talk about the protection of a sector that includes works that are meant to be used freely, meaning unprotectable, whose main characteristic is that they can be used in any way without the consent of the author/proprietor, and without payment of any fee.

But the free use must not be confused with the right of ownership. Large defined the public domain as being “a place of sanctuary for individual creative expression, a sanctuary conferring affirmative protection against forces of private appropriation that threatened such expression.”¹

Public domain works can be used in any way, it's true, can suffer any form of

transformation, adaptation, remixing, incorporations of any kind, but none of these forms should lead to a way of appropriation of the public domain work, damaging other users or in the detriment of other types of uses. It's true that a new work is created, with patrimonial and moral rights that are distinct from the ones held by the original work. But all of these new rights can be exercised only as far as the new contribution is concerned, this original component being different from the one which belongs to public domain.

Because there won't always be a clear demarcation between the two types of works, or rather between the public domain work and the added value of the new contribution, there are cases in which the proprietors of the new work have tried to exercise their exclusive exploitation rights over the work as a whole, including over the public domain component, forbidding any

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¹ David Lange, *Reimagining the Public Domain*, 66 *Law and Contemporary Problems*, Winter 2003, p. 463-484.

form of usage. These uses are completely inappropriate and disadvantageous for society, because it can be deprived of exercising the right of access to the public domain work.

Mostly, everything starts from a misperception of what a “public domain work” means. The majority of people thinks that it’s an abandoned material, when, in fact, it’s a material that belongs to everyone, meaning a material upon which we all have rights and the protection that is mentioned in the title refers exactly to this aspect, namely the protection of the rights that every person holds over public domain materials, rights that need to be protected in the same way that regular works are protected by copyright.

The most discussed case of private appropriation is that of Disney Enterprises, Inc., a producer who, following the exhaustion of the exploitation rights in its 1938’s adaptation, started a series of trademark registrations of several character names such as “Snow White” who, before belonging to its film adaptation, belonged to a story that was part of the public domain (“Snow White” - as part of the Brothers Grimm anthology). Actually, the replacement of a determined and limited in time form of protection is being attempted, with an infinite one (through mark renewals) and maybe the perseverance of defending intellectual property rights as efficiently as possible would be admirable, if this form of protection wouldn’t cover elements that belong to public domain and that should remain in this sphere of free use.

Another example is that of the works management done by libraries and museums. There is now a fairly high frequency of efforts to digitize works owned by museums and public libraries. Although

works that these institutions present to the public digitally belong to the public domain (most works’ protection periods have expired), the access to these is marked by copyright references that belong to said libraries and museums. Since the work in question is not protected by copyright, the only right that could be claimed is over photographic reproduction. But photographic reproductions of public domain materials cannot be protected, as they lack the main quality – originality. This was argued in a case discussed before U.S. courts, but could easily be argued before any other court (including the European ones), because a digital copy is just a form of reproduction; if the original belongs to the public domain the copy has to belong to it as well. These things seem clear and simple, but the copyright references of libraries and museums are mentioned to the damage of the public, which perceives the access to these works as being restricted.²

Libraries and museums have gone from copyright references to publicly communicate the works by submitting to open licenses, such as creative commons, but isn’t the access to this licensing system allowed solely to authors/owners? It’s the case of the National Library of Spain, which uses open licensing (licensing systems that should not be confused with copyright), in order to communicate works that belong to the public domain. It’s what can be called an attempt to limit the use of works that should be available to anyone.

2. What is public domain and what is the importance of the right of access?

The report issued by WIPO in 2010 on the protection of traditional knowledge and

² Ignasi Labastida i Juan, The Digital Closing Of The Public Domain, http://blogs.cccb.org/lab/en/article_eltancament-digital-del-domini-public/ - Long live the public domain.

traditional cultural expressions of folklore³ has held that the public domain “consists of intangible materials that are not subject to exclusive IP rights and which are, therefore, freely available to be used or exploited by any person.”

The definition does not transpose a normative text; the sphere of what public domain involves being rather inferred/understood in relation to what a work that benefit or could benefit from copyright protection means. Perceived more as a symbol of non-property (the opposite of property), the public domain seems to contradict protection itself, although there are plenty of opinions who argue that, on the contrary, innovation, in its essence, depends on the existence of a rich/vast public domain.

We support this opinion, adding that the position according to which the act of creation itself is the result, not only of the individual effort, but of the multitude of resources made available throughout the years, needs to be affirmed. Among these, a substantial part is represented by the public domain materials, a range of works whose protection rights have expired, for example, or which do not fulfill the conditions to be protected by copyright, any one of them being available to be taken and used for the development of future works. One could say that the creative act itself can be dependent on the existence of a public domain that the author can access and that should contain a wide enough variety of quality works.

The aforementioned WIPO report clarifies the types of works that can belong to the public domain; this nuancing is important because each type comes with specific abusive forms of use or with specific limitation forms of subsequent access.

WIPO identifies three categories in the sphere of public domain: (i) works whose protection term has expired, (ii) works that do not meet the legal conditions to be protected by copyright and (iii) invalidated materials (if we consider the US legislation from before 1978, for example, these would be works that have not been registered or those that, after their registration, have never been renewed).

Freedom of use, the first of the characteristics that are presented as a common denominator of all the aforementioned categories, actually represents an effect of the lack of any intellectual property rights. The work, although it can belong to a certain author, will be available for use, in principle, without restrictions, without the need of any payments or requesting said author’s permission. A second common characteristic of all the works belonging to the public domain is accessibility, a characteristic that, moreover, emphasizes the freedom of use because a free work that cannot be accessed, is in fact a work that carries restrictions, one being unable to refer to these as public domain works.

Concretely, freedom of use and accessibility are not just features derived from the definition of public domain, since they mark the existence of certain rights that automatically arise in each person’s patrimony. Accessibility is only one aspect of the right of access, while the characteristic of being free cannot be accepted in the lack of a right of usage without restrictions, all of these generating, independently, as well as corroborated, the need for symmetric exploitation.

This is the context in which we can talk in detail about the existence of a right of access that can be exercised by any person, regarding any public domain work and without which the public domain itself is

³ World Intellectual Property Organization Draft report of Sixteen Session, 2008.

under the risk of remaining at the level of concept, with repercussions on innovation itself.

I think of the right of access to public domain as being one of the cultural rights, considered a natural component of human rights, without which the human personality cannot assert itself in its entirety.

Edmond Kaiser maintained, in his study “Terre des Hommes” (“Lands of People”) that cultural rights are “acknowledged as one of the most important conquests of the human spirit,” the states’ obligation being that of “insuring the access to training, education, participation in the cultural life, in order to guarantee the normal development of the individual, in a world that is increasingly more complex and demanding.”

Is the existence of this right of access to public domain works certain? And what value does this right have in relation to copyright? In order to answer these questions, some aspects correlated with the very functions of copyright need to be mentioned.

The copyright limitations, for example, have been discussed and sustained from the very first forms of copyright regulation, and they are especially correlated with its social function.

The social function of copyright imposes a double limitation – in its duration – and in exercising certain prerogatives. In order to explain the limitation in exercising copyright, Adolph Diez talks about a tension relation between copyright and modern society’s need for information. From this perspective, we could, in reality, consider that, in addition to the categories indicated by the abovementioned WIPO report, one can also talk about a free use category resulted from copyright limitations and exceptions.

What justified the existence of these limitations? Was the protection system

always thought out to be limited, or is it in its nature that rights not be exclusive or that this exclusivity manifest itself within certain limits? There are interpretations that explain the existence of these limitations as a regulation of exception, conceived to lead the work to its destiny of being devoured by the consumer and to finally become a part of the cultural heritage, which needs to be continuously enriched. The limitative nature of copyright is explained, as well as the purpose of the regulation derived from the copyright’s social function, which is that of also satisfying the public’s need of information/knowledge. This perspective is not at all wrong, but without a detailed explanation of what a regulation is in the field of copyright, the majority will perceive the existence of limitations as being similar to a series of legislative favors awarded by authors and owners to society in general. Whereas in reality, copyright limitations and exceptions “translate” into fact real rights of access to protectable works or to works in general (if we take into account the works from the public domain).

Anyway, to not recognize the rights of the public (with the right of access in a leading role) in this field is equivalent to deny the process preceding any regulation and the fact that any provision, regardless of the domain, has as main purpose social order, which is made by attempting to create an equilibrium between holders of various conflicting interests. In the field of copyright, the norm is the expression of an attempt to maintain the interests of authors/copyright holders in order, on one hand, with the interests of the general public, of access to culture, on the other hand.

The above mentioned tension relation represent, in fact, the legal relationship regulated by the norm, the subjects remaining the same, regardless of whether or not they are expressly highlighted. There is, without a doubt, a relation between owners

and the object of the protection, namely protectable or protected works, but the copyright regulation itself is the prioritized expression of the relation between authors and the rest of the people, categorized as being the general public, society in general, if you will, whose interest is of access to information/culture is contrary (somewhat and to a certain level) with the interest of the author to protect that work and narrow/limit the access to the work without its consent.

Guaranteeing certain rights to a category of subjects, for example to owners, will always correspond with the existence of certain obligations assigned to the other category of subjects, the obligation to not reproduce a protected work without the owner/author's permission, for example, actually being the expression of the owner's rights to authorize or forbid the reproduction of said work. It is what the doctrine considers to be an indissoluble connection between the subjects of judicial relation, manifested throughout the ongoing judicial relationship.

In general, the norm goes into effect according to certain situations, mostly determined, or at least relatively determined. Outside of those situations, the norm does not have effect, respectively, the obligation cannot be imposed, which leads to the birth of the corresponding right – which can at least be accepted as a right to non-conform to the norm.

It is easier to highlight these aspects in the context of the limitations accepted by the current legislation, and, if you take into account the characteristics of the public domain and the fact that its existence is manifested just as any limitation of exercise the exclusive rights, the same explanations can also be used as regards to the right of access to public domain works. The rule of symmetry mentioned above is also applied to the public domain. If you consider, for example, the works that became part of the

public domain as a result of the expiration of the protection period, we would be dealing with a norm that indicates a protection up to a certain date, after which the norm would cease to function in the sense of the existence of certain rights over the works. The inexistence of the patrimonial rights actually represent the owners/author's corresponding obligation to abstain from exercising them, thus being confirmed the correlative existence of the right of access to these works.

But what is the right of access in the context of a confusing regulation, which does not emphasize it clearly? And what value does this right have in the lack of obligations of correct use of public domain works?

The correct use is actually a legal use, in the context of guaranteeing right of access. With exact reference to another type of work in the public domain, different from the ones whose protection period has expired, Yolanda Eminescu noted, in 1987, regarding folklore materials, that these should be used correctly and exactly. It was mentioned the necessity of limiting the usage, as well as the necessity to “ban the deformation of folkloric works to preserve, unaltered, this important legal indissoluble fund of cultural identity of a people.”

It's most certainly the specific nature of folkloric works that entails particular discussions, but the common denominator between any type of works in the public domain sphere, is the fact that the inexistence of rules of exercising the right of access implicitly leads towards abusive forms of use that restrain future uses, ultimately altering the public domain fund.

3. The right of access and the technological means of protection as an abusive form of exercising the owners' rights

In order to prevent and limit any actions on protected works, to the benefit of the rights holder, the possibility of using "efficient technology" has been created, meaning technologies that "allow control by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism."

The definition of technological measures of protection has been integrated at European legislation through the Information Society Directive⁴:

"(...) "Technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective."

This type of technology meets the efficiency conditions required by the European norm only in the case in which the control is as efficient as to ensure the achievement of the goal of protection, namely the prevention and ban of some unauthorized acts by the author/holder. Basically, the possibility not only of a copy control is created, but more importantly, a control of access is created, equivalent with the possibility to exercise the rights granted to holders, exclusively, unlimitedly.

This type of technology allows, at any point, abuses by the rightholders, to the disadvantage of the users/public, with serious repercussions over the availability that has to define public domain works, in order to allow access to culture, to information, ultimately stagnating development, progress.

Point 4 of the same Article 6 from the Directive, presents itself as an 'attempt' to balance interests by so-called provisions meant to protect the beneficiaries of the copyright exceptions provided by the same directive, however, without any of these provisions being more than a simple recommendation, if we consider the fact that neither one of these provisions is supported by methods of sanction of the non-conforming holder.⁵

"Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit

⁴ Art. 6, point 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonization of certain aspects of copyright and related rights in the information society.

⁵ References to Articles 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, correspond to the following exceptions: private reproductions, specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, ephemeral reproductions that are transitional, for the benefit of people with a disability, for the sole purpose of illustration for teaching or scientific research.

from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions."

Therefore, although there are clear provisions⁶ that regulate the cases of violation of the technical protection methods and there are obligations addressed to efficiently protect these instruments of control ("legal protection of anti-circumvention measures"), there is no obligations assigned to Member States in order to guarantee the right of access for the beneficiaries of the copyright exceptions, nor are there any sanctions provided for the abusive use of technical measures. And this is largely because of the fact that the interests of the two parties are not considered as needing equal protection, an aspect that is also nuanced by the preamble of the Directive, "(39) Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention."

The aspects above mentioned exclusively nuance the situations of copyright exceptions and especially of certain exceptions, through precise identification, one also being able to mention that the application through analogy

for other types of exceptions, which are not specified in the European text, could not be accepted. For these reasons, it cannot be assumed that the text would apply to other types of free uses that, even without being identified as exceptions, have the same effects, and we are particularly referring to the examples of public domain work usage. Particularly, we're talking about what is actually called "retelling a story" from public domain, or about the situations in which certain public domain works or fragments of them, are taken over and integrated into original works, or about the case of adapting works from the public domain. Each of these is an example of situation in which the public has the right of access to the public domain work, as it does not carry exclusive rights and because the access to it should be free, therefore unrestricted. But this right of access is only theoretical, since we cannot talk of its actual exercising in the context of the existence of technical protection measures, to which the Member States have obliged themselves to a legal and unconditioned protection.

The situation deserves to be summed up – the protection of technological measures needs to be legal and the measures need to be efficient, including through the sanction of any form of violation/circumvention of TPM, whereas, as far as the general public is concerned, Member States are obliged to only take "appropriate measures" and that only to some of the forms of free use, which do not include, as I mentioned, the use of public domain works, but only those forms of use corresponding to the exceptions noted in Article 6.

Legalizing TPM indisputably led to the impossibility of enforcing the provisions relating to copyright exceptions and

⁶ Art.6 pt.1, of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, "Member States shall provide adequate legal protection against the circumvention of any effective technological measures".

limitations, as prof. Lawrence Lessig, correctly, classified it as a transposition of "copyright abuse", indeed referring exclusively to fair-use. His assessment was supported by the reality of many processes initiated by owners, also being just as pertinent referring to the well-known warning that marks the beginning of any DVD or VHS recording, through which the reproduction of any part of said recording, without permission from the producer, is strictly forbidden. This example represents a blatant denial of the fair-use doctrine, of what is represented by the copyright exceptions and limitations, implicitly of the notion of private copy, of user and consumer rights, of the possible public domain components, and of society in general.

The American correspondent of the aforementioned European Directive is the Millennium Copyright Act, at least as far as the technological protection means are concerned, and the means of sanction any forms of circumvention.

"Section 1201(a)(1) of the Copyright Act prohibits the act of "circumvent[ing] a technological measure that effectively controls access to a work," including, for example, by-passing password protection or encryption intended to restrict access to paying customers. Section 1201(a)(2) prohibits the manufacture or sale of "any technology, product, service, device, component, or part thereof primarily designed for the purpose of circumventing access controls on copyrighted works. Additionally, § 1202(b) prohibits the manufacture or sale of products, devices or services primarily designed to circumvent "a technological measure that effectively protects a right of a copyright owner"-for example, a technological measure intended

to prevent reproduction of a copyrighted work. The authors of Fair's Fair⁷ said, "the ban against circumvention devices can prevent many users from making a fair use of protected works. The problem illustrates a more general threat. A legal prohibition against circumventing the protective measures adopted by copyright owners leaves those owners with virtually absolute control over the terms of use."

There are currently DVDs or e-books sold with restricted access, although many of them contain collections or public domain works, such as stories whose protection period has expired, or legends belonging to traditional knowledge or folklore⁸.

Inevitably, the issue of the existence or not of a right of access is, most of the time, unresolved in these situations because reference may be made to the multitude of **other** free resources, available as alternatives, and which allow, to the same extent, the user's access to public domain works, such as the versions available in public libraries. But the issue of the right of access should not be studied from the perspective of other alternative resources that are available. Encrypting an e-book will represent in any case an abusive form of use of the public domain works it contains and this is because, by applying technological protection methods, the nature of these free materials change, through their restriction.

In all these cases, we obviously also need to consider the interest of the owner who uses those technological protection methods. Even if, most times, these collections do not represent aspects of originality and the only valuable component resides in its public domain material, it needs to be accepted that there are also situations in which the owner's interest especially

⁷ Robert C. Denicola, *Fair's Fair - An Argument for Mandatory Disclosure*, University of Nebraska, 2004.

⁸ <http://www.elefant.ro/ebooks/fictiune/literatura-romana/literatura-romana-clasica/legende-populare-romanesti-167551.html>, <http://www.polirom.ro/catalog/ebook/povestile-fratilor-grimm-2572/redirect.html>

require protection, the most obvious cases being those of adaptations, of the type of retelling, as well as of the public domain works' integration as part of original works. Each of these shows, without a doubt, particularities but the most important aspect, and the most common, of these examples is the fact that the right of access needs to be guaranteed and, if the solutions to protect both interests are not impossible to find, even in the event in which there is not a clear divide between the public domain material and the original work⁹.

Coming back on European ground, we have to admit that, despite the provisions mentioned, the recent jurisprudence has nuanced interpretations of Directive 2001/29/EC that are closer to what it could be called an equilibrium of interests. The year 2014 meant quite a lot if we consider the decision taken in January 2014 by the European Court of Justice, which decided that circumventing a protection system may be lawful¹⁰, from which we hold:

1 "Technological measures' within the meaning of Article 6 may include measures incorporated not only in protected works themselves but also in devices designed to allow access to those works;

2 When determining whether measures of that kind qualify for protection pursuant to Article 6 where they have the effect of preventing or restricting not only acts which require the rightholder's authorisation pursuant to that directive but

also acts which do not require such authorisation, a national court must verify whether the application of the measures complies with the principle of proportionality and, in particular, must consider whether, in the current state of technology, the former effect could be achieved without producing the latter effect or while producing it to a lesser extent."

It's interesting to study the problem of protecting technologies created not only to prevent copying, but to restrict interoperability as well, being a way to emphasize the fact that technologies applied by owners are not protected unconditionally, but only if they conform with the definitions provided by law¹¹. A correct interpretation leads to the conclusion that, beyond the limitations expressly provided by the law, one cannot talk about a correct/legal use, the protection, as a final effect, being unobtainable. If the technological protection measures have the effect of restriction of those acts that are not subject to holder authorization (by effect of the law), these TPM are obviously examples of abusive TPM, whose violation can be considered legal.

Indeed, CJEU ruled that the manufacturer of the console is protected against that circumvention only in the case where the protection measures seek to prevent illegal use of videogames, thus being understood that legal protection

⁹ GPL licenses for open-source software have the particularity of maintaining the source code available for any other subsequent use. Similarly, the rightholders that take over, in any way, public domain materials, should be obliged to allow the access of public to that material, in a format free of any other intervention, in order to ensure the access is unrestricted.

¹⁰ Advocate General Eleanor Sharpston, Opinions in Case C-355/12 Nintendo v PC Box, September 2013 <http://curia.europa.eu/juris/document/document.jsf?docid=141822&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=1931439> http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=1&part=1&mode=req&docid=141822&occ=first&dir=&cid=1931439

¹¹ Article 6 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society – "Technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorized by the rightholder.

cannot be ensured to other forms of restriction.

Legal protection cannot be granted to restrictions aiming at the public domain component, as these type of measures also have the purpose of forbidding/limiting some forms of use that do not need the permission of the authors/owners.

4. Other dangers: Information society and the impact on the public domain sphere.

The public domain is diverse in its content, works whose protection period has expired being only one of the categories that belong to this sphere. Another category is that of materials that, in accordance with the internal or international legislation, cannot be protected by copyright¹².

These types of materials are, most of the times, located outside of copyright protection, as effect, for example, of provisions that establish the exemption from protection of ideas, mathematical concepts and formulas, theories, procedures and methods of function. Mathematical formulas, concepts and functioning methods, are, in accordance with the legislation corresponding to copyright, types of materials that are included in the public domain sphere, naturally, from their very development.

But as diverse as the sphere of public domain is, it is just as fluctuant, certain legislative changes or court decision leading

to a narrowing of the public domain sphere, by considering some material/information, which are by nature excluded from protection, as being protectable, such as functioning methods, or simple data.

I'm referring to the case of Oracle v. Google¹³, the most recent decision regarding them stating that "the APIs are protected by copyright, both in regards to their source code, as well as the structure, sequence and organization of the Java library (API packages)."

Taking into account their component¹⁴, and the purpose for which these APIs were used in programming, objectively established as being – the insurance of interoperability, it goes without saying that this decision has the potential to significantly affect the public domain sphere, by considering these materials/information (if we can call them that) as being protectable by copyright.

This decision would affect everything open-source stands for, and innovation in general, the EFF¹⁵ mentioning that the freedom to reimplement and extend existing APIs represents the key to progress both in the development of hardware products, as well as software. With a higher emphasis on the need for software compatibility, the following explanations are offered: "When programmers can freely reimplement or reverse engineer an API without the need to negotiate a costly license or risk a lawsuit, they can create compatible software that the interface's original creator might never have

¹² This paper exclusively takes into account the public domain related to copyright, but, evidently, any work or material that does not carry exclusive rights and that can be freely used, regardless of their rights, trade secrets, patents, etc., falls in the sphere of what the public domain is.

¹³ U.S. appeals court decided Oracle could copyright parts of the Java programming language, which Google used to design its Android smartphone operating system - see the full text of the decision: https://www.eff.org/files/2014/11/10/oracle_v_google_13-1021.opinion.5-7-2014.1.pdf

¹⁴ All SSO details/components – structure, sequence and organization – lack protection, as they **represent** functioning methods.

¹⁵ <https://www.eff.org/deeplinks/2014/05/dangerous-ruling-oracle-v-google-federal-circuit-reverses-sensible-lower-court>

envisioned or had the resources to create. Moreover, compatible APIs enable people to switch platforms and services freely, and to find software that meets their needs regardless of what browser or operating system they use.”

Pamela Samuelson recently said¹⁶, referring directly to the dispute between Google and Oracle:

“ (...) a computer program designed to be compatible with another program must conform precisely to the API of the first program which establishes rules about how other programs must send and receive information so that the two programs can work together to execute specific tasks“.

“(...) once that the API exists, it becomes a constraint on the design of follow-on programs developed to interoperate with it.”

The digital era is supposed to be favorable to the spread of information and innovation in general, but also bears, as we've seen, multiple threats to the public domain.

5. Conclusions

An excessive control of copyright actually means a denial of the citizens' right of access to the public domain, a denial of the importance of public domain in general and a denial of the special role the public domain has in innovation.

The context of the existence of technological protection methods and of some confusing regulations of what a legal use of the public domain means, has lead to numerous actions, such as the Communia Association, which issued, in 2014, a set of recommendations, from which we can mention the ones with implications involving the public domain¹⁷.

"Pt.6 Any false or misleading attempt to misappropriate Public Domain material must be declared unlawful. False or misleading attempts to claim exclusivity over Public Domain material must be sanctioned. In order to preserve the integrity of the Public Domain and protect users of Public Domain material from inaccurate and deceitful representations, any false or misleading attempts to claim exclusivity over Public Domain material must be declared unlawful. There must be a system of legal recourse that allows members of the public to get sanctions imposed on anyone attempting to misappropriate Public Domain works.

Pt. 7 The Public Domain needs to be protected from the adverse effects of Technical Protection Measures. Circumvention of TPMs must be allowed when exercising user rights created by Exceptions and Limitations or when using Public Domain works. The deployment of TPMs to hinder or impede privileged uses of a protected work or access to public domain material must be sanctioned. Technical Protection Measures such as Digital Rights Management systems can have adverse effects on the Public Domain. Access restrictions imposed on works can remain in effect even after a work has passed into the public domain and over time Protections Measures can become orphaned making access to protected works impossible. Most current TPM 'solutions' do not take into account user rights created by Exceptions and Limitations thereby limiting their effectiveness and undermining the inherent checks and balances of the copyright system. Given the above, circumvention of TPMs must be allowed when exercising user rights created by Exceptions and Limitations or when using Public Domain works."

¹⁶ Pamela Samuelson, Are APIs Patent or Copyright Subject Matter?, <http://patentlyo.com/patent/2014/05/copyright-subject-matter.html>, May 2014

¹⁷ <http://www.communia-association.org/recommendations-2/>

References

- David Lange, Reimagining the Public Domain, 66 Law and Contemporary Problems, Winter 2003, p. 463-484.
- Pamela Samuelson, Are APIs Patent or Copyright Subject Matter?, <http://patentlyo.com/>, May 2014.
- Advocate General Eleanor Sharpston, Opinions in Case C-355/12 Nintendo v PC Box, <http://curia.europa.eu/>, September 2013.
- Robert C. Denicola, Fair's Fair - An Argument for Mandatory Disclosure, University of Nebraska, 2004.
- World Intellectual Property Organization, Report on Public Domain, Seventeenth Session, Geneva, December 2010.

EU DIRECTIVES IN THE FIELD OF COPYRIGHT AND RELATED RIGHTS

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Abstract

The aim of this article is to underline the evolution and the importance of the European Directives in the field of copyright and related rights, their contribution to the development of the law and the national implementation, namely their transposition into Romanian Law no. 8/1996 on copyright and related rights. For this purpose, the article will analyze the historical evolution of the European Directives in the field of copyright and related rights and their most important dispositions. Given the wide range of subject matter with which it is concerned, the European Directives in the field of copyright and related rights address to enforcement, protection of databases, protection of computer programs, resale right, satellite and cable, term of protection, rental and lending rights, copyright and related rights in the information society, orphan works and management of copyright and related rights. Taking into account the wide range of subjects that European Directives in the field of copyright and related rights address, it is important to observe the permanent interest of the European legislator on the harmonization of the law on copyright and related rights. In this way, the result was the adoption of 7 directives in a 10-year interval between 1991 and 2001, and of 4 directives, including the one for the modification of the Directive on the term of protection, also in a 10-year interval between 2004 and 2014. Despite the extensive process of harmonization, copyright law in the Member States of the European Union is still largely linked to geographical boundaries of sovereign states.

Keywords: *directive, copyright and related rights, enforcement, protection of databases, protection of computer programs, resale right, satellite and cable, term of protection, rental and lending rights, copyright and related rights in the information society, orphan works, management of copyright and related rights, evolution, harmonization, national implementation.*

1. Introduction

At the present 11 Directives in the field of copyright and related rights are in place in the European Union¹:

a). Council Directive 91/250/CEE from the 14th of May 1991 on legal protection of computer programs, published in the Official Journal of European Communities no. L 122 from the 17th of Mai 1991, replaced by the Directive 2009/24/EC

of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, published in the Official Journal of the European Union no. L 111/16 from the 5 of May 2009;

b). Council Directive 92/100/CEE from the 19th of November 1992 on the rental and lending right and other rights related to copyright in the field of the intellectual property, published in the Official Journal of EC no. L 346 from the 24th of November 1992;

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¹ Ciprian-Raul Romițan, Paul-George Buta, *Drept român și comunitar al proprietății intelectuale: Dreptul de autor și drepturile conexe* (București: Ed. ASDPI, 2006), 141-318, [http://www.orda.ro/default.aspx?pagina=212](http://ec.europa.eu/internal_market/copyright/acquis/index_en.htm)

c). Council Directive 93/83/CEE from the 27th of September 1993 on the harmonization of certain provisions regarding copyright and neighboring rights applicable to the broadcasting of programs via satellite and cable retransmission, published in the Official Journal of EC no. L 248 from the 6th of October 1993;

d). Council Directive 93/98/CEE from the 29th of October 1993 on the harmonization of the duration for the protection of copyright and certain neighboring rights, published in the Official Journal of EC no. L 290 from the 24th of November 1993;

e). European Parliament Directive and that of the Council 96/9/CE from the 11th of March 1996 on the legal protection of databases, published in the Official Journal of European Communities no. L 077 from the 27th of March 1996;

f). European Parliament Directive and that of the Council 2001/29/CE from the 22nd of May 2001 on the harmonization of certain issues of copyright and neighboring rights in the information society, published in the Official Journal of European Communities no. L 006 from the 10th of January 2002;

g). European Parliament Directive and that of the Council 2001/84/CE from the 27th of September 2001 on resale right for the benefit of the author of original works of art, published in the Official Journal of European Communities no. L 272 from the 13th of October 2001;

h). European Parliament Directive and that of the Council 2004/48/CE from the 29th of April 2004 on insuring the observance of intellectual property rights,

published in the Official Journal of European Communities no. L 157 from the 30th of April 2004;

i). Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, published in the Official Journal of the European Union no. L 372/12 from 27 December 2006, amended by the Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, published in the Official Journal of the European Union no. L 265/1 from 11 October 2011;

j). Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, published in the Official Journal of the European Union no. L 299/5 from 27 October 2012;

k). Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, published in the Official Journal of the European Union no. L 84/72 from 20 March 2014.

Having in mind the wide range of subjects concerning copyright and related rights described by the Directives, it is important to analyze their historical evolution, their main dispositions, the level of harmonization and their national implementation into the Law no. 8/1996 on copyright and related rights².

² Published in the Official Journal of Romania no. 60 from 26 March 1996, subsequently amended and completed by Law no. 285/2004 on the modification and completion of Law no. 8/1996 (published in the Official Journal of Romania no. 587/30.06.2004), GEO no. 123/2005 on the modification and completion of Law no. 8/1996 (published in the Official Journal of Romania no. 843/19.09.2005) and Law no. 329/2006 (published in the Official Journal of Romania no. 657/31.07.2006).

The research of the EU Directives in the field of copyright and related it is an important part of the general research on copyright and related rights, being a part of the legislation structure in the field, together with the international framework.

The international vocation³ of copyright and related rights is underline by international conventions and treaties like: Berne Convention for the Protection of Literary and Artistic Works (1886), Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), WIPO⁴ Performances and Phonograms Treaty (1996), WIPO Copyright Treaty (1996), and Trade Related Aspects on Intellectual Property Rights (TRIPS - 1994). All above mentioned international conventions and treaties are adopted and transposed into our national legislation.

Copyright and related rights has to be protected also outside the national frontiers, on the territory of other states⁵, and, of course, has to be protected on a harmonize level inside the European Union. The instrument chosen by the European legislator in order to fulfill this aim is the directive, defined as binding the Member State only for the result, leaving the Member States the competence to choose the forms and the ways for fulfilling the objective⁶. As it was underlined in the doctrine⁷, this is the main difference between directive and

regulations. The regulations are compulsory, having as the law a general influence, unlike the directive which binds only as regards the result.

The Romanian literature in the field, limits to presents the European Directives in the field⁸, as a collection of laws, or tackles in a comprehensive manner to some subjects of the Directives⁹.

2. Content

As I mentioned before, at the present 11 Directives in the field of copyright and related rights are in place in the European Union.

The first Directive, on computer programs, was adopted in 1991. The **Directive on the legal protection of computer programs (91/250/EEC)** was a real European "first" for copyright law, the first copyright measure to be adopted. The objective of the Directive was to harmonize Member States' legislation regarding the protection of computer programs in order to create a legal environment which will afford a degree of security against unauthorized reproduction of such programs¹⁰. In the sense of the Directive, the object of protection is the 'computer programs', which shall include their preparatory design material¹¹. So, the protection in accordance with this Directive shall apply to the

³ Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, (București: All Beck, 2005), 24.

⁴ World Intellectual Property Organization.

⁵ *Idem*.

⁶ Ion P. Filipescu, Augustin Fuerea, *Drept instituțional comunitar european*, ediția a V-a (București: Actami, 2000), 38.

⁷ *Idem*.

⁸ Romițan, Buta, *Drept roman și comunitar al proprietății intelectuale*, 141-318.

⁹ Roș, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 419, 423-429, 448-452, 490-492. Ciprian Raul Romițan, Mariana Liliana Savu, *Drepturile artiștilor interpreți sau executanți*, (București: Universul Juridic, 2008), 47-50.

¹⁰ http://ec.europa.eu/internal_market/copyright/prot-comp-progs/index_en.htm

¹¹ Art. 1 (1).

expression in any form of a computer program, with the exception of ideas and principles which underlie any element of a computer program, including those which underlie its interfaces that are not protected by copyright¹². The only criteria that will be applied to determine the eligibility for protection of a computer program is if it is original in the sense that it is the author's own intellectual creation¹³.

Another important disposition of the Directive regards the authorship of the computer programs created by an employee in the execution of his duties or following the instructions given by his employer. In this case, the employer exclusively shall be entitled to exercise all the economic rights in the program so created, unless otherwise is provided by contract¹⁴.

Directive 91/250/EEC has been repealed and replaced by Directive 2009/24/EC and has been transposed totally into the Romanian legislation.

The second Directive adopted in the field of copyright and related rights was the **Rental Right Directive** in 1992 which harmonized the rights of commercial rental and lending. In this case, the most important fact of the Directive is that harmonizes certain related rights of fixation, reproduction, broadcasting and communication to the public and distribution at levels in excess of the minimum norms of the Rome Convention¹⁵. The related rights beneficiaries are the performers, phonogram producers, film producers and broadcasters.

Directive 92/100/EEC has been repealed and replaced by Directive 2006/115/EC and had been transposed into Romanian Law no. 8/1996 on copyright and related rights.

In 1993, two more Directives were adopted.

The **Satellite and Cable Directive** was described in the special literature as a direct response to the deployment of new technologies of transmission of broadcast programs, by satellite and cable that greatly facilitated the broadcasting of television programs across national borders¹⁶, envisioned in this way the establishment of an internal market for broadcasting services.

Also, one of the most important characteristics of the Directive is that introduce a scheme of mandatory collective rights management with regard to acts of satellite and broadcasting. In this way, according to article 9 (1) of the Directive *“Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society”*. Thereupon, *“Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society and he shall be able to claim those rights within a period, to be fixed by the Member State*

¹² Art. 1 (2).

¹³ Art. 1 (3).

¹⁴ Art. 2 (3).

¹⁵ Estelle Derclaye, *Research Handbook on the Future of EU Copyright* (UK: Edward Elgar, 2009), 15.

¹⁶ *Idem*.

concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter”¹⁷.

Law no. 8/1996 on copyright and related rights transposes the above mentioned dispositions of the Directive¹⁸, cable retransmission right being a case of compulsory collective management¹⁹ together with the private copy remuneration²⁰.

In 1993, also the **Term Directive** was adopted, which harmonized the term of protection of copyright and related rights of 70 years *post mortem auctoris*, and set the duration of related rights at 50 years.

The Directive has been repealed and replaced by Directive 2006/116/EC on the term of protection of copyright and certain related rights. According to article 1 of this Directive “*The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention*²¹ shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public” and according to article 3 the duration of related rights is:

“(1) *The rights of performers shall expire 50 years after the date of the performance. However, if a fixation of the performance is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.*

“(2) *The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram has been*

lawfully published within this period, the said rights shall expire 50 years from the date of the first lawful publication. If no lawful publication has taken place within the period mentioned in the first sentence, and if the phonogram has been lawfully communicated to the public within this period, the said rights shall expire 50 years from the date of the first lawful communication to the public.

“(3) *The rights of producers of the first fixation of a film shall expire 50 years after the fixation is made. However, if the film is lawfully published or lawfully communicated to the public during this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier. The term ‘film’ shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.*

“(4) *The rights of broadcasting organisations shall expire 50 years after the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite.”*

Three years later, in 1996, the **Database Directive** was adopted. The Directive created a new exclusive “*sui generis*” right for database producers, valid for 15 years, to protect their investment of time, money and effort, irrespective of whether the database is in itself innovative (“non-original” databases). The Directive harmonized also copyright law applicable to the structure and arrangement of the contents of databases (“original” databases). The Directive’s

¹⁷ Art. 9 (2).

¹⁸ Art. 121.

¹⁹ Art. 123¹ (1) g).

²⁰ Art. 123¹ (1) a).

²¹ Art. 2 Protected Works: 1. “Literary and artistic works”; 2. Possible requirement of fixation; 3. Derivative works; 4. Official texts; 5. Collections; 6. Obligation to protect; beneficiaries of protection; 7. Works of applied art and industrial designs; 8. News.

provisions apply to both analogue and digital databases²².

As it was mentioned in the doctrine²³, Law no. 8/1996 on copyright and related rights regulates the databases as object of copyright as derivative works, but transposing the Database Directive, envisages a *sui-generis* right of the makers of databases, and not a right for copyright. Therefore, the Law talks about the makers of databases and not of creators/authors²⁴. However, this *sui-generis* right on databases is not excluding the possibility of protection of the databases or their content through copyright and other rights (art. 122⁴). This is reason why the databases are still enumerated by the Law no. 8/1996 as object of protection as derivative works.

In the light of the *sui-generis* right, the maker of a database has the exclusive economic right to authorize and prohibit the extraction²⁵ and/or re-utilization of the entire or of a substantial part of the database, evaluated qualitatively or quantitatively²⁶.

In 2001, was adopted the **Directive of copyright and related rights in the informational society**. The final text is a result of over three years of thorough discussion and an example of co-decision making where the European Parliament, the Council and the Commission have all had a decisive input²⁷.

As it was mentioned in the press release of the Directive²⁸, its aim was to stimulate

creativity and innovation by ensuring that all material protected by copyright including books, films, music are adequately protected by copyright. It provides a secure environment for cross-border trade in copyright protected goods and services, and will facilitate the development of electronic commerce in the field of new and multimedia products and services (both on-line and off-line via e.g. CDs).

The Directive harmonizes the rights of reproduction, distribution, communication to the public, the legal protection of anti-copying devices and rights management systems. Particular novel features of the Directive include a mandatory exception for technical copies on the net for network operators in certain circumstances, an exhaustive, optional list of exceptions to copyright which includes private copying, the introduction of the concept of fair compensation for rightholders and finally a mechanism to secure the benefit for users for certain exceptions where anti-copying devices are in place.

Adoption and implementation of the Directive enabled the Community and its Member states to ratify the 1996 WIPO Treaties - the so-called Internet Treaties²⁹.

Implementing this Directive, Law no. 8/1996 on copyright and related rights regulates in Chapter VI, articles 33-38, the Limitations on the Exercise of Copyright. These limits are strictly provided by the law,

²² http://ec.europa.eu/internal_market/copyright/prot-databases/index_en.htm

²³ Roș, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 180.

²⁴ Art. 122¹-122⁴.

²⁵ Art. 122² (2) a): extraction shall mean the permanent or temporary transfer of all or a substantial part, evaluated qualitatively or quantitatively, of the contents of a database to another medium by any means or in any form.

²⁶ Art. 122² (2) b): re-utilization shall mean any form of making available to the public all or a substantial part of the contents of a quantitative or qualitative apprised database by the distribution of copies, by renting, or other forms, including by making available to the public of the contents of the database so that anyone may access it in a place and time individually chosen by them. The first sale, on domestic market, of a copy of a database by the rightholder of *sui generis* right or with his consent shall exhaust the right to control resale of that copy.

²⁷ http://ec.europa.eu/internal_market/copyright/copyright-info/index_en.htm

²⁸ http://europa.eu/rapid/press-release_IP-01-528_en.htm?locale=en

²⁹ WIPO Performances and Phonograms Treaty and WIPO Copyright Treaty.

they cannot be extended by analogy³⁰, as in case of the exceptions on copyright and related rights.

Also, the limits and the exceptions has to be enclosed to the so-called 3 steps test³¹: that such uses conform to proper practice, are not at variance with the normal exploitation of the work and are not prejudicial to the author or to the owners of the exploitation rights³².

Analyzing the legal norms, the doctrine³³ underlined the following categories of limitations for public use:

1. The reproduction with the scope of quotations (art. 33 (1) b-d);

2. The reproduction of visual works placed in public places (art. 33 (1) f);

3. Information on actuality problems;

4. temporary acts of reproduction that are transient or incidental forming an integral and essential part of a technical process and the sole purpose of which is to enable transfer, in a network between third parties, by an intermediary or the lawful use of another protected object and that should have no separate economic value on their own, are excepted from the reproduction right³⁴;

5. The alteration of a work shall be permissible without the author's consent and without payment of remuneration in the following cases³⁵:

(a) If the alteration is made privately and is neither intended for nor made available to the public;

(b) If the result of the alteration is a parody or caricature, provided that the said

result does not cause confusion with the original work and the author thereof;

(c) If the alteration is made necessary by the purpose of the use permitted by the author;

(d) If the alteration is a short review of the works by didactic purpose, mentioning the author.

6. For the purpose of testing the operation of their products at the time of manufacture or sale, trading companies engaged in the production or sale of sound or audiovisual recordings, equipment for the reproduction or communication to the public thereof and also equipment for receiving radio and television broadcasts may reproduce and present extracts from works, provided that such acts are performed only to the extent required for testing³⁶.

One of the most important limit regulated by the Directive and the one that had been controversial at the level of the Member States till recently is the private copy.

Article 34 (1) Law 8/1996 on copyright and related rights define the private copy: the reproduction of a work, without the author's consent for personal use or for use by a normal family circle, provided that the work has already been disclosed to the public, while the reproduction does not contravene to the normal use of the work or prejudice the author or the owner of the utilization rights.

In order to compensate the prejudice broth to the copyright and related rights holders, the Romanian legislator established a

³⁰ Roș, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 302.

A. Lucas, *Droit d'auteur et numérique*, (Paris : Litec, 1998), 170-172.

³¹ Art. 9 (2) Berne Convention and art. 5 parag. 5 Directive of copyright and related rights in the informational society.

³² See for more details on the conditions of the 3 steps test Roș, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 304-305.

³³ Roș, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 311-322.

³⁴ Art. 33 (3).

³⁵ Art. 35.

³⁶ Art. 37 (1).

levy system for the private copy remuneration³⁷: For the media on which sound or audio-visual recordings can be made or on which reproductions of the works graphically expressed can be made, as well as for apparatus dedicated for copying, in the situation provided for in paragraph (1), a compensatory remuneration established by negotiation, according to the provisions of this law, shall be paid.

The private copy exception doesn't apply to computer programs³⁸, for which is permitted only a copy for archive or safety, in the manner in which this is necessary for using the computer program³⁹.

On the one hand, the Directive generated a series of documents and consultations very important in the information society economy, like:

1. The Green Paper on copyright in the knowledge economy (16.07.2008)⁴⁰. With this Green Paper, the Commission plans to have a structured debate on the long-term future of copyright policy in the knowledge intensive areas. In particular, the Green Paper is an attempt to structure the copyright debate as it relates to scientific publishing, the digital preservation of Europe's cultural heritage, orphan works, consumer access to protected works and the special needs for the disabled to participate in the information society. The Green Paper points to future challenges in the fields of scientific and scholarly publishing, search engines and special derogations for libraries, researchers and disabled people. The Green paper focuses not only on the dissemination of knowledge for research, science and education but also on the current legal framework in the area of copyright and the possibilities it can currently offer to a variety

of users (social institutions, museums, search engines, disabled people, teaching establishments).

2. The public consultation on "Content Online" (October 2009) with the need to create a genuine Single Market for creative content on the internet, focused on three area of actions:

- Make sure creativity is rewarded so that creators, rightholders, and Europe's cultural diversity can thrive in the digital world;

- Give consumers' clearly-priced, legal means of accessing a wide range of content through digital networks anywhere, anytime;

- Promote a level playing field for new business models and innovative solutions for the distribution of creative content across the EU.

In the press released of the public consultations⁴¹, is noted that in Europe, the cultural and creative sector (which comprises published content such as books, newspapers and magazines, musical works and sound recordings, films, video on demand and video games) generates a turnover of more than € 650 billion annually and contributes to 2.6% of the EU's GDP, employing more than 3% of the EU work force. European policymakers therefore have the responsibility to protect copyright, especially in an evolving economic and technological environment.

As part of the ongoing discussions on the priorities for a European Digital Agenda, and adding to similar debates currently taking place at national level, the Commission now wishes to focus the debate on practical solutions for encouraging new business models, promoting industry

³⁷ Art. 34 (2).

³⁸ Art. 81.

³⁹ Art. 77.

⁴⁰ http://europa.eu/rapid/press-release_IP-08_1156_en.htm?locale=fr

⁴¹ *Idem*.

initiatives and innovative solutions, as well as on the possible need to harmonize, update or review the applicable rulebook of the EU's single market.

3. Communication on Copyright in the Knowledge Economy (19.10.2009) aiming to tackle the important cultural and legal challenges of mass-scale digitisation and dissemination of books, in particular of European library collections.

On the other hand, the private copy system and levies was one of the most controversial subject in the field of copyright and related rights. A mediation process took place at the level of EU in the period 02.04.2012-31.01.2013, date when the mediator António Vitorino presented its recommendations⁴².

The core elements of the recommendations refer to:

- The private copy remunerations between Member States have to be collected at the level of the State where the final consumer reside (this principle results from the European Court of Justice case C-462/09 - *Stichtung de Thuiskopie vs. Opus Supplies Deutschland GmbH*)⁴³.

- The general possibility to establish remunerations for devices and equipment depends on the place where the product is capable to make copies, this is way the scope is that the product to be remunerated only one time in the European Union.

- Non-application of private copying levies to professional users.

- Shift the liability to pay levies from the manufacturer's or importer's level to the retailer's level while at the same time simplifying the levy tariff system;

- Oblige manufacturers and importers to

inform collecting societies about their transactions concerning goods subject to a levy.

- Place more emphasis on operator levies compared to hardware-based levies in the field of reprography.

- The levies should be visible for the final consumer.

- Ensure more coherence with regard to the process of setting levies by defining 'harm' uniformly as the value consumers attach to additional copies in question (lost profit).

- Ensure more coherence with regard to the process of setting levies by providing a procedural framework that would reduce complexity, guarantee objectiveness and ensure the observance of strict time-limits, for example:

- In the case of a new product being introduced on the market, the decision as to the applicability of levies should be taken within 1 month following its introduction. The provisional level of tariffs applicable should be determined not later than within 3 months following its introduction.

- The ultimate level of the applicable levy should, to the extent possible, not be superior to the one imposed temporarily. If nevertheless this were the case, the resulting difference should be payable gradually and could be split into several instalments.

- The final tariff applicable to a given product should be agreed or set within 6 months period from its introduction on the market.

In the view of the Recommendations and in light of the Directive of copyright and related rights in the informational society, it is necessary that the Romanian legislation to be

⁴² Ana-Maria Marinescu, "Analiza Recomandărilor lui Antonio Vitorino rezultate din medierea privind copia privată și remunerațiile în reprografie", *Revista Română de Dreptul Proprietății Intelectuale* nr. 3 (2013): 46-49.

⁴³ See for details on the case Ana-Maria Marinescu, "Gestiunea colectivă a dreptului de autor și a drepturilor conexe. Jurisprudență română și europeană în domeniu", *Revista Română de Dreptul Proprietății Intelectuale* nr. 4 (2014): 107-110.

harmonized at this level, by amending and completing the dispositions of Law no. 8/1996 regarding the private copy system.

In 2001, after barely surviving its perilous journey between the Commission, the European Parliament and the Council (and back again), the **Resale Right Directive** was finally adopted⁴⁴.

The resale right – as an inalienable right, which cannot be waived, even in advance - was provided, for the benefit of the author of an original work of art, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author⁴⁵. The right shall apply to all acts of resale involving as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art⁴⁶.

The European Court of Justice Decision in the case C-518/08 (VEGAP vs. ADAGP) stated that art. 6 (1) Resale Right Directive⁴⁷ must be interpreted in the sense that is not opposing to a national disposition which reserve the benefit of the resale right only to the legal inheritors of the author, excluding the testamentary legatees⁴⁸.

For stating this Decision, the Court took into account on the one hand, the fact that the Directive is intended to assure a certain level of remuneration of authors and this purpose is not compromised by the devolution of the resale right to some legal subjects by excluding others after the death of the artist. On the other hand, although the EU legislator had in mind that legatees to benefit of the resale right after the death of the author, didn't considered that is advisable to interfere in the field of the inheritance national laws, leaving to each state the competence to define the categories of legatees. Results that in the light of the Directive the Member States have the liberty to establish the categories of persons which can benefit of the resale right after the death of author.

According to article 21 of Law no. 8/1996, as stated also in the doctrine⁴⁹, the resale right applies only to an original work of graphic or plastic art or of a photographic work. Also, as stated in the doctrine⁵⁰, having in mind the frugifer nature of the resale right, it least all the life of the author and is the subject of being inherited for 70 years after the death of author, according to article 25 of Law no. 8/1996⁵¹.

⁴⁴ Derclaye, *Research Handbook on the Future of EU Copyright*, 16.

⁴⁵ Art. 1 (1).

⁴⁶ Art. 1 (2).

⁴⁷ Article 6 Persons entitled to receive royalties

1. The royalty provided for under Article 1 shall be payable to the author of the work and, subject to Article 8(2), after his death to those entitled under him/her;

2. Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1;

⁴⁸ Marinescu, "Gestiunea colectivă a dreptului de autor și a drepturilor conexe. Jurisprudență română și europeană în domeniu": 126-128.

⁴⁹ Roș, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 284.

⁵⁰ Roș, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 285-286.

⁵¹ Art. 25.—(1) The economic rights provided for in Articles 13 and 21 shall last for the author's lifetime, and after his death shall be transferred by inheritance, according to civil legislation, for a period of 70 years, regardless of the date on which the work was legally disclosed to the public. If there are no heirs, the exercise of these rights shall devolve upon the collective administration organization mandated by the author during his lifetime or, failing a mandate, to the collective administration organization with the largest membership in the area of creation concerned.

(2) The person who, after the copyright protection has expired, legally discloses for the first time a previously unpublished work to the public shall enjoy protection equivalent to that of the author's economic rights. The duration of the protection of those rights shall be 25 years, starting at the time of the first legal disclosure to the public.

The **Directive on the enforcement of intellectual property rights** such as copyright and related rights, trademarks, designs or patents was adopted in April 2004.

The Directive requires all Member States to apply effective, dissuasive and proportionate remedies and penalties against those engaged in counterfeiting and piracy and so creates a level playing field for right holders in the EU. It means that all Member States will have a similar set of measures, procedures and remedies available for rightholders to defend their intellectual property rights (be they copyright or related rights, trademarks, patents, designs, etc.) if they are infringing. The similar set of measures refers to: measures for preserving evidence⁵², right of information⁵³, provisional and precautionary measures⁵⁴, corrective measures⁵⁵, injunctions⁵⁶, alternative measures⁵⁷, damages⁵⁸, legal costs⁵⁹ and publication of judicial decisions⁶⁰.

Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights extended the term of protection for performers and sound recordings to 70 years. In this way the Directive narrows the gap between the copyright term of protection for authors (currently life plus 70 years after the authors' death) and the term of protection for performers (currently 50 years after the performance). Consequential the performers

will receive remunerations over a longer period of time.

The Directive also strengthens the position of performers with a number of accompanying measures⁶¹:

- A 20% fund for session musicians, paid by the record companies. This remuneration ensures that performers who are forced to sell their rights against a one-off flat fee obtain additional payments during the extended term. The fund would apply to all recordings which benefit from the term extension.

- A 'use it or lose it' clause, which means the record company will have to cede control over its copyright to performers if it does not market the sound recording containing the performance. If a record company does not market a recording despite the performers' request, the performers will get their rights back and can market the recording themselves.

- A 'clean slate' provision, which means that producers are not entitled to make any deductions from the contractual royalties due to featured performers during the extended term.

According to art. 2 of the Directive Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 November 2013.

In Romania, the Directive was transposed through Law no. 53/2015 for the modification and completion of Law no. 8/1996. The Law no. 53/2015 was adopted

⁵² Art. 7.

⁵³ Art. 8.

⁵⁴ Art. 9.

⁵⁵ Art. 10.

⁵⁶ Art. 11.

⁵⁷ Art. 12.

⁵⁸ Art. 13.

⁵⁹ Art. 14.

⁶⁰ Art. 15.

⁶¹ http://ec.europa.eu/internal_market/copyright/term-protection/index_en.htm

after the term prescribed for the implementation of the Directive, Romania being for a short time in the pre-infringement procedure.

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works sets out common rules on the digitisation and online display of so-called orphan works. Orphan works are works like books, newspaper and magazine articles and films that are still protected by copyright but whose authors or other rightholders are not known or cannot be located or contacted to obtain copyright permissions⁶². Orphan works are part of the collections held by European libraries that might remain untouched without common rules to make their digitisation and online display legally possible.

For the purposes of establishing whether a work or phonogram is an orphan work, the libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations shall ensure that a diligent search⁶³ is carried out in good faith in respect of each work or other protected subject-matter, by consulting the appropriate sources for the category of works and other protected subject-matter in question. The diligent search shall be carried out prior to the use of the work or phonogram.

The Directive establish also the mutual recognition of orphan work status⁶⁴, in this way a work or phonogram which is considered an orphan work in a Member State shall be considered an orphan work in all Member States. By consequence, Member States shall ensure that a rightholder in a work or phonogram

considered to be an orphan work has, at any time, the possibility of putting an end to the orphan work status in so far as his rights are concerned⁶⁵.

The permitted uses of orphan works are set out in article 6 of the Directive, for this Member States shall provide for an exception or limitation to the right of reproduction and the right of making available to the public provided for respectively in Articles 2 and 3 of Directive 2001/29/EC to ensure that the libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations are permitted to use orphan works contained in their collections in the following ways:

(a) by making the orphan work available to the public, within the meaning of Article 3 of Directive 2001/29/EC;

(b) by acts of reproduction, within the meaning of Article 2 of Directive 2001/29/EC, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration the libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations shall use an orphan work only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection. The organisations may generate revenues in the course of such uses, for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public.

Member States shall bring into force the laws, regulations and administrative

⁶² Art. 2.

⁶³ Art. 3.

⁶⁴ Art. 4.

⁶⁵ Art. 5.

provisions necessary to comply with this Directive by 29 October 2014. By present, in Romania the collective management organisations submitted to the Romanian Copyright Office (ORDA) proposals for transposing the Directive, but the Directive wasn't implemented yet.

The last of the Directives adopted by the European Union is the **Directive on collective management of copyright and related rights**.

Chronologically the predecessors of the Directive were the Recommendation 2005/737/EC regarding the trans-border management of copyright and related rights for the on-line music services, adopted by the European Commission at 18.10.2005, the public hearings on governance of collective management in the European Union (Brussels, 23.04.2010) and the proposal of the Directive (11.07.2012)⁶⁶.

The Directive 2014/26/EU on collective rights management and multi-territorial licensing of rights in musical works for online uses aims at ensuring that rights holders have a say in the management of their rights and envisages a better functioning of the collective management organizations in the EU. The Commission will work closely with the Member States in order to achieve a correct transposition of the provisions of the Directive into national law by the transposition date of 10 April 2016. *De lege ferenda*, the transposition of the Directive 2014/26/EU on collective rights management and multi-territorial

licensing of rights in musical works for online uses into Romanian Law on copyright and related rights requires a minimum set of provisions taking into consideration the fact that Romania implemented already the principles of the Recommendation 2005/737/EC⁶⁷.

The main dispositions of the Directive refer to:

- Definitions⁶⁸ – more than 14 definitions are set by the Directive, some of them can be implemented also into the Law no. 8/1996, for example the definition of user;

- General principles⁶⁹ like the fact that collective management organizations act in the best interests of the rightholders whose rights they represent and that they do not impose on them any obligations which are not objectively necessary for the protection of their rights and interests or for the effective management of their rights.

- Membership rules of collective management organisations⁷⁰ including the electronic ways to communicate with the members;

- Rights of rightholders who are not members of the collective management organisation⁷¹, which in my opinion had to be set down also in the Statue of the collective management organisations;

- General assembly of members of the collective management organisation⁷², including the possibility of the members to vote through a representative or for voting by electronically means;

⁶⁶ Ana-Maria Marinescu, Gheorghe Romițan, Alina Havza, "Analiza Propunerii de Directivă privind gestiunea colectivă", *Revista Română de Dreptul Proprietății Intelectuale* nr. 3 (2012): 238.

⁶⁷ Ana-Maria Marinescu, "Analiza Directivei 2014/26/UE a Parlamentului European și a Consiliului privind gestiunea colectivă a drepturilor de autor și a drepturilor conexe", *Revista Română de Dreptul Proprietății Intelectuale* nr. 3 (2014): 112-121.

⁶⁸ Art. 3.

⁶⁹ Art. 4.

⁷⁰ Art. 6.

⁷¹ Art. 7.

⁷² Art. 8.

- Supervisory function⁷³ which, in my opinion, is not set very clearly, because interfere with the functions of the Censors Commission establish by the Romanian laws. If this function will be done by external auditors, it will be very expensive for some of the collective management organisations in Romania;

- Collection and use of rights revenue⁷⁴, deductions⁷⁵ and distribution of amounts due to rightholders⁷⁶. In my opinion, the weak spot of the Directive is the distribution of amounts due to rightholders. The provisions regarding this point of the Directive were better set in the proposal of the Directive than the Directive itself.

- Management of rights on behalf of other collective management organisations⁷⁷;

- Relations with users: Licensing⁷⁸ and Users' obligations⁷⁹;

- Transparency and reporting divided in 5 parts⁸⁰:

a) Information provided to rightholders on the management of their rights;

b) Information provided to other collective management organisations on the management of rights under representation agreements;

c) Information provided to rightholders, other collective management organisations and users on request;

d) Disclosure of information to the public;

e) Annual transparency report.

Most of the transparency measures mentioned before are already set down in

Law no. 8/1996⁸¹ and in some cases, for example the annual transparency report, it is provided by the Law no. 8/1996 in the form of the annual report. So, in my opinion, the transposition of these provisions have to very well compared in order not to excessive load the obligations of the collective management organisations.

- Enforcement measures divided in 3 parts:

a) Complaints procedures⁸² set by the collective management organisations for dealing with complaints, particularly in relation to authorisation to manage rights and termination or withdrawal of rights, membership terms, and the collection of amounts due to rightholders, deductions and distributions.

b) Alternative dispute resolution procedures⁸³ between collective management organisations, members of collective management organisations, rightholders or users regarding the provisions of national law. In my opinion, this disposition address to a very wide range of subjects, and *de lege ferenda* could be implemented only as regards, on the one hand, collective management organisations and, on the other hand, collective management organisations and users.

c) Dispute resolution⁸⁴.

In the present, in Romania, we are in the stage of the First Compliance Table. For this, the collective management organisations communicated to the

⁷³ Art. 10.

⁷⁴ Art. 11.

⁷⁵ Art. 12.

⁷⁶ Art. 13.

⁷⁷ Art. 14-15.

⁷⁸ Art. 16.

⁷⁹ Art. 17.

⁸⁰ Art. 18-22.

⁸¹ Art. 134¹ – 135.

⁸² Art. 33.

⁸³ Art. 34.

⁸⁴ Art. 35.

Romanian Copyright Office their proposals of implementing the Directive.

3. Conclusions

The European Directives adopted till 2004 refer to a wide range of subjects according to the needs of economic and technical evolution of the society. In my opinion, the most ambitious of them is the Directive of copyright and related rights in the informational society. Also, as I mentioned previously, it was the Directive that generate most of the controversial.

After 2004, we can observe a period extremely relaxed for the European Union for adopting new Directives, therefor were adopted only Directives that repealed and replaced older Directives.

After 2011, we can observe a new wave of EU Directives one more important than the other, culminating with the adoption of the Directive on the collective management of copyright and related rights, which in my opinion is the first supra-national act on the management of copyright and related rights, because till it adaptation some of the Directives were referring to the collective management of rights⁸⁵.

The new generation of Directives (term of protection, orphan works and collective management), demonstrate again the interest of EU on finding legal solutions to problems that we can find in practice, but also a way to preserve a field that is bringing so much money to the EU and international economy. If we think that the phonograms of Beatles or Elvis

were approaching the term of 50 years of protection, we will understand we it was a need to extend the term of protection for performers and sound recordings to 70 years. If we think that UE are functioning more than 250 collective management societies, that are managing annually revenues for more than 6 milliards EURO, and the remunerations resulted from music using represent approximately 80% from the revenues collected by the collective management societies⁸⁶, we will understand we it was a need to adopt a Directive on collective management of copyright and related rights.

Analyzing the Directive on collective management of copyright and related rights, I can affirm that its impact on the collective management activity for sure cannot be measured now: maybe it will ultra-regulate the activity of the collective management societies, or maybe it will modernize the Law no. 8/1996 on copyright and related rights which is already exceeded by the practical situations. It will take years to quantify the impact of the Directive, at least as regards its benefits, but is sure that the way in which the collective management activity is done is not neutral⁸⁷ for the EU and that the role of the collective management is growing in the universe of the digital era⁸⁸.

In Romania the level of harmonization is pretty high, except the fact that the Directive on orphan works wasn't implemented till now and it will be implemented after the term prescribed for transposition. If the Directive on the term

⁸⁵ Roş, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 490-492.

⁸⁶ Marinescu, Romițan, Havza, "Analiza Propunerii de Directivă privind gestiunea colectivă", 238.

⁸⁷ André Lucas, Henri-Jacques Lucas, *Traite de la propriété littéraire et artistique*, 3 édition, (Paris : Lexis Nexis, 2006), 559.

⁸⁸ Mihaly Ficsor, *Gestiunea colectivă a drepturilor de autor și a drepturilor conexe*, (București: Universul Juridic, 2010), 165.

of protection and the Directive on the orphan works, were transposed in the national legislation after the term stipulated in the Directives, hopefully this will not happen and the scenario will not

repeat in the case of the Directive on the collective management of rights. For this, of course, there is a need also for some political will.

References

- Derclaye Estelle, Research Handbook on the Future of EU Copyright, UK: Edward Elgar, 2009.
- Ficsor Mihaly, Gestiunea colectivă a drepturilor de autor și a drepturilor conexe, București: Universul Juridic, 2010.
- Filipescu Ion P., Fuerea Augustin, Drept instituțional comunitar european, ediția a V-a , București: Actami, 2000.
- Lucas A., Droit d'auteur et numérique, (Paris : Litec, 1998).
- Lucas André, Lucas Henri-Jacques, Traite de la propriété littéraire et artistique, 3 édition, Paris: Lexis Nexis, 2006.
- Marinescu Ana-Maria, "Analiza Recomandărilor lui Antonio Vitorino rezultate din medierea privind copia privată și remunerațiile în reprografie", Revista Română de Dreptul Proprietății Intelectuale nr. 3/2013.
- Marinescu Ana-Maria, "Gestiunea colectivă a dreptului de autor și a drepturilor conexe. Jurisprudență română și europeană în domeniu", Revista Română de Dreptul Proprietății Intelectuale nr. 4/2014.
- Marinescu Ana-Maria, Romițan Gheorghe, Havza Alina, "Analiza Propunerii de Directivă privind gestiunea colectivă", Revista Română de Dreptul Proprietății Intelectuale nr. 3/2012.
- Marinescu Ana-Maria, "Analiza Directivei 2014/26/UE a Parlamentului European și a Consiliului privind gestiunea colectivă a drepturilor de autor și a drepturilor conexe", Revista Română de Dreptul Proprietății Intelectuale nr. 3/2014.
- Romițan Ciprian-Raul, Buta Paul-George, Drept român și comunitar al proprietății intelectuale: Dreptul de autor și drepturile conexe, București: Ed. ASDPI, 2006.
- Romițan Ciprian Raul, Savu Mariana Liliana, Drepturile artiștilor interpreți sau executanți, București: Universul Juridic, 2008.
- Roș Viorel, Bogdan Dragoș, Spineanu-Matei Octavia, Dreptul de autor și drepturile conexe - Tratat, București: All Beck, 2005.
- <http://www.orda.ro/default.aspx?pagina=212>
- http://ec.europa.eu/internal_market/copyright/prot-comp-progs/index_en.htm
- http://ec.europa.eu/internal_market/copyright/acquis/index_en.htm
- http://ec.europa.eu/internal_market/copyright/prot-databases/index_en.htm
- http://ec.europa.eu/internal_market/copyright/copyright-infso/index_en.htm
- http://europa.eu/rapid/press-release_IP-01-528_en.htm?locale=en
- http://ec.europa.eu/internal_market/copyright/docs/copyrightinfso/citizens_summary16102009_en.pdf
- http://europa.eu/rapid/press-release_IP-08-1156_en.htm?locale=fr

TAXATION OF PERFORMERS' RIGHTS IN ROMANIA

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Abstract

*In accordance with the Law no. 8/1996 („the Law”), the performers are required to exercise their rights through **collective management** for a range of economic rights provided for in article 123¹ of the Law. A number of non-profit associations of various intellectual property right holders were established in this sense.*

*Among them, CREDIDAM is the **Performers’ Association**, apart from that of authors (UCMR-ADA) or of that of phonogram producers (UPFR). Through a series of ORDA’s Decisions, these Associations have each of them received a certain role in the collection of the rights which must be collectively managed.*

CREDIDAM activity is strictly regulated by Law; the duties and activities that it can carry on are performed under the provisions of the special law, the Law 8/1996 on copyright and related rights, and under their own Articles of Association. As a trustee, CREDIDAM activity consists in collecting the remuneration due to performers by the companies that use their artistic performances, and distribution of the appropriate remuneration to the artists, depending on the actual use of the Repertoire based on which they empowered CREDIDAM.”

Keywords: *Performers’ Association, intellectual property right, collecting the remuneration, artistic performances, distribution of the appropriate remuneration to the artists.*

1. Introduction

The rights related to copyright or “neighboring rights” as they were referred to in the French doctrine and jurisprudence, were regulated for the first time by the Romanian law by Law no. 8/1996 on

copyright and related rights¹. Romanian Legislator was inspired by the provisions of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, signed in Rome on October

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

26th, 1961² and the Convention for the Protection of Phonogram Producers against Unauthorized Copy of their Phonograms, signed in Geneva on October 29th, 1971³.

The rights related to copyright are intellectual property rights, other than copyrights, which are enjoyed by the performers, for their own performances, the producers of audio recordings and the producers of audiovisual recordings, for their own recordings, and the broadcasting and television organizations, for their own shows and program services.

The collective management of copyright and related rights emerged when the first laws on copyright and related rights began for the first time to be adopted, a practice that has developed over the centuries with the evolution of scientific progress. Thus, we may say that copyright has been collectively managed since the late 18th Century.

The first Performers' Associations were established in France. At first, the roles of professional associations – that of fighting, inter alia, for the full recognition and consideration of copyrights – were combined with the elements of the collective management of rights.

Establishment of the first organization of this kind is strongly related to the name of Beaumarchais. He was the one who led the legal „battles” against the theatres which had certain legal reservations in respect of the recognition and consideration for moral and economic rights of authors.

In Romania, the collective management of related rights was regulated for the first time by Law no. 8/1996 which, by the amendments brought to it by Law no.

285/2004 in June 2004, by Government's Emergency Ordinance no.123/2005 in September 2005, and by Law no. 329/2006 in 2006, has undergone significant amendments and supplements.

Following the adoption of this Regulation, many organizations were created in Romania for the management of copyright and related rights, currently operating a number of 17 Collective Management Organizations.

2. Content

A) On the Romanian territory, CREDIDAM is the most representative Collective Management Association for Performers' Rights.

CREDIDAM represents both performers from Romania and from abroad, the latter having the possibility to receive their due remuneration either by direct CREDIDAM membership, or by means of a foreign collective management association that has a Management Bilateral Agreement signed with CREDIDAM for mutual representation. Thus, CREDIDAM has both the right and obligation to collect the related rights due to performers from a series of legal entities, which are bound to pay such remunerations, for a number of over 12000 performers – members - and of nearly 1000000 foreign performers represented under the 33 international bilateral agreements. Such activity involves, on the one hand, maintaining a permanent communication with performers and with representatives of the Authorities regulating the activity of Collective Management Associations and, on the other hand, the

² Romania joined the Rome Convention on the Protection of Performers, Phonogram Producers and Broadcasting Organizations by Law no. 76 of April 8th, 1998 as published in the „Official Gazette of Romania”, Part I, no. 148 of April 14th, 1998.

³ Romania joined the Geneva Convention on the Protection of Phonogram Producers against Unauthorized Copying of Phonograms by Law no. 78 of April 8th, 1998, as published in the „Official Gazette of Romania”, Part I, no. 156 of April 17th, 1998.

development and organization of collecting and distribution capacity of the amounts owed by various debtors.

In accordance with the legal provisions, CREDIDAM undertakes the obligation of collecting and distributing the remunerations under the management mandate as granted by the right holders. The distribution of collected amounts is performed subject to the law, to the Articles of Association and to the Distribution Rules, as approved by the General Assembly. Amounts from the remunerations collected by CREDIDAM are directly distributed to the holders of rights, the performers, depending on the actual use of their own performances, after deducting a management quota (fee) in order to cover the operating expenses.

The management quota (fee) for the members of this Collective Management Association - CREDIDAM – complies with the maximum percentage as provided by Law no. 8/1996, with subsequent amendments and supplements. For the non-members, the management quota (fee) is given by the actual expenses borne for the management of rights (both collection and distribution), but it does not exceed 25%.

The remaining amounts are taxed according to the provisions of the law on taxation. Distribution of remunerations to the beneficiaries of rights is carried out every six months.

If bilateral agreements concluded with the partner Management Associations from abroad provide otherwise, the distribution to foreign beneficiaries shall be made according to the agreement.

Because of the great number of debtors from which CREDIDAM is required to collect the amounts due to performers, the association is often in a position to initiate Court actions in order to recover due

amounts. Consequently to such actions, the amounts to be recovered arrive at a distance of three or four years from the date that they should have been paid by the debtors. The large number of such actions (there are over 568 active cases on trial before the Courts of Justice) leads to a time-lag between the moment the amounts would be due and the one when the amounts can be effectively recovered from the debtors and distributed to the performers. The number of legal actions also involves an additional effort in coordinating the work of attorneys representing CREDIDAM's interests in disputes with users. The communication of legal solutions as well as the supervision of developing a unitary jurisprudence is essential for CREDIDAM activity.

As artistic performances of some performers, members of CREDIDAM, are also broadcasted abroad, CREDIDAM proceeded to signing the 33 bilateral agreements as well as to "uploading" the repertoire in international joined databases. (IPDA⁴ and VRDB⁵)

Upon his/her enrollment as a member in the Association, each performer pays a fee of RON 10. Subsequently, the actual collection activity of the amounts owed by the debtors that use the repertoire managed by CREDIDAM is conducted by withholding a management quota/fee of the money due to artists, governed by a special Law No. 8/1996 on Copyright and Related Rights and which may not exceed the maximum of 15%.

According to the Law on Copyright and Related Rights, the management quota/fee which CREDIDAM enjoyed was up to 15% of the collected and distributed amounts, amount which has to be used for both the collection activity and the distribution one of the collected remunerations. By way of example, within

⁴ International Performers Database Association

⁵ Virtual (Musical and Audiovisual) Recordings Database

the collection activity CREDIDAM uses the management fee for the issuance of the approximately 10500 invoices/year, for notifying the users, paying utilities (rent, phone bills, internet connection subscription, subscription for „internet boxes" allocated for use to each member by the organization, based on USERNAME and PASSWORD, salaries, postage, stamp duties, expert fees, attorney fees, arbitration fees – a single arbitration carried out in order to develop certain methodologies means costs of approximately RON 50000, and in 2012 we had four arbitrations which were subsequently cancelled by the Courts or their solutions were modified), as well as for expenses caused by the distribution of collected remunerations.

The authorization granted by artists is a special delegation both from the point of view of its granting method (under Law no. 8/1996 on Copyright and Related Rights) and from the point of view of costs, because the Principal does not transfer money into the account of the organization. In order to receive the management fee, CREDIDAM is the one that has to endeavor to collect and distribute the amounts of money in order to withhold the management fee in order to be able to run its activity. Any economic blockage affects the activity of this collective management organization. A major issue is the one regarding VAT. Although the collective management associations are non-profit organizations without carrying out economic activities, they are subject to VAT payment. If the organization has issued an invoice in order to collect remuneration, and the user refuses to pay it until the due date, CREDIDAM is bound to pay the relating VAT to the State Budget by the 25th day of the following month, which, because of the fact that the amount was not collected, will be paid only from the management fee. The CREDIDAM Articles of Association does not allow this

money to be covered from the amounts payable/due to artists.

From this brief description of the complex activity carried out by the Collective Management Association CREDIDAM, we have to ensure ourselves that the provisions of the Fiscal Code are legally applied to the actual facts:

- The activity carried out by CREDIDAM, a Collective Management Association, is governed by Law 8/1996 on Copyright and Related Rights,

- The revenues gained by CREDIDAM are revenues from the intellectual property due by the users to the holders of rights related to copyright, more precisely to the performers,

- Community Principles on the generating event and on the chargeability of VAT establish that revenues due for the period before becoming a VAT payer, are not subject to VAT.

To the extent that such an association deems that one of its rights is affected by the tax authorities as far as the interpretation and application of legal provisions in tax matters are concerned, then it may address to the Court of Justice.

According to art. 8 paragraph 1 of Law no. 554/2004, „A person who/ which incurred damages regarding one of his/her/its legal rights or regarding a legitimate interest because of an unilateral administrative act, and received an unsatisfactory response to his/her/its prior complaint or has received no response within the period of time as provided by art. 2, paragraph 1, letter h, may notify the competent Administrative Court in order to request for the cancellation of all or part of the act, the repair of caused damage and, possibly, the repairs for moral prejudice. The person who/which considers that he/she/it incurred damages regarding one of his/her/its legitimate rights or interests because of failure to settle it within due time

or by an unjustified refusal to settle an application/request, as well as by a refusal to perform a certain administrative operation required for the exercise or protection of such legitimate right or interest, may also notify the Administrative Court.”

Likewise, according to art. 11, paragraph 1, letter c of Law 554/2004,

„The requests for cancellation of an individual administrative act, of an administrative contract, for the recognition of a claimed right and for the repair of the caused prejudice, may be submitted within 6 months since: (...) c) the expiry of the deadline for solving the prior complaint (...)”

According to art. 2, paragraph 2 of Law no. 554/2004, „the unjustified refusal to solve the request regarding a legitimate right or interest or not responding the applicant within a due legal term, are assimilated to the unilateral administrative acts”.

Accordingly, under art. 8, paragraph 1, in conjunction with art. 11, paragraph 1, letter c and with art.2, paragraph 2 of Law 554/2004, the entity is entitled to submit a file to the Administrative Court by which, as a result of failing to settle the Tax Complaint within the legal term, requests for the cancellation of the assimilated harmful tax administrative acts.

The practices of the Supreme Court also comes to support the above, the High Court of Cassation and Justice ruling as a principle, by the Decision 1224/2009 on the plea of inadmissibility of the action raised by the Tax Authorities for not solving the appealed Tax Complaint, that the latter is culpable for not solving such Tax Complaint within due legal term, for which reason the Supreme Court held as admissible the direct intimation of the Court, learning that „the refusal of the Defendant obviously constitutes the grounds for not solving the administrative complaint, which resulted in prejudicing the Plaintiff and to the right of the latter to notify the Court of this case of

unsolved prior complaint within the legal term”.

The Supreme Court considered the Constitutional Court’s Decision no. 409/2004, which established that the procedure of appealing against the tax administrative acts before the Tax Authorities, which is currently regulated by the provisions of art. 205 and seq. of the Fiscal Code, does not grant jurisdiction, having the nature of a prior complaint, as the one provided by art. 7 of the general Law no. 554/2004. In this case, by silencing the special law, the general rules in art. 11, paragraph 1, letter c) of law 554/2004, which completely value the right to notify the Court supposing that the prior complaint was not solved within the legal term, become incidental if the Tax Authority failed to solve the complaint within the legal term.

Basically, after the expiry of the legal term for solving the preliminary procedure (the tax complaint), within which the competent authorities, culpably, has not issued any solution, by granting the Administrative Courts the proper jurisdiction to settle the case for the cancellation of the tax administrative act and of the assimilated act, represented by the lack of response to the complaint, the bodies which had to solve the complaint are automatically discharged from solving the administrative procedure, they no longer having the right to issue any solution.

The 45 day term provided by art. 70, paragraph 2 of the Fiscal Code for solving a complaint, is an imperative deadline provided by law, not a simple recommendation, similar to the 30 day term required for the taxpayers, within which they can submit the tax complaint (as provided by art. 207 of the Fiscal Code) and which is an imperative deadline, provided under the penalty of forfeiture. Therefore, in case of exceeding the 45 day term for solving the administrative procedure, the competent

bodies are deprived of the right to issue a solution.

To construe otherwise the regulations of the fiscal procedural law would mean a serious violation of taxpayers' right of access to justice, by being forced to wait indefinitely (*sine die*) for the issuance of a solution by the tax authorities in the prior administrative procedure and could lead to serious abuses by tax authorities, which could deliver anytime a solution in the preliminary procedure, even after solving the dispute before the Litigation Courts, the issuing moment being practically at their discretion.

B) The Tax Administrative Act as *negotium*, subject of the cancellation action.

The presence of elements that lead to the cancellation of the tax administrative acts issued during tax inspections also bring the cancellation of the assimilated administrative act represented by the lack of an answer to the administrative complaint.

The legal report of taxation right emerges after the issuance by the competent Tax Authorities of the tax administrative act, a document by which taxpayer's duties are regulated. On this report, the creditor is the State, which is the rightful collector and it has the obligation to pursue for the accurate collection of the amount which is to be paid by the taxpayer – i.e. the debtor. The Tax *Negotium* includes several rights and obligations of the subjects in the Tax Report, which emerge in certain tax administrative acts, of instrumentum⁶. Such tax administrative operation, generically called

negotium, is so contained in a number of interdependent acts, that give substance to the tax decision and which lead together to its effectiveness.

Unilateral acts may be seen as producing final legal effects only when they become irrevocable. Only from this point the rightful subject is aware of the entire content of the legal report generated by the Tax Administrative Authority, the right and obligations established by the latter and especially their grounds.

The opposite of this principle could lead to legal uncertainty which is impermissible particularly in the field of taxation law, where the consistency and predictability of the acts are core principles. As Professor Antonie IORGOVAN claims, related to prior complaints in the administrative law, this preliminary stage of the administrative complaint (appeal), where the will of the two fiscal subjects of the taxation report meet, „values exactly the principle of revocability of administrative acts”⁷.

In this respect it is also the art. 216 paragraph 3 of the Fiscal Code, which provides that, if the tax administrative act is cancelled, a new one shall be concluded „which will take in consideration the only the reasons of the decision”. Thus, the decision for solving the complaint appears as the last form of consent of the Administrative Authority, a binding and final form both for the taxpayers and for the Tax Administrative Authority.

⁶ The taxation law doctrine lists, among the rights and obligations of the taxation law subjects, the following: achievement of prior procedure acts; finding taxable earnings and assets or issuance of tax debt securities, amendment of the obligations included in the tax debt securities and payment of financial debts – budgetary. In this respect: R. BUFAN, B. CASTAGNEDE, A. SAFTA and M. MUTAȘCU: *Treaty of Taxation Law. General Part*, Volume I, Ed. Lumina Lex, 2005, pag. 302 – 303.

⁷ This principle also emerges from the jurisprudence of the European Community Court of Justice which held that the principle of revoking the administrative acts that create subjective rights involve, in particular: a person's right to be heard before the individual measure is taken, the person's right of access to their own file and the obligation of the Administration to motivate its decision. A. IORGOVAN, L. VISAN, A-S. CIOBANU, D-I. PASARE: *The Law of Administrative Offenses. Comments and Jurisprudence*. Universul Juridic 2008, pag. 169 – 173.

The role of complaint's settlement decision is to show the reasons, to confirm or to deny the acts previously issued by the tax authorities, together forming a whole, a single tax administrative negotium, which creates rights and obligations for taxpayers. In this respect it is also art. 213, paragraph 1 of the Fiscal Code which provides that: „In solving the complaint, the competent body shall check the grounds de facto and de jure which gave rise to the issuance of the tax administrative act.”

The decision for the settlement of the complaint completes the decision of the administrative authority by adding the instrumentum to the tax control instruments, by which the Tax Authority finally decides upon its obligations, the decision for solving the complaint no longer being administratively revocable. The finality is provided right in the end of the Decision for the Settlement of the Complaint, which generally provides that „this decision is final in the administrative complaint system”.

By developing the preliminary procedure of the administrative complaint, in general, and the tax complaint, in particular, procedure which is performed before the issuer of the act, a new phase in issuing the tax administrative act has been established. This phase, which gives the possibility to the issuing authority to revoke the administrative operation or to strengthen the tax negotium, leads to the emergence of a new instrumentum. All these instrumentums compose the challenged tax administrative act and the illegality grounds for any of the former entail the cancellation of the whole.

C) The collective management associations do not owe any income tax.

The collective management associations which rights emerge only from the

intellectual property rights do not pay income tax. From checking the records of the Ministry of Finance, we see clearly the factual basis of these claims for the collective management associations, of which the most important are: UPFR, UCMR-ADA, ADPFR, ARDAA, UNART, COPYRO, DACIN-SARA, PERGAM.

Both ORDA⁸ and the European Association of Performers (AEPO - ARTIS⁹) sent detailed information about the lack of any incidences of economic activities for the purposes of tax on revenues (corporation tax) over the field of collective management associations.

However, the tax inspection bodies argue that for the management fees which are imperative in order to support the operational expenses, the collective management associations should pay an income tax. In my opinion, the reasoning of tax inspection bodies is based on misunderstanding the manner in which the copyright and related rights collective management system is organized both in Romania and in the EU Member States. Although the collective management associations are non-profit organizations that participate in the fulfillment of legal obligations of debtors and, although the operation and organization method of this activity is established by normative acts, the control bodies have thought that this is an economic activity.

Directives and treaties to which Romania is part of, define:

- „revenues/ incomes from intellectual property rights” mean revenues collected by a collective management association on behalf of right holders, whether they come from an exclusive right, from a remuneration right or from a right to compensation. By way of example here we have the compensatory remuneration for private copying;

⁸ Romanian Office for Copyright, public control body/authority, which oversees and controls the collective management organizations.

⁹ International Structure of Performers' Collective Management Organizations.

- „management fee” means the amount charged by a collecting society (in Romania by a collective management association) in order to entirely cover the costs relating to the management services for copyright and related rights;

The Tax Inspection bodies think that the activity of collection of rights related to copyrights is an economic activity carried out by CREDIDAM with the purpose of gaining profits, subject to the laws governing the economic activity specific to NGOs as provided by art. 15, paragraph 3 of the Fiscal Code.

This point of view is inconsistent with Law no.8/1996 on copyright and with CREDIDAM Articles of Association, both leading to one conclusion only, that such management quota (fee) obtained as a result of the collecting activity should be included as in-cash or in-kind contributions of members or sympathizers as provided by art. 15, paragraph 2, letter b of the Fiscal Code.

C.1) Operation of CREDIDAM activity as a collective management organization

In accordance with art. 124 of the Law, „the copyright and related rights collective management organizations, as referred to as collective management bodies/organizations within the law text, are, for the purposes of this Law, legal entities established by freedom of association which main object of activity is to collect and distribute those rights which management is entrusted to them by the right-holders.” In order to exercise this rights’ collecting and distribution activity, the organizations should be based on Articles of Association providing for, according to art. 127 of the Law, inter alia:

(1) the Articles of Association of the collective management organization has to include provisions regarding:...

i) the methods for establishing the commission fee due by the right-holders to the collective management organization in

order to cover the operative required expenses;...

From these legal provisions it results that, precisely according to the law, CREDIDAM has the right to receive a commission fee in order to cover only its operating expenses.

Such commission fee is apart from the membership fee which is a small one, and it is paid upon registration of a new member.

The reason for the existence of such commission fee is the one of a contribution fee received from the members, through which they participate to the common expenses of the organization. Besides that, the Explanatory Dictionary of the Romanian Language defines the contribution fee as follows: “money/cash contribution to a common expense paid by the members of an organization”. This commission fee is determined by art. 18, paragraph 2 of the Articles of Association:

The amounts resulting from the remunerations collected by CREDIDAM are directly distributed to the right-holders in proportion to the real use of their own performances, deducting a management quota (the commission fee) for covering the operation expenses.

The management quota (the commission fee) for the members of the CREDIDAM collective management association is the maximum percentage provided by the Law no. 8/1996...

These provisions of the Articles of Association are therefore supplemented even by the legal provisions:

Art. 134 (2) The collective management shall be exercised according to the following rules: ...

b) the commission fee due by the right-holders who are members of a collective management organization for covering the operation expenses of the same, as provided by art. 127 paragraph (1) letter i), combined with the commission fee due to the collective

management organization which is a sole collector in accordance with the provisions of art. 133 paragraph (2) letter c) and paragraph (4), cannot exceed 15% of the annually collected amounts;

All these provisions should have led the Tax Inspection Bodies to the obvious conclusion that it is not an economic activity, but to the conclusion that it is only a contribution of the members to the CREDIDAM operation expenses.

C.2) CREDIDAM does not carry out an economic activity classified by gaining a profit

The Fiscal Code defines the activity as any activity performed by a person with the purpose to gain profit. The revenues are accounting elements defined by Order 3055/2009 as being an increment of the economic benefits registered during the accounting period, as inflows or increases in assets or reduction of debts, which are reflected in increases in equity, other than those resulting from contributions of the shareholders.

Consequently, the taxable activity, in terms of tax on returns, is the one pursuing for economic benefits that would result in an increase in equity.

The same concept also emerges from the economic activity in terms of VAT, which is characterized by the purpose of continuously gaining income (art. 127 paragraph 2 of Fiscal Code) Even if this definition is mainly used in relation to VAT, the thing which characterizes an economic activity in all fiscal areas contrary to any other simple activity is the continuity purpose of gaining income, i.e. the continuity in increasing the equity of the taxpayers.

These considerations are not applicable in respect of an amount that a collective management organization shall retain in order to cover its expenses. There can be no economic activity, for the continuity in obtaining benefits in order to increase equity

in relation to an amount for which retention is required by a legal provision, and the management quota (fee) which any collective management organization may withhold is covered by a special law which governs the operation of such legal entities.

CREDIDAM does not play the role of a company collecting debts/receivables, a company having as object of activity the purchase of receivables due and unpaid at a lower price in order to generate a profit by their recovering at the original price. The undersigned is an organization which, for the purposes of the law, performs a service to a certain category of taxpayers, thus approaching more to an organization performing a public service based on a special authorization granted by the artist.

The CJUE (Court of Justice of the European Union) stresses in the Case C-467/08, *Padawan*, that CJUE has established that, regarding the remuneration for private copying, this payment system: complies with the requirements of this "proper balance" to be provided that persons who have the equipments, devices, and digital reproduction supports and, on that basis, make this equipment, de jure or de facto, available to private users or provide the latter with a reproduction service, are debtors of the obligation to finance an equitable compensation, to the extent that they are able to pass on the real task of such funding on the private users (paragraph 50).

The Law 8/1996 requires a certain mechanism for collecting copyrights, which has a dual role:

- To facilitate the communication between lenders, performing artists and debtors, the persons who use their works, and
- To facilitate the collection of fees and taxes due by performing artists for these amounts – instead of checking over 12000 performing artists, the inspection bodies analyze a single entity.

Such an explanation was also retained by the Courts which concluded:

„Copyrights and related rights are not part of the category of trade deeds covered by art. 3 letter ‘c’ of the Commercial Code, which is limited to publishing companies, bookstores and art objects, when they are sold be persons other than the authors.

Criticism regarding the civil nature of this dispute as established by the Court is not well grounded. The Commercial Law provides that, even if carried out by a trader, deeds concluded with the author or the artist himself/herself by which the latter capitalizes his/her property rights derived from the artistic creation, are not classified as commercial deeds.

This is our case here, the Plaintiff is the agent of the holders of the related rights, and the activity carried out by the Defendant for the purpose of cable retransmission of phonograms does not entail the commercial nature of a legal report existing with the Plaintiff and which only limits to the collection of remunerations due to artists" Civil Judgment nr.809/R/2008 of Cluj Court of Appeal.¹⁰

Withholding a commission fee in order to cover CREDIDAM operation expenses does not represent an economic activity. It represents the contribution of the members required for the proper operation of the collecting and distribution of the collected amounts mechanism as established by law. Within this mechanism CREDIDAM acts as agent which existence is required by law.

This contribution is not an income generated by an economic activity but a method enforced by law to the members, in order to support the activity for which the association was established. Even if covered expenses would be less than the amounts resulting from the application of the

commission fee (which, in reality, it is hard to imagine), the remaining amounts were not subject to tax on profits, but represented amounts for future expenses.

In conclusion, the Tax Inspection Bodies misinterpreted the commission fee withheld by the collective management organization under the provisions of its own Articles of Association, as approved by ORDA, and of the Law no. 8/1996, as being the result of an economic activity, the same representing in fact a form of in-cash contribution of the members which is enforced by the Law no. 8/1996, and CREDIDAM cannot exclude it from its Articles of Association and on which it depends the carrying out of CREDIDAM activity as being the only source of income from which it covers all the expenses related to the operation of the association (see art. 134, paragraph 2, letter ‘b’) of the special law).

D) Tax on nonresidents’ revenues

The Tax Inspection Bodies appreciate that the tax rate on nonresidents’ revenues is of 16% instead of 10%, taking into consideration that such revenues also gained from intellectual property rights would benefit from a different rate in relation to the nationality of the recipient.

Both from the provisions of art. 118, paragraph 1 of the Fiscal Code and from the Double Taxation Conventions concluded with the States toward which the distributed amounts were sent by CREDIDAM, it results that tax cannot exceed 10% of the paid amounts. Because we have here amounts payable to beneficiaries of the European Union Member States, we will apply the most favorable taxation rate, i.e. the 10% one.

Moreover, the percentage of tax treatment differences between Romanian citizens and the European Union ones would

¹⁰Available at: <http://jurisprudencedaco.com/Casarea-acesteia-si-trimiterea-cauzei-spre-solutionare-Judecatori-ei-Cluj-N-iar-in-subsidiar-modificarea-sentintei-in-sensul-respingerii-actiunii-ca-neintemeiata.html>

be a violation of the principle of freedom to provide services and of freedom of people migration. Knowing that revenues from Romania are subject to 16% taxation rate and not to 10% taxation rate, for the simple fact that they are not residents in Romania, performers from Europe would cease to transfer broadcasting rights toward the Romanian area.

In case C-290/04, FKP Scorpio Konzertproduktionen GmbH, the European Union Court of Justice has determined that, in the matter of income tax due for artistic performances, the mere existence of withholding procedures to the source for nonresidents' revenues which is not applicable to residents, is a violation of the freedom to provide services under European Union treaties (paragraph 28-39).

If the mere existence of different procedural provisions implies the violation of Community principles, the existence of different tax percentages even more represents a breach of Community regulations.

In accordance with the provisions contained under the Title Withholding tax on taxable revenues obtained by nonresidents from Romania, art.116, paragraph (4) of Law 571/2003 on Fiscal Code, "Tax is calculated, respectively withheld at the moment when the revenue is paid and should be paid to the State Budget until the 25th day, inclusively, of the month following the month in which the revenue was paid.[...]"

E) Correct calculation and payment of due VAT.

In my opinion, as far as the collected VAT is concerned, it is important to correctly understand the timing of the chargeable event and chargeability of VAT. The Tax Inspection Bodies think that they depend on the issuance of an invoice and not from the actual performance of the service. As a starting point for understanding the method by which VAT is construed, one should take

into account that collection and distribution operations are carried out by the collective management organizations under a legal mandate granted by its members.

Any expenses related to the initiation and completion of a taxable operation is susceptible of being subject to VAT deduction. Thus, in case C-32/03, Skatteministeriet, CJUE (the European Union Court of Justice) has determined that even the services required in order to close a company which no longer carries out any business, are subject to VAT deduction (paragraph 23).

Based on the provisions of the Fiscal Code and on the VAT principles, the reasoning for VAT calculation and payment was the following:

- VAT is due at the moment of taxable debt chargeability.
- According to art. 134² of the Fiscal Code, chargeability of the tax is liable when its generating event occurs. Only by way of exception, the tax chargeability becomes liable upon the date of issue of the invoice, only if the invoice was issued before the date when its generating event occurs;
- According to article 134¹ of the Fiscal Code the generating event occurs either on the date of goods' delivery or on the date of services' performance.

The generating event is represented by the services enjoyed by debtors through using the rights related to copyright of CREDIDAM members. Such related rights are born, according to Law 8/1996, on the date of fulfilling the legal conditions depending on the method of use. They are due for each year, as the licenses for use are granted on annual basis.

Therefore, if the VAT generating event is reflected over a period of time during which CREDIDAM was not a VAT payer because its revenues did not exceed the limit as provided by law, such operations are not subject to VAT, regardless of the date on which the invoice is issued.

Such reasoning results:

- Either from the provisions of point 45 paragraph 2 of the final thesis of Methodological Norms according to which:

By exception to the provision of art. 155 paragraph (19) of the Fiscal Code, the invoice does not have to include a specification regarding the VAT registration code for the operations carried out before the taxable person, according to article 153 of the Fiscal Code, becomes subject to VAT liability.

- Or from the Letter no. 270105/15.02.2006 of the Ministry of Public Finance – General Department for Indirect Taxes' Legislation¹¹, which retains the same solution regarding the invoicing of amounts due by users before the date when the Undersigned became a VAT payer.

In conclusion, there is no reason to justify VAT collection for the operations carried out before the date of registration of the collective management organization as a VAT payer.

F) The social security contributions withheld at the source for revenues from intellectual property rights.

The withholdings at source for the remunerations distributed to the holders of related rights, i.e. the performers, are:

a. The Unemployment Fund individual contribution due by the persons who gain professional income (with the remark that starting with 01.07.2012 CREDIDAM has no longer the obligation to withhold this contribution);

b. The Unemployment Fund contribution for professional income;

c. Social Security individual contribution due by the persons who gain income from intellectual property rights;

d. Health Insurance individual contribution due by the persons who gain income from intellectual property rights.

The remunerations collected by CREDIDAM are not directly transferred into the property of right-holders. Distribution of such amounts is carried out, at 6 months legally predetermined periods of time depending on the criteria as set by the Distribution Rules and Law 8/1996. Since the time of collection and up to distribution, amounts collected by CREDIDAM are kept in special bank accounts and produce interests. These interests, which are entirely distributed to the artists together with the main amount of their due rights, were taxed by CREDIDAM as revenues from intellectual property rights or as revenues from interests.

This was also the opinion of the Ministry of Public Finance, National Agency of Tax Administration, General Department for Complaints Settlement, asserted in a Point of View dated October 31st, 2013, we quote: „in our opinion, the interests distributed to the members of the association neither can be classified as revenues from interests, as long as the holders of bank deposits are not the CREDIDAM members, but the association itself, nor as revenues from other sources, as long as they represent a civil fruit of the remunerations received on the basis of an invoice from all the categories of users provided by law.

We estimate that revenues from such interests are classified as revenues from intellectual property rights, because they are covered by the legal nature of the main amount which generated them.”

Tax Authorities' classification of interests as revenues from other sources instead of revenues from intellectual property rights, is not in compliance with the legal provisions.

Tax Authorities' reasoning is erroneous considering the following provisions:

- The Art. 52, paragraph 1 of the Fiscal

¹¹ Unpublished.

Code classifies the revenues from intellectual property rights as revenues from independent activities, i.e. the relationship of a part from the whole¹².

- The Art. 48, paragraph 2, letter b of the Fiscal Code provides the rules for determining the annual gross revenues from independent activities (self-employment). It is expressly emphasized that interests are part of the gross revenues gained from independent activities¹³. If they are incorporated into the category of revenues from independent activities, as a whole, and being their civil fruit; likewise they are part of the category of revenues from intellectual property rights, as their civil fruits.

- The Art. 52, paragraph 2 of the Fiscal Code sets that for such revenues from intellectual property rights, the percentage withheld at source shall be of 10%.

For reasons related to the proper management of revenues due to holders of related rights, the collective management organization CREDIDAM was prudent enough to also collect the interests related to the period of time prior to the distribution.

The Law no. 8/1996 does not allow to the collective management organizations to apply to the remuneration due to right-holders any accounting treatment specific to credit institutions to distinguish between actual remuneration and interests. Consequently, according to this accounting treatment, the revenues distributed and paid to the right-holders was treated in terms of taxation according to the income tax rules, thus we withheld at source the corresponding 10% taxation rate by way of advance tax, in accordance with the legal rules regarding

NGOs, as nonprofit organizations. Consequently, there is no additional payment liability to be borne by the collective management organizations as difference relating to the tax on interests, because in reality, the Law makes the revenues' beneficiary (i.e. the performer) responsible for such a liability, i.e. the 6% difference which is regulated by the Annual Statement no. 200.

It is obvious that the amounts owed by the debtors of copyright related rights are receivables of the CREDIDAM members, and the interests relating to them are also part of the amount of gross revenues relating to such rights. The interest represents, under these circumstances, a civil fruit of the revenues which are deposited in the bank account up to the moment of the effective distribution. The only role played by these interests is to maintain the value of the amounts by reporting them to the period of time during which they stay under the property of the collective management organization, i.e. for maximum 6 months.

Furthermore, according to articles 117 and 124 of the Fiscal Code, the taxpayers have the right to gain interests for the amounts which were paid to the State Budget but which were not due. The principles of legal certainty as well as the avoidance of enrichment based on unjust cause, lead to the conclusion that such interests should be calculated starting with the date on which the undue amounts have been paid.

¹² ART. 52 Withholding at source the tax representing prepayments for certain revenues from independent activities (1) For the following revenues, the taxpayers that are legal entities or other entities which have to manage accounting, are required to calculate, withhold and transfer the tax by withholding at source, representing prepayments from the paid revenues: a) revenues from intellectual property rights.

¹³ (2) Gross revenues include: a) collected amounts and the equivalent in RON of the in-kind revenues resulted from activity performance; b) **interest** revenues from trade receivables (claims) or from other receivables (claims) used in relation to an independent activity.

3. Conclusions

De lege ferenda

According to the Fiscal Code, non-profit organizations are exempt from the income tax (corporation tax) for certain types of income listed exhaustively, including fees and registration fees of members and contributions in-cash or in-kind from members and sympathizers. Compared to these legal provisions, it is necessary to clarify the tax treatment of the fee payable by the holders of copyrights and related rights to the collective management association for covering the expenses necessary for its operation, by changing the relevant provisions of the Tax Code.

Clarification regarding the exemption subjects. The fiscal code defines the non-profit organizations as any association, foundation or federation established in Romania, in accordance with the law in force, but only if the revenues and assets of the association, foundation or federation are used for an activity of general, community or non-patrimonial interest.

According to Government's Ordinance no. 26/2000 on associations and foundations, the common law regarding the non-profit organizations, associations and foundations are defined as non-profit legal entities, of which associates pursue to perform certain activities of general interest or in the interest of communities or, as appropriate, in their non-profit personal interest.

On the other hand, the collective management organizations are defined by Law no. 8/1996, on copyright and related rights, as legal entities established by freedom of association, which main object of activity is to collect and distribute those rights which management is entrusted to them by the right holders. According to art. 125, paragraph 1 of Law no. 8/1996, the collective management organizations operate as non-profit associations.

Therefore, although the legislator uses non-unitary vocabulary, susceptible of creating confusion, the collective management organizations are undoubtedly non-profit organizations, as their operation as associations, their object of activity and their non-profit purpose are all expressly regulated by the Law no. 8/1996.

Consequently, the collective management organizations are susceptible to benefit from the exemption from the revenues tax regulated by the Fiscal Code.

1. Clarification regarding the categories of exempt revenues

The Fiscal Code exempts the non-profit organizations from the payment of revenues tax for the contributions and registration fees of the members and for the in-cash or in-kind contributions of members and sympathizers. To a certain extent, also the revenues from economic activities carried out by non-profit organizations are exempt.

In terms of the revenues of non-profit organizations, the Government's Ordinance no. 26/2000 also expressly distinguishes in art. 46, between the contributions of members and the revenues from direct economic activities.

Therefore, it is a clear distinction between the revenues of non-profit organizations from economic activities and other categories of revenues. As far as the collective management organizations are concerned, the art. 127 of Law no. 8/1996 regulates the charging of a commission fee for covering the expenses required for the operation, which fee shall be withheld from the holder of copyrights or related rights from the amounts due to each of them, after calculating the individual distribution. Therefore, the commission fee, as a category of revenues, is distinctly and expressly regulated by the legislator, apart from the revenues from economic activities and having a precise destination, to cover the operation required expenses.

From this point of view, the management fee paid by the holders of copyrights is a real contribution required for the effective operation of the specific activity of collection and distribution of copyrights or related rights by the collective management organizations.

Since the reasoning of this fee is the same as the one underlying the regulation of contributions or donation as revenues of non-profit organizations and since this fee does not correspond to an economic activity, but for financing the specific activity to the interest of the performers, the tax treatment of such fee should be the same.

Since the vocabulary used by the legislator for defining the non-profit organi-

zations and their specific categories of revenues is non-unitary, as mentioned above, the express listing of management contributions within the category of incomes for which the non-profit organizations are exempt from the payment of revenues tax is compulsory.

2. Proposal for the amendment of the Fiscal Code

Therefore, the art. 15, paragraph 2, letter f of the Fiscal Code shall appear as follows:

„b) in-cash or in-kind contributions of the members and sympathizers, as well as the commission fees owed by the right-holders to the collective management organizations, according to the special law”.

References

- Law no. 8/1996 published in the „Official Gazette of Romania”, Part I, no. 60 dated March 26th, 1996, as amended and supplemented by Law no. 285/2004, as published in the „Official Gazette of Romania” , Part I, no. 587 dated June 30th, 2004, as amended and supplemented by Government’s Emergency Ordinance no. 123/2005, as published in the „Official Gazette of Romania”, Part I, no. 843 dated September 19th, 2005, as amended and supplemented by Law no. 329/2006 regarding the approval of Government’s Emergency Ordinance no. 123/2005 for the amendment and supplementation of Law no. 8/1996 regarding copyright and neighboring rights, as published in the „Official Gazette of Romania”, Part I ,no. 657 dated July 31st, 2006. (Moreover all specifications regarding Law no. 8/1996 refer to the form amended and supplemented by Law no.329/2006).
- Mihaly Ficsor, Collective management of copyright and related rights, WIPO, 2002.
- 3.Tarja Koskinen-Olsson, the Collective Management of Reproduction. This study was developed under the cooperation agreement between WIPO and IFFRO in 2003.
- WIPO Treaty on performances, executions and phonograms, ratified by Romania by Law no. 206/2000.
- See Civil Resolution no.57A/2011 of BCA Civil Section IX and for IP causes, unpublished.
- Romania acceded to the Rome Convention regarding the protection of performers, producers of phonograms and broadcasting organizations by Law no. 76 dated April 8th, 1998 published in the „Official Gazette of Romania”, Part I, no. 148 dated April 14th, 1998.
- Romania acceded to the Geneva Convention for the protection of producers of phonograms against unauthorized duplication of their phonograms by Law no. 78

- dated April 8th, 1998, published in the „Official Gazette of Romania”, Part I, no. 156 dated April 17th, 1998.
- „À l'exclusion de l'artiste de complément”. Code de la propriété intellectuelle, Édition 2002, Litec, Paris.
 - Romanian Academy, „Iorgu Iordan” Institute of Linguistics, The Explanatory Dictionary of Romanian Language, DEX, Universul Enciclopedic Printing House, Bucharest.
 - Paula Schepens, Guide sur la gestion collective des droits d'auteur (La Societe de Gestion au Service de l'Auteur et de l'Usager), UNESCO, 2000).
 - http://europa.eu.int/comm/internal_market/copyright/management/management_fr.htm
 - Rodica Pârvu, Ciprian Raul Romițan, Copyright and Related Rights, All Beck Publishing House, Bucharest, 2005.
 - Bucharest Court of Appeal, Civil Section IX and intellectual property cases, Decision no. 134 A dated May 24th, 2007, published in the Off. Gazette no. 610 on September 4th, 2007.
 - Law no. 76/1998 for Romania's accession to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, concluded at Rome on October 26th, 1961, published in the Off. Gazette no. 148/1998.
 - Arbitration Resolution dated July 25th, 2007, published in the Off. Gazette no. 586 dated August 27th, 2007, according to the ORDA General Manager's Decision no. 262 dated July 31st, 2007. The Arbitration Panel was composed of the following arbitrators: Ana Diculescu-Șova; Cristian Iordănescu; Alexandru Țiclea; Mihai Tănăsescu; Gheorghe Gheorghiu.
 - Bucharest Court of Appeal, Civil Section IX and intellectual property cases, Resolutions no.115A and no.116A dated May 2nd, 2007, published in the Off. Gazette no. 562 dated August 16th, 2007;
 - Resolutions no. 29A dated March 7th, 2006 and 116A dated June 15th, 2006, published in the Off. Gazette no. 841 dated October 12th, 2006.
 - See location: www.urbandictionary.com/define.php?term?=figurant
 - Katherine M. Sand, Study on Agreements and Remuneration Practices regarding Performers of Audiovisual Works in the United States of America, Mexico and the United Kingdom, presented within „**Informal Ad-hoc Meeting on Audiovisual Interpretations and Performances**”, Geneva, November 6th-7th, 2003.
 - Viorel Roș, Dragoș Bogdan, Octavia Spineanu – Matei, Author rights and Neighboring Rights, Treaty, All Beck Publishing House, Bucharest, 2005.
 - Ligia Dănilă, Figurants – subject for neighboring rights or just ornaments?, in „Romanian Magazine of Intellectual Property Right”, no.4/2007.
 - Ligia Dănilă, Intellectual Property Right, C.H. Beck Printing House, Bucharest, 2008.
 - <http://jurisprudentacedo.com/Casarea-acesteia-si-trimiterea-cauzei-spre-solutionare-Judecatoriei-Cluj-N-iar-in-subsidiar-modificarea-sentintei-in-sensul-respingerii-actiunii-ca-neintemeiata.html>

PRIVATE LAW EFFECTS OF THE NON-RECOGNITION OF STATES' EXISTENCE AND TERRITORIAL CHANGES¹

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Abstract

The study presents an outline of the effects in private law (including private international law) of the non-recognition of a state or a change of territory. Specifically, it addresses the question of what measures can another state take, in the field of private law, in order to give effect to its policy of not recognizing a state or a territorial annexation, and, in parallel, what are the means available to private parties with links to the unrecognized state or territory. The study is structured in two parts, namely 1) the effects in private law of the non-recognition of a state; and 2) the effect in private law of the non-recognition of an annexation of territory. I will make specific references in particular to the situation in Transnistria and Crimea, as examples of the two issues being addressed. The study intends to be a guide of past and present state practice at the legislative and judicial level, as well as presenting the connections between instruments of public international law, such as Sanctions Resolutions of the UN Security Council, and normative instruments of private law, such as rules of civil procedure, which must adapt to the policy of non-recognition adopted by (or imposed on) states. The study also presents specific examples of situations or administrative practices which create practical problems, and result from the existence of a non-recognized entity or change of territory: issues like air traffic coordination, postal traffic, the change in the official currency of a territory, questions of citizenship etc., the aim being to present the reader with a full picture of the issues and intricacies resulting from irregularities existing at the level of the international community of states.

Keywords: *recognition, private law, conflict of laws, annexation, independence¹.*

1. Introduction

This study is proposed as a bridge between public and private international law. It covers two situations which appear in public international law, namely the proclamation of independence of a new state, and the annexation of territory, but which suffer from issues of legality on the

international sphere, and thus are not recognized by the (vast majority of the) community of states. These situations, which involve a (purported) change in the sovereignty over a territory and a population, produce effects not only in public international law, but also in the conflict of laws situations, where a particular legal relation can be localized, with the help of conflictual rules of the forum, to the

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territory which is annexed, or which is claimed by the newly proclaimed independent entity. The issues raised by such an event are manifold, and this article does not attempt to cover them all. Its importance lies in laying the doctrinal principles which can serve as guidelines for solving conflicts of laws which may appear in such situations. The reader should find in this study a short summary of current national and foreign doctrine on the subject, as well as some jurisprudence regarding cases where issues of the effects of the existence of unrecognized entities have been raised. It bases itself on the state of the current doctrine, in particular Romanian private international law doctrine, as well as German and British studies at the crossroads between public and private international law. From the quoted jurisprudence and doctrine, I will attempt, at the end, to extract potential principles for solving situations of conflicts of law where unrecognized annexations of territory are involved, as a phenomenon which has recently reappeared on the global arena.

The events taking place to the immediate East of Romania, as well as around the Black Sea, culminating with the annexation of Crimea by the Russian Federation make clearly necessary the analysis of the private international law position which the Romanian courts could take. While unrecognized proclamations of independence are not unheard of in the international community, the forceful change of the borders of a sovereign state, which had received independence and territorial integrity guarantees, in exchange for renouncing nuclear weapons, is unprecedented in the history of international relations, and is an extremely grave affront

to international equilibrium and security. Therefore, a look at the private international law effects of such a situation is warranted.

2. Content

Recognized as the principal subject of public international law, the state is also invested, by definition, with international legal capacity, and thus legal personality. Also, it is recognized as a legal subject in internal law systems, where, in particular through its diplomatic missions, which are amongst its organs, it concludes contracts, acquires chattel and landed property (inasmuch as the local legislation allows), is part in trials etc.². Beginning with the older Romanian doctrine, it was asked whether the new state which entered the international community and which benefits of all the rules of public international law regarding its representative organs, diplomatic and consular agents, the laws of war etc., is entitled to exercise all its prerogatives on the territory of the state which granted the legal personality, and thus the right to have rights and obligations just as natural persons. The answer is in the affirmative, because the personality of a state cannot be the product of the juxtaposition of two personalities, it being unique. The legal personality of the state is only the personality of that state considered from the point of view of some of its manifestations³.

Granting recognition to a state means accepting its presence in the international community and its enjoyment of all rights and obligations which pertain to its quality of a state. The act of recognizing a state or a government attracts for the state being

² Ignaz Seidl-Hovenveldern and Gerhard Hafner, *Liber Amicorum Professor Ignaz Seidl-Hovenveldern* (Amsterdam: Martinus Nijhoff, 1998), 86.

³ George Plastara, *Manual de drept internațional public cuprinzând și o expunere a conflictelor de legi (Drept internațional privat)* (București: All Beck, 2004), 27.

recognized a number of effects, of which the most important are the following:

1 obtaining the entitlement to begin diplomatic relations with other states which recognize it and of concluding treaties with such states;

2 obtaining the right (which according to some states' laws it would not otherwise have), of beginning civil trials before the courts of the recognizing state;

3 the acquisition by the recognized state (with effects also over its property) of jurisdictional and enforcement immunity before the courts of the recognizing state, an immunity which, in some law systems such as the British one, it could not have enjoyed before recognition;

4 the acceptance of its executive and legislative acts in the courts of the recognizing state.

Besides these, in the states where legal precedent gives retroactive effect to recognition, such as the United Kingdom and the United States, the acts of the newly recognized state or government are considered legally valid from the moment when the recognized authority has been installed in power⁴.

In civil issues, the states can agree so that, in limited circumstances, they allow for the reciprocal extension of the exercise of some of the state's competences beyond the limits of national territory. In civil legal relationships, with one or more extraneous elements, the private international law rules of each state usually apply. Because of the diversity of solutions which these rules give rise to, in the practice of international private law relations between state, relatively few principles or customary rules have been formed regarding the exercise of civil matter competences⁵.

Correspondingly, not recognizing a state means denying it these attributes. In this sense, recognition has a constitutive character, because the act of recognition itself is the one which produces legal effects in the internal law system of the recognizing state. In comparative law, one must now analyze the positions of the United Kingdom and the United States in this regard.

British courts have taken for some time the position that an entity not recognized by the Foreign Office as a state shall be treated by the courts as not existing, and thus will not be able to invoke immunity of jurisdiction. Thus, in a case, the ships belonging to "The Provisional Government of Northern Russia", an unrecognized entity, were not granted immunity from creditors⁶. Correspondingly, an unrecognized entity may not act as a plaintiff in court. For example, in 1804, the Revolutionary Government of Berne could not stop the Bank of England from disbursing the funds of the former city administration⁷. The current main precedent regarding the effects of recognizing an entity in internal law is *Luther v Saigor*. This concerned the operations and production of a timber yard in Russia, owned by the plaintiffs, which had been nationalized in 1919 by the Soviet government. In 1920, the defendants had bought a quantity of timber from the USSR, and the right of ownership was invoked upon it in England by the plaintiffs. These argued that the Soviet decree of nationalization should be ignored because the United Kingdom had not recognized the Soviet government. The first court agreed, and the defendants appealed. In the meantime, the United Kingdom had recognized *de facto* the Soviet government and the Home Secretary had informed the Court of Appeal in writing

⁴ Raluca Miga-Besteliu, *Drept internațional public* (București: C. H. Beck, 2010), 37.

⁵ Miga-Besteliu, *Drept internațional public*, 117.

⁶ *The Annette; The Dora* [Admiralty], 1919.

⁷ *The City of Berne v The Bank of England* [Chancery], 1804.

regarding this. The result was that the higher court was obliged to take judicial notice of the Soviet decree and give it effect as a law of a recognized state or government. The Court also showed that the fact that the Soviet government had been recognized *de facto* and not *de jure* did not change the solution. Another important point is that, because in the Home Secretary's certificate it was stated that the Provisional Government of Russia, recognized by the United Kingdom, had disbanded in December 1917, the Court considered that the Soviet government had started its existence at that date.

Inasmuch as laws, contracts concluded by unrecognized states or governments will not be recognized by British courts, because the unrecognized entity does not exist before national courts. Official recognition operates retroactively up to the time indicated by it, for example up to the *de facto* recognition, which precedes a *de jure* one. To this effect is the case *Haile Selassie*, where the *de jure* recognition of the Italian authorities as occupants of Ethiopia involved the obligation of British Courts to refuse the recognition of the Ethiopian State's legal personality, through its Emperor living in exile, with retroactive effect from the date of the *de facto* recognition of Italian occupation.

A more interesting problem appears when conflicting rights are claimed by entities exercising *de jure* and, respectively, *de facto* control over the same territory. The solution is that the actions of a *de facto* authority regarding people and goods located in its sphere of effective control will be recognized by the British courts, but when the goods of persons are in the United Kingdom, the *de jure* sovereign shall have precedence⁸.

In the United States the situation is similar. Only a recognized state may act as plaintiff in American courts. However, American courts allow in limited cases the access to justice of an unrecognized state, on the basis of case by case analysis of the entity under discussion. For example, in the case *Transportes Aereos de Angola v. Ronair*, it was held that where the US State Department had clearly indicated that the plaintiff's (a company wholly owned by the unrecognized government of Angola) access to American courts was to the benefit of the foreign relations of the United States, the courts had to respect this declaration⁹. Absent such governmental declarations, American law is more flexible regarding unrecognized entities, on the basis of the "Cardozo doctrine", according to which "an unrecognized entity which has kept control over its own territory, may gain, for its own acts and decrees, a quasi-governmental validity, if otherwise our fundamental principles of justice, or our public order would be violated¹⁰".

One can thus observe that the non-recognition of a state does not involve *de plano* its nonexistence in the national law of other states, but only a presumption of the lack of civil capacity, as well as of the invalidity or nonexistence of its acts. This presumption can be overturned either through a declaration, even retroactive or *de facto*, of its recognition, or through a relaxation of the rule with the purpose of protecting private interests.

Citizenship is, ever since Mancini, at least in Continental Europe, the most important point of connection for personal status. By this one understands those legal relationships which concern the party or parties personally. Citizenship is generally understood as a legal community, which

⁸ Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press, 2008), 475.

⁹ Shaw, *International Law*, 482.

¹⁰ *Sokoloff v. National City Bank of New York* (208 App. Div. 627), 1924.

subjects a person to a state, and makes this state the owner of rights and obligations. Furthermore, citizenship involves the right of its holder to protection from his state. From the point of view of conflict of laws rules, this public law aspect of citizenship has a restricted importance. Such an example is art. 2600 alin. (2) of the Civil Code which protects the Romanian citizen spouse from the impossibility of terminating the marriage (if such is prescribed by the foreign law). Another example is art. 1069 alin. (2) of the Code of Civil Procedure, which foresees the compulsory jurisdiction of the Romanian courts, as a *forum necessitatis*, when the Romanian citizen plaintiff shows that he cannot begin the action abroad, or that it cannot be reasonably expected for the action to be filed abroad, even when the law does not otherwise grant jurisdiction to Romanian courts, thus protecting the citizen from a denial of access to justice.

In public international law, citizenship is a legal link, which is established on a social fact, on a link, an effective solidarity of existence, interests, feelings, as well as a reciprocity of rights and obligations. It can be said that it is the legal expression of the fact that the individual to whom it is offered is, in fact, more strongly related to the population of the granting state than to that of any other state¹¹. By virtue of sovereignty, each state determines alone the criteria and means of acquiring and losing its own citizenship, as well as the rights and duties pertaining to its citizens. In international legal order, only the state as the primary subject of international law, has such a competence¹². However, the conditions of

opposing this citizenship against other states are regulated in principle, by international law. From the point of view of international law, the exercise of state competences over a person is relevant with regard to the conditions in which the legal status of citizens or foreigners is recognized and can be opposed to other states or international entities; and the compatibility of the exercise of these competences with international law rules¹³.

Granting someone citizenship without asking that person first, not finding a way, as a state, to subject the granting of citizenship, the fundamental right, the one which conditions all the other rights in a state, to the will of the prospective holder, whom, at the same time, you thus deprive of the benefit of the citizenship to which he did not renounce and from which he had not been excluded, denies *ab initio* any proof that belonging to such a state is a citizenship, and creates the presumption that it is a subjugation, and thus transforms citizenship into the status of a subject¹⁴. International law refuses to recognize the effects of complimentary, fictitious citizenships, abusively granted by some states to individuals who are not effectively attached to them. At the same time, laws regarding the acquisition or loss of citizenship, founded on racial, religious or political criteria would be considered illicit from the point of view of human rights norms, and thus could not be opposed to other states¹⁵. Furthermore, the exercise of state competences over persons, although in principle discretionary, must take place in consideration of the following: the regime of a state's own citizens should not irreversibly

¹¹ The *Nottebohm Case*, ICJ Reports, 1955, 23.

¹² Beșteliu, *Drept internațional public*, 119.

¹³ Beșteliu, *Drept internațional public*, 118.

¹⁴ Barbu B. Berceanu, *Cetățenia. Monografie juridică* (București: All Beck, 1999), 23.

¹⁵ Beșteliu, *Drept internațional public*, 119.

violate fundamental human rights, and the regime of foreigners should not violate their interests or those of their state of origin. At the same time, every states tries to ensure as good a regime as possible to its citizens located, temporarily or permanently, on the territory of other states¹⁶.

In our legal system, citizenship is not considered as pertaining to the field of private international law, this opinion being in the majority. The arguments brought to this end are as follows: the fact that citizenship constitutes a criterion for determining the applicable law, for example in the field of civil status and capacity of a natural person, does not constitute an argument for including the matter within private international law, because it would mean that all the criteria which serve to determine the applicable law should pertain to this branch of law. The link between citizenship and the legal status of the foreigner does not oppose nor does it deny their separate study, within different legal disciplines¹⁷. In recent literature the thesis was posited that we can observe a link of interdependency between conflict of laws, conflict of jurisdictions, the legal status of the foreigner and citizenship, because their solution is sometimes preceded by the determination of a person's citizenship¹⁸. In French doctrine, it is considered that the citizenship, defined as the ensemble of rules which determine the link between an individual and a state, presents sufficient links with private international law so as to be included in its normative sphere. Thus, civil status and capacity of a person being given by their citizenship, the inclusion of the study of citizenship in the field of private international law is justified, as also for the

reason that in all cases the legal condition of the foreigner is determined by comparison with that of the national¹⁹.

For private international law, the significance of citizenship is that of an indicator of the appurtenance of a person to a legal system. The fact that the private interests of a party, in respect of their personal status, point towards the existence of the competence of that system of law where the party feels most integrated, leads to a presumption in favor of the appurtenance of a person to a certain system of law. Citizenship is not, however, neither in Romanian law, nor in the Continental European one, the most important point of connection, and in this quality, it is neither unique in comparative law, nor lacking political and legal critiques. In comparative law, one can observe that almost all *common law* states do not see in citizenship, but in domicile, the predominant criterion of belonging to a certain legal system. Domicile is a legal figure composed of factually determinable elements, together with the *animus* of the party, which proves a voluntary and special link towards a state, one more stable than the presence or residence on that territory. It is therefore false to relate domicile (in its *common law* definition) to such mobile spatial connection points; it is closer to citizenship in that it involves a conscious identification with a certain state. Other states (especially in Scandinavia) choose sometimes as a connecting factor, even for the personal status, the place of concluding a certain legal act and thus allow individuals a flexible adaptation to the local law (even if chosen at short notice), which sometimes even allows for manipulations. Citizenship as a

¹⁶ Beșteliu, *Drept internațional public*, 118.

¹⁷ Bianca Maria Carmen Predescu, *Drept internațional privat. Partea generală* (București: Wolters Kluwer, 2010), 128.

¹⁸ Predescu, *Drept internațional privat. Partea generală*, 128.

¹⁹ Predescu, *Drept internațional privat. Partea generală*, 128.

connecting factor is in retreat as of the second half of the 20th century. The intervention of other connecting factors, such as habitual residence, even in personal status issues, is ever more visible.

The link between citizenship and the solutions to conflicts of laws shows how complex the legal foundations of conflictual rules are. In as much as conflicts of laws solutions cannot be outside the complexities and particularities of material life, neither can the legal foundations and solutions of private international law be outside the complexities of legal norms, of law seen in its ensemble as the most efficient way of ordering social life of all times and for ever²⁰. The institution of citizenship and the condition of a citizen express, however, in the first place, a link, which is principally a static one, of the individual with the State. Evidently, the link is with a particular state. There shall be as many citizenship and as many types of citizens as there are states. And, in respect of citizens of a particular state, the citizens of other states, and stateless persons, are called foreigners²¹. The Romanian State, as it recognizes a foreign state, it recognizes its citizens as such. On the basis of such states' documents, Romanian authorities issue documents for foreigners, valid on Romanian soil, in which that foreign citizenship is attested; similarly, Romanian authorities apply visas on foreign passports, and generally on international travel documents, as the protection of a state does not always involve its citizenship²².

The proof of a person's citizenship in private international law always takes place from the point of view of the state whose citizenship is in question. The law of citizenship is of a public nature; no state may

decide on the question of whether a person is another state's citizen²³. In as much as the Romanian State grants citizenship to a person, the foreign citizenship granted until then to such a person are not taken into account. Conversely, a person not granted Romanian citizen is a foreigner, even when another state considers him a Romanian citizen²⁴. Thus, in practice, one must prove the rules of citizenship of the state whose citizenship the party might have; in most cases, this is a documentary step without any problems, but sometimes it can offer an interesting image of citizenship rules of various states, or regarding the historical development of nation-states in Europe. Thus, for example, if in 1998 the succession is opened in Slovenia of a *de cuius* born in Slovenia in 1908. During his life, he has held Austrian, Hungarian, Yugoslav and Slovene citizenships, and, perhaps, through his willing enlistment in the German Army, he also became a German, keeping this quality by virtue of the first German law regarding citizenship issues of 22nd February 1955. If, during the probate process, it is discovered that *de cuius* is himself the heir of an uncle deceased in 1944 in Romania (which was not particularly rare before the fall of the Iron Curtain over Europe), whose citizenship is questionable because of unclear circumstances in the last days of the War, the inheritance certificate can easily become a history manual.

The stateless person is that who cannot be considered citizen of any state, according to its rules of citizenship. *De jure* statelessness appears when it can be proven that, according to the citizenship rules of the present systems of law, the person is not a citizen of any of the relevant states. Also, a

²⁰ Predescu, *Drept internațional privat. Partea generală*, 130-131.

²¹ Berceanu, *Cetățenia. Monografie juridică*, 8.

²² Berceanu, *Cetățenia. Monografie juridică*, 226-227.

²³ Art. 3 of the 1997 European Convention on Citizenship.

²⁴ Berceanu, *Cetățenia. Monografie juridică*, 226.

person holding a laissez-passer issued according to art. 28 of the UN Convention regarding the legal status of stateless persons of 28th September 1954, is a *de jure* stateless.

German law considers *de facto* stateless those persons whose statelessness cannot be clearly demonstrated, but who do not hold a citizenship which can be proven. This can be the result of the nonrecognition of their origin state by the Federal Republic, especially in case of UN nonrecognition. Thus, for example, the South African Republic had excluded of its state territory the so-called *homelands*, which had however not been recognized by the UN, which retrospectively did not affect South Africa as much as it affected their inhabitants who held an unrecognized citizenship, and thus were not treated as citizens by their recognized state of origin, South Africa. For similar reasons, in German law Palestinian refugees are also considered stateless, because, even though they might have held before the establishment of the state of Israel the citizenship of the British Mandate in Palestine, presently they are prevented by the Israeli occupation of the Palestinian Territories from placing themselves under the protection of a Palestinian state. Germany considers that the population of the Palestinian Territories themselves cannot yet benefit from a Palestinian citizenship, even after the admission of Palestine to the UN as an observer state, because of the “lack of effectivity” of Palestinian sovereignty. On the other hand, German law does not exclude conflictual application of Palestinian law, even absent recognition of a Palestinian citizenship, for persons who are habitually resident there²⁵. One must observe, from the practitioner's perspective, that there is no one Palestinian law. The law being applied in the Palestinian Territories (Transjordan and Gaza) is different, being made up of

rules kept from the time of the British Mandate, military public order rules imposed by Israel, Islamic law (especially in family matters), but also various rules kept from the time of the Egyptian (Gaza) and, respectively, Jordanian (Transjordan) administration.

A problem usually found in jurisprudence, the determination of applicable law in the case of an unrecognized state is specific to the modern and contemporary eras. In private international law of the 19th century, the solving of the conflict of laws in the case of the unrecognized state has been influenced by the considerations given to state recognition as being constitutive and not declarative. In French doctrine, Bartin established the theory whereby the solution to this type of conflict of laws is subject to the rules of public international law. The judge may not apply the law of a foreign state that the forum state had not recognized as a subject of international law, because that would contradict the public power of the forum state. In these circumstances, the court may not apply the law of the unrecognized state, because its national public law rules, as well as public international law principles impose this solution. Bartin's thesis has been dominant until the first half of the 20th century when, at the end of this period, a contrary thesis was argued, namely that even the laws of an unrecognized state may give rise to conflicts of law in the private sphere. This solution begins, above all, from the affirmation, in most legal systems, of the declarative nature of state and government recognition.

Supporting this theory, Henri Batiffol and Paul Lagarde show that the mission of the French judge and the French government are not situated on the same plane. The judge who applies foreign law must establish if his

²⁵ Thomas Rauscher, *Internationales Privatrecht* (Heidelberg: C. F. Muller, 2012), 62-63.

authority is contested on the territory of the foreign state. The reasons for which the government might not recognize a state are of a different nature, much more complex, and mostly of a political nature²⁶. In the second half of the 20th century, an important part of the doctrine, including the Romanian scholars, affirms the possibility that the law of the unrecognized state might give rise to the conflict of laws. This solution was reached both on the basis of general principles of law, as well as particular principles of private international law. In as much as the law of the unrecognized state is not taken into consideration, the effect is the application of a previously existing law, on the basis of its exclusive recognition, which is inadmissible, both as a legal principle, as well as with regard to the effects felt by private persons. The lack of application of the law of an unrecognized state means that the objective law which governs the subjective rights which individuals can enjoy in that state is disregarded, and the purpose of the laws is thus violated, in that they do not attain their goal of protecting individuals, of serving to satisfy their material and spiritual needs²⁷.

The hypothesis taken into account is that where the conflictual rule of the forum points to the system of law of a state which is unrecognized by the forum state. The generally admitted solution in practice and in literature is that the laws of an unrecognized state may give rise to the conflict of laws. This solution is traditional in Romanian private international law. To support this solution, the following arguments may be brought forward:

– recognition of a foreign state has, in principle, a declarative and not constitutive

nature. Thus, a state may recognize another state, but it cannot ignore its legal order. Recognition of a state has a majority political character, and does not apply in the field of conflict of laws, where the foreign state remains a legal subject²⁸. The contrary would involve violating the sovereignty of the foreign state;

– if the law of the foreign state is not applied, then the formerly existing laws ought to apply, which would lead to unjust effects for the parties;

– as private law relations are involved, it would be unjust for persons' rights to be diminished or denied because these persons belong to an unrecognized state²⁹.

A second problem regards the solution of the conflict of laws in the case of a state succession when the successor state is not recognized. The question is asked which law should apply: the law of the state which does not exist anymore, or that of the unrecognized state? In my opinion, the solution is clearly the same as presented above. Thus, this conflict appears when the state, to whose system of law points the conflictual norm, “disappears” between the moment of the legal relation's birth and that of the trial. A just solution involves taking into consideration the context in which this change has taken place. It was thus proposed that, in case the state was disbanded through “force”, the idea of the protection of legitimate interests of persons affected directly by the abusive change in sovereignty should prevail. This would mean applying the law of the disappeared state. If we are in the presence of a voluntary unification or split, the rules of the treaty of unification or division should be applied. I concur with this opinion, with the note that,

²⁶ Predescu, *Drept internațional privat. Partea generală*, 235.

²⁷ Predescu, *Drept internațional privat. Partea generală*, 236.

²⁸ Nicoleta Diaconu, *Drept internațional privat* (București: Lumina Lex, 2009), 125-126.

²⁹ Dragoș-Alexandru Sitaru, *Drept internațional privat* (București: C.H. Beck, 2013), 39-40.

in order to establish the character of the international change of legal personality, one must take into account the official position of the forum state regarding that particular situation³⁰. Jurisprudence retains several situations where the non-recognition of a state was invoked, as a reason to deny the application of the currently existing law of the foreign state, and to continue to apply the old law, the one applicable before the change of political regime. Thus, after the establishment of the Soviet Union in 1917, French courts continued to apply tsarist law for more than a decade, such solutions being encountered even much later. In the Scherbatoff / Stroganoff case, solved by the Court of Cassation in Paris, in 1966, it was held that the non-recognition of the foreign government is an impediment for the French judge to apply the foreign law given by this government, before its recognition by the forum state³¹.

A similar question is raised by the unrecognized annexation of territories. In such a case, the main difference is that both relevant states continue to exist, and demand the application of their laws to legal relationships which are localized in the territory being annexed. This issue is also connected to the state's presence in such a territory, for example with control over state resources, companies and institutions. In such cases, I believe that the "character" of the annexation takes precedence over considerations of private interests, because of a strong presumption that the unrecognized annexation does not reflect the real attachments of the persons living on the territory, but on the contrary, it is being imposed from above, as an illegitimate act. Furthermore, one must take into account the relevant UN Security Council or General Assembly Resolutions which express an

opinion over the annexation, as well as potential rulings of international courts to the same effect. In as much as a UN Security Council calls for the denial of recognition of a factual situation, it would be unlawful for courts of a state, which are part of its official organs, to grant even indirect recognition by applying the law of the unlawful sovereign. This illegality in international law would preclude any national laws or considerations to the contrary. Where there is no such binding international determination, then I believe that courts should follow the official opinion of the government on the issue of the legality of annexation, so as to protect the interest of the state in not giving recognition to a situation which might affect its international relations. Where the state does not issue any official positions, previously discussed considerations apply, and the court should check whether the parties of the legal relation have indicated expressly the law they understand as being applicable, because in such a case it should be first and foremost for the parties to express their attachment to one or the other system of law in presence.

We can see that where unrecognized states or territorial annexations are concerned, the notion of sovereignty is brought to the fore, and therefore we can think of the principles expressed above as determining the notion of a law proclaimed by a sovereign power as the basis for the appearance of a conflict of laws³². I believe that in such a situation the criterion of effectiveness should also find its plenary application, as it exists in public international law. In as much as an entity effectively controls a territory and a population, with private law effects in the legal relations of its members, then its acts should be recognized at least private

³⁰ Dan Lupașcu and Diana Ungureanu, *Drept internațional privat* (București: Universul Juridic, 2012), 64-65.

³¹ Predescu, *Drept internațional privat. Partea generală*, 235.

³² Predescu, *Drept internațional privat. Partea generală*, 233.

international law effects because otherwise, the obligation of non-involvement in other states' affairs would be violated, as well as the rights and interests of the persons concerned. Furthermore, private international law has the means, amongst which first and foremost is the notion of public order, to censure the application of the laws of an unrecognized entity which would not be compatible with its national principles.

3. Conclusions

The article has looked at the private international law effects of unrecognized proclamations of independence and annexations of territory. It has illustrated the state of national doctrine, as well as bringing forward approaches from other countries' doctrine and jurisprudence. It has

established a number of principles, which could be applied by Romanian courts when confronted with these special types of conflict of laws. I hope this article will serve as a starting point for a bigger discussion in the doctrine and practitioners' forums regarding the means whereby the legal world (by which I understand courts, attorneys, but also the public administration) could react in an appropriate and unified manner to the unrecognized, and often violent, changes taking place in the international community nowadays. I also hope that, during my doctoral studies, I will be able to continue the research on these topics in other legal systems, so as to be able to present a general European view of the matter, in the spirit of unified European principles of law, especially when dealing with threats to the security and balance in the European Union's near abroad.

References:

- Barbu B. Berceanu, Cetățenia. Monografie juridică (București: All Beck, 1999).
- Raluca Miga-Beșteliu, Drept internațional public (București: C. H. Beck, 2010).
- Nicoleta Diaconu, Drept internațional privat (București: Lumina Lex, 2009).
- Dan Lupașcu and Diana Ungureanu, Drept internațional privat (București: Universul Juridic, 2012).
- George Plastara, Manual de drept internațional public cuprinzând și o expunere a conflictelor de legi (Drept internațional privat) (București: All Beck, 2004).
- Bianca Maria Carmen Predescu, Drept internațional privat. Partea generală (București: Wolters Kluwer, 2010).
- Thomas Rauscher, Internationales Privatrecht (Heidelberg: C. F. Muller, 2012).
- Ignaz Seidl-Hoenveldern and Gerhard Hafner, Liber Amicorum Professor Ignaz Seidl-Hoenveldern (Amsterdam: Martinus Nijhoff, 1998).
- Malcolm N. Shaw, International Law (Cambridge: Cambridge University Press, 2008).
- Dragoș-Alexandru Sitaru, Drept internațional privat (București: C.H. Beck, 2013).

THE CONFLICT BETWEEN THE LEGAL INTERESTS OF THE ORIGINAL OWNER AND THE GOOD FAITH ACQUIRER OF MOVABLES – A COMPARATIVE OVERVIEW OF THE SOLUTIONS

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Abstract:

The present article compares the legal rules on the good faith acquisition of movables in various national legislations of both Member states and countries outside the EU, in order to analyze the differences of the three major types of legal approach towards this means of original acquisition of ownership over movables. It is underlined that the existing diversity in the regulation can cause serious difficulties when multiple jurisdictions are concerned. One of the solutions to this issue is the unification of these rules at the EU level. The provisions of Book VIII, art.3:101 of the Draft Common Frame of Reference provide a solid foundation for this unification and may help to solve cross-border cases in a more efficient and just manner.

Keywords: *'nemo plus iuris' principle, good faith acquisition, original owner, bona fide acquirer, transfer of movables, comparative legal research, Draft Common Frame of Reference.*

Introduction:

Due to its great importance for the security of transactions, there is hardly a major legal system that doesn't contain any rules on the good faith acquisition of movables as well as the protection of the rights of the deprived original owner. The legislations of the particular Member states, as well as other countries outside the European Union are not coherent and they differ in the solution of the arisen legal conflict, taking a different approach to the Roman principle *'nemo plus iuris ad alium transferre potest quam ipse habet'*. Either the deprived owner or the bona fide acquirer (or sometimes even both sides) must bear the risk of losing their rights. The interests of commercial transactions and the

liberalization of the market normally favor the bona fide acquirer, while even the basic notion of justice is offended by the idea that the owner of a movable could be deprived of it, sometimes even against his will, simply because someone has disposed with it. Of course, if the acquirer knows or under the specific circumstances of the case should have known that he is dealing with a non-owner or a person not being entitled to transfer the movable, every major legal system unambiguously protects the deprived owner, thus preventing the loss of his rights *in rem*. Much more complicated to solve are those situations where the acquirer is in good faith and the transferor, who has disposed of the movable, is holding it with the consent of its owner.

It is possible to divide the major contemporary national legislations into three

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broad groups as far as protection of the good faith acquirer is concerned. It will be inaccurate to say that every particular country has an absolutely identical set of rules with the other countries, included in the same group. What is important to stress out is that those legislations share a common legal principle that has defined their legal approach on resolving the conflict between the rights of the dispossessed owner and of the bona fide acquirer. Two extreme and one balanced legal approach can be distinguished. Using the comparative method of legal research the present article aims at studying these three main types of legal approach in cases where the law has to take side in the conflict of legal interests of the deprived owner, on one hand, and a good faith acquirer, on the other.

I. The Original Owner Rule

At the first extreme the original owner's legal interests are being meticulously protected irrespective of the means in which he was deprived of his property. The owner is granted the right to claim back his property, wherever he finds it, even if it has passed in the hands of a good faith acquirer.

The roots of the *original owner rule* can be traced back to Roman private law. In the early period (about 450 BC) private law was codified by Lex Duodecim Tabularum (The Twelve Tables) and original acquisition of ownership was recognized by acquisitive prescription only – the so called *usucapio*. This principle intended to protect the owner of the movable from being deprived of his property, on one hand, and the party in possession who could acquire the movable after a certain period of time. A means for the owner of the movable was

provided to claim back his property if the prescriptive period had not run.

By the Classical period of Roman law, extending from 1 AD to the end of the third century AD the rules on acquisitive prescription evolved immensely. The major principle, applicable both to immovables and movables, was formulated by Ulpianus – “*One cannot acquire ownership from a person who is not himself the owner*”¹. Together with another tenet, formulated by Paulus “*What belongs us cannot be transferred to another without our consent*”², they formed a concept of the consistent protection of the original owner.

During this period, the basic action available to an owner out of possession to recover his property, both movable and immovable was the *rei vindicatio*, or revindicatory action. Initially the period for this action was limited to one year. The possessor could repel the claim if proving the fact that his possession had lasted longer than one year, without having to prove anything else. This circumstance was seriously obstructing the interests of the original owner.

That's why at the end of the Republican era the prerequisites for the *usucapio* were set to five elements: *res habilis* (a movable or immovable thing that is not *extra commercium*), *possessio*, *iustus titulus* (a just title, capable of transferring ownership by nature), *bona fides* (good faith) and *tempus* (an elapsed period of time).

Furthermore, at the time of Justinian and his *Corpus Iuris Civilis*, enacted in the middle of the 6th century, the prescriptive period was increased to three years. If the prerequisites were not met (for example, if the *iustus titulus* was not present because of the circumstance that the goods were lost or stolen, or the possessor was lacking good

¹ “*Nemo plus iuris ad alium transferre potest quam ipse habet*”- D.50, 17, 54.

² “*Id, quod nostrum est, sine facto nostro ad alium transferri non potest* – D. 50, 17, 11.

faith) the period of possession necessary to acquire the thing was set to thirty years. In addition, the Justinian legislation strengthened the *rei vindicatio* so that the owner could pursue his property during the whole prescriptive period.

As a conclusion, Roman law established and developed an approach that meticulously protected the dispossessed owner. This approach has been enacted by a series of national legislations.

English common law takes as a starting point the *nemo plus iuris* principle. As a consequence if someone has disposed of a property not belonging to him, in the conflict between the original owner and a third acquirer the former has the stronger position. This is expressed in art. 21 (1) of the English Sale of Goods Act of 1979 (SGA)³.

The major difference between English and civil law in respect of good faith acquisition is that the first one lacks a general exception to the *nemo plus iuris* rule to benefit the good faith acquirer. Rather, the SGA of 1979 provides several statutory exceptions to this principle.

The emergence of these exceptions is to an extent influenced by a statement by Lord Denning:

“In the development of our law two principles have striven for mastery. The first is for the protection of property: nobody can give a better title than he himself possesses. The second one is for the protection of commercial transactions: the person who

*takes in good faith and for value without notice should get a good title.”*⁴

The first exception concerns *apparent authority* (also known as the doctrine of estoppel), which is actually provided in the second part of art. 21 (1) SGA'1979 "... unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell". This doctrine means that if the owner has assured the buyer that the seller has an actual right to transfer the title of the goods, the buyer can acquire the title despite the fact the seller was not the owner⁵.

The second statutory exception to the *nemo plus iuris* principle is referred to as *sale under voidable title* (art. 23 of the SGA) - "When the seller of goods has a voidable title to them, but this title has not been voided at the time of the sale, the buyer acquires a good title, provided he buys them in good faith and without notice of the seller's defect of title". It offers protection to the buyer of a movable if he purchased it in good faith and did not know that his seller has a defect of title (cases of fraud, duress, misrepresentation etc).

The SGA contained the market overt rule as well, but the provision was abolished in 1995⁶.

Other statutory exceptions can be found in the Factors Act of 1889, concerning

³ Art. 21 (1) SGA : "Subject to this Act where goods are sold by a person who is not their owner and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

⁴ See *Bishopsgate Motor Finance Corporation Ltd. v Transport Brakes Ltd* [1949] 1 KB 332 at 336-337.

⁵ The estoppel is actually a rule of evidence preventing a person from denying the truth of a statement he has made previously or the existence of facts in which he has lead another to believe. See Laszlo Pók, op. cit., 7.

⁶ The market overt rule was codified in art. 22 (1) SGA'1979 : Where goods are sold on market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect of title on the part of the seller".

cases of mercantile agency⁷ and seller in possession after sale⁸.

The provisions of the English Sale of Goods Act have influenced a number of common law national legislations, like Scotland and Northern Ireland (as part of the United Kingdom), Cyprus⁹, India¹⁰, Canada¹¹ etc.

Among the countries whose national legislations belong to the Continental legal system Portugal is the only country whose Civil Code has fully adopted the *nemo plus iuris* principle. Portuguese civil law does not recognize good faith acquisition. There are no rules comparable to the “possession is equal to a title” principle, embodied in the French law, or even to the provisions of §929-932 BGB allowing the good faith purchase despite the enhanced protection of the original owner.

This circumstance results in the legal construction that a sales contract, by which the seller is neither the owner, nor legally entitled to dispose of the goods, is considered void, as art. 892 of the Portuguese Civil Code explicitly provides. If, however, such a contract is concluded and the purchaser acting in good faith, paid a consideration, the Portuguese legislator provides a restitution claim for the price because of unjustified enrichment of the transferor (art. 894 of the Portuguese Civil Code). The dispossessed owner can always claim back his movable, no matter how much time has elapsed.

II. The Bona Fide Acquirer Rule

At the second extreme, an acquirer who gained possession over a movable through a valid title, becomes the rightful owner, even if the movable has originally been lost or stolen from its original owner. The former owner loses his rights over the movable, but can always claim compensation for unjustified enrichment against the transferor of the goods. The policy of a comprehensive protection of the good faith transferee, known as the bona fide acquirer rule, has been adopted by the new Italian Civil Code of 1942. Pursuant to art.1153 of the Italian Civil Code, as far as movables are concerned, the possession is equal to a title. This principle is based on the need to increase certainty in the circulation of movables, since it is nearly impossible for a person to undertake a thorough investigation if every transferor of the goods was in fact their owner. Another argument in support of adopting this principle is the speed with which transactions occur, not allowing the transferee to keep a complete record of the transfers. It is being stressed out that the possession of a movable creates a legitimizing appearance of ownership, so that every person exercising power over a movable has a right to dispose with it, as far as other people unaware who the actual owner is are concerned. Pursuant to art. 1153 et seq. Italian Civil Code, the former owner cannot bring a *rei vindicatio* action against the good faith acquirer under any circumstances, not even if the goods were lost or have been stolen from him. Thus, the

⁷ Art. 2 of the Factors Act provides: “Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale ... made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same.”

⁸ Art. 8 of the Factors Act provides that if the owner of a good sells it two times the second buyer can acquire the title if he acts with good faith and has no knowledge about the first sale.

⁹ Cyprus’s Sale of Goods Act of 1994 and its articles 27-30 mirror the provisions on good faith acquisition of English Sale of Goods Act of 1979.

¹⁰ See art.26-30 of India’s Sale of Goods Act.

¹¹ See § 22-24 of Canada’s Sale of Goods Act.

Italian Civil Code of 1942 has eliminated the distinction between involuntary and voluntary loss of ownership and enhanced the protection of the bona fide transferee in either cases. Furthermore, there are no additional requirements concerning the title except its validity, which means that both onerous and gratuitous acquisition will lead to extinguishing the original owner's right and the good faith acquirer shall become the new owner.

Throughout the Member states, there is no other legal system implementing the *bona fide acquirer rule* to such an extreme extent. The other national legislations are being somewhat influenced either by the balanced approach or by the *original owner rule* that consistently protects the right of the dispossessed owner. Particularly interesting is the policy towards good faith acquisition adopted in the Czech and Slovakian legislation. Both countries have very similar civil and commerce codes and thus share the same principles. Their civil codes do not provide any rules on good faith acquisition. Is it not possible to acquire ownership from a transferor who lacks the right to dispose regarding the transferred property. The absence of a right of disposition of the property always results in an absolute nullity of such a contract¹². It is clear that Czech and Slovak civil law have adopted the *nemo plus iuris* principle. Surprisingly, on the other hand, the Czech and Slovak Commercial Codes have codified a set of very liberal rules on good faith acquisition, applicable to merchants only (see § 446 of the Slovak Commercial Code and § 446 of the Czech Commercial code). The main purpose was to promote the security of commercial

transactions. § 409 of the Slovak Commercial code explicitly provides an exception of the *nemo plus iuris* principle if the good faith acquisition is based on a business relationship. Since there is no rule excluding lost or stolen goods, scholars¹³ believe that they can be acquired in an original manner from the good faith transferee.

Another example of a national legislation that adopted the bona fide acquirer rule, but sustained some influence from the balanced approach is Austria.

Art. 367 of the Austrian Civil Code provides that it is possible to acquire ownership over movables from a non-owner in three particular situations: at a public auction; if it is purchased from a person in the course of the latter's commercial activity of selling goods of this kind; and if the owner has voluntarily entrusted the movable into the seller's possession. Moreover, the acquisition must be for value and the acquirer must have obtained possession over the movables in good faith. The rules on good faith acquisition in the Austrian civil code do not provide an exception on lost or stolen goods. This circumstance has lead scholars to assume that it is possible for the good faith transferee of these goods to gain ownership over them in an original manner¹⁴. This effect can occur only if the other prerequisites of the good faith acquisition are present. Despite these limitations, the Austrian Civil Code provides an enhanced protection of the legal interest of the good faith transferee, allowing him to acquire ownership even over lost or stolen goods. Scholars tend to categorize Austrian law as one of the most protective

¹² Ivan Petkov, National Report on the Transfer of Movables in Slovakia, in vol. 6 of *National Report on the Transfer of Movables in Europe* (Munich: Sellier European Law Publishers, 2011), 421.

¹³ Ivan Petkov, op.cit., p. 421

¹⁴ Helmut Koziol and Rudolf Welsler, *Bürgerliches Recht*, Band 1 (Wien: Manzsche Verlags-und Universitätsbuchhandlung, 2006), 335.

jurisdictions towards good faith purchasers¹⁵.

The liberal Austrian provisions that can be ranked as the second most favorable to the bona fide acquirer (after the Italian ones), have been fully adopted by the art. 64 et seq. of the Slovenian Ownership Code as well.

III. The Balanced Approach

1. The Consensual System

Just like the bona fide acquirer rule, the balanced approach recognizes good faith acquisition as a separate, original manner of acquiring ownership over a movable from a person acting in good faith.

The basic rule that has become the founding stone in a number of national legislations when it comes to good faith acquisition is that “with reference to movables, possession is considered equivalent to title”¹⁶, meaning that possession and ownership of movables go hand in hand. The first national legislation to adopt this principle with the intention to protect good faith acquirers and the interests of commerce, was the French Civil Code of 1804 and its article 2279 (a recent reform changed the numeration to art. 2276). The drafters of the Code placed this provision in a section called “On some special prescriptions”. Thus, good faith acquisition was looked upon as a special, instantaneous acquisitive prescription rule. This explanation is rejected by Marcel Planiol¹⁷,

however, being in contradiction in terms since “acquisition by prescription presupposes a certain period of time has actually elapsed”. A more recent theory explains the legal nature of the provision on good faith acquisition as an irreputable presumption of ownership in favor of the possessor¹⁸. The prevailing view, supported by the case law of the French Cassation Court is that the good faith acquisition is a separate, independent method to acquire ownership over a movable in an original manner. The main effect of the principle “as far as movables are concerned, possession is equivalent to title” is that it overrides the rules in the law of obligations regarding abuse of trust by a transferor holding a limited title or even nullity of a contract. The result therefore is that the good faith acquirer a non domino neither receives the ownership right on a derivative basis, nor takes title by instantaneous prescription, but acquires a clear title by statutory provisions¹⁹.

In order to fully comprehend the good faith acquisition in French law one must keep in mind that according to art. 711 of the French Civil Code, ownership is acquired and transmitted by succession, by gift (both inter vivos and mortis causa) and by the mere effect of a obligation. This provision brings us to the conclusion that the French transfer system is consensual, which can be derived from a closer look on article 1138 as well : *An obligation of delivering a thing is complete by the sole consent of the*

¹⁵ Ernst Karner, *Gutgläubiger Mobiliärerwerb*, (Wien : Springer, 2006), 18.

¹⁶ “*En fait des meubles, la possession vaut titre*”. This principle was formulated in the first half of the XVIII century by the famous French civil law scientist Francois Bourjon in his work *Le commun droit de la France et la Coutume de Paris réduits en principes*. (Paris, 1770) p. 1094., see Arthur Salomons, “The Purpose and Coherence of the Rules on Good Faith Acquisition and Acquisitive Prescription in the European Draft Common Frame of Reference. A Tale of Two Gatekeepers.” *European Review of Private Law* vol. 3 (2013): 843.

¹⁷ M.Planiol, *Traite elementaire de Droit Civil. Droit les biens*, translated by Tihomir Naslednikov (Sofia, 1928, Staykov Printing Office), 214.

¹⁸ P. Michael Hebert, “Sale of Another’s Movables”, *Louisiana Law Review*, vol. 29 (1969): 335.

¹⁹ Colin, A., Capitant, H., *Traite elementaire de Droit Civil, Tome 1, Livre II – Droit les biens*, translated by Galab Galabov, (Sofia, 1926, Royal Court Printing Office), 326.

contracting parties. It makes the creditor an owner.

Thus, the provision of art. 2276 (1) serves a double function. In the first place, it provides a rule of proof – possession establishes a legal presumption that whoever is exercising the factual power over a movable is deemed to be its owner, unless proven otherwise. In the second place, it contains a material rule – the act of possessing a movable renders its possessor as the owner in case the movable is being transferred to him by someone not entitled to dispose with it.

The French Civil Code does not specify further requirements that the possessor has to meet before he is entitled to invoke the *possession vaut titre* rule. That's why case law helped the institute to evolve. Nowadays, it is unambiguous that the transferee of a movable that was transferred to him by a non-owner can acquire ownership if he received actual ("real") possession and he doesn't know or should not have known that his transferor lacks ownership over the movable. Transition of ownership is not caused by the effect of an obligation, but instead, by mere possession. This possession creates a new title on behalf of the good faith transferee, independent and not deriving from the original title. There is no requirement for the transaction to be onerous – any valid legal act capable of transferring rights over movables is sufficient²⁰.

The major difference between the balanced approach and the bona fide acquirer rule can be found in the attitude towards lost or stolen goods. Unlike the quite liberal approach in Italy that allows the good faith transferee to acquire ownership even over lost or stolen goods, the provisions

of the French Civil Code exclude them from the material protection of the good faith acquisition. The reason for this exception can be found in the circumstance that loss and theft lead to involuntary loss of possession. If the property was lost or got stolen, the original owner can reclaim it back from whoever holds it, even from the good faith transferee. Because of its somewhat radical nature, the French legislator has limited the time-span for such a claim to be made to three years – not from the date of the bona fide acquisition, but from the moment the movable got lost or was stolen (see art. 2276 (2) French Civil Code).

The good faith transferee of a lost or stolen movable is not left completely empty-handed. Pursuant to art. 2277 French Civil Code, *when the present possessor of a thing lost or stolen has bought it at a fair or market, or at a public sale, or from a merchant selling similar things, the original owner may have it returned to him only by reimbursing the possessor for the price which it has cost him.*

This remarkable provision of medieval origin is called the "market overt" rule. It serves a primary function – to create a counter-exception in favor of the transferee who acquired in good faith lost or stolen movables under normal, unsuspecting circumstances²¹. On the other hand, it protects him against a possible insolvency and/or untraceability of his transferor. If the dispossessed owner reclaims back his goods, the good faith buyer can spare the difficulties of trying to find the seller and refund the purchase price. The French Civil Code has adopted a much more fast and practical solution that strikes the best possible compromise in the conflict of legal interests between the original owner and the

²⁰ Eleanor Kashin Ritaine, National Report on the Transfer of Movables in France, in National Report on the Transfer of Movables in Europe, (Munich: Sellier. European Law Publishers, 2011), 119-128.

²¹ Arthur Salomons, "Good Faith acquisition of movables", in *Towards an European Civil Code, 4th revised and expanded edition*, ed. M. Hesselink et al. (Wolters Kluwer Law International, 2011), 1065-1082.

bona fide acquirer – the owner is obliged to reimburse him with the price paid for the lost or stolen goods. Until he has received this payment, the possessor is entitled even to exercise a retention right over the movables.

This balanced approach, resulting in a compromise in the conflict of legal interests between the dispossessed owner and the bona fide acquirer was adopted by the revoked Italian Civil Code of 1865 (art. 707). One of the most significant merits of art.707 Italian Civil Code'1865 was expanding the protection of good faith acquisition institute over bearer instrument and money as well. The old Italian Civil Code had a great impact on a huge number of national legislations that belong to the Romanistic legal family, including the Bulgarian one.

In Bulgaria, the first rule on good faith acquisition was enacted in 1904 in the revoked Law on Property, Ownership and Servitudes. This act implemented the provisions on ownership and other real rights from the revoked Italian Civil Code and closely followed both the consensual system of transferring ownership and the balanced approach in terms of good faith acquisition. Its article 323, identical to art. 707 of the old Italian Civil Code, contained the rule “With reference to movables and bearer instruments, possession is considered equivalent to a title”. The possibility for the original owner to reclaim his lost or stolen movables for a period of three years, as well as the market overt rule in favor of the good faith acquirer who bought lost or stolen goods at a fair, market or at a public sale, were present as well (art. 324 and 325 of the Bulgarian Law on Property, Ownership and Servitudes).

After the deep socio-economic changes in the Bulgarian society after World War II, in 1951 a new Ownership Act came into force and remains until today the primary source of rules on ownership and

other real rights. The policy on good faith acquisition sustained only minor changes. Pursuant to art. 78 (1) of the Bulgarian Ownership Act, the good faith purchaser of movables or bearer instruments, who acquired them on a valid onerous title is their new owner if he didn't know that the transferor did not own them. If the goods were lost or stolen, art. 78, (2), first sentence provides the familiar three year period for an ownership claim to be made by the dispossessed owner.

The first change concerns the requirement for value of the legal act that transfers ownership. If it is gratuitous, the interests of the dispossessed owner will prevail, because it is not justified to protect the person who has enriched himself, without sacrificing a counter-performance. As mentioned above, modern Bulgarian civil law has continuously adopted the balanced approach and a general policy of enhanced protection of the bona fide acquirer has never been customary.

The second change is tightly connected with the socio-economic changes in Bulgaria. After 1950, commercial law was abolished and private enterprises were nationalized. They were all transformed into State-owned socialistic enterprises who were the only major participant in Bulgaria's economic life until 1989. That circumstance made the counter-exception concerning lost or stolen movables bought at a fair, market or at a public sale pointless and incompatible with the socialistic state regime, since it presumed the presence of private commercial relationships. This rule was substituted with another provision that suited the new regime better, yet expressed the same ideas. Pursuant to art. 78, (2) second sentence, if a person bought lost or stolen goods from a State or cooperative enterprise, he acquires ownership in an original manner and the former owner cannot claim the goods back under any

circumstance. No possibility for reimbursement of the price was provided as well. The legislator's aim was to affirm the dominant position of State and cooperative enterprises as the substitute of all previous private companies and partnerships and to increase citizens' trust in the new legal subjects who were designed to achieve the primary economic goals of the ruling party. Still, it must be pointed out that the good faith transferee enjoyed such a favorable position only if he acquired the lost or stolen movable from a State or cooperative enterprise. If the goods were transferred by anyone else, the original owner's interests prevailed and a claim could be successfully carried out even without having to reimburse the good faith acquirer with the price paid.

After the transition to free market economy in the late 80's and in the beginning of the 90's, the State and cooperative enterprises are no longer the only and the biggest participant in the economic life of Bulgaria. The majority of them were reorganized in the process of privatization and nowadays they have a negligible role. This circumstance significantly reduces the applicability of the provision of art. 78, (2), second sentence and causes a debate on enacting a new rule on the protection of the good faith transferee who acquired lost or stolen goods from a transferor acting in the ordinary course of business.

Apart from Bulgaria, the consensual system of transferring ownership as well as the balanced approach on good faith acquisition was adopted with some changes by many other national legislations within the European Union, as well as other, Non-member States. The Belgian Civil Code has adopted an identical set of rules and stands

the closest to its primary source – the French Civil Code. The provisions of art. 2279 and 2280 of the Belgian civil Code follow art. 2276 of the French Civil Code to the letter. Out of the EU, art. 1161 and 1162 of the Ethiopian Civil Code have fully adopted the French approach on good faith acquisition as well. The only difference is that the rules on good faith acquisition in the Ethiopian Civil Code are not placed next to the provisions about prescription, but among the other separate methods of acquiring ownership by original manner.

Modern national legislations have adopted the consensual transfer system as well, but have provided some additional requirements or other prerequisites as far as good faith acquisition is concerned. The most typical one is that the acquisition must be onerous. Only when the good faith transferee has given or promised a counter-performance his legal interest is worthy of protection. A number of national legislations broaden the scope of the "good faith" requirement as well. In contrast to the French Civil Code where case law defined good faith as the lack of knowledge that the transferor is not the owner of the movable²², modern civil codes tend to perceive the good faith requirement as a lack of knowledge that the transferor is not entitled to dispose of the goods. The transferee may know that he is dealing with a non-owner and this circumstance will not vitiate the acquisition a non domino. The main reason for this concept is protecting the dynamic commercial relationships in cases when the transferor established factual power over the movable on a lease, pledge or rent contract, but the acquirer believes that his transferor holds the goods on a consignment contract, for example and is entitled to transfer them.

²² Cass. 1re civ., 23 mars 1965: Bull. civ. I, n° 206: « *En matière d'application de l'article 2279 du Code civil, la bonne foi ... s'entend de la croyance pleine et entière où s'est trouvé le possesseur au moment de son acquisition des droits de son auteur, à la propriété des biens qu'il lui a transmis; le doute sur ce point est exclusif de la bonne foi.* »

A number of national legislations combine the classical French approach and a modern, reformed policy on the good faith acquisition. Such rules can be found in art. 933 of the Swiss Civil Code²³, art. 464 of the Spanish Civil Code²⁴ art. 4.96 of the Lithuanian Civil Code²⁵, art. 95, (1) of the Estonian Property and Ownership Act²⁶, art. 5:39 of the New Hungarian Civil Code (in force since 2014)²⁷, art. 3:86 of the Dutch Civil Code²⁸, the Swedish Good Faith Acquisition of Personal Property Act and § 1 of the Norwegian Good Faith Acquisition Act. Outside the EU, the balanced approach on good faith acquisition has been implemented in art. 1197, 1204 and 1268 of

the Brazilian Civil code²⁹, § 34 of the Sale Law of Israel, art. 798 and 799 of the Mexican Civil Code, art. 194 of the Japanese Civil Code, art. 1713 and 1714 of the Civil Code of Quebec and art.1157 of the Iraqi Civil Code³⁰.

2. The Abstract (Traditio) Transfer System

Among those national legislations included in the balanced approach group, the rules on good faith acquisition enacted in § 932 of the German Civil Code (Bürgerliches Gesetzbuch) deserve special attention. The starting point of the German transfer system is that a legal consequence can either follow

²³ Article 933 of the Swiss Civil Code states that “If someone has acquired ownership or other real rights over a movable in good faith is worthy of protection in case his transferor was not entrusted with the movable as well”. Article 934 (1) provides a 5-year period of time for the original owner to claim back his stolen or lost goods after he reimburses the good faith acquirer with the price the latter paid for the movables. For additional information see Arnold F. Rusch, *Gutgläubiger Fahrniswerb als Anwendungsfall der Rechtsscheinlehre*, in:

Jusletter 28. January 2008, p. 12-13; Tuor/Dreyer/Schmid, *Das Schweizerische Zivilgesetzbuch* (Zürich: Schulthess Polygraphischer Verlag, 1996), 618-619.

²⁴ “As far as movables are concerned, possession is equivalent to title”. For additional information see José Manuel de Torres Perea, “Acquisition from a non domino in Spanish civil law” (paper presented at the International Scientific Congress on Spanish-Philippine Private Law, University of Malaga, April 16-17, 2015).

²⁵ “If a person in good faith acquires property for value and without notice that the transfer doesn’t have authority to dispose, the legitimate owner may bring an action for *rei vindicatio* of the goods against the good faith transferee, provided that the owner lost the goods or was dispossessed without consent or that the goods were stolen.” Apart from this exception, the good faith acquirer can always rely on a title to ownership. Art. 4:96 of the Lithuanian Civil code provides that lost or stolen goods can be vindicated within three years from the moment of dispossession.

²⁶ “A person who has acquired a good by transfer in good faith is the owner of the good from the moment of gaining possession over the thing even if the transferor was not entitled to transfer ownership.” The Estonian civil law doesn’t explicitly provide a requirement “for value” of the acquisition. However, if the acquisition was gratuitous, the acquirer must re-transfer the thing to the entitled person even if the disposition was otherwise valid. This provision is derived from the rule of art. § 1040 Law of Obligations Act: “An acquirer in good faith who is no longer enriched in the extent of the (gratuitous) transfer by the time he learns or should have learned about the filing of a claim against him, is relieved of the duty to re-transfer the thing”. For more detailed information about the Estonian national legislation in terms of the good faith acquisition see : Priit Kama, *Evaluation of the Constitutionality of Good-Faith Acquisition*, *Juridica International*, XIX (2012), accessed May 08, 2015, doi:10.12697/1406-1082.

²⁷ Section 5:39 (1) provides that “A bona fide acquirer acquires ownership of a good, which has been sold in the course of the transferor’s commercial activity, even if the merchant was not the owner of the goods”. Section 5:39, (2) and (3) create the exception concerning lost and stolen goods and the counter-exception, when these goods are obtained at public auctions. See Laszlo Pók, *An old topic in a modern world*, *European Review of Law and Economics*, vol. 2 (2012), 7.

²⁸ “Although an alienator lacks the right to dispose of the property, a transfer pursuant to articles 90, 91 or 93 of a movable thing, unregistered property, or a right payable to bearer or order is valid, if the transfer is not by gratuitous title and if the acquirer is in good faith.”

²⁹ See Eduardo Filho, *Good Faith in the Brazilian Civil code : Ten Years Later*, *Teisé*, 88 (2013), 211-221.

³⁰ Dan Stigall, *A closer look on Iraqi Property and Tort Law*, *Louisiana Law Review*, 68 (2008), 780.

directly from a statutory provision or from a party's legal act. In contrast to the French Civil Code, German private law does not grant translatory effect to the contractual agreement, but has developed its own method, known as the "Trennungs- und Abstraktionsprinzip". The transfer of title must find its basis in a real agreement distinct from the obligation created prior by the parties. The basis of the transfer therefore is held to be the agreement on the transfer of title, this real agreement being an agreement in rem. Furthermore, pursuant to § 929 BGB the real agreement must be made public by the abstract act of *traditio*, that is the transfer of possession and both contracting parties must have agreed upon the passing of ownership. As far as these requirements are fulfilled, all powers embraced in the right of ownership pass to the transferee. In other words, ownership doesn't pass until the transferor has actually delivered the movable to the transferee. The transfer of title is a consequence of the real agreement, not of the underlying agreement creating just a mere obligation to transfer³¹.

Apart from this major difference, with regard to the acquisition a non domino, German private law resembles the French provisions, yet imposes a much more consistent legal protection of the original owner in comparison to art. 2277 of the French Civil Code.

The basic rule is given in § 932 (1) BGB: *The transferee becomes the owner occurring under paragraph 929 even if the movable doesn't belong to the transferor, unless he did not act in good faith at the time at which he would acquire ownership under these provisions.* The transferee is worthy of protection only if he acts in good faith at the moment of delivery. Section 932, (2) BGB sets out that "*the purchaser is not in good*

faith if he is aware or due to gross negligence is unaware that the movable doesn't belong to the seller".

Paragraph 932 BGB does not provide a requirement for value and this might create the false impression that both onerous and gratuitous transfers can lead to a good faith acquisition. However, § 816 BGB provides that the person who acquires a movable without a counter-performance, may be under a duty to return it to the owner under the rules of unjustified enrichment. This means that good faith acquisition under the rules of the German Civil Code can occur only if it is for value.

Despite being positioned in the balanced approach group, German private law is somewhat influenced by the *original owner rule* and this can easily be seen when it comes to the scope of protection of the dispossessed owner. Similarly to French law, §935 BGB starts off by manifesting that the movable must have been voluntarily entrusted to the transferor, thus excluding lost or stolen goods, but continues by referring explicitly to goods of which the owner had otherwise involuntarily lost possession. This provision extends the number of occasions when the dispossessed owner can reclaim back his movable and since there is no requirement for him to reimburse the price the good faith acquirer had paid³², we can conclude that the rules on good faith acquisition in the German Civil Code, despite sharing common principles with the French provisions, stand much closer to the *original owner rule* than most of the other national legislations from the *balanced approach group*.

The German approach has influenced a number of national legislations, for example the Greek Civil Code. Its provisions on the abstract method of transfer

³¹ Manfred Wolf, *Sachenrecht* (München: Verlag C.H.Beck, 2006), 198-200.

³² W. Brehm/C. Berger, *Sachenrecht* (Tübingen: Mohr Siebeck, 2000), 412; H. J. Wieling, *Sachenrecht I*, (Berlin: Springer, 2001), 385-395.

of movables, as well as on good faith acquisition (art.1034-1038 Greek Civil Code) follow in general § 929-932 of the German Civil Code. However, the Greek legislator has adopted the “French” market overt rule on lost or stolen goods, bought at a public auction, or at a fair or on the market, providing a better protection of the legal interests of the bona fide acquirer in comparison to the German Civil Code³³.

Other national legislations that adopted the German Civil Code, can be pointed out as well – the provisions of art. 22 of the Law on Property and other real rights of Kosovo³⁴ and art.187 et seq. of the Georgian Civil Code³⁵.

IV. The need for coherence and the Draft Common Frame of Reference as a role model

As this short comparative overview has shown, there is a considerable diversity on the rules of good faith acquisition. The majority of national legislations strive to find a balance between the interests of both the original owner and the good faith transferee, especially when it comes to lost or stolen goods. Yet, within Europe Italian and Portuguese law represent the two

contemporary extremes and throughout the national legislations there are differences beyond trifle. This circumstance is able to cause serious difficulties in legal enforcement if multiple jurisdictions are concerned, not to mention the unfair treatment of either parties if the applicable law is less susceptible and provides a considerably lower level of legal protection towards one of them in comparison to their national legislation, for example.

In my opinion, the existing diversity of rules could be overcome on the way of a unification of the provisions on good faith acquisition through a mandatory act, enacted at EU level. For this purpose the rules of the Draft Common Frame of Reference (DCFR) may serve as a role model. The Draft Common Frame of Reference is prepared by the Study Group on a European Civil Code that consists of legal scholars from several jurisdictions in the EU. It is a soft law codification³⁶ which can serve as a common denominator in the approximation of laws within the Member States³⁷.

Because of its great importance for promoting security of transactions and commerce, the Study Group has provided a set of rules regarding good faith acquisition of movables in Book VIII, art. 3:101 of the DCFR³⁸.

³³ See art. 1039 Greek Civil Code : “If the lost or stolen things are ... things, sold at a public auction, or at a fair or on the market, the buyer does acquire ownership of them if he is acting in good faith”. See P. Agalopoulou, *Basic Concepts of Greek Civil Law* (Athens, 2005), 394.

³⁴ Haxhi Gashi, Acquisition and Loss of Ownership under the Law on Property and Other Real Rights (LPORR): The influence of the BGB in Kosovo Law, *Hanse Law Review*, 9 (2013), 41-61.

³⁵ Eugenia Kursynsky-Singer and Tamar Zarandia, Rezeption des deutschen Sachenrechts in Georgien, *Max Planck Private Law Research Paper*, 14 (2010), 108-137.

³⁶ See Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law* (Munich: Sellier European Law Publishers), 2009, 431-432.

³⁷ <http://www.sgecc.net/pages/en/introduction/100.aims.html> (accessed on 09.05.2015)

³⁸ The Study Group agreed upon the need of drafting rules on good faith acquisition. This would balance the interest not only of the concrete parties at an individual level, but also of all participants in the commercial relationships intending to acquire goods. The scholars state that it would be too burdensome, costly and insecure if every particular acquirer was forced to undertake a detailed investigation of his transferors' rights. Not having a good faith acquisition rule would ruin legal certainty and increase investigation costs immensely. See Eric Clive,

The provision of art. 3:101, (1) DCFR sets out that when a movable is acquired for value from an unauthorized transferor, the transfer is valid, provided all other transfer requirements are met and the transferee neither knew nor could reasonably be expected to know that the transferor was not entitled to transfer. The article contains a rule on burden of proof as well: “The facts from which it follows that the transferee could not reasonably be expected to know of the transferor’s lack of right or authority have to be proved by the transferee”.

Art.3:101, (2) DCFR provides that good faith acquisition does not take place with regard to stolen goods, unless the transferee acquired them from a transferor acting in the ordinary course of business.

As one can see, the Study Group has tried to strike a compromise between the provisions on good faith acquisition in the majority of national legislations. The requirement for value, the strict standard on good faith and the exclusion of lost or stolen goods from its scope of application are aimed at granting a better protection of the dispossessed original owner, whereas the market overt rule and the wider content of good faith (especially compared to the provisions of the French Civil Code) put the transferee in a favorable position.

The choice of the Study Group to place the burden of proof on the good faith transferee has been regarded as “highly unusual” and criticized for causing a detrimental effect to commercial transactions, as well as urging costly and time-consuming lawsuits that the rules on good faith acquisition are evocated to prevent³⁹. Perhaps the reason for this criticism is that in the majority of national legislations a presumption of good faith is

provided in favor of the transferee. The only two countries in the EU whose rules on good faith acquisition provide a requirement for the transferee to prove that he did not know or couldn’t have known that he was dealing with a non owner or a person, not entitled to transfer ownership, are Sweden and the Netherlands.

On the other hand, one can find solid arguments in support of this policy. Placing the burden of proof on the transferee can be regarded as a form of balancing the interests. The good faith acquisition leads to depriving the original owner of his rights *in rem* and should be seen as an exceptional opportunity for the transferee to acquire ownership.

Another justification for this decision can be found in the general principles of the law of evidence. The transferee, as one of the contracting parties, is much closer to the act of acquisition than the original owner and it would be much easier for him to provide evidence of his good faith. The original owner will have immense difficulties to investigate the circumstances of the transfer that might have occurred on a different place or after a considerable period of time has elapsed. Moreover, there is a general principle that a person who wants to benefit from a specific provision has to provide facts and evidence that support his statement.

Conclusion:

The comparative overview of the major national legislations made above reveals that the existing diversity of the solution to the conflict between the legal interests of the original owner of a movable and its good faith acquirer can cause serious difficulties when multiple jurisdictions are

Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Full Edition, vol. 5 (Munich: Sellier European Law Publishers), 2010, p. 4827.

³⁹ Arthur Salomons, *The Purpose and Coherence of the Rules on Good Faith Acquisition and Acquisitive Prescription in the DCFR: A Tale of Two Gatekeepers*, *European Review of Private Law*, 3 (2013), 854.

concerned. The importance of this issue is even bigger under the conditions of the EU-Internal market and its primary feature - the free movement of goods. In spite of being a mere soft law codification, the DCFR can provide a solid basis for legal harmonization

among national jurisdictions. Adopting a set of harmonized rules may help to solve cross-border cases on good faith acquisition in a more efficient, consistent and equitable manner.

References:

- Arnold F. Rusch, Gutgläubiger Fahrnisserwerb als Anwendungsfall der Rechtsscheinlehre, in.
- Arthur Salomons, “Good Faith acquisition of movables”, in *Towards an European Civil Code, 4th revised and expanded edition*, ed. M. Hesselink et al. (Wolters Kluwer Law International, 2011), 1065-1082.
- Arthur Salomons, “The Purpose and Coherence of the Rules on Good Faith Acquisition and Acquisitive Prescription in the European Draft Common Frame of Reference. A Tale of Two Gatekeepers.” *European Review of Private Law* vol. 3 (2013): 843.
- Arthur Salomons, *The Purpose and Coherence of the Rules on Good Faith Acquisition and Acquisitive Prescription in the DCFR: A Tale of Two Gatekeepers*, *European Review of Private Law*, 3 (2013), 854.
- Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law* (Munich: Sellier European Law Publishers), 2009.
- Colin, A., Capitant, H., *Traite elementaire de Droit Civil, Tome 1, Livre II – Droit les biens*, translated by Galab Galabov, (Sofia, 1926, Royal Court Printing Office), 326.
- Dan Stigall, A closer look on Iraqi Property and Tort Law, *Louisiana Law Review*, 68 (2008), 780.
- Eduardo Filho, Good Faith in the Brazilian Civil code : Ten Years Later, *Teisé*, 88 (2013), 211-221.
- Eleanor Kashin Ritaine, National Report on the Transfer of Movables in France, in *National Report on the Transfer of Movables in Europe*, (Munich: Sellier. European Law Publishers, 2011), 119-128.
- Ernst Karner, Gutgläubiger Mobilärerwerb, (Wien : Springer, 2006), 18.
- Eugenia Kursynsky-Singer and Tamar Zarandia, Rezeption des deutschen Sachenrechts in Georgien, *Max Planck Private Law Research Paper*, 14 (2010), 108-137.
- Haxhi Gashi, Acquisition and Loss of Ownership under the Law on Property and Other Real Rights (LPORR): The influence of the BGB in Kosovo Law, *Hanse Law Review*, 9 (2013), 41-61.
- Helmut Koziol and Rudolf Welser, *Bürgerliches Recht*, Band 1 (Wien: Manzsche Verlags- und Universitätsbuchhandlung, 2006), 335.

- Ivan Petkov, National Report on the Transfer of Movables in Slovakia, in vol. 6 of *National Report on the Transfer of Movables in Europe* (Munich: Sellier European Law Publishers, 2011), 421.
- Jusletter 28. January 2008, p. 12-13; Tuor/Dreyer/Schmid, *Das Schweizerische Zivilgesetzbuch* (Zürich: Schulthess Polygraphischer Verlag, 1996), 618-619.
- Laszlo Pók, An old topic in a modern world, *European Review of Law and Economics*, vol. 2 (2012), 7.
- M.Planiol, *Traite elementaire de Droit Civil. Droit les biens*, translated by Tihomir Naslednikov (Sofia, 1928, Staykov Printing Office), 214.
- Manfred Wolf, *Sachenrecht* (München: Verlag C.H.Beck, 2006), 198-200.
- P. Michael Hebert, "Sale of Another's Movables", *Louisiana Law Review*, vol. 29 (1969): 335.
- P.Agallopoulou, *Basic Concepts of Greek Civil Law* (Athens, 2005), 394.
- Priit Kama, Evaluation of the Constitutionality of Good-Faith Acquisition, *Juridica International*, XIX (2012), accessed May 08, 2015, doi:10.12697/1406-1082.
- W. Brehm/C. Berger, *Sachenrecht* (Tübingen: Mohr Siebeck, 2000), 412; H. J. Wieling, *Sachenrecht I*, (Berlin: Springer, 2001), 385-395.

THE LEGAL STATUS OF THE SHARES TRADED ON RASDAQ MARKET

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Abstract

RASDAQ Market was launched in Romania in 1996, appeared as a mirroring of the well-established American market NASDAQ (which stood for National Association of Securities Dealers Automated Quotations). The role designated for RASDAQ was as platform for valuing papers issued in the privatization program in Romania (mass privatization process - MPP). In fact the participating companies to MPP had the legal obligation, under first Romanian Capital Market Law, No 52/1194, to be listed on a stock exchange.

Although it attended a US regulatory model, RASDAQ had to adapt to European rules with the accession of Romania to the European Union. The relevant EU rules (i.e., Directive 2004/39/EC on markets in financial instruments – MiFID, about to be replaced by Directive 2014/65/EU – MiFID II) provide for only two types of trading systems, i.e. regulated markets and multilateral trading facilities (MTF), while the RASDAQ Market securities fall under none of these two trading systems regulated by MiFID I.

After an entire decade of uncertainty concerning the status of the RASDAQ, Romanian legislator settled the situation of shares traded on this market. This regulation means the end for RASDAQ. Law No. 151/2014 provides that the RASDAQ Market is to be closed within twelve months as of the effective date of such law (October 27, 2014). To this end companies listed on the RASDAQ Market will have to opt for listing on a regulated market or on a MTF or for becoming private companies. Such option rests on the hands of shareholders. Going private asks for shareholders' rights protection so Romanian Financial Supervisory Authority (FSA) provides a procedure implementing the right to withdraw from the company of the dissenting shareholders and for computing compensation for their shares (FSA Regulation No. 17/2014).

Keywords: *capital market, investments, RASDAQ, multilateral trading facility (MTF), regulated market, shareholders protection.*

1. Introduction

RASDAQ Market was launched in Romania in 1996, with the support of the well-established American market NASDAQ. The role designated for RASDAQ was as platform for valuing papers issued in the privatization program in Romania (mass privatization process -

MPP). In fact the participating companies to MPP had the legal obligation, under first Romanian Capital Market Law, No 52/1194, to be listed on a stock exchange, so that most of them got listed on the RASDAQ Market. Subsequently, in 1999, there were about 5,500 Romanian companies listed on RASDAQ making it the European market with the most issuers.

As the mother platform, NASDAQ, evolved from an OTC legal status (over-the-

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counter or off-exchange trading is done directly between two parties, without any supervision) to a regulated exchange (in 2006, the status of NASDAQ was changed from a stock market to a licensed national securities exchange), RASDAQ itself faced a long time of ambiguities regarding its legal status.

Therefore RASDAQ Market started trading in 1996 under the initial name Electronic Exchange RASDAQ, as a trading platform for shares in state owned companies converted into public companies under the mass privatization program. That market was authorised by decision of the National Securities Commission (CNVM, now become ASF – Financial Supervisory Authority) of 27 August 1996 and thus was regarded as a market organised and regulated by the Romanian competent authorities.

On 1 December 2005, Electronic Exchange RASDAQ merged with Bucharest Stock Exchange, the former being incorporated into the latter as a distinct section. The legal person resulting from that merger, Bucharest Stock Exchange Company (public limited liability company), operated two different markets: the regulated market (Bursa de Valori București – Bucharest Stock Exchange) and the RASDAQ Market. The first market (BSE) was then authorised by the competent authority of the market (NSC at that time). That authority, under its statutory powers, also controls and regulates the functioning of the RASDAQ Market, but the latter has not been included in any of the categories of negotiating platforms European rules

provided for¹. Such irregularities were the starting point for long term controversy about the legal status of shares traded on RASDAQ Market. As important rules, i.e. the compulsory offers or market abuse offences, were to be applied on regulated market only, the status of RASDAQ Market knew various interpretations. Even the European Court of Justice was asked to deliver a preliminary ruling regarding the regulated market concept and its meaning.

Although it attended a US regulatory model, RASDAQ had to adapt to European rules with the accession of Romania to the European Union. The relevant EU rules (i.e., Directive 2004/39/EC on markets in financial instruments – MiFID, about to be replaced by Directive 2014/65/EU – MiFID II) provide for only two types of trading systems, i.e. regulated markets and multilateral trading facilities (MTF), while the RASDAQ securities market fall under none of these two trading systems regulated by MiFID².

The judgement of the European Court stated that a market in financial instruments which does not satisfy the requirements laid down by Directive (Title III Directive 2004/29/CE, MiFID 1) does not fall within the concept of ‘regulated market’, as defined in that provision, notwithstanding the fact that its operator merged with the operator of such a regulated market³.

In last year was set out the legal procedure to be followed for the clarification of the situation of the shares traded on RASDAQ Market (and of the shares traded

¹ CJEU, C-248/11 Para (19), (20).

² Cristian Gheorghe, *Capital Market Law*, Bucharest: C.H. Beck, 2009, p. 34-39.

³ Judgment of the Court of Justice of the European Union (second chamber) in case C-248/11, Criminal proceedings against Rareș Doralin Nilaș and Others, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30dbd281f1af23294c8cb5a9a432709a697a.e34kaxilc3qmb40rch0saxukahn0?text=&docid=120763&pagindex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=263962>

on the unlisted shares market too)⁴. The assumed purpose of the law is to align the RASDAQ market with Capital Market Law No. 297/2004 and European Law⁵.

2. Legal solution. Cessation of the activity of RASDAQ Market.

After an entire decade of uncertainty concerning the status of the RASDAQ, Romanian legislator settled the situation of shares traded on this market. This regulation means the end for RASDAQ. Law No. 151/2014 provides that the RASDAQ market is to be closed within twelve months as of the effective date of such law (October 27, 2014). To this end companies listed on the RASDAQ market will have to opt for listing on a regulated market or, as the case may be, on a MTF or for becoming private companies. Such option stays on shareholders' hands. Going private asks for shareholders' right protection so Financial Supervisory Authority (FSA) provides a procedure implementing the right to withdraw from the company of the dissenting shareholders and for computing compensation for their shares (FSA Regulation No. 17/2014).

3. Shareholders decision

Cessation of activity of RASDAQ Market rise to shareholders decision on the future fate of their company: it will remain

on the exchange floor or it will exit the public area and will go private.

The shareholders shall debate on the status of the company as RASDAQ Market wasn't licensed for future operation. They shall make a decision regarding the legal actions to be taken by the company required for the admission to trading of the shares issued by the company. Future trading implies admission on a regulated market or trading within an alternative trading system (ATS or MTF), based on the provision of Capital Market Law No. 297/2004 and regulations issued by the Financial Supervisory Authority (FSA)⁶.

In the absence of such a decision for market admission or subsequent to an explicit decision, the company will exit the trading floor and it will go private.

4. Shareholders rights.

The shareholders shall have the right to withdraw from the company if the General Meeting of shareholders resolves that the company takes no legal actions required for the admission to trading of the shares issued by the company on a regulated market or trading thereof within an alternative trading system (ATS)⁷. The same right is recognized if the shareholders decision is not accomplished by any cause.

Right to withdraw is subject to the conditions of Company Law No. 31/1990, as subsequently amended and supplemented⁸. This law recognizes such a right of

⁴ Law No. 151/2014 on the clarification of the legal status of the shares traded on RASDAQ Market or on the unquoted securities market.

⁵ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

⁶ FSA Regulation No. 17/2014 on the legal status of the shares traded on RASDAQ market or on the unquoted securities market, Law No. 151/2014, Art. 2.

⁷ Law No. 151/2014, Art. 3.

⁸ Cristian Gheorghe, *Romanian Commercial Law*, Bucharest: C.H. Beck, 2013, p. 421.

dissenting shareholders in the case of articles of incorporation alteration if such alterations change the initial incorporation of the joint stock company in an essential manner. Thus the shareholders who do not agree with the decisions of the General Meeting regarding the changing of the main object or the legal form of the company, the moving abroad of the registered office, have the right to withdraw from the company and to receive from the company consideration for the shares they possess, at the average value determined by an authorized expert, by using at least two methods of assessment recognized by the European Assessment Standards⁹.

5. Procedure

Convening the General Meeting. The board of directors of the companies whose shares are traded on RASDAQ Market must call and take all necessary arrangements for holding the Extraordinary General Meetings of shareholders within 120 days after the entry into force of Law No. 151/2014¹⁰. All these actions are subject to the conditions of Company Law No. 31/1990¹¹.

The shareholders debate on the situation created by the extinction of RASDAQ Market and they decide further actions within the new legal framework.

In order to timely and thoroughly inform the shareholders the company's board of directors shall draw up and provide shareholders with a report in accordance with Art. 117² of Company Law No.

31/1990. The report shall comprise at least the legal framework applicable to trading shares on a regulated market or within a multilateral trading facility and a presentation of regulated markets and multilateral trading facilities (ATS) on which the companies' shares may be traded¹².

If the decision taken asks for listing on a regulated market or multilateral trading facility company must follow the steps imposed by such a procedure. Capital Market Law No. 297/2004 and NSC (now FSA) Regulation No. 1/2006 provides an exhaustive set of instructions for admission to a stock exchange. As a result, the company, after the date of adoption of the resolution of the General Meeting of shareholders, shall send FSA the prospectus for the admission to trading, drawn up in accordance with the legal provisions laid down for this procedure¹³.

Admission to regulated market. The Extraordinary General Meeting of shareholders may decide the admission to trading on a regulated market. In this situation the company the shares of which are traded now on RASDAQ Market shall fill with the Financial Supervisory Authority (FSA) the request for approval of the prospectus for the admission to trading on a regulated market. Such request shall be submitted within 90 days after the date of adoption of the resolution of the General Meeting of shareholders, in compliance with the regulations¹⁴.

The prospectus for the admission to trading on a regulated market shall be drawn

⁹ Company Law No. 31/1990, Art. 134.

¹⁰ Law No. 151/2014, Art. 2 Para (1).

¹¹ St. D. Căpănu, *Romanian Commercial Law Treaty*, Bucharest: Universul Juridic, 2014; Cristian Gheorghe, *Romanian Commercial Law*, Bucharest: C.H. Beck, 2013, p. 361.

¹² Law No. 151/2014, Art. 2 Para (2).

¹³ Law No. 151/2014, Art. 6 Para (1).

¹⁴ FSA Regulation No. 17/2014, Art. 3 Para (1), NSC Regulation No. 1/2006, on issuers and operations with securities, as subsequently amended and supplemented, Art. 89 Para (6).

up in accordance with the provisions of Law No. 297/2004 and European Regulation¹⁵.

The company shall also submit to the market operator which runs the regulated market the company intends to be admitted to, a request for admission to trading¹⁶.

The company requesting admission to trading shall send FSA the decision of the market operator regarding the agreement in principle on the admission to trading of securities on the regulated market managed by such market operator. After its analysis of the request for approval of the prospectus, FSA may approve (or refuse) the admission to trading of the shares in accordance with the provisions of Law No. 297/2004¹⁷.

Admission to a Multilateral Trading Facility. The procedure for admission to a trading facility (alternative trading) is very similar to admission to a regulated market. In such case the provisions the company have to comply with are less than in the case of admitting to a regulated market.

The Extraordinary General Meeting of shareholders may decide the initiation of the process for trading the company's shares in a multilateral trading facility (or alternative trading system in American view). In this case the company shall submit to FSA the request for trading in such trading facility (alternative system) together with the system operator's agreement (in principle) on the trading of the shares in the alternative system managed by it.

FSA's decision for admission to trading or refusal of the request for admission to trading in an alternative trading system shall be made based on the

regulations applied to alternative trading system¹⁸.

Right to withdrawal. Right to withdraw from the company is recognized for shareholders if the company the shares of which are traded on RASDAQ market is not to be traded on a regulated market or on any alternative trading system once RASDAQ ceases to exist. The term within which shareholders may exercise their withdrawal right is 90 days after the publication of the resolution of the General Meeting of Shareholders in the manner prescribed by the law.

In order to establish the price to be paid by the company for the shares held by the shareholders having exercised their right to withdraw, the board of directors shall request the Office of the Trade Register to appoint an independent authorised expert. This request shall be submitted to the Office within five days following the day of receiving by the company of the first request for withdrawal from shareholders.

The report drawn up by independent expert should be prepared within 30 days after expert appointment and should contain the modalities whereby the shareholders may consult the report and also the price computed by the appointed expert for a share¹⁹.

The company shall inform FSA and the Bucharest Stock Exchange (BSE) through the submission of current reports about all relevant aspects regarding withdrawal procedure, as follows: the registration of the first request for withdrawal, the appointment (by the Office

¹⁵ Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/CE of the European Parliament and of the Council as regards the information contained in prospectuses, as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements.

¹⁶ FSA Regulation No. 17/2014, Art. 3 Para (3), NSC Regulation No. 1/2006, Art. 94 Para (1).

¹⁷ FSA Regulation No. 17/2014, Art. 3 Para (4), Law No. 297/2004, Art. 214, and Art. 217 Para (3).

¹⁸ FSA Regulation No. 17/2014, Art. 4 Para (1), (2).

¹⁹ FSA Regulation No. 17/2014, Art. 6.

of the Trade Register of the independent expert; the price for one share to be paid to the shareholders intending to withdraw from the company; the deadline for shareholders for submission of the requests for withdrawal from the company.²⁰

De-registration with FSA. The company the shares of which are traded on RASDAQ market may decide to go private or fails to complete the procedure for the admission to a regulated market or trading facility. In this case the shares traded on RASDAQ Market shall be withdrawn from trading and deregistered from FSA. The withdrawal rights of the shareholders have to be satisfied first.

De-registering with FSA is the proof that the company is not a subject of Capital Market regulations any longer.

There are many cases, under Law no. 151/2014, when the company the shares of which are traded on RASDAQ Market fails to be admitted to a stock exchange: the companies did not take the actions necessary for holding the Extraordinary General Meeting of shareholders within the 120 days' term laid down by Law No. 151/2014; companies did not hold the Extraordinary General Meeting of shareholders due to the failure to fulfil the legal quorum; the companies did not adopt any decision in the Extraordinary General Meeting of shareholders due to the failure to fulfil the legal majority rules; the companies adopted in the Extraordinary General Meeting of shareholders the decision that the company takes no legal actions necessary for the admission to trading of the shares issued by the company on the regulated market or in an MTF (ATS); companies' request for admission of the shares issued by it on a regulated market or MTF (ATS) was rejected by FSA²¹.

Obviously, in all these cases the right of withdrawal of the shareholder is granted in accordance with the provisions of Law No. 151/2014 and the company have to conduct the procedure for withdrawal of the shareholders from the company.

The shares traded on RASDAQ Market shall be withdrawn from trading and deregistered from FSA's records, in the case of the companies which conducted the withdrawal procedure or did not receive any request from the shareholders for withdrawal from the company in all those abovementioned cases.

6. Conclusions

The regulation of RASDAQ Market situation is a radical one. Between the choice of adapting the market in order to fit within the limits of present normative framework and its abolition, with the related options for companies, the legislator chose the last option. The alternative for the companies that are still looking for a trading floor is to apply for admission to established markets that already existed.

Basically the choice is not that difficult: regulated markets in Romania are: Bucharest Stock Exchange (BSE) administrated by the BSE Company (market operator) and SIBEX managed by SIBEX Company (administrator of the market). Alternative trading systems (or MTF) are managed by the same two companies (BVB and SIBEX as system operators).

The chosen normative solution involves carrying out from zero the procedure for admission to trading for companies that decide to follow this path (prospectus for admission to trading, ASF's decision after the approval in principle of the operator concerned). This option involves an

²⁰ FSA Regulation No. 17/2014, Art. 8.

²¹ FSA Regulation No. 17/2014, Art. 9.

administrative effort large enough for the company... And against its inertia: companies need to follow this procedure voluntarily, but as the reward is. Besides the benefits of trading usually recognized (visibility, access to a cheaper financial market, secure and easy transfer of ownership of shares, etc.) admission to trading floor allows the company to avoid payment of shareholders' withdrawal rights.

Refusal of admission to trading or failure to complete the procedure draws a considerable burden for the company: obligation to pay the shareholders' withdrawal rights which shall become due once the company behaves in this manner (explicit decision of non-admission, failure of deliberation in assembly, failure of the process of admission to trading).

Although the decision of non-admission to trading belongs to the shareholders majority, not on them press the burden of claims (as in squeeze out/sell-out procedure²²) but on company. These claims consist in withdrawal rights and they imply on the one hand the uncertainty of determining their fair value (independent evaluation should be performed) and on the other hand, are subject to economic pressure

on the company. In fact the impossibility of their payments calls an insolvency procedure so that company may face the dissolution. Even the majority shareholders' may decide to exercise these rights, in such a case the company will cease definitely to exist.

We consider the solution of placing the burden of these rights on the shareholders who decide to keep the company out of the trading market, instead on company itself, would have been fairer. Last but not least, the legislator's intervention is disproportionate as long as the authority (FSA) was able to solve RASDAQ legal status through administrative arrangements. The pendant solution may be qualifying (and authorizing) RASDAQ Market as Multilateral Trading Facility (MTF) with the recognition of a general and time-limited withdrawal procedure from trading together with the recognition of a right of withdrawal from the company for the shareholders in this case. Indecision (perpetuated at least ten years) shown by the FSA has led to present disproportionate legal solution that effectively discourages companies from remaining to trading floor: cessation of the activity of RASDAQ.

References:

- St. D. Cărpenaru, *Tratat de drept comercial roman*, Bucharest: Universul Juridic, 2014.
- St. D. Cărpenaru et al., *Legea societăților. Comentariu pe articole. Ed. 5*, Bucharest: C.H. Beck, 2014.
- C. Duțescu, *Legea privind piata de capital. Comentariu pe articole*, Bucharest: C.H. Beck, 2007.
- Francisc Deak, *Tratat de drept civil. Contracte speciale*, vol III, 4th Edition, Bucharest: Universul Juridic, 2007.
- I.L. Georgescu, *Drept comercial român*, Bucharest: All Beck, 2002.
- Cristian Gheorghe, *Drept comercial român*, Bucharest: CH Beck, 2013.
- Cristian Gheorghe, *Dreptul pietei de capital*, Bucharest: CH Beck, 2009.

²² Cristian Gheorghe, *Capital Market Law*, Bucharest: C.H. Beck, 2009, p. 242-247.

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- C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de Drept Civil Român*, Bucharest: All, 1996.
 - N.K. Kubasek și a., *The legal environment of business*, Prentice Hall, Upper Saddle River, New Jersey, 1996.
 - O. Manolache, *Drept comunitar*, Bucharest: All Beck, 2003.
 - T. Prescure, N. Călin, D. Călin, *Legea pieței de capital, Comentarii și explicații*, Bucharest: C.H. Beck, 2008.
 - M. Șcheaua, *Legea societăților comerciale nr. 31/1990, comentată și adnotată*, Bucharest: Rosetti, 2002.
 - I. Turcu, *Teoria și practica dreptului comercial român*, Bucharest: Lumina Lex, 1997.

THE TRAINING OF LAWYERS - A CONSTANT IN EU'S OBJECTIVES, IN A SOCIETY OF KNOWLEDGE

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Abstract:

The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity. Also, the Union shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.

Keywords: *Union European, training policy, education, law practitioners.*

Introduction

It is very well known that today's international society is marked by very profound changes which are happening very fast, being often placed at strategic interferences. Increasingly more, economic accumulations are based on information and innovation, both turning into essential development resources, in general. The same society of information that is a source of wealth for some people, represents at the same time, a potential factor of exclusion for others. A careful analysis of realities highlight the fact that the main goal pursued by those who founded the European Union (in 1992, with the signing of the Maastricht Treaty) was and still is to make from this European area, not only a space economically competitive, but equally, a social space, close to citizens and their problems. In this context, lifelong learning becomes crucial. Its stake is to provide

economic competitiveness and social cohesion, development, favouring thus the exercise of active European citizenship. For lifelong learning to become reality, it is essential that the role of professional training is grounded on new bases, including in contemporary Romania, which as far as integration concerns, is related to requirements specific to a new future.

Successive European political structures revealed common themes, offering national strategies, a new element called lifelong learning, reference element for any natural evolution, providing the context for practical cooperation, such as, for example, mutual exchanges and pilot projects.

Obviously, the pace of economic and social development has accelerated. In Europe, more than ever, enterprises need a qualified and thoroughly informed staff. Employers choose, more rarely, unskilled workforce, seeking for capabilities endowed with performant reasoning, including in the

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field of technical competence. The evolution has merely reinforced the role of lifelong learning, which has become crucial for developing a professional career.

2. The right to education¹

Article 165 of the Treaty on the Functioning of the European Union (TFEU) is the legal basis of actions undertaken, both at EU and Member State level, in order to continue training throughout life, for all professional categories, including lawyers, meaning those who, „although representing an autonomous profession, are an integral and necessary part of the judicial activity, fulfilling a central role in the implementation of EU legislation”². The Commission considers that, „in order to foster a genuine European culture in the judicial and law enforcement field, is essential to speed up training on Union-related issues, and this should become systematically accessible for all professions involved in the implementation of the area of freedom, security and justice”³. The Union’s action in the fields of education and professional training aims at⁴:

- developing the European dimension in education, particularly through the learning and dissemination of Member States’ languages;
- favouring the mobility of students and teachers, by encouraging the academic recognition of diplomas and periods of study;
- promoting cooperation between educational institutions;

- developing exchanges of information and experience on issues common to educational systems in the Member States;
- encouraging the development of youth exchanges and exchanges of socio-educational trainers and supporting youth participation to the democratic life of Europe;
- encouraging the development of distance education,
- developing the European dimension of sport, by promoting fair-play and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially of the youngest.

To achieve these objectives, the European Parliament and the Council shall adopt incentive measures, excluding any harmonization of laws, regulations and administrative provisions of the Member States, deciding in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions. The Council also adopted recommendations⁵ to the Commission’s proposal⁶.

The European Union and Member States are making considerable efforts to continuously raise the level of competence in all areas. The efforts that our country should also pragmatically report to, are made in order to reduce the number of young people leaving school without a qualification. Also, solutions are sought for those who drop out of school, to be offered an alternative in the sense of finding a

¹ For details, see Fuerea Augustin, *Un sistem educațional continuu, articol de autor*, in Revue „Tribuna învățământului”, no. 680 (2561)/2003, pp. 1–2.

² COM (2011) 551 final, p. 4.

³ The Stockholm Programme - An open and secure Europe serving and protecting the citizens (2010 / C 115/01), p. 6.

⁴ According to art. 165 TFEU para. (2).

⁵ About the legal status of recommendations, see Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, p. 49.

⁶ Art. 165 TFEU para. (4).

training opportunity in order to subsequently find a job.

The principle increasingly common in the Member States of the European Union is that according to which each person must have also the right to learn throughout his life: it concerns a lifelong learning, based on the reality of our times. The process of knowledge and lifelong learning requires considerable force. First, it tends to blur traditional distinctions between initial education and continuing education, formal and informal requirements and, not least, general and professional education. Secondly, it is useful to know, now when Europe opens its doors for our country in terms of rights and obligations, that establishing a continuous education system leads to a profound review of the role of vocational training, which includes its modes of transmission, financing and insurance so that education could remain accessible to a larger number of people.

Whatever differences may exist between their systems of continuing education, all EU Member States are working towards the same purpose, more important than any other: to bring this change to an end. The European labour market needs skilled and flexible people because, only in this way, the European Union will become one of the biggest competitors in the field of global competition. Lifelong learning is the source of this success, is the factor that can provide continuous updating of requirements and optimal exploitation of the potential of information. Therefore, now more than ever, vocational training systems in the Member and associated States need to be integrated into a common European strategy.

Retrospectively, we see that, in this area too, the Member States have set common goals. Initially, there was an exchange of ideas concerning the objectives to be achieved and the joint actions they will

develop in order to achieve them. Thus, the Union played an important role in the development of national policies and cooperation. The conjunct views of the social partners served at European level, to develop a common strategy, by aligning first, the national legislation in the very important field of continuing education.

Subsequently, it was concluded that, at European level, a clearly defined policy framework was required for Member States to be able, through efforts both individual and common, to reorganize their national education systems. Such a framework would allow, obviously, to better highlight issues of common interest and the connections between lifelong learning and the European strategy, in favour of the employee. Also, the achieved political framework stimulates the debate on the means used to achieve lifelong learning and contributes to building consensus throughout the Union on training objectives and measures to be taken in order to achieve them. It was also demonstrated, theoretically and practically, that the institutionalized political framework favoured the application of an effective system for the exchange of information and experience at European level, on the one hand, and created the necessary conditions to achieve a forum for examining and analysing the ways in which the decision-making process could be improved.

The European policy framework is not, however, the only solution; it is necessary, but not sufficient. Issues, such as the content and organization of continuing education, are incumbent upon Member (and the associated) States, meaning that they have the freedom to choose how they will develop and implement the policy in the field. The continuing education reform occurs as a result of the fight against the lack of qualification, and also in response to the specific needs of adults who, most often, didn't get the initial education. Thus, for

example, the UK and Ireland are trying to achieve greater flexibility to meet these needs, through networking and learning centres funded by private enterprises, especially created for this purpose. In Finland and the Netherlands, emphasis is placed respectively on long-term planning and cooperation of all partners involved, and Germany tries to make all young people benefit of vocational training through a well-developed and thoroughly organized system. Denmark also attaches to this reform by expanding higher education programs of short duration, with professional vocation.

The future of the European Union is closely linked to economic performance, and more. To this end, the EU launched a genuine structured cooperation framework („Rolling agenda”) consisting of an initiative that allowed the materialization of the role that Community cooperation has in education. The aforementioned structured cooperation framework is not placed in a purely „pragmatic” perspective meant to simplify or relaunch actions already existing, but in this way, it can be considered that the European Union set a new strategic goal, with the purpose of education reform, in general and continuing education, in particular. And that, especially since the development of a society which meets the requirements of the XXI century (of knowledge and innovation) is essential to launch a genuine process of economic and social renewal of Europe. Innovation and knowledge are key factors for the

competitiveness of the Union and for Europe's ability to fight, including against unemployment, so harmful to the entire international society. The investment in human resources is a prerequisite for successful economic and social development.

The Lisbon Treaty has given the European Union competence⁷ to „support the vocational training of magistrates and judicial staff⁸” in the field of judicial cooperation in civil and criminal matters. The entry into force of the Lisbon Treaty enables the Union „to show more ambition in responding to the daily concerns and aspirations of European citizens”⁹. And this is due to the strengthening of the role of the European Parliament, as co-legislator and to a greater involvement of national parliaments, and also to the introduction of qualified majority voting in the Council, in most policy areas¹⁰.

3. The initial and continuing vocational training of lawyers according to provisions of the European Union.

According to a press release from the European Commission¹¹, its target is to train 700,000 specialists in EU law by 2020. This happens in the context in which „there are about 1.4 million law practitioners in the European Union (...). The Commission wishes to create conditions for at least half of these legal practitioners to participate to European judicial training at local, national

⁷ For details on the division of powers, see Augustina Dumitraşcu, Roxana-Mariana Popescu, *Dreptul Uniunii Europene. Sinteză și aplicații*, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015, p. 183-190.

⁸ See Elena Ştefan *Brief considerations on the disciplinary liability of the magistrates*, Lex et Scientia International Journal nr.2/2013, p.109-114.

⁹ Commission Communication *Delivering an area of freedom, security and justice for Europe's citizens. Action Plan for implementing the Stockholm Programme*, COM (2010) 171 final, 20 April 2010, p. 3.

¹⁰ On these issues, see widely Augustina-Mihaela Dumitraşcu, *Dreptul Uniunii Europene și specificitatea accestuia*, Universul Juridic Publishing House, Bucharest, 2013, p. 61.

¹¹ IP / 11/1021.

or European level by 2020”¹². It has also been established as additional objective that „all legal practitioners should benefit during their careers of at least one week training in EU law”¹³.

The objective is not new. In 2006, the European Commission stated in its *Communication on judicial training in the European Union*, the need to develop vocational training for lawyers and to make more effective and visible the progress recorded in creating an area of freedom, security and justice.

To this end, the Commission itself emphasizes the need to train legal practitioners in the field of European Union law, by inviting „national governments, high Councils for the Judiciary, professional organizations and educational institutions in the field, both at EU and national level”¹⁴, by asking them „to commit in order to integrate EU law into their training programs and to increase the number of classes and participants”¹⁵.

The Commission shall facilitate access to EU funding to support quality training projects, including the e-learning type modules. Under EU multiannual financial framework, the Commission proposed that the European judicial training should become a top priority in order to prepare more than 20,000 legal practitioners per year, by 2020. Training half of the legal practitioners of the European Union until 2020 is a shared challenge.

It is very important to remember that „in order to help creating a European judicial culture based on mutual trust, the Commission has launched since 2014, an

exchange program for new judges and prosecutors, lasting two weeks. The Commission supports the training through the European e-Justice portal - which is the „single window of the EU” for legislation and access to justice in all EU countries - and by sharing practical guidelines on training methodologies and evaluation”¹⁶.

We cannot ignore the fact that, as determined by the Commission in its Communication, „the European judicial training can take place either during the initial training or in the permanent training. This training concerns the following aspects: EU law, including substantive and procedural law, together with the related case law of the Court of Justice of the European Union and knowledge of national judicial systems”.

The primary legal basis of vocational training is the Treaty on the Functioning of the European Union which, in Article 81 paragraph (2), section (h) and Article 82, paragraph (1), section (c) invites the EU to „support the vocational training of magistrates and judicial staff in both civil and criminal field”.

The judicial training is, essentially, a national responsibility, as outlined in the Council Resolution on the training of judges, prosecutors and judicial staff in the European Union¹⁷.

A similar significance has the report of 9 May 2010 of the former European Commissioner Mario Monti, entitled „A New Strategy for the Single Market”¹⁸ which required European leaders to eliminate remaining bottlenecks affecting

¹² *Id.*

¹³ According to press release IP / 11/1021.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 2008/C 299/01 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:299:0001:0004:RO:PDF>)

¹⁸ http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_ro.pdf

innovation, and hampering the growth potential of the EU.

The Stockholm Programme¹⁹ adopted by national governments in December 2009, sets out measures aimed at creating a single area of justice in the EU and requires effective action at European level to support training efforts and to develop training mechanisms at EU level. In turn, the European Parliament has consistently emphasized that a qualitative judicial training contributed significantly to improving the functioning of the internal market and facilitated the exercise of rights by citizens.

In late 2010, the Commission consulted the Member States, members of the Justice Forum, the European Judicial Training Network and its members²⁰.

Currently, we are in the third development phase of EU programs of education, training and youth (Lifelong Learning and Youth in Action), of which also institutions of vocational training in the legal field can benefit²¹.

On 13 September 2011, the European Commission presented the Communication entitled *the Establishment of a climate of confidence in justice at EU level. A new dimension of European judicial training*²². From the first pages, the Commission recalls one of its objectives, namely to allow half of European Union lawyers to participate in European judicial training activities by 2020, by using all available resources at local, national and European level in accordance with the objectives of the

Stockholm Programme. To achieve this objective, the participation and cooperation of all stakeholders, at national and European level, are required.

According to the European Commission, „the European judicial training in the field of the EU *acquis*, both at national and at European level, is still modest”²³. For example, in May 2011, 51% of judges and prosecutors declared that they had not participated before to judicial training activities in the field of Union law or of the law of another Member State, while 74% declared that the number of cases involving the Union law increased over the years. 24% of judges and prosecutors have never participated in training courses on EU law because such courses have not been at their disposal. Activities vary greatly from one Member State to another, the annual number of trained judges or prosecutors ranging from 240 to 13 000. The Commission funded or co-funded 162 projects involving almost 26 000 participants from 2007 to 2010²⁴.

Regarding the training of lawyers, it must include initial and continuing training. „Every new lawyer should know right from the start EU law. The initial training, organized before the employment or when getting the job, must be complemented by lifelong learning, to help legal practitioners have knowledge up to date and to know where and how to acquire new skills and information „”²⁵.

In order to achieve these goals, each Member State should take all possible measures to ensure that its national bodies

¹⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:RO:PDF>

²⁰ According to the press release, *cited above*.

²¹ The Commission’s Decision of 26 April 2007 on the responsibility of Member States, the Commission and the National Agencies for the implementation of the Lifelong Learning Programme (2007-2013), C (2007) 1807 final, not published.

²² COM (2011) 551 final.

²³ COM (2011) 551 final, p. 4.

²⁴ *Id.*

²⁵ *Id.*, p.8.

responsible for training lawyers, disseminate information on legal systems, develop and stimulate direct exchanges between lawyers in different Member States, including by taking an active role in the Exchange Program of the Judiciary, by promoting projects of „twinning” and by any other appropriate means²⁶.

Only by pursuing such training programs in Romania, as is the case of all Member States of the European Union, we can talk about recognition of diplomas and professional qualifications under the existing *acquis* in the field (Directive 2005/36 / EC of the European Parliament and the Council on the recognition of professional qualifications).

3. Conclusions

At EU level, it is considered that for the construction of a European area of justice for citizens and businesses, it is necessary to improve European judicial training. The European training of lawyers must be based on joint actions of: Member States; European partners and the European Commission.

We conclude by showing that lifelong learning is the starting point to promote active European citizenship and of a society based on social inclusion, not exclusion, leading to fulfilling a wish difficult to accomplish, but not impossible, namely that of a finality corresponding to efforts made so far. This finality will be translated through a united Europe, a Europe of all people, from which, in no case, Romania and Romanians, with all their potential, often confirmed, shall miss.

References:

- Dumitrașcu, Augustina; Popescu, Roxana-Mariana, *Dreptul Uniunii Europene. Sinteze și aplicații*, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015.
- Dumitrașcu, Augustina-Mihaela, *Dreptul Uniunii Europene și specificitatea acestuia*, Universul Juridic Publishing House, Bucharest, 2012.
- Fuerea, Augustin, *Un sistem educațional continuu*, articol de autor, in *Revue „Tribuna învățământului”*, no. 680 (2561)/2003.
- Popescu, Roxana-Mariana, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011.
- Ștefan, Elena, *Brief considerations on the disciplinary liability of the magistrates*, *Lex et Scientia International Journal* nr.2/2013.
- Commission Communication *Delivering an area of freedom, security and justice for Europe's citizens. Action Plan for implementing the Stockholm Programme*, COM (2010) 171 final, 20 April 2010.
- The Commission's Decision of 26 April 2007 on the responsibility of Member States, the Commission and the National Agencies for the implementation of the Lifelong Learning Programme (2007-2013), C (2007) 1807 final, not published.

²⁶ Resolution of the Council and of Representatives of the Governments of Member States meeting within the Council on the training of judges, prosecutors and judicial staff in the European Union (2008 / C 299/01), pt. 3.

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- Resolution of the Council and of Representatives of the Governments of Member States meeting within the Council on the training of judges, prosecutors and judicial staff in the European Union (2008 / C 299/01), pt. 3.
 - The Stockholm Programme - An open and secure Europe serving and protecting the citizens (2010/C 115/01).
 - Press release IP / 11/1021.
 - COM (2011) 551 final.
 - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:299:0001:0004:RO:PDF>
 - http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_ro.pdf
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:RO:PDF>

APPLYING INTERNATIONAL HUMANITARIAN LAW TO CYBER-ATTACKS

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Abstract

Technology plays an important role in everyday life. Technological advancement can be found in every field of government including the military. Because of this, new means and methods of conducting hostilities have emerged. Cyber warfare starts to represent the latest challenge at an international level. States and non-state actors have started to implement new security policies and new defences against cyber-attacks but also have embraced using cyber-attacks as a method of conducting hostilities. The question that has to be answered regarding the use of cyber-attacks is what is the legal regime that governs such attacks and if IHL can apply to cyber warfare?

Keywords: *jus ad bellum, jus in bello, cyber-attacks, cyber-warfare, Tallinn Manual.*

1. Introduction

Our world is changing at an increasing rate and this change is caused, mostly, by the rapid advancement of technology. This accelerated technological evolution has led to the development of new means and methods of conducting hostilities. Cyber-attacks represent the latest threat and states and international organizations have begun to develop new defence strategies and new methods to combat these threats. If states and non-state actors resort to using cyber-attacks what is the threshold that these attacks have to reach to trigger a response under article 51 of the UN Charter from the

victim state? Also, can a computer attack or a series of computer network attacks trigger the beginning of an armed conflict? International Humanitarian Law (IHL) is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare¹. IHL is a branch of international law, and applies only to armed conflict. The question that this article wants to answer is does IHL apply to cyber-attacks? At this moment there is legislation at a national level, that deals with cybercrimes (cracking, copyright infringement, child pornography, ID theft, fraud, etc.) but there is no international treaty that mentions the

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¹ International Committee of the Red Cross (ICRC) – “What is International Humanitarian Law?” accessed February 20, 2015. https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf

applicability of IHL to computer network attacks during situations of armed conflict. As a response to this situation in 2009, the NATO Cooperative Cyber Defence Centre of Excellence², invited an independent “International Group of Experts” to produce a manual on the law governing cyber warfare. In April 2013, The Tallinn Manual on the International Law Applicable to Cyber Warfare was published. Even though this is not a binding document it represents a first effort to comprehensively and authoritatively analyse this subject.

2. Content

Conflict is governed by two distinct branches of law, *jus ad bellum* which governs the situations in which states can resort to force as an instrument of their national policy and *jus in bello* which governs the conduct of hostilities. The latter applies only in situations of armed conflict. The term *attack* can be found in both branches of law but its meaning differs.³ Due to this situation there must be a clear distinction between cyber-attack governed by the norms of *jus ad bellum* and those governed by *jus in bello*.

At this moment no definition of cyber-attacks is recognised at an international level. NATO Glossary of Terms and Definitions defines computer network attacks (CNA) as “action taken to disrupt,

deny, degrade or destroy information resident in a computer and/or computer network, or the computer and/or computer network itself⁴”. The Glossary also states that a CNA is a type of cyber-attack.

In the Tallinn Manual, the term cyber operations is used to *define employment of cyber capabilities with the primary purpose of achieving objectives in or by the use of cyberspace*⁵. Cyber operations are not limited to cyber-attacks. While a cyber-attack is defined as a *cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects*⁶. In this case, the term cyber-attacks applies to situations of armed conflict. In this article the terms cyber operations and cyber-attacks will be understood as defined in the Tallinn Manual.

Not all cyber-operation and cyber-attacks are unlawful. There is a threshold that cyber-operations must reach to be considered use of force. Rule 10 of the Tallinn Manual states that “a cyber operation that constitutes a threat or use of force against the territorial integrity or political independence of any State, or that is in any other manner inconsistent with the purposes of the United Nations, is unlawful⁷.” This rule references Article 2(4) of the UN Charter which states that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence

² International military organisation based in Tallinn, Estonia, and accredited in 2008 by NATO as a ‘Centre of Excellence’. NATO CCD COE is neither part of NATO’s command or force structure, nor funded by NATO.

However, it is part of a wider framework supporting NATO Command Arrangements.

³ For more information see Michael N. Schmitt - “Attack” as a Term of Art in International Law: The Cyber Operations Context, *PROCEEDINGS OF THE 4TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT* 283-293 2012 -https://ccdcoe.org/publications/2012proceedings/5_2_Schmitt_AttackAsATermOfArt.pdf Accessed on 27.02.2015.

⁴ NATO Standardization Agency, NATO Glossary of Terms and Definitions (AAP-06) (2013) at 2-C-11.

⁵ Tallinn Manual on the International Law Applicable to Cyber Warfare – Cambridge University Press, Cambridge, 2013 – p. 211.

⁶ *Idem* – p. 92.

⁷ *Idem* 5 – p. 45.

of any State, or in any other manner inconsistent with the Purposes of the United Nations.” This article is now regarded as a principle of customary international law, thus is binding for all states⁸. A cyber-operation will be considered unlawful when it constitutes a threat or use of force. There are two exceptions from the prohibition set out in art 2(4) of the UN Charter – uses of force authorized by the Security Council under Chapter VII and self-defence in accordance with Article 51 of the UN Charter. The prohibition does not apply to non-state actors, organized groups, individuals and terrorist groups if the actions of the said groups cannot be attributed to a state.

According to Rule 11 of the Tallinn Manual “A cyber operation constitutes a use of force when its scale and effects are comparable to non-cyber operations rising to the level of a use of force.”⁹ To understand what criteria a cyber operation has to meet to be considered use of force we must look at non-cyber operation that reach the threshold of use of force.

The UN Charter does not provide a definition for the term *use of force* and does not provide the necessary criteria to determine the situations in which actions of a state may be regarded as uses of force. During the 1945 San Francisco Conference, Brazil wanted to include economic coercion as a use of force but the proposition was rejected.¹⁰ Due to this fact cyber-operations aimed at economic coercion will not be considered use of force. The lack of criteria by which to determine when an act could be considered use of force, the International Group of Experts took into consideration the decision of the International Court of Justice

(ICJ) in the Nicaragua Judgement. The ICJ stated that the “scale and effects” are to be considered when determining whether a certain action amounts to use of force. The International Group of Experts agreed that “scale and effects” are qualitative and quantitative factors that would apply when determining if a cyber operation qualifies as a use of force. ICJ distinguished between the most grave forms of use of force (armed attack) and other less grave forms¹¹. All armed attacks are uses of force and all cyber operations that reach the threshold of armed attack and could be attributed to a state will be considered uses of force. This distinction is important given the fact that an action that amounts to use of force is a violation of Article 2(4) of the UN Charter while an action reaching the threshold of armed attack could trigger an armed response from the victim state under Article 51 of the UN Charter.

Not all cyber operations are uses of force. Because the question of what actions amount to use of force remained unanswered, the International Group of Experts created a series of factors to help states in determining if a certain action reaches the threshold of use of force. These factors are not formal legal criteria¹²:

a) *Severity* – an action, including a cyber operation that causes damage, destruction, injury or loss of life is more likely to be regarded as a use of force.

b) *Immediacy* – there is a higher probability that an operation that produces immediate effects will be considered a use of force.

c) *Directness* – in the case of armed actions, cause and effect are closely related.

⁸ Malcolm N. Shaw – International Public Law, Cambridge University Press, 2008, - p. 1123.

⁹ Idem 5 – p. 47.

¹⁰ Sergey Sayapin - The Crime of Aggression in International Criminal Law, Asser Press, 2014 – p.80.

¹¹ International Court of Justice, Case concerning Military and Paramilitary activities in and against Nicaragua (Merits) (1986) para. 191. <http://www.icj-cij.org/docket/files/70/6503.pdf>. Accessed on 28.02.2015.

¹² Tallinn Manual – p. 49.

Cyber operations in which the cause and effects are clearly linked are more likely to be characterized as use of force.

d) *Invasiveness* – refers to the degree to which a cyber operation manages to intrude the computer systems of a State. The higher the security levels of a computer system, the greater the invasiveness of the action. This rule shall not apply to cases of cyber espionage; it will only apply to actions that reach the threshold of use of force.

e) *Measurability of effects* – This factor derives from the greater willingness of States to characterize actions as a use of force when the consequences are apparent.¹³

f) *Military Character* – a link between a cyber operation and a military operation increases the likelihood of being characterized as a use of force

g) *State involvement* - The clearer and closer a nexus between a State and cyber operations, the more likely it is that other States will characterize them as uses of force by that State¹⁴

h) *Presumptive legality* - International law is generally prohibitive in nature. Acts that are not forbidden are permitted. In the absence of a treaty or a customary rule an act is presumed to be lawful. Thus actions that are not expressly prohibited by a treaty or a customary rule shall not be interpreted by states as use of force.

The conditions in which a state, that is the target of a cyber operation that reaches the threshold of armed attack, can exercise the right of self-defence are defined in Rule 13 of the Tallinn Manual: „A State that is the target of a cyber operation that rises to the

level of an armed attack may exercise its inherent right of self-defence. Whether a cyber operation constitutes an armed attack depends on its scale and effects.”

The right of self-defence is reflected in Article 51 of the UN Charter: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

ICJ, in the Nicaragua Judgement¹⁵, confirmed the customary status of the right of self-defence. The Court held that Article 51 of the UN Charter can only apply if there is a natural¹⁶ or inherent right of States to self-defence and this right has a customary nature. Also, the ICJ noted that a State can resort to armed force in accordance with the right of self-defence only if it was the target of an armed attack¹⁷. As was the case of actions that reach the threshold of use of force, actions that constitute armed attacks are not defined in any international document. There is a direct link between armed attack and use of force. All actions that reach the threshold of armed attack will be considered uses of force. However, not all

¹³ Tallinn Manual - p. 51.

¹⁴ Ibid.

¹⁵ Nicaragua Judgment – para. 176.

¹⁶ Article 51 of the UN Charter – *droit naturel*.

¹⁷ ICJ - Case Concerning Armed Activities on the Territory of The Congo (2005): “Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council.

uses of force will be qualified as armed attacks. This distinction was made by the ICJ in the Nicaragua and Oil Rigs case.

In the case of cyber operations the International Group of Experts concluded that certain action could reach the threshold of armed attack. The Group of Experts' opinion is based on the ICJ's view in the Legality of Nuclear Weapons Advisory Opinion "that the choice of means of attack is immaterial to the issue of whether an operation qualifies as an armed attack¹⁸". To reach the threshold of an armed attack, a cyber operation has to cause damage, destruction, injury or loss of life. Cyber espionage operations, information theft and cyber operation causing short term disruption of non-essential services will not be qualified as armed attacks. If a cyber operation reaches the threshold of armed attack then the victim state can exercise its inherent right of self-defence. The International Group of Experts believes that a state can exercise its right of self-defence if it is the victim of a cyber-operation that can be qualified as an armed attack, launched by a rebel or terrorist group. This view is based on the response of the international community to the situation that occurred on the territory of the United States of America on September 11, 2001. The action launched by the terrorist organization Al Qaeda was characterised as an armed attack triggering the right of self-defence of the United States.

International Humanitarian law¹⁹ applies to all situations of armed conflict regardless of a formal declaration of war and irrespective of whether the parties involved recognise the state of armed conflict. None of the rules that form IHL explicitly deal with cyber operations. For situations of international conflict, common Article 2 of the 1949 Geneva Conventions states that the

provisions of the Conventions shall apply in full "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" and "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Additional Protocol I to the Conventions states that its provisions shall apply to all situations stated in common Article 2 and to situations of "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination". Common Article 3 to the Geneva Conventions deals with situations of non-international armed conflict stating that the hostilities take place on the territory of one of the high contracting power. Additional Protocol II (AP II) to the Geneva Conventions, in Article 1 includes additional rules for application such as control of a territory by an organized armed group, under responsible command that can carry sustained and concerted military operations. AP II differentiates between situations of internal disturbance and tensions such as riots, isolated and sporadic acts of violence and armed conflicts. The term armed conflict was not defined in the Geneva Conventions or in the Additional Protocols. A definition of armed conflict was given by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the Tadic case: "An armed conflict exists wherever there is resort to armed force between states or protracted armed violence between government authorities and organised armed groups or between such groups with a state. International humanitarian law applies from

¹⁸ Tallinn Manual – p. 54.

¹⁹ Laws of Armed Conflict (LOAC) in some Manuals.

the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.²⁰” According to the definition given in the Tadic case, resort to armed force is a requirement to be in a situation of international or non-international armed conflict. Will IHL apply if a cyber operation rises to the threshold of armed force? According to Rule 20 of the Tallinn Manual “cyber operations executed in the context of an armed conflict are subject to the law of armed conflict.” The rule states that IHL will apply to cyber operations executed both in international and non-international armed conflicts. In the context of cyber operations launched against Estonia in 2007, IHL does not apply because the situation did not rise to the level of an armed conflict. The only situation where IHL could be applied to cyber operations was the 2008 conflict between Russia and Georgia but those operations could not be attributed to any party to the conflict. The International Group of Experts agreed that there must be a nexus between the cyber operation and the armed conflict for IHL to apply to the operation in question but there were two different opinions regarding the nature of

that nexus. According to one view, IHL governs any cyber activity conducted by the party to the armed conflict against its opponent while the second view noted that the cyber operations must be undertaken in furtherance of the hostilities²¹.

Given the way that Rule 20 was formulated one could say that a cyber operation could not be considered the start of an armed conflict. If we look closely at Rule 22²² of the Manual that defines: “*An international armed conflict exists whenever there are hostilities, which may include or be limited to cyber operations, occurring between two or more States*” and Rule 23²³ which states that “*a non-international armed conflict exists whenever there is protracted armed violence, which may include or be limited to cyber operations, occurring between governmental armed forces and the forces of one or more armed groups, or between such groups. The confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum degree of organisation*” we can see that the International Group of Experts addressed the situations in which armed conflicts of international or non-international nature could be limited only to cyber operations, if said operations reached the required threshold. It is safe to note that a cyber operation launched by a state or a rebel group that causes physical damage to life or property could be considered the start of an armed conflict if all the necessary conditions are met.

²⁰ The Prosecutor v. Dusko Tadic – International Tribunal for the Former Yugoslavia, para. 70 - <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> Accessed on 2.03.2015.

²¹ Tallinn Manual – p. 69, Rule 22, para.5: “*Consider a cyber operation conducted by State A’s Ministry of Trade against a private corporation in enemy State B in order to acquire commercial secrets during an armed conflict. According to the first view, the law of armed conflict would govern that operation because it is being conducted by a party to the armed conflict against a corporation of the enemy State. Those Experts adopting the second view considered that the law of armed conflict does not apply because the link between the activity and the hostilities is insufficient.*”.

²² Tallinn Manual – p. 71.

²³ Idem p. 76.

Even though no specific instrument of IHL deals directly with cyber operations, the Martens Clause could be considered. The Clause can be found in Hague Convention IV²⁴, the 1949 Geneva Conventions²⁵ and Additional Protocol I²⁶. The text in the Hague Convention IV states that: “Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.” The Martens Clause reflects customary international law and ensures that cyber operations launched during an armed conflict are not conducted in a legal vacuum. Opinions stating that IHL should not apply to cyber operations could be dismissed by citing, in addition to the Martens Clause, Article 36 of Additional Protocol I: “In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.”

It is important to remember that the role of IHL is to limit the effects of armed conflict not to prohibit the use of armed force. Jus ad bellum is the body of law that limits the situations in which states may resort to armed force. In the opinion of

Professor Yoram Dinstein²⁷ the usage of International Humanitarian Law as a term designated to incorporate both the Hague Law and Geneva Law, could cause the false impression that the role of IHL is truly humanitarian in nature. The use of armed attacks is permitted under IHL if the fundamental principles of this branch of law are respected. As with conventional attacks, cyber-operations are permitted during situations of armed conflict if the principles of military necessity, proportionality and the humanitarian considerations are respected. Application of IHL rules to cyber operations serves to limit the effects of the operations on the civilian population.

3. Conclusions

International Humanitarian Law applies to cyber operations launched both during situations of international armed conflict and non-international armed conflict. Fortunately, until the present time, no cyber operations reached the threshold necessary to be considered an armed attack but that moment may come sooner than imagined and the international community must be prepared to respond in a timely manner. The horrors of the Second World War should never be repeated and states and international organizations should pay more attention to emerging means and methods of warfare and, if that is the case, create the necessary legislation to protect the civilian population.

²⁴ Hague Convention IV, preamble.

²⁵ Geneva Convention I - art.63; Geneva Convention II, art. 62; Geneva Convention III, art. 14; Geneva Convention IV, art. 158.

²⁶ Additional Protocol I to the Geneva Conventions, art.1 para. 2.

²⁷ Yoram Dinstein – The conduct of Hostilities under the Law of International Armed Conflict, Cambridge University Press (2004) p.13

References

- Michael N. Schmitt et al., *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Cambridge: Cambridge University Press, 2013).
- Heather Harrison Dinniss, *Cyber Warfare and the Laws of War* (Cambridge: Cambridge University Press, 2012).
- Yoram Dinstein – *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004).
- Raluca Miga-Beșteliu, *Drept Internațional Public Volumul I*, (Bucharest: C.H.Beck, 2010).
- Raluca Miga-Beșteliu, *Drept Internațional Public Volumul II*, (Bucharest: C.H.Beck, 2008).
- Beatrice Onica-Jarka , *Drept International Umaniar* (Bucharest: Universul Juridic, 2010).
- Beatrice Onica-Jarka, *Jurisdictii Penale Internationale* (Bucharest: C.H.Beck, 2008).
- Malcolm N. Shaw, *International Public Law* (Cambridge: Cambridge University Press, 2008).
- Sergey Sayapin, *The Crime of Aggression in International Criminal Law* (The Hague: Asser Press, 2014).
- Michael N. Schmitt - “Attack” as a Term of Art in International Law: The Cyber Operations Context, *Proceedings of the 4th International Conference On Cyber Conflict* 283-293 2012 -https://ccdcoe.org/publications/2012proceedings/5_2_Schmitt_AttackAsATermOfArt.pdf Accessed on 27.02.2015.
- The 1949 Geneva Conventions I-IV and Additional Protocol I & II (1977).
- International Court of Justice, *Case concerning Military and Paramilitary activities in and against Nicaragua (Merits)* (1986) <http://www.icj-cij.org/docket/files/70/6503.pdf>. Accessed on 28.02.2015.
- International Court of Justice - *Case Concerning Armed Activities on the Territory of The Congo* (2005).
- *The Prosecutor v. Dusko Tadic*, *International Tribunal for the Former Yugoslavia*, <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> Accessed on 2.03.2015.

DISPUTED MATTERS ON THE CONCEPT OF PUBLIC AUTHORITY

Elena Emilia ȘTEFAN*

Abstract

The issue on the submitting of the statement of assets and interests is a subject of great interest within the Romanian society. Starting from this subject, this study aims to analyze which are the legal entities required under the legislation in force to submit the statement of assets and interests and the penalty incurred for the failure to do so.

Furthermore, we consider relevant, in order to have an overview on the set out issue, to establish the significance of the concept of public authority. Not incidentally, we understand to discuss these two concepts, respectively the statement of assets and interests and the public authorities due to the fact that they were closely related within the judicial practice. Therefore, the qualification of a legal entity as a public authority leads to the obligation of the employees of the respective entity to submit the statement of assets and interests.

Keywords: *contentious administrative law, public authorities, statement of assets and interests, Financial Surveillance Authority, civil servant.*

1. Introduction

Following the occultism practiced by the totalitarian regime removed on December 22nd, 1989, the transparency became an imperative matter for the public life¹. *De facto*, this means that the public offices and functions fulfilled for personal scopes, generally material scopes, shall be avoided².

According to the accepted legal principle, the statement of assets is usually

analyzed under the name of obligation of disinterestedness and makes part of the category of the duties which equally aim both the professional and the private life of the civil servant³. The statement of assets and the statement of interests represent personal deeds and they can be revised only under the terms of this law⁴. (...) Another author showed that the law seeks to prevent the cases of abuse, corruption, the use of the service in order to achieve outstanding material advantages⁵.

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¹ Mihai Constantinescu, Ioan Muraru, *Drept parlamentar (Parliamentary Law)*, Gramar Publishing House, Bucharest, 1994, p.55.

² Mihai Constantinescu, Ioan Muraru, *op.cit.*, p.101.

³ Verginia Vedinaș, *Drept administrativ (Administrative Law)*, 4th edition reviewed and updated, Universul Juridic Publishing House, Bucharest, 2009, p. 482.

⁴ Art. 3 paragraph (1) of Law no. 176/2010 on the integrity in exercising the public offices and functions, for the amendment and supplementation of Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency (...), published in Official Journal no. 621/2010.

⁵ Verginia Vedinaș, *Drept administrativ, (Administrative Law)*, 4th edition reviewed and updated, Universul Juridic Publishing House, Bucharest, 2009, p. 482.

Each and every state has its own enacted law according to its social and political demands, to the traditions and values that it defends⁶. Therefore, the activity of the public administration bodies is governed by a mandatory set of rules and principles of conduct which aim to ensure it a social utility as high as possible⁷. As shown in the accepted legal principle, „the characteristics of any society and form of social power are the following: a particular regulatory system and a set of conduct rules”⁸.

According to art. 1 par. (5) of the reviewed Constitution, in Romania the observance of the Constitution, of its supremacy and laws is mandatory, therefore, all the categories falling under the scope of the law shall be bound to submit the statement of assets and interests due to the fact that, as shown in the Constitution in par. (2) of art. 16:”*No one is above the law*”. Along with the same lines, as the accepted legal principle noted, the compulsoriness of the rules of law is ensured, if necessary, by the coercive power of the state⁹.

The following concepts shall be discussed within this study: public authority, civil servant and then the categories bound to submit the statement of assets and interests shall be analyzed. Therefore, the procedure of investigating the civil servants and/or high officials, performed by the

integrity inspector shall be presented, and in the end we shall present a case study.

2. Content

2.1. The public authority concept

The main meaning of the concept of *public authority* is that of public body, namely an organized group of people performing public powers, within the state or the local level, or within another form, an organizational structure which acts as a public power in order to achieve a public interest.¹⁰ According to another opinion, the concept of public administration has a double meaning: organization and activity.¹¹

According to the legislation, in what concerns the concept of *public authority*, art.2 par.(1) letter b) of Law no. 554/2004¹² of the contentious administrative, the private legal entities which, according to the law, have obtained the public status or are authorized in order to provide a public service under the public power regime are assimilated to the public authorities.

The Constitution of 1991, as well as the reviewed version of 2003 established and maintained several autonomous central administrative authorities and the legislation fully developed this special category of bodies without combining them in a separate unitary system, such as the local public

⁶ Refer to Elena Anghel, *Constant aspects of law*, in CKS-eBook 2011 proceeding, Pro Universitaria Publishing House, Bucharest, 2011, p. 594.

⁷Dumitru Brezoianu, Mariana Oprican, *Administrația publică în România (Public Administration in Romania)*, C.H.Beck Publishing House, Bucharest, 2008, p. 12.

⁸ Ion Deleanu, *Instituții și proceduri constituționale, în dreptul român și în dreptul comparat (Institutions and constitutional procedures in Romanian law and comparative law)*, C.H. Beck Publishing House, Bucharest, 2006, p.35.

⁹ Roxana Mariana Popescu, *Introducere în dreptul Uniunii Europene (Introduction in the law of the European Union)*, Universul Juridic Publishing House, Bucharest, 2011, p.12.

¹⁰ Dana Apostol Tofan, *Drept administrativ (Administrative law)*, vol.1, 2nd edition, C.H.Beck Publishing House, Bucharest, 2008, p.6.

¹¹ Rodica Narcisa Petrescu, *Drept administrativ (Administrative law)*, Hamangiu Publishing House, Bucharest, 2009, p. 5.

¹² Law no.554/2004 of the contentious administrative, published in Official Journal no.1154/2004.

administration which is also autonomous¹³. By means of being autonomous authorities which fulfill administrative tasks, they are not subject to the administrative custody regime, such as the autonomous authorities of the local public administration (county councils, local councils, city halls, etc.)¹⁴.

2.2. The civil servant concept

The meaning of the *civil servant* concept results from the case law of the Romanian Constitutional Court. Therefore, one of the decisions is read as follows: “as shown in the legal literature, according to the criminal law, the concept of civil servant and office holder has a broader meaning that the one awarded in the administrative law, due to the nature of the social relations protected by the incrimination of certain actions which are dangerous in social terms and to the fact that the actions of protecting the assets and promoting the community interests require a better protection by means of the criminal law¹⁵”.

According to the status of the civil servants, the public office represents all the duties and responsibilities established under the law in order for the public power prerogatives to be achieved by the central public administration, local public administration and the autonomous administrative authorities.¹⁶

1.3. The obligation to submit the statement of assets and interests

“Upon the assignment of a public office and the termination of the service, the civil servants shall be bound to submit, under the terms of the law, the statement of assets, to the head of the public authority or institution. The statement of assets shall be annually updated, according to the law.”¹⁷

The recent accepted legal principle showed that (...) this obligation is incumbent on all the civil servants and high official and for a while it was regulated by Law no. 115/1996, currently being regulated by Law no. 144/2007 on the establishment of the National Integrity Agency, as further amended and supplemented.¹⁸ The provisions of this normative act (Law no. 176/2010) are applicable to the category of persons “who are bound to declare their personal assets and interests”, among them being placed the civil servants, including the ones having a special status, namely they perform their activity within all the central or local public authorities, or as the case may be, within all the public institutions”.¹⁹

According to the aforementioned Law no. 176/2010, art.2, the statements of assets and the statements of interests are filled in according to the enclosed model, respectively Appendix 1 and Appendix 2 and the certified copies together with the personal numeric code of the declarant shall be submitted to the Agency. Paragraph (2) of

¹³Vasile Tabără, *Dezvoltarea capacității administrative (The development of the administrative ability)*, C.H.Beck Publishing House, Bucharest, 2012, p. 98.

¹⁴ Ion Corbeanu, *Drept administrativ (Administrative law)*, 2nd edition reviewed and supplemented, Lumina Lex Publishing House, Bucharest, 2009, p.291.

¹⁵ Decision no. 2/2014 of the Romanian Constitutional Court, published in Official Journal no.71/2014.

¹⁶ Ion Corbeanu, *op.cit.*, 2009, p.210.

¹⁷ Dana Apostol Tofan, *op.cit.*, 2008, p.357; Verginia Vedinaș, *op.cit.*, 2009, p. 481; Dumitru Brezoianu, Mariana Oprican, *op.cit.*, 2008, p. 384.

¹⁸ Verginia Vedinaș, *op.cit.*, p. 482.

¹⁹ Cristian Clipa, *Drept administrativ. Teoria funcției publice. Raportul juridic de serviciu- noțiune, părți, obiect și conținut (Administrative law. The theory of the public office. The service legal relation – concept, parts, scope and content)*, Hamangiu Publishing House, Bucharest, 2011, p. 348.

art.3 of the law states that: “*the statements are made in writing, on own risk and include the rights and obligations of the declarant, his/her spouse and dependent children*”.

Law no. 176/2010 expressly shows in art. 4 the following: “the statements of assets and interests shall be submitted within 30 days as of the date of the designation or appointment, or as of the date of entering the service”.²⁰ The persons provided in this law shall be bound to annually submit or to update the statements of assets and interests, no later than June 15th.

1.4. The procedure of investigating the civil servants performed by the integrity inspector

The scope of the Agency is to ensure the integrity in what concerns the performance of the public offices and functions and to prevent the institutional corruption by means of assessing the statements of assets, the data and information on the personal fortune, as well as the modification of the assets, the incompatibilities and the potential conflict of interests that the persons referred to in art.1 may be subject to throughout the performance of the public functions and offices²¹. According to the legislation in force, the investigation of the civil servant performed by the integrity inspector, in terms of assessing the acquisition of assets, in relation to the incomes earned or the investigation of the incompatibility condition consists of several stages that we will summarize in the following lines.

In this respect, the Law grants a Section entitled: „The assessment of the conflicts of interests and the incompatibilities”, namely Section III of the content of Chapter II: “Procedures of the National Integrity Agency” of Title II

entitled: “*The procedures intended to ensure the integrity and transparency of the public functions and offices*” of law no. 176/2010.

A. *The assessment of the conflicts of interests and the incompatibilities*²²

– a.1. the integrity inspector analyzes the statement of assets and interests drawn up by the civil servant (art. 20 par. 1 of law no. 176/2010)

– a.2. if the integrity inspector finds that the civil servant does not justify, in full or in part, the fortune earned, the integrity inspector informs the latter and invites it, by means of a written invitation, to provide an explanation. The invitation sent by the integrity inspector shall be delivered by registered letter with acknowledgement of receipt.

– a.3. the investigated civil servant may be present in person, according to the invitation of the integrity inspector, at the indicated hour and location, in order to provide its explanation on the situation it is investigated for. On this occasion, the investigated person shall be entitled to submit any data or information which it considers to be relevant.

– a.4. if, after the expiry of the 15 day deadline as of the receipt of the invitation delivered by the integrity inspector, the civil servant fails to respond, the law provides the possibility that the integrity inspector draws up the assessment report. It is important to mention that the integrity inspector, in the absence of the acknowledgement referred to in par.(1), shall draw up the assessment report following the fulfillment of a new procedure for the notification of the investigated person.

B. *The issuance of the assessment report*

– b.1. the assessment report has the following content, according to art. 21

²⁰ Law no. 176/2010 (...).

²¹ Art. 8 par (1) of Law no. 176/2010 (...).

²² In this respect see Cristian Clipa, *op.cit.*, 2011, pp. 350-352.

par.(3) of law no.176/2010, namely it consists of four sections: the description part of the *de facto* situation; the explanation of the person subject to the investigation, if expressed; the assessment of the conflict of interests and the incompatibilities; conclusions.

- b.2 the assessment report shall be communicated to the investigated persons within 5 days as of its completion, by the integrity inspector, and as the case may be, to the criminal investigation bodies;

C. the appeal of the assessment report

- c.1. the report on the assessment of the conflict of interests or the incompatibilities, according to art. 21 of law no. 176/2010 may be appealed before the competent contentious administrative court, within 15 days as of its receipt;

- c.2. if the report on the assessment of the conflict of interests was not appeal within the 15 day deadline as of its receipt, the Agency notifies, within 6 months, the competent bodies on the initiation of the disciplinary procedure; if the case may be, the agency notifies, within 6 months, the competent contentious administrative court on the cancellation of the instruments issued, adopted or drawn up on the violation of the legal provisions on the incompatibilities.

- c.3. if following the assessment of the statement of assets, as well as of other data and information, the integrity inspector finds the existence of an incompatibility condition or of a conflict of interests, it shall draw up a report to be delivered to the investigated person (...), according to art.22 par.(4) of law no.176/2010.

- c.4. Furthermore, the law also states that in what concerns the conflict of interests, all the legal or administrative acts concluded directly or by means of intermediaries, under the violation of the legal procedures on the conflict of interests, shall be declared void. In addition to the appeal on the nullity of the respective acts,

the court shall order the restoration of the parties.

2.5. Penalties for the failure to submit the statement of assets

According to art.27 of law no. 176/2010, the failure to fulfill the obligation to respond to the requests of the Agency, provided by this law, shall be sanctioned by a civil fine amounting to RON 200 for each day of delay. According to art.28 of law no. 176/2010, the action of the persons who willingly submit false statements of assets or interests represents the offense of misrepresentation and shall be punished according to the Criminal Code.

Furthermore, the law also provides civil sanctions for certain situations, as follows:

- according to art. 29, par.(1) the failure to submit the statements of assets and interests on the provided deadlines, as well as the failure to declare in the respective statement the amount of the earned income or to declare the income by reference to other documents represent an offence and shall be sanctioned with a fine amounting between RON 50 and RON 2,000.

- according to art. 29, par.(2) the failure to fulfill the obligations provided for by art.6 of the persons in charged with the implementation of the provisions of this law, represents an offense and shall be sanctioned by a fine amounting between RON 50 and RON 2,000. The same penalty shall apply to the head of the respective unit, if it fails to fulfill the obligations provided by this law.

- according to art. 29, par.(3), the failure to apply the disciplinary penalty or the failure to appeal the termination of the public function, as the case may be, if the ascertainment instrument remained definitive, represents an offense and shall be sanctioned by a fine amounting between RON 50 and RON 2,000, if the committed action does not represent a crime.

The ascertainment and the sanctioning of these offences provided by this law shall be performed by the authorized persons within the Agency according to the provisions of Government Ordinance no.2/2001²³.

3. Case study

It was shown in one case that, following the notification of the Financial Surveillance Authority, N.M was given a warning by the National Integrity Agency for committing the offence provided for by art.1 par.(1) of law no.176/2010, namely for the failure to submit the statement of assets and interests within the legal deadline.²⁴ The case raised several issues that the court had to clarify: if the Financial Surveillance Authority is a public authority according to the law; if the special status servants are assimilated to the civil servants in what concerns the obligation to submit the statements of assets and interests.

The Financial Surveillance Authority, under the provisions of art.1 par.(2) of Government Emergency Ordinance no. 93/2012²⁵ is an autonomous administrative authority, with legal personality, independent, which fulfills its duties by means of taking over and reorganizing all the duties and prerogatives of the Securities National Commission, Insurance Surveillance Commission and Private Pension System Surveillance Commission.

Furthermore, according to the provisions of Government Emergency Ordinance no. 93/2012 the members of the council of the Financial Surveillance Authority are designated by the Parliament

and the annual report of the Financial Surveillance Authority is discussed within the joint meeting of the two Chambers. According to the law, the Financial Surveillance Authority is an authority under the provisions of art.1 item 31 of law no. 176/2010, in connection to its certification, regulation, surveillance and control duties.

In what concerns the qualification of the special status servants as civil servants, the court noted that according to art.1 item 31 of law no. 176/2010: „the provisions of this law shall be applicable to the following categories of persons who are bound to submit the statements of assets and interests: 31. *The persons with management and control functions, such as civil servants, including the special status civil servants who perform their activity within all the central or local public authorities or, as the case may be, within all public institutions*”. Furthermore, on the date of applying the penalty, the court noted that, the applicant had the capacity of a management and control person, even if it was not a civil servant. Therefore, the court considered that the applicant's claim on the absence of its capacity of civil servant was truth, but not likely to remove the penalty since the provisions of the aforementioned article state the punishment of both the civil servants and the persons with management and control functions – even if they do not have the capacity of civil servants.

4. Conclusions

The submission of the statement of assets and interests is contemplated by a special regulation, as presented in this study.

²³ Government Ordinance no.2/2001 on the legal regime of the offences, published in Official Journal no. 410/2001.

²⁴ Civil Ruling no. 13964/2014 District 1 Bucharest Court, unpublished.

²⁵ Government Emergency Ordinance no. 93/2012 on the establishing, organization and operation of the Financial Surveillance Authority, published in Official Journal no. 874/2012.

As shown on other occasions, the legislative amendments occurred at a certain point in time raise serious issues for a certain field in what concerns the construction and implementation of the normative acts²⁶. Therefore, in our opinion, an important factor for the compliance with the law is on the one side, the legislative coherence and on the other side, the unification of the

legislation on fields, so that the legislation is no longer subjectively construed²⁷.

The judicial practice notes that, despite the lack of the capacity of civil servant, the persons are bound to submit the statement of assets and interests, if they perform their activity within an assimilated public authority, under the law.

References

- Dumitru Brezoianu, Mariana Oprican, *Administrația publică în România (Public Administration in Romania)*, C.H.Beck Publishing House, Bucharest, 2008.
- Mihai Constantinescu, Ioan Muraru, *Drept parlamentar (Parliamentary Law)*, Gramar Publishing House, Bucharest, 1994.
- Ion Corbeanu, *Drept administrativ (Administrative Law)*, 2nd edition reviewed and supplemented, Lumina Lex Publishing House, Bucharest, 2009.
- Cristian Clipa, *Drept administrativ. Teoria funcției publice. Raportul juridic de serviciu- noțiune, părți, obiect și conținut (Administrative law. The theory of the public office. The service legal relation – concept, parts, scope and content)*, Hamangiu Publishing House, Bucharest, 2011.
- Ion Deleanu, *Instituții și proceduri constituționale, în dreptul român și în dreptul comparat, (Institutions and constitutional procedures in Romanian law and comparative law)*, C.H. Beck Publishing House, Bucharest, 2006.
- Rodica Narcisa Petrescu, *Drept administrativ (Administrative Law)*, Hamangiu Publishing House, Bucharest, 2009.
- Roxana Mariana Popescu, *Introducere în dreptul Uniunii Europene (Introduction in the European Union Law)*, Universul Juridic Publishing House, Bucharest, 2011.
- Elena Emilia Ștefan, “Contribuția practicii Curții Constituționale la posibila definire a aplicabilității revizuirii în contenciosul administrativ The contribution of the Constitutional Court practice to the possible defining of the applicability of the disputed claims office revision), published in *Drept Public Magazine no.3/2013*, Universul Juridic Publishing House, Bucharest.
- Elena Anghel, *Constant aspects of law, in the proceedings of CKS-eBook 2011*, Pro Universitaria Publishing House, Bucharest, 2011.

²⁶ Elena Emilia Ștefan, “*Contribuția practicii Curții Constituționale la posibila definire a aplicabilității revizuirii în contenciosul administrativ*”(The contribution of the Constitutional Court practice to the possible defining of the applicability of the disputed claims office revision), published in *Drept Public Magazine no.3/2013*, Universul Juridic Publishing House, Bucharest, pp.82-83.

²⁷ See Elena Anghel, *The reconfiguration of the judge’s role in the romano-germanic law system*, published in *LESIJ.JS XX – 1/2013*, Pro Universitaria Publishing House, Bucharest, 2013, pp. 65-72.

- Elena Anghel, The reconfiguration of the judge`s role in the romano-germanic law system, published in LESIJ.JS XX – 1/2013, Pro Universitaria Publishing House, Bucharest, 2013.
- Dana Apostol Tofan, Drept administrativ (Administrative Law), vol.1, 2nd edition, C.H.Beck Publishing House, Bucharest, 2008.
- Vasile Tabără, Dezvoltarea capacității administrative (The development of the administrative ability), C.H.Beck Publishing House, Bucharest, 2012.
- Verginia Vedinaș, Drept administrativ (Administrative Law), 4th edition reviewed and updated, Universul Juridic Publishing House, Bucharest, 2009.
- Law no. 176/2010 on the integrity in exercising the public offices and functions, for the amendment and supplementation of Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency (...), published in Official Journal no. 621/2010.
- Law no.554/2004 on the contentious administrative, published in Official Journal no.1154/2004.
- Government Emergency Ordinance no. 93/2012 on the establishing, organization and operation of the Financial Surveillance Authority, published in Official Journal no. 874/2012.
- Government Ordinance no. 2/2001 on the legal regime of the offences, published in Official Journal no. 410/2001.
- Decision no. 2/2014 of the Romanian Constitutional Court, published in Official Journal no. 71/2014.
- Civil ruling no. 13964/2014 District 1 Bucharest Court, unpublished.

SPECIAL LOCAL TAXES. THEORETICAL AND PRACTICAL ISSUES REGARDING LATE LODGING OF PRELIMINARY COMPLAINTS IN ADMINISTRATIVE COURTS UNDER ARTICLE 30 OF LAW 273/2006 ON LOCAL PUBLIC FINANCES

Andrei Costin GRIMBERG*

Abstract

The procedure to challenge decisions imposing the local taxes is a special procedure. Article 30 of Law no. 273/2006 has provided a special procedure for the challenging of special taxes, by derogation from the Law no. 554/2004. Thus, interested persons may challenge the special taxes within 15 days of the posting or publication thereof; in this case, however, the claimant has failed by far to meet this deadline, virtually skipping the appeal stage and going straight and only through the procedure stipulated by Law no. 554/2004. Any contrary approach would amount to a case of disregarding of the legal reasoning introduced by the special law no. 273/2006 under which appeals against special charges should be lodged with the decision-making bodies within 15 days after their passing. In the case that the applicant skips this stage, his action in court will be deemed, for the purpose of the provisions of article 30 of Law no. 273/2006, as a belated application. It was thus found that Article 30 paragraph 6 of the Law no. 273/2006 and article 194 of the Rules for implementation of the Law no. 571/2003 contain rules that are exemptions from the provisions of Law no. 554/200, in terms of the deadline for challenging decisions passed by local governments, establishing special charges. It is therefore normal in fiscal matters that a special and derogatory term for appeal be established, which is shorter and accrues as of the moment in time when the term has been objectively determined, and which applies equally to all applicants, with the need for establishing such a term being called for by the need to avoid levying special taxes for a long period of time and from a significant number of target taxpayers, as well as the subsequent cancellation at some point in time of the administrative act by which such taxes were imposed.

Keywords: *tax, administrative, derogatory, Law no. 273/2006, Law no. 554/2004.*

Under Article 2 section 55 of Law no. 273/2006, and for the purpose of this law, the terms and expressions below have the meaning ascribed to them as follows:

55. tax - the amount paid by a natural or legal person, usually for services rendered to it by an economic operator, a public institution or a public service;

As such, and when it comes to any local public tax, the provisions of article 30

of the Law No. 273/2006 become applicable, according to which:

(1) For the operation of local public services created in the interest of individuals and corporate entities, local councils and the Bucharest General Council, as appropriate, may approve special taxes;

(2) The amount of special fees shall be set annually and the revenues derived there from shall be used entirely to cover the costs

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spent to set up the local public services concerned and to finance current expenditures for the maintenance and operation of such services;

(3) The regulation approved by the decision-making bodies shall establish the fields of activity and the conditions in which special taxes may be charged, as well as the way of organization and functioning of the local public services with respect to which such are proposed;

(4) The decisions taken by decision-making bodies regarding the levying of special taxes from taxpayer individuals and corporate entities shall be displayed at the headquarters of the target taxpayers and published on the website or in the media.

(5) Appeals against the decisions to charge special taxes may be filed by interested persons within 15 days after the posting or publication thereof. Upon the expiring of the 15 day's term, the decision-making body which has issued the decision shall meet and deliberate on the appeals received.

(6) Special taxes shall be collected only from individuals and corporate entities that use the local public services for which such fees have been established.

(7) The special taxes imposed under the provisions of this Article shall be collected in a separate account opened outside the local budget and shall be used for the purposes for which they are established. The account for execution of the special taxes shall be subject to approval by the decision-making authorities.

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The procedure to challenge decisions imposing the local taxes is a special procedure.

Article 30 of Law no.273/2006 has provided a special procedure for the challenging of special taxes, by derogation from the Law no. 554/2004.

Thus, interested persons may cha-

llenge the special taxes within 15 days of the posting or publication thereof; in this case, however, the claimant has failed by far to meet this deadline, virtually skipping the appeal stage and going straight and only through the procedure stipulated by Law no.554/2004.

Insofar as free access to justice under Law 554/2004 is restricted, the holder of the right to take legal action may circumvent the specific rules laid down by Law no. 273/2006.

Any contrary approach would amount to a case of disregarding of the legal reasoning introduced by the special law no. 273/2006 under which appeals against special charges should be lodged with the decision-making bodies within 15 days after their passing.

In the case that the applicant skips this stage, his action in court will be deemed, for the purpose of the provisions of article 30 of Law no.273/2006, as a belated application.

The argument that the applicant was restricted the free access to justice does not hold, insofar as the applicant has the freedom to file an action for annulment, should an administrative be issued against him, which, in the applicant's opinion, would harm his interests.

We are not dealing in this case with a restriction of free access to justice, but only with a case of failure to follow certain mandatory procedural steps stipulated by the special law.

The procedure in question does not hinder the taking of action in court. It simply defines the deadlines and the conditions by and in which special taxes may be challenged with the decision-making authorities, as mandatory procedural steps to be taken prior to referring the matter further to the administrative courts.

Decisions on special charges should be adopted under Title IX of Law no. 571/2003 – The Tax Code Act, and Title IX of the

Rules to implement the Law no. 571/2003, approved by GD no. 44/2004, as well as pursuant to Articles 20 and 30 of Law no. 273/2006 on local public finances.

According to the regulations specified above, including their subsequent amended and extended versions:

Article 282. - (1) In consideration for the provision of local public services created in the interest of individuals and corporate entities, local councils, county councils and the Bucharest City Council, as the case may be, may decide to charge special taxes.

(2) The sectors with respect to which the local councils, the county councils and the Bucharest City Council, as the case may be, may decide to charge special taxes for the provision of local public services and the amount of such taxes shall be determined in accordance with the provisions of Government Emergency Ordinance no. 45/2003 on local public finances.

Application Rules:

Section 192. Local councils, county councils and the Bucharest City Council, as appropriate, shall, under the regulation approved, establish in accordance with the Government Emergency Ordinance no. 45/2003 on local public finances the conditions and sectors, as well as the organization and functioning of the public services, with respect to which such taxes are proposed, and the manner of consultation with and obtaining the consent of the individual and corporate entities benefiting from such services.

Section 193. The decisions taken by the authorities referred to in Section 192 with respect to the levying of special taxes from taxpayer individuals and corporate entities shall be displayed at the headquarters of the local public authorities concerned and published according to the law.

Section 194. Interested persons may challenge the decision specified above

within 15 days from the posting or publication thereof. After expiry of the 15 days' term, the decision-making authority adopting the decision shall meet and deliberate on the appeals received.

Section 195 (1) The special taxes shall be collected only from individuals and corporate entities that are using the local public services with respect to which the special charges were established.

(2) Deleted.

Section 196. The special charges set according to Article 282 of the Tax Code shall be collected in a separate account opened outside the local budget and shall be used for the purposes for which they were established, and their execution account shall be approved by the local council, the county council or the General Bucharest City Council, as appropriate.

It is true that EGO no. 45/2003 on local public finances was expressly repealed by Article 86 paragraph 2 of Law no. 273/2006 on local public finances, in force as of 01.07.2006, yet considering that, from that date onwards, any reference EGO no. 45/2003 contained by the various legal regulations in force are references to the provisions of Law no. 273/2006.

According to Article 30 of Law no. 273/2006:

Article 30. - (1) For the operation of certain local public services created in the interest of individuals and corporate entities, the local councils, the county councils and the Bucharest City Council, as appropriate, may approve the charging of special taxes.

(2) The amount of the special fees shall be set annually and the revenues derived there from shall be used entirely to cover the costs spent to set up the local public services and to finance the current expenditures for the maintenance and operation of such services;

(3) The regulation approved by the decision-making bodies shall establish the

fields of activity and the conditions in which special taxes may be charged, as well as the way of organization and functioning of the local public services with respect to which such taxes are proposed;

(4) The decisions taken by decision-making bodies regarding the levying of special taxes from taxpayer individuals and corporate entities shall be displayed at the headquarters of the target taxpayers and published on the website or in the media.

(5) Interested persons may challenge the decisions to charge special taxes within 15 days after the posting or publication thereof. Upon the expiring of the 15 day's term, the decision-making body which has issued the decision shall meet and deliberate on the appeals received.

(6) Special taxes shall be collected only from individuals and corporate entities that are using the local public services for which such fees have been established.

(7) The special taxes imposed under the provisions of this Article shall be collected in a separate account opened outside the local budget and shall be used for the purposes for which they are established. The account for execution of the special taxes shall be subject to approval by the decision-making authorities.

In fact, the content of Article 30 paragraph 6 of the Law no. 273/2006 is identical with that of Article 194 of the Implementing Regulations of the Law no. 571/2003, approved by GD no. 44/2004, as well with the content of Article 25 paragraph 6 of the former GEO no. 54/2003, to the effect that interested persons may challenge decisions taken by the local authorities to charge special fees within 15 days of publication of such decisions. Moreover, it follows from the interpretation of Article 30 paragraph 6 of the Law no. 273/2006 and of Article 194 of the Rules on implementation of the Law no. 571/2003, approved by GD no. 44/2004,

that we are dealing with a challenge to be addressed to and filed with the issuing authority.

Article 7 paragraph 1 of Law no.554/2004 says that “Before taking the matter to the competent administrative court, the person who considers that any of his or her rights or legitimate interests has been infringed by an individual administrative order shall ask the issuing body or the higher body, if any, within 30 days from the date of the serving of the order, cancellation thereof in whole or in part.”

According to paragraph 11 paragraph 4.1 of the same law, the orders or the provisions therein that are deemed unconstitutional, as well as any administrative acts of a normative force that are deemed illegal may be appealed against at any time.

However, Article 14 – “Special and Derogatory Regulations” of the Law no. 24/2000 on law-making technique for the drafting of laws, republished, with subsequent amendments and additions, stipulates that:

(1) A regulation in the same matter and of the same level may be included in another law, provided that the former has a special nature compared to the law containing that general regulation on the matter concerned.

(2) The special nature of a regulation shall be determined depending on its object, in relation to certain categories of circumstances, and on the specificity of the legislative solutions it sets in place.

(3) The regulation is deemed to be derogatory, where the legislative solutions relating to a particular case include rules that differ from the rules of the framework regulation in the field, with the latter retaining its general mandatory nature with respect to all the other cases.

Conclusions

It was thus found that Article 30 paragraph 6 of the Law no. 273/2006 and article 194 of the Rules for implementation of the Law no. 571/2003 contain rules that are exemptions from the provisions of Law no. 554/2004, in terms of the deadline for challenging decisions passed by local governments, establishing special charges.

The decisions of the local council laying down special taxes are normative administrative acts with a fiscal content and are subject, in terms of the right to challenge them, to the special and derogatory provisions of article 30 paragraph 6 of the Law no. 273/2006 and article 194 of the Rules on implementation of the Law no. 571/2003, approved by the GD no. 44/2004, meaning that any appeal against decisions with a fiscal content had to be lodged within 15 days of publication, before the issuing body. Regarding the significance of the appeal, the courts have consistently attached

to it the legal significance of the preliminary complaint referred to in article 7 paragraph 1 of Law no. 554/2004, such complaint being nevertheless governed by the special term of 15 days from the date of publication of the decision, as set by a special provision, by derogation from the general term of 30 days established under article 7 paragraph 1 of Law no. 554/2004.

It is therefore normal in fiscal matters that a special and derogatory term for appeal be established, which is shorter and accrues as of the moment in time when the term has been objectively determined, and which applies equally to all applicants, with the need for establishing such a term being called for by the need to avoid levying special taxes for a long period of time and from a significant number of target taxpayers, as well as the subsequent cancellation at some point in time of the administrative act by which such taxes were imposed.

References

- Law 273/2006 on local public finances.
- Government Emergency Ordinance no. 45/2003 on local public finances.
- Law no. 571/2003 regarding the Fiscal Code.
- Decision no. 44/2004 approving the Methodological Norms for the application of Law no. 571/2003 regarding the Fiscal Code.
- Law nr. 554/2004 Administrative Litigation Law.

THE LEGAL FRAMEWORK OF CIRCUMCISION IN TURKISH LAW

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Abstract

The circumcision of a male child has not been a concept discussed in Turkish law before today. However, recently, particularly based upon the decision rendered by the German criminal court, the jurists have started to focus on the evaluation of circumcision from a legal point of view and the criminal law dimension of the topic has been discussed¹ in particular. On the other hand, female circumcision is a practice which is not accepted either in the traditional or legal sense.

Keywords: *circumcision, corporal integrity, religious rule, law provisions.*

Introduction

Circumcision is a practice which is characterized as a religious rule particularly in Muslim and Jewish societies. Therefore, even if it is accepted as a reflection of freedom of religion and conscience, the scope of the topic is extensive. Particularly in cases where such a practice, which indeed interferes with corporeal integrity, is performed on a male child whose permission is not bound with legal results due to his age, the discussion concentrates on the rights of the person upon his corporeal and spiritual presence. Considering also that the limit of this is specified as medical necessity, it is seen that there is a legal dilemma. Within this respect in order for the topic to be clarified and for the purposes of determination of the legal nature of

circumcision, it is of importance to firstly explain a person's right to protect his/her corporeal integrity and limits thereof in Turkish law.

It is clearly established under Turkish law that the corporeal integrity of a person cannot be violated and that a person has right to life and is entitled to protect and improve his/her corporeal and spiritual existence. Likewise, it is also provided for that the interference to corporeal integrity of a person can only be possible under medical necessity² and in cases prescribed by law and that a person can only be subjected to scientific or medical experiments with his/her consent. In our study, first of all the state in Turkish law will be set out, and the practice will be reflected afterwards³.

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¹ NUHOĞLU Ayşe, Sünnet ve Ceza Hukuku, in: Prof.Dr. Nur Centel'e Armağan, T.C. Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Özel Sayı, Yıl:2013, Cilt: 19, Sayı:2, sh. 211-219; YERDELEN Erdal, Sünneti Kasten Yaralama Suçu Olarak Kabul Eden Köln Eyalet Mahkemesi Kararı ve Alman Kanun Koyucunun Karara Tepkisi, in: Kamu Hukuku Arşivi Dergisi, Y: 16, S:1-32, 2013-1, sh. 1-8.

² BAYRAKTAR Köksal, Hekimin Tedavi Nedeniyle Cezai Sorumluluğu, Sermet Matbaası, İstanbul, 1972, sh. 23.

³ ÖZBEK Veli Özer/KANBUR Mehmet Nihat/ DOĞAN Koray/ BACAĞIZ Pınar/ TEPE İlker, Türk Ceza Hukuku Genel Hükümler, 5.Baskı, Seçkin, Ankara 2014, sh.90-91.

1. Turkish Constitutional Provisions On Fundamental Rights and Liberties

Fundamental rights and liberties are provided in the 1982 Turkish Republic Constitution in detail. Turkey has also become party to various international agreements for the purposes of the protection of fundamental rights and liberties and adopted these as an integral part of the domestic law by ratifying the same by way of codes. Moreover, the last paragraph of Article 90, with the heading of Ratification of International Treaties, of the Constitution reads as follows: *“International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170/art. 7) In the case of a conflict between international agreements which are duly put into effect, concerning fundamental rights and freedoms, and the laws due to differences in provisions on the same matter, the provisions of the international agreements shall prevail.”* By this provision, the preferential application of the international agreements regulating the fundamental rights and liberties, in case of their conflict with the laws, has been regularized in a constitutional level and granted a state almost above the law. Within this respect, Turkey has set forth various regulations in its domestic law also pursuant to the liabilities introduced especially due to being a party to the European Human Rights Convention. In this context, in Turkish law there are not only the rights granted at a constitutional level, but also the direct application of the provisions, providing for fundamental rights and liberties, of the international agreements to which Turkey is

a party and their important reflections upon Turkish practice.

In order for the circumcision to be evaluated in Turkish law, first of all the constitutional framework of the fundamental rights and liberties to which the circumcision is related must be specified. Within this respect, firstly the constitutional basis of the rights such as fundamental rights and liberties⁴, personal inviolability, child rights, and rights to health will be expressed below.

A. Circumcision Within the Scope of Fundamental Rights and Duties

In examining the provisions of the Constitution of the Republic of Turkey to be evaluated in connection with circumcision, Articles 12, 13 and 14 which are qualified as fundamental rights must be taken into account in particular.

Article 12 of the Constitution, which sets forth *“Everyone possesses inherent fundamental rights and freedoms, which are inviolable and inalienable.”*

The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his/her family and other individuals”, the nature of the fundamental rights and liberties is expressed.

Article 13 of the Constitution provides for the *“Limitation of fundamental rights and liberties”*. Accordingly; *“Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the statements in and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.”*

⁴ ERMAN Barış, *Tıbbi Müdahalelerin Hukuka Uygunluğu*, Seçkin, Ankara 2003, sh.134 vd.

Article 14 of the Constitution provides for “Prohibition of the abuse of fundamental rights and liberties”. Accordingly: *“None of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming at violating the indivisible integrity of the State within its territory and nation, and endangering the existence of the democratic and secular order of the Republic based on human rights.*

No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms recognized by the Constitution or to enable the performance of an activity with the aim of restricting them more extensively than stated in the Constitution.

The sanctions to be applied against those who perpetrate activities contrary to these provisions shall be determined by law.”

Under these provisions of the Constitution, it is expressed that the essence of the fundamental rights and liberties cannot be interfered with, the exception thereof being the limitation thereof only by law under the principles of necessity and proportionality⁵.

B. Circumcision Within the Scope of Rights and Duties of a Person

It is very difficult to outline according to the current practice the circumcision framework in terms of the positive and negative liabilities of the State in the protection of self-improvement and the corporeal and spiritual existence of the individual. Due to the fact that circumcision is an act having an impact on the corporeal and spiritual existence of the individual as a

religious and traditional ritual, it is important to state the constitutional regulation with respect to the topic. Habeas Corpus, as a concept expressing the personal inviolability, is the expression of the concept of protection of the person as a subject⁶.

Article 17 of the Constitution, with its nature that presents the subject directly, holds the heading of “Personal inviolability, corporeal and spiritual existence of the individual” and includes a clear provision with respect to the corporeal integrity of the person. Accordingly:

“Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.

The corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his/her consent.

No one shall be subjected to torture or mal-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity.

(As amended on May 7, 2004; Act No. 5170) The act of killing in case of self-defense and, when permitted by law as a compelling measure to use a weapon, during the execution of warrants of capture and arrest, the prevention of the escape of lawfully arrested or convicted persons, the quelling of riot or insurrection, or carrying out the orders of authorized bodies during martial law or a state of emergency, do not fall within the scope of the provision of the first paragraph”.

When giving particular consideration to circumcision in view of the mandatory provision with respect to the fact that the

⁵ TANÖR Bülent/ YÜZBAŞIOĞLU Necmi, 1982 Anayasasına Göre Türk Anayasa Hukuku, 13. Bası, Beta, Eylül 2013, sh. 134-156; ÖZBUDUN Ergun, Türk Anayasa Hukuku, 14. Baskı, Yetkin, Ankara 2013, sh.109-113.

⁶ KILIÇ Muharrem, İnsan Haklarında Beden Bütünlüğünün Korunması, in: İğdiş, Sünnet, Bedene Şiddet Kitabı, Editörler: Emine Gürsoy-Naskali/ Aylin Koç, KİTABEVİ, İstanbul 2009, sh. 396-397 (sh. 393-410).

corporeal integrity of the individual can only be restricted under medical necessity and in cases prescribed by law, it is concluded that this procedure can be referred to where the mentioned conditions are met⁷.

Another constitutional provision that may constitute the legal basis for the acceptance of circumcision in Turkish law is Article 24, set out under the section with the heading of Personal Rights and Duties, providing for the freedom of religion and conscience. Accordingly: *“Everyone has the freedom of conscience, religious belief and conviction.*

Acts of worship, religious rites and ceremonies shall be conducted freely, as long as they do not violate the provisions of Article 14.

No one shall be compelled to worship, or to participate in religious rites and ceremonies, or to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions.

Religious and moral education and instruction shall be conducted under state supervision and control. Education regarding religious culture and morals shall be one of the compulsory lessons in the curricula of primary and secondary schools. Other religious education and training shall be subject to the individual’s own desire, and in the case of minors, to the request of their legal representatives.

No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets”.

The evaluation of freedom of religion and conscience is left to the free will of individuals based upon the principle of necessity and proportionality in a democratic society⁸. With the adaption of the principle that nobody will be blamed for his religious belief and his free performance of religious ceremonies, it is observed that a system is adapted where the religious education of children is left to the request of the family. It is possible to see that the concepts of religious culture and moral education and religious education are respectively provided in the article. Within this respect, it is observed that the State has authority upon general culture lessons, to be limited with religion and moral education, with the religious education being left to the preference of the family. However these provisions are both open to interpretation and have the nature of enabling arbitrary practices. Establishing of the limits has great importance. When the provision is considered focusing on the circumcision, the disposal of the family upon the circumcision of the male child is characterized as an appearance of religious belief.

C. Constitutional Framework of Child Rights

In Turkish law we see the validity of the obligations arising out of the international agreements regarding children, in addition to the obligations imposed as a result of being a party to the UN Convention of the Rights of the Child, Lanzarote

⁷ ÜNVER Yener, Psikiyatride Hasta Hakları, in Sağlık Hakkı Özel Sayı: Hasta Hakları, Sayı:3, Kasım 2007, (sh.20-44), sh. 25.

⁸ TANÖR/ YÜZBAŞIOĞLU, 1982 Anayasasına Göre Türk Anayasa Hukuku, sh.170-173.

Convention⁹, and İstanbul Convention¹⁰, the constitution also takes into account the child rights in addition to personal inviolability and protection of corporeal and spiritual existence of the individual. Within this respect, pursuant to the Constitution's Article 41 with the heading of protection of the family, and children's rights provided in the third part with the heading of social and economic rights and duties; *"The family is the foundation of the Turkish society and is based on the equality between the spouses.*

The State shall take the necessary measures and establish the necessary organizations to protect the peace and welfare of the family, especially the mother and children, and to ensure the education for family planning and its practice.

Every child has the right to protection and care and the right to have and maintain a personal and direct relationship with his/her mother and father unless it is contrary to his/her higher interests.

The State shall take measures for the protection of the children against all kinds of abuse and violence".

By this provision the constitutional framework of the positive obligation of the State as regards the protection of every child, not acting in contradiction with their high benefits and their not being subject to abuse, is set out. In the same regulation the relationship of the parent with the child is also expressed, provided that it is not in contradiction with the higher benefits of the

child. Considering the social acceptance of the circumcision both as a religious and customary practice, the legality of the practice prevents it from being evaluated in contradiction with the discipline and education right of the parent. In fact, the opinions considering the topic within the framework of the act's social compliance expresses that the act is not in contradiction with the law¹¹.

2. Evaluation of Circumcision Under Civil Law

It is seen that in Turkish civil law, the legal status of the child is determined according to the provisions of the Turkish Civil Code No. 4721 (TCC). When the provisions regarding the topic are examined in order to make evaluation in relation to circumcision, first of all the rights and duties of the parent upon the child must be determined. Article 322 of the Turkish Civil Code expresses the mutual obligation of family members as *"Mother, father and child are obliged to help each other in a manner necessitated by the peace and integrity of the family, respect and show understanding and observe the family honor"*. The equitable approach of the mutual obligations of the mother, father and children to each other within the family must be taken into account together with the care and custody obligations on the child.

⁹ Avrupa Konseyi Çocukların Cinsel Suistimale ve Cinsel İstismara Karşı Korunmasına Dair Sözleşmesi için bkz., http://www.coe.int/t/dghl/standardsetting/children/Source/LanzaroteConvention_tur.pdf, erişim tarihi: 03.10.2013, saat: 11.35.

¹⁰ YENİSEY Feridun, Uluslar arası Sözleşmede Kadına Yönelik Şiddet Riskinin Değerlendirilmesi ve Türk Hukuku, in: Yoncalı Platformu Sempozyum Günleri Kütahya-Türkiye'de Aile İçi Şiddetle Mücadele Hukuk Sempozyumu, Bahçeşehir Üniversitesi Hukuk Fakültesi Kazancı Hakemli Hukuk Dergisi, Yıl: 2012, Cilt: 8, Sayı:97-98, sh.11 (sh. 10-13); ŞAHİN Cumhur, İstanbul Sözleşmesi'nin Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanun Üzerindeki Etkisi, in: Yoncalı Platformu Sempozyum Günleri Kütahya-Türkiye'de Aile İçi Şiddetle Mücadele Hukuk Sempozyumu, Bahçeşehir Üniversitesi Hukuk Fakültesi Kazancı Hakemli Hukuk Dergisi, Yıl: 2012, Cilt: 8, Sayı:97-98, sh. 17 (sh. 17-19).

¹¹ NUHOĞLU, sh. 218.

The minor child is under the guardianship of its parents; the guardianship of the child cannot be taken from its parents without legal grounds¹². The scope of the guardianship is also determined in the Civil Code and accordingly; the mother and father shall take the necessary decisions upon the care and education of the child by considering its benefit, and apply these decisions. The child is obliged to follow its mother and father's advices. The mother and father give the child the opportunity of regulating its own life in proportion to its maturity; upon important issues, they take its opinion into account as much as possible. A child cannot leave the house without the consent of its mother and father and cannot be taken from them without a legal reason. A child is named by its mother and father. (Turkish Civil Code, Article 339).

The education, one of the subjects within the scope of guardianship, is respectively specified as education and religious education. Within this respect, the mother and father educate the child according to their resources and provide and maintain its physical, mental, spiritual, moral and social development. The mother and father provide a general and occupational education to the child, particularly those with physical and mental disabilities, according to their ability and tendencies (Turkish Civil Code, Article 340). However religious education is expressed in Article 341 of the Turkish Civil Code. In the provision it is expressed that the right to determine the religious education of the child belongs to the mother and father; that any and all contracts that will restrict their rights upon this topic will be invalid and that an adult person is free to select his religion. There is no clear regulation in these provisions that may explain the circumcision. Again when the provisions

regarding protection of child in Turkish Civil Code are observed, in case where the benefit and development of the child are jeopardized and the mother and father cannot remedy or are able to do this, a judge will take the appropriate precautions for the protection of the child (Turkish Civil Code, Article 346). In Article 368 of the Turkish Civil Code Article 368, where it is expressed that the persons living together are subject to the house order and benefits of each of the family members will be justly regarded, it is also provided that each of the household will benefit from the freedom required for his education, religious beliefs, occupation and art. The necessary liberty will also be evaluated within the scope of the Constitution.

Circumcision is not clearly set out under the Civil Code. However, for the purposes of the limits of religious education within the scope of guardianship, a broad regulation is to be interpreted according to usage and customs, taking circumcision into consideration within this respect will not be a contradicting interpretation.

In a decision rendered by the Court of Cassation with respect to the delivery of guardianship, the evaluation of the court regarding the circumcision partially reflects the approach to this act in Turkish law. In the decision "*it is seen that the mother has her joint child born on 1979, named Göktuğ, circumcised secretly from claimant father, without informing him by any means, the claimant father, who has a male child, has learned this fact from third persons, the defendant newly wedded and therefore had to go abroad with her husband has taken the child with her, without giving information to the school administration and the father; the situation has been informed to the father by the school administration, the legal meeting rights granted to the father with the court*

¹² Article 335 of the Turkish Civil Code No. 4271.

decision have been restricted all along. In fact, it is seen that the defendant mother, by hiding the circumcision ceremony that can occur once in a lifetime and deemed as the happiness and pride of a parent according to Turkish custom and usage and particularly going abroad hide her address from the father and clearly tried to prevent the meeting rights established between the child and the father pursuant to the provisions of the code and the satisfaction of the paternity feeling.¹³ As it is to be determined from the decision, circumcision is qualified as a kind of right and deemed as a part of Turkish usage and custom.

3. Circumcision in Turkish Criminal Law

There is also no clear regulation upon circumcision in Turkish Criminal Code No. 5271 (TCC). However, it has not been discussed until today whether circumcision can be evaluated as a reason of compliance with laws due to its attribution as a kind of medical intervention. In fact whether the medical intervention determined as the limit of the inviolability in the Constitution under personal inviolability can be interpreted in a way including circumcision has now started to be discussed. It is beyond doubt that the act is an injury despite the fact that

circumcision is not legally accepted. Injury is an offense committed against the corporeal integrity provided in Article 86 and continuous articles of TCC No. 5237 as deliberately, involuntarily and aggravated due to conclusion.

The fact that circumcision is performed mostly as a customary and religious ritual, the medical intervention's being exceptional makes the evaluation of this practice under medical intervention difficult. One of the criteria determining the legal compliance of medical intervention is whether the intervention is necessary as regards health or not¹⁴. However this discussion has been exceeded due to aesthetic surgeries and by referring to the fact that the consent of the person makes this intervention in compliance with law, the consent of the injured is classified as a reason for compliance with laws.

However the state of consent is controversial when the topic is child circumcision¹⁵. Thus, in a field where the consent of the child cannot be possible, in cases of a lack of medical intervention, the legal nature of circumcision will continue to remain disputable¹⁶. Nevertheless, the discussion of the subject by jurists does not go beyond the theoretical level¹⁷. There is no decision questioning the legal framework of circumcision or discussing whether the act is in compliance with law or not.

¹³ Yargıtay Hukuk Genel Kurulu E. 1992/2-140, K. 1992/248, T. 15.4.1992, bkz. <http://66.221.165.115/cgi-bin/highlight/ibb/highlight.cgi?file=ibb/files/hgk-1992-2-140.htm&query=sünnet#fm>. (Court of Cassation, General Board of Law Department with file number 1992/2-140 and decision number 1992/248, dated 04/15/1992, see. <http://66.221.165.115/cgi-bin/highlight/ibb/highlight.cgi?file=ibb/files/hgk-1992-2-140.htm&query=sünnet#fm>.)

¹⁴ ÇAKMUT YENERER Özlem, Tıbbi Müdahalelerin Rızanın Ceza Hukuku Açısından İncelenmesi, Legal, İstanbul, Ocak 2003, sh. 81-101; SEVÜK YOKUŞ Handan, Sağlık Hakkı Kapsamında Yapılan Müdahalelerin Türk Ceza Hukukunda Hukuka Uygunluğu, in: Marmara Üniversitesi Hukuk Fakültesi Sempozyum Özel Sayısı, Sağlık Hukuku ve Yeni Türk Ceza Kanunu'ndaki Düzenlemeler Sempozyum no:1, Ocak 2007, (sh. 221-243); sh. 228-230; HAKERİ Hakan, Tıbbi Müdahalenin Hukuka Uygunluğunun Koşulları ve Hekimin Yükümlülüğü, in: Tıbbi Uygulama Hataları (Malpraktis) Komplikasyon ve Sağlık Mensuplarının Sorumluluğu, Yayına Hazırlayan: Yener Ünver, Yeditepe Üniversitesi Yayınları, İstanbul 2008, sh. 13-52.

¹⁵ ERMAN, Tıbbi Müdahalelerin Hukuka Uygunluğu, sh. 80.

¹⁶ ÇAKMUT YENERER, Tıbbi Müdahalelerin Rızanın Ceza Hukuku Açısından İncelenmesi, sh. 81 vd.

¹⁷ YERDELEN Erdal; Hukuki Açısından Sünnet, in: Tıp Hukuku Dergisi, Nisan 2013, C:2, S:3;sh.48, (sh. 43-75).

A. Circumcision As Medical Intervention

As circumcision is evaluated within the scope of a medical intervention, for the conditions of medical intervention and acceptance thereof as a ground for compliance with law in Turkish law, the medical intervention must be compulsory¹⁸. This necessity is the illustration of a state expressing that medical intervention is based on justifiable causes¹⁹. However, in Article 17 of the Constitution of the Republic of Turkey, medical intervention is provided as one of the limits of personal inviolability. The compliance of the medical intervention with the law is explained with the exercise of the right²⁰ and consent of the concerned; grounds for compliance with the law²¹ expressed in Article 24 of TCC. The condition sought here for the purposes of grounds for compliance of law for the consent of the concerned who will make the medical intervention legal, is the capability of the person declaring the consent to dispose upon the legal value, subject of the consent of that person²². When the topic is taken into account within this context, even if the circumcision is accepted as a medical intervention, the validity of the consent will be disputable for the purposes of the procedure performed on a legal value upon which the child is not capable to dispose legally. There is no legal problem in taking the consent of the parent arising out of guardianship in cases necessitating medical

intervention. However in this case, where there is no medical necessity it is legally difficult to try to explain the validity of consent as regards the act violating the corporeal integrity, wished to be performed by parents upon the child. There is not always a medical intervention enabling the acceptance of the medical intervention in circumcision as in compliance with law; the opinions with respect to the fact that circumcision is medically useful cannot be adequately justified²³.

B. Circumcision Under Social Compliance of the Act

The act of circumcision is not explained with medical conclusions. Circumcision is as a social matter of fact performed with the consent of the parents of a child, both customary and religious practice. The circumcision is accepted in society as the transition ceremony from childhood to manhood, its being a kind of pride occasion for mother and father as it is expressed in the previously mentioned Court of Cassation decision means that this practice is in contradiction with the law for social purposes. Thus, the acceptance of this practice accepted as socially, that may give rise to the exclusion of the child from certain social environments in cases where it is not performed, as injury becomes difficult. In fact, the reason for the non-punishment of the act originally provided for in Article 86 of the TCC as an intentionally injury offense

¹⁸ HAKERİ Hakan, Tıp Hukuku El Kitabı, Seçkin, 8. Baskı, Ankara 2014, sh. 117-196.

¹⁹ YERDELEN, Hukuki Açidan Sünnet, sh.48.

²⁰ DÖNMEZER Sulhi/ERMAN Sahir, Nazari ve Tatbiki Ceza Hukuku, Genel Kısım Cıl:II, Yeniden Gözden Geçirilmiş Onikinci Bası, Beta, Ekim 1999, sh.51; İÇEL Kayhan, Ceza Hukukunda Taksirden Doğan Söbjektif Sorumluluk, İstanbul 1967, sh. 207-208.

²¹ ÜNVER Yener, İzin Verilen Risk, Beta, Mart 1998, İstanbul, sh. 188 vd.; HAKERİ, Tıp Hukuku El Kitabı, sh. 153.

²² ÜNVER Yener, Ceza Hukukuyla Korunması Amaçlanan Hukuksal Değer, Seçkin, Ankara 2003, sh. 977; SEVÜK YOKUŞ, Sağlık Hakkı Kapsamında Yapılan Müdahalelerin Türk Ceza Hukukunda Hukuka Uygunluğu, sh. 228-230.

²³ YERDELEN, Hukuki Açidan Sünnet, sh. 47.

is nothing other than the social compliance of the act²⁴.

It is possible in Turkish law to determine that the circumcision is also legally accepted. The legal framework of the person and institutions authorized to execute the circumcision performed without criminal necessity²⁵, Article 3 of the Law Upon Mode of Execution of Medicine and Medical Sciences No. 1219 provides the surgical procedure and expresses that circumcision is such a procedure. Legally it is stated that the person authorized to perform this must be a medical doctor and that only doctors can perform the circumcision and only at the institutions authorized to intervene medically²⁶.

An event, despite not being related to the legal validity of circumcision, where the person performing the circumcision caused the injury of the child with negligence has become the subject of the Court of Cassation decision and sentence is served upon the health officer qualified as a circumciser for negligence injury²⁷. The circumcision has also been performed by the legally authorized health officer, other than doctors, at the period of decision.

Conclusion

As a conclusion, a discussion of the legal validity of circumcision is quite new in Turkish Law. Despite this innovation, the social legality of the circumcision makes the qualification of the act as an act of willful injury, difficult. Even if the circumcision is

considered within the respect of fundamental rights and liberties, the determination of the place thereof within the rights such as personal inviolability, freedom of religion and conscience, the child's rights and the parent's right to educate, develop and the medical care of child has great difficulty.

Child inviolability is undoubtedly a part of the personal inviolability. Within the personal inviolability, the person is entitled to protect and develop his/her corporeal and spiritual existence and there are religious belief especially within spiritual existence. Although the circumcision is assessed within all of these rights, it is difficult to express that it is totally a part of these rights. The fact is that the circumcision is a ritual taking place within the customary and religious rules of society. In cases where this practice is not performed, the child questions, being himself at the first place, his personality and existence.

The social compliance of the action accepted as a ceremony of traditionally transition from childhood to manhood both for the child, waiting the performance of circumcision ceremony excitedly and the family, is beyond dispute.

Therefore, the circumcision has never been seen as an act constituting a crime. However the superficial characterization of the topic in this manner, the act's being tried to be explained with the social compliance, are insufficient to explain the circumcision legally. For this reason that is required to be made is the legalization of the topic with a clear regulation exactly as in German Law.

²⁴ NUHOĞLU, Sünnet ve Ceza Hukuku, sh. 218-219; HAKERİ, Tıp Hukuku El Kitabı, sh. 195.

²⁵ ÜNVER Yener, Tıbbi Malpraktis ve Ceza Hukuku, in Tıbbi Uygulama Hataları (Malpraktis) Komplikasyon ve Sağlık Mensuplarının Sorumluluğu, Yayına Hazırlayan: Yener Ünver, Yeditepe Üniversitesi Yayınları, İstanbul 2008, (sh. 53-116).

²⁶ Law Upon Mode of Execution of Medicine and Medical Sciences No. 1219; Official Gazette: 04/14/1928 – 863.

²⁷ Yargıtay Ceza Genel Kurulu, E.2002/2-188, K.2002/317, T.24.9.2002; karar için bkz. <http://www.kazanci.com.tr>, erişim: 12.04.2015. (Court of Cassation General Board of Criminal Department with file number 2002/2-188 and decision number 2002/317, dated 09/24/2002; see <http://www.kazanci.com.tr> for the decision, access: 04/12/2015).

Against the incapacity of the current regulation, the clear expression of the compliance of the circumcision with the law should be made. Despite the fact that circumcision is considered as a medical activity within the health legislation, it does not always bear the validity conditions of medical activity. It is difficult for an act performed on a child to be resolved with an invalid consent. In our opinion, the

application of criminal law rules with an explanation of the lack of legal basis such as the social conformation of the act can only be excluded for a while.

As we mentioned within this context, due to the fact that the circumcision is an essential ritual for the purposes of Turkish society, reaching a clear regulation will be appropriate.

References

- Bayraktar Köksal, Hekimin Tedavi Nedeniyle Cezai Sorumluluğu, Sermet Matbaası, İstanbul, 1972.
- Çakmut Yenerer Özlem, Tıbbi Müdahaleye Rızanın Ceza Hukuku Açısından İncelenmesi, Legal, İstanbul, Ocak 2003.
- Dönmezer Sulhi/Erman Sahir, Nazari ve Tatbiki Ceza Hukuku, Genel Kısım Cilt:II, Yeniden Gözden Geçirilmiş Onikinci Bası, Beta, Ekim 1999.
- Erman Barış, Tıbbi Müdahalelerin Hukuka Uygunluğu, Seçkin, Ankara 2003.
- İçel Kayıhan, Ceza Hukukunda Taksirden Doğan Sübjektif Sorumluluk, İstanbul 1967.
- Kiliç Muharrem, İnsan Haklarında Beden Bütünlüğünün Korunması, in: İğdiş, Sünnet, Bedene Şiddet Kitabı, Editörler: Emine Gürsoy-Naskali/ Aylin Koç, Kitabevi, İstanbul 2009, (sh. 393-410).
- Hakeri Hakan, Tıp Hukuku El Kitabı, Seçkin, 8. Baskı, Ankara 2014.
- Hakeri Hakan, Tıbbi Müdahalenin Hukuka Uygunluğunun Koşulları ve Hekimin Yükümlülüğü, in: Tıbbi Uygulama Hataları (Malpraktis) Komplikasyon ve Sağlık Mensuplarının Sorumluluğu, Yayına Hazırlayan: Yener Ünver, Yeditepe Üniversitesi Yayınları, İstanbul 2008, sh. 13-52.
- Nuhoğlu Ayşe, Sünnet ve Ceza Hukuku, in: Prof.Dr. Nur Centel'e Armağan, T.C. Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Özel Sayı, Yıl:2013, Cilt: 19, Sayı:2, sh. 211-219.
- Özbek Veli Özer/Kanbur Mehmet Nihat/ Doğan Koray/ Bacaksız Pınar/ Tepe İlker, Türk Ceza Hukuku Genel Hükümler, 5. Baskı, Seçkin, Ankara 2014.
- Özbudun Ergun, Türk Anayasa Hukuku, 14. Baskı, Yetkin, Ankara 2013.
- Sevük Yokuş Handan, Sağlık Hakkı Kapsamında Yapılan Müdahalelerin Türk Ceza Hukukunda Hukuka Uygunluğu, in: Marmara Üniversitesi Hukuk Fakültesi Sempozyum Özel Sayısı, Sağlık Hukuku ve Yeni Türk Ceza Kanunu'ndaki Düzenlemeler Sempozyum no:1, Ocak 2007, (sh. 221-243).
- ŞAHİN Cumhur, İstanbul Sözleşmesi'nin Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanun Üzerindeki Etkisi, in: Yoncalı Platformu Sempozyum Günleri Kütahya-Türkiye'de Aile İçi Şiddetle Mücadele Hukuk Sempozyumu, Bahçeşehir Üniversitesi Hukuk Fakültesi Kazancı Hakemli Hukuk Dergisi, Yıl: 2012, Cilt: 8, Sayı:97-98, (sh. 17-19).

- Tanör Bülent/ Yüzbaşıoğlu Necmi, 1982 Anayasasına Göre Türk Anayasa Hukuku, 13. Bası, Beta, Eylül 2013.
- Ünver Yener, Psikiyatride Hasta Hakları, in Sağlık Hakkı Özel Sayı: Hasta Hakları, Sayı:3, Kasım 2007, (sh.20-44).
- Ünver Yener, İzin Verilen Risk, Beta, Mart 1998, İstanbul.
- Ünver Yener, Ceza Hukukuyla Korunması Amaçlanan Hukuksal Değer, Seçkin, Ankara 2003.
- Ünver Yener, Tıbbi Malpraktis ve Ceza Hukuku, in Tıbbi Uygulama Hataları (Malpraktis) Komplikasyon ve Sağlık Mensuplarının Sorumluluğu, Yayına Hazırlayan: Yener Ünver, Yeditepe Üniversitesi Yayınları, İstanbul 2008, (sh. 53-116).
- Yenisey Feridun, Uluslar arası Sözleşmede Kadına Yönelik Şiddet Riskinin Değerlendirilmesi ve Türk Hukuku, in: Yoncalı Platformu Sempozyum Günleri Kütahya-Türkiye’de Aile İçi Şiddetle Mücadele Hukuk Sempozyumu, Bahçeşehir Üniversitesi Hukuk Fakültesi Kazancı Hakemli Hukuk Dergisi, Yıl: 2012, Cilt: 8, Sayı:97-98, (sh. 10-13).
- Yerdelen Erdal, Sünneti Kasten Yaralama Suçu Olarak Kabul Eden Köln Eyalet Mahkemesi Kararı ve Alman Kanun Koyucunun Karara Tepkisi, in: Kamu Hukuku Arşivi Dergisi, Y: 16, S:1-32, 2013-1, (sh. 1-8).
- Yerdelen Erdal; Hukuki Açından Sünnet, in: Tıp Hukuku Dergisi, Nisan 2013, C:2, S:3; (sh. 43-75).

Websites:

- Avrupa Konseyi Çocukların Cinsel Suistimale ve Cinsel İstismara Karşı Korunmasına Dair Sözleşmesi için bkz., [http://www.coe.int/t/dghl/standard setting/children/Source/LanzaroteConvention_tur.pdf](http://www.coe.int/t/dghl/standard_setting/children/Source/LanzaroteConvention_tur.pdf), erişim tarihi: 03.10.2013, saat: 11.35.
- Yargıtay Hukuk Genel Kurulu E. 1992/2-140, K. 1992/248, T. 15.4.1992, bkz. <http://66.221.165.115/cgi-bin/highlt/ibb/highlight.cgi?file=ibb/files/hgk-1992-2-140.htm&query=sunnet#fm>. (Court of Cassation, General Board of Law Department with file number 1992/2-140 and decision number 1992/248, dated 04/15/1992, see. <http://66.221.165.115/cgi-bin/highlt/ibb/highlight.cgi?file=ibb/files/hgk-1992-2-140.htm&query=sunnet#fm>).
- Yargıtay Ceza Genel Kurulu, E.2002/2-188, K.2002/317, T.24.9.2002; karar için bkz. <http://www.kazanci.com.tr>, erişim: 12.04.2015. (Court of Cassation General Board of Criminal Department with file number 2002/2-188 and decision number 2002/317, dated 09/24/2002; see <http://www.kazanci.com.tr> for the decision, access: 04/12/2015).

THE TRAFFICKING IN HUMAN BEINGS PREVENTION: A CRIMINOLOGICAL PERSPECTIVE¹ - PART ONE

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Laura C. DI FILIPPO**

Abstract

Our investigation intends to individualize particular and different kind of trafficking in persons and their quantitative official incidence at international, European and Italian level, also to specify the activities realized by the organizations involved about. Our aim is to prospect new criminological perspectives on trafficking starting from the role of indicators, the econometric principles of cost-benefit analysis, the theory of the rationale choice, up to reach a new model about the 5 P's strategies.

Keywords: *trafficking, human beings, prevention, data, criminological perspective.*

Introduction

We have divided our investigation in different steps finalized:

1.To individualize particular and different kind of Trafficking in Persons and their quantitative official incidence at International, European and Italian level

2.To specify the activities realized by the Organizations involved in the Trafficking in Human Beings

3.To prospect new criminological perspectives on Trafficking in Human Beings Prevention as follows:

a)The Role of Trafficking Indicators according to a Dynamic Multidisciplinary Dimension: Trafficking Indicators, Risk/Vulnerability Factors, Risk Situations

b)The Econometric Principles of the Cost-Benefit-Analysis (c/b/a) and the

Theory of the Rationale Choice of the Criminal Behavior applied to the Trafficking in Human Beings Prevention

c)The Trafficking in Human Beings Prevention according to a Theoretical Interdisciplinary/Transnational Structure

4.To suggest a New Model about the 5 P's Strategies

1. Data on Trafficking in Human Beings

It's not possible to propose preventive and contrast actions regarding a criminal phenomenon if we don't know it in deep and exhaustive way. So for our survey we make use and give note of the different kind of statistical sources on trafficking from: a) the global point of view, b) the European point of view, c) the Italian point of view, in order to prospect, obviously, the only quantitative

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official incidence of this kind of criminality and of the activities undertaken by Organizations involved in this field.

a) From the global point of view the statistical data elaborated by

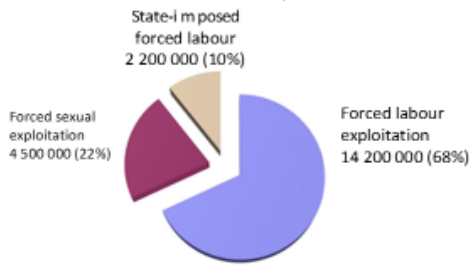
a1.) ILO (ILO Global Estimate of Forced Labour 2012)

a2.) UNODC (Global Report on Trafficking in Persons 2014)

a3.) U.S. Department of State (Trafficking in Persons 2014) show a very hard and considerable trend.

ILO Global Estimate of Forced Labour Results and methodology 2012

For the period 2002 – 2012, the total number of victims 20.9 million, so divided:

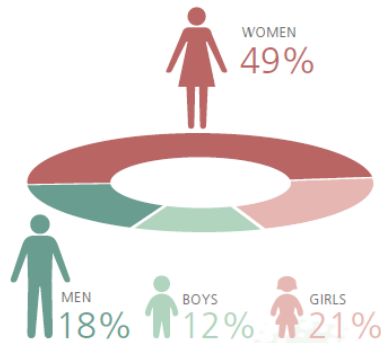


a2.) UNODC – Global Report on Trafficking in Persons, 2014

CORE RESULTS

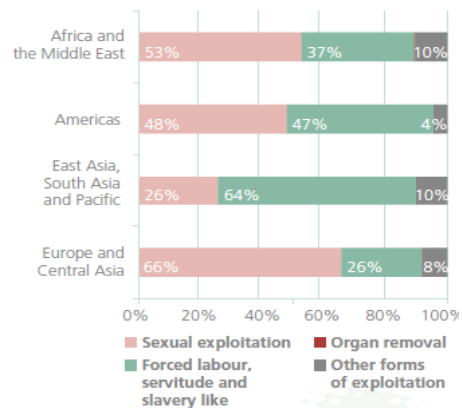
- Data coverage: 2010-2012 (or more recent).
- Victims of 152 different citizenships have been identified in 124 countries across the world.
- At least 510 trafficking flows have been detected.
- Some 64 per cent of convicted traffickers are citizens of the convicting country.
- Some 72 per cent of convicted traffickers are men, and 28 per cent are women.
- 49 per cent of detected victims are adult women.
- 33 per cent of detected victims are children, which is a 5 per cent increase compared to the 2007-2010 period.

Detected victims of trafficking in persons, by age and gender, 2011



Source: UNODC elaboration on national data.

Forms of exploitation among detected trafficking victims, by region of detection, 2010-2012 (or more recent)



Source: UNODC elaboration on national data.

a3.) U.S. Department of State *Trafficking in persons report 2014*

Data on trafficking investigations, prosecutions, convictions, victims identified.

YEAR	PROSECUTIONS	CONVICTIONS	VICTIMS IDENTIFIED
2006	5,808	3,160	
2007	5,682 (490)	3,427 (326)	
2008	5,212 (312)	2,983 (104)	30,961
2009	5,606 (432)	4,166 (335)	49,105
2010	6,017 (607)	3,619 (237)	33,113
2011	7,909 (456)	3,969 (278)	42,291 (15,205)
2012	7,705 (1,153)	4,746 (518)	46,570 (17,368)
2013	9,460 (1,199)	5,776 (470)	44,758 (10,603)

b) From the European point of view the statistical data elaborated by EUROSTAT (Trafficking in Human Beings 2015) in 2013 with the "first working paper" in Trafficking in Human Beings in Europe and the "second working paper" at EU level on statistics on trafficking human beings and contains data for the years 2010-2011 and 2012. The Paper includes statistical data from all 28 EU Member States and the following EU Candidates and EFTA/EEA (Iceland, Norway) countries (Montenegro, Norway, Serbia, Switzerland and Turkey).

EUROSTAT, Trafficking in human beings, 2015

Registered victims (identified and presumed Victims)

identified and presumed victims in the 28 EU member states over the three years 2010-2012	30.146
female	80%
Child victims were trafficked for sexual exploitation.	Over 1 000
Victims were trafficked for sexual exploitation.	69%
female victims of sexual exploitation	80%
male victims of labor exploitation	71%
EU citizens victims	65%

2009 – 2421 identified and presumed victims

2010 - 2381 identified and presumed victims

2011 – 1560 identified and presumed victims

2012 – 2631 identified and presumed victims

In the period 2000 – 2012 ex art. 18 d.lgs 286/98 and ex art. 13 L. 228/2003 21 795 victims of trafficking (1171 minors) have been assisted according ex art. 18. During the 2014 1451 (88 minors) assisted ex art. 18.

The last Italian data source is the analysis realized annually by the Direzione Nazionale Antimafia

CRIMINAL PROCEEDINGS ENTERED

DURING THE PERIOD 1.1.2010 /30.06.2014

IN RELATION TO THE ARTS. 600, 601, CRIMINAL CODE (MEASURES AGAINST TRAFFICKING IN PERSONS)

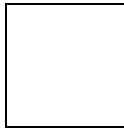
Art. 600 c.p. – Riduzione in schiavitù,

2010	302
2011	406
2012	270
2013	157
2014 up to 30.06.14	78

C – From the Italian point of view

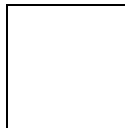
According to Eurostat for the period 2008 - 2012 in Italy we had:

2008 – 1624 identified and presumed victims



Art. 601 c.p. - Tratta e commercio di schiavi

2010	152
2011	267
2012	192
2013	195
2014	37



2013-2014

2. Activities of the Organizations involved in the Trafficking in Human Beings

a) also the Interpol (3rd Interpol Global Trafficking in Human Beings Conference 12-14 November 2014) tasks are directed to contrast all kind of transnational organized crimes (drugs - related crime, people smuggling - trafficking in human beings, financial crime and money laundering, intellectual property rights, counterfeiting medicines), but the special action realized in the field of human trafficking is specifically linked to the aspect represented by the abuse of the vulnerability of the victims, as the trafficking in women for sexual exploitation, the trafficking for forced labour, the commercial sexual exploitation of children in tourism and the trafficking in organs, all criminal behaviors whose business reach a multi-billion-dollar form in the sector of international organized crime constituting a modern-day slavery. Consequently Interpol's response, given the complexities of the topic suggests a multitude of strategies in order to

Art. 600 c.p. - Riduzione in schiavitù			
Nazione di Nascita di Indagati e Persone Offese			
1 luglio 2013 - 30 giugno 2014			
Nazione di nascita	Nr. Indagati	Nazione di nascita	Nr. Persone offese
Romania	72	Romania	39
Italia	39	Italia	12
Albania	21	Nigeria	7
Marocco	9	Bulgaria	6
Bulgaria	6	Bangladesh	4
Nigeria	2	Albania	2
Polonia	2	Marocco	2
Altre nazionalità	7	Altre nazionalità	8
Luogo non indicato	7	Luogo non indicato	48
TOT	165	TOT	128



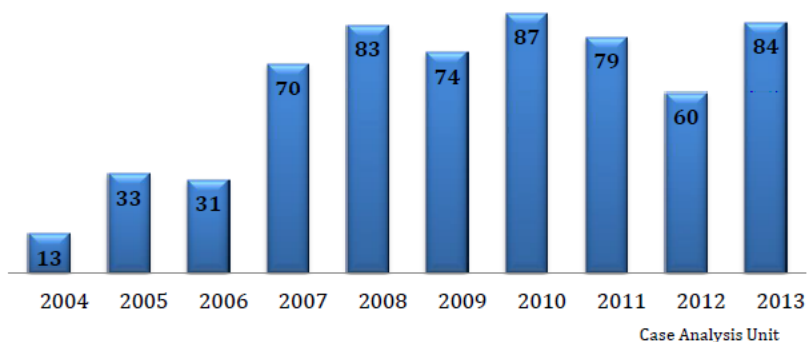
Art. 601 c.p. - Tratta e commercio di schiavi			
Nazione di Nascita di Indagati e Persone Offese			
1 luglio 2013 - 30 giugno 2014			
Nazione di nascita	Nr. Indagati	Nazione di nascita	Nr. Persone offese
Romania	32	Romania	19
Albania	17	Eritrea	8
Marocco	5	Nigeria	7
Italia	4	Siria	7
Nigeria	3	Bulgaria	6
Pakistan	2	Italia	2
Altre nazionalità	3	Altre nazionalità	4
Luogo non indicato	4	Luogo non indicato	25
TOT	70	TOT	78

"attempt" of reducing this criminal problem, like operation and projects (concrete action in the field to dismantle human trafficking networks), Interpol tools (technical tools and systems for sharing information globally), partnerships (strengthening the approach by working across sectors), events and conferences with the participation and experiences of experts across the world.

b) the Eurojust relative data (Action Plan against Trafficking in Human Beings 2012 for the period 2004-2011 and Eurojust

-Annual Report 2013) show that the cases of trafficking registered in the Eurojust Case Management System represent only the 5.6% (470 cases) of the total number of cases registered at Eurojust (8251). As a follow-up the strategic project "Eurojust's Action against Trafficking in Human Beings" and the adoption of the "Action Plan against Trafficking in Human Beings" 2012-2016, that is bringing up to date will give an actual vision of the phenomenon.

Number of registered THB cases 2004-2013



Total number of THB cases



Case Analysis Unit

Eurojust THB cases in %



Case Analysis Unit

In any case the numbers of Trafficking in Human Beings cases at Eurojust are remained almost stable in the last few years, but in 2013 are increased by 40% over 2012:

Data on Trafficking in Human Being:	2012	2013
Number of cases registered:	60	84

Implementation of the Eurojust Action Plan against Trafficking in Human Beings 2012-2016

Mid-term report, 2014

c) Also the Europol, in order to support Trafficking in Human Beings operations has infrastructures in place to successfully provide investigators with a platform for the secure exchange of information on trafficking in human beings data, transmitted rapidly through the network of Europol National Units in each EU Member State and in third countries with which operational cooperation agreements are in place. Europol Information System is a database with which Europol provides for Member States to give directly criminal information, including trafficking in human beings data.

d) The strategic analysis realized by the Europol's analytical activities in the field of Trafficking in Human Beings is well supported also in United Kingdom by the work of the Serious Organized Crime Agency (SOCA, UKHTC: a Strategic Assessment on the Nature and Scale of Human Trafficking in 2012), whose data on potential victims are well structured: with a specific key points:

- 2255 potential victims of Human Trafficking encountered in 2012 show an increase of 178 (9%) compared to those reported in 2011

- of these 2255 potential victims, 778 has received a positive conclusive decision or are awaiting

- 1246 (55%) are female and 910 (40%) male

- The gender of 95 (5%) of potential victims is unknown

- 1607 (71%) are adults and 549 (24%) children

- The age of 99 (5%) is unknown.

- Sexual exploitation (35%) and labor exploitation (23%) have been the two most prevalent exploitation types reported and about as a minor have been sexual exploitation (28%) and criminal exploitation (24%).

e) The OSCE/OECD - Organization for Security and Co-operation in Europe (Annual Report of the OSCE Office of the Special Representative and Coordinator for Combating Trafficking Human Beings 2014) too, in his annual reports and in his numerous meetings, continues and aims to offer an overview of the wide range of activities carried out and the progress achieved in combating trafficking (as modern - day slavery) and exploitation according to human rights, social justice and the rule of law principles. The OSCE among his complex tasks to realize from his constitution (Helsinki 1975) to now, has specified, among other ones, the principle of the respect of the human rights in particular of the rights of the people belonging to minority. The trafficking of human beings considered whether a threat to the security or a question of human rights enlarges, according to OSCE position, his content until to embrace human rights and the respect of the law, the corruption and the control of criminality, the discrimination and the inequality, the economic policies, the work and the smuggling.

f) Although the trafficking in human beings is not frequently reported at the

external border of the European Union, this phenomenon is, by its transnational nature, closely related to the national borders and the work of border guards undertaken by FRONTEX.

Over the past years FRONTEX has followed the EU trend and given increasing priority to the issue of Trafficking in Human Beings and his main role is the identification of victims and traffickers during border control procedures.

His statistical data and relative analysis/reports of national rapporteurs provided by Member States and SAC (Schengen Associated Countries) concern and reflect, after that the potential victims have crossed the border, cases of trafficking detained inside the EU.

For the year 2009 the data collected report 3.023 potential victims of trafficking from third countries, while only 2.075 in the 2008, with an increase of 27%. Most of the third-country potential victims came from West Africa countries, followed by nationals from South America, East Asia and North Africa. Most of the potential victims have been trafficked for purpose of sexual exploitation, but also for forced labor or services showing an increasing trend. The same increasing trend is also observed regarding male victims numbers: in 2009 have in 2008. Another significant data concern the number increasing of minor's potential victims in 2009, coming, especially, from Nigeria and Guinea, trafficked for sexual exploitation and other activities associated with begging or other illegal behavior, such as petty theft... A relative low number of potential victims have been identified by the border control authorities, while most identification has taken place inland. About the nationalities of potential traffickers not European predominate Nigerian, Chinese and Brazilian ones.

g) European Union Policy on Trafficking in Human Beings

As the trafficking in Human Beings has become an increasing concern and a high priority for the entire EU and its Member States, the EU policy action realized by the European Commission, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions has always provided for legal instruments addressed to trafficking in human beings focusing on prevention, protection of victims, prosecution of criminals and partnership with the various actors involved (v. infra 3C) realizing, in this way, a correct approach based on human rights, victims centered, gender specific and child sensitive and aiming for coherence across all relevant policy fields.

Very long has been the EU juridical proceedings (and almost repetitive): from the Framework Decision on "the Standing of Victims in Criminal Proceedings" (15 March 2001), the Council Directive 2004/81/EC of 29 April 2004 on "Residence Permit for Victims of Human Trafficking" issued to third country nationals who are victims of Trafficking in Human Beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, to the new Directive (adopted on 14 December 2010) on "Preventive and Combating Trafficking in Human Beings and Protecting the Victim" obliging the EU Member States to act on three fronts: Prosecuting Criminals Responsible for Trafficking in Human Beings, Protection the Victim and Preventing the Offences". This approach is again reflected in the EU Directive 2011/36 (in force on 5th April 2011) on "Preventing and Combating Trafficking in Human Beings and Protection its Victims". This Directive brings robust provision on victim protection, including national

mechanism for early identification and assistance of victims and supports the principles of non-punishment and unconditional assistance. And finally the next EU Directive 2012/29 of the European Parliament and of the Council (25 October 2012) establishing "Minimum Standards on Rights, Support and Protection of Victims of Crime", until to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region on "the EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016 ", adopted by the European Commission on 19 June 2012.

The strategy is a set of concrete and practical measures to be implemented in the period considered based on five key priorities:

- identified, protecting and assisting victims of trafficking
- stepping up the prevention of trafficking in human beings
- increased prosecution of traffickers
- enhanced coordination and cooperation among key actors and policy coherence with all people involved as well as the establishment of national law enforcement units specialized in human trafficking and the creation of joint European investigation team to prosecute cross-border trafficking cases
- Increased knowledge and effective response to emerging concerns related to all forms of trafficking in human beings.

In date 17 October 2014 the European Commission presented a mid-term report of the 2012-2016 Emu Strategy accompanied by the second Working Paper at the EU level on statistics on Trafficking in Human Beings for the years 2010-2011-2012. It's interesting to note that this Statistical Report on Victims and Traffickers is the only EU numerical data collection existing in the field and Trafficking in human beings

In this period EU Member States registered:

- On victims
 - 30.146 victim of trafficking in human beings
 - 80% of registered victims female
 - 16% of registered victims children
 - Over 1.000 child victims registered as trafficked for sexual exploitation
 - 69% of registered victims trafficked for sexual exploitation
 - 95% of registered victims of sexual exploitation female
 - 71% of registered victims of labour exploitation male
 - 65% of registered victims EU citizens

- On traffickers
 - 8.551 prosecutions
 - Over 70% of traffickers male (suspects, prosecutions and convicts)
 - 3.786 convictions

Remember, at this point, that during the meeting of 12 September 2014 organized by the Law Enforcement Working Party r (LEWP), the Italian Presidency presented a proposal in relation to combating trafficking in human beings, initiative which represents fundamental points of reference and an essential source of information on the phenomenon, whose aim is to update a list of indicators on trafficking, focusing on the investigative and law enforcement profiles and offering specific indicators on victims and on identification of perpetrators (see *infra* 3a).

And finally with the EU Trafficking reports, April 2013 and April 2015, the European Commission has intended to establish effective monitoring and evaluation procedures that do not create repetitive mechanism, as in the past, but to encourage the Member States to do own evaluation and monitoring of national strategies and activities undertaken in the

field, in order to reach and to know the final results of the EU Strategy towards the Eradication of Trafficking in Human Beings for the period 2012-2016.

Obviously it's not possible to realize a comparison among all these data, specially for a different juridical terminology used by countries that reflects a no-complete harmonization (as we have already showed in our previous research concerning the Trafficking of moldavian minors in Italy and in Europe realized in the frame of the project <<Additional measures to fight child moldavian trafficked for sexual exploitation in Europe and Italy>> - Programme EU Grant Contract N.

2009/1556290), but, in any case, they are only a picture of trafficking situation showing a very hard official quantitative incidence.

Conclusions

The analysis of quantitative official data on trafficking in human beings shows a very hard incidence of the phenomenon but it's not possible to realize a full comparison among all these data, specially for a different juridical terminology used by countries.

References

- Adams C., Re-trafficked victims: how a human right approach can stop the cycle of re-victimization of sex trafficking victims, *Int. Law Rev.*, 2011.
- Di Filippo L.C., Il traffico di persone alla luce della normativa internazionale, europea ed italiana, in Rimoli F. (a cura di) "Immigrazione e integrazione: dalla prospettiva globale alle realtà locali", vol. II Il traffico di persone, Editoriale Scientifica, Napoli, 2014.
- Di Nicola A.(ed.), A study for monitoring the international trafficking of human beings for the purpose of sexual exploitation in the EU member states, realized by Transcrime (Università di Trento e Cattolica di Milano, EUNI and Research Centre on Criminology, University of Castilla-La Mancha), 2004
- Dipartimento per le Pari Opportunità, dati al 01/08/2014.
- Dipartimento Pari Opportunità, in http://www.pariopportunita.gov.it/images/stories/documenti_vari/UserFiles/Il_Dipartimento/tratta/Dati3_tratta.pdf
- Dottridge M., Child Trafficking for sexual purposes, ECPAT International, 2008.
- Dudley Safeguarding Children Board, Resource Pack re: Child Sexual Exploitation Human Trafficking Runaways, May 2013.
- Eurojust, Strategic meeting on trafficking in human beings, Outcome report, 26-27 April 2012.
- Eurojust, Strategic project on "Eurojust's action against trafficking in human beings", Final Report and Action Plan 2012 European Commission, Guidelines for the Identification of Victims of Trafficking in Human Beings, 2013.
- European Union Agency for Fundamental Rights, Child Trafficking in the European Union-Challenges, Perspectives and Good Practices, July 2009.
- Europol/ Socta 2013, EU Serious and Organized Crime Threat Assessment, European Police Office, 2013.
- Eurostat/European Commission, Trafficking in Human Beings, 2013.

- Giannini M.C., The revitalisation, of the interdisciplinary/integrated approach in the criminological research: theoretical interrelations and econometrical models of the rational choice, in *Criminology and European Crime Policy*, Sakkoulas Publications Athens, 2009.
- Giannini M.C., Di Filippo L.C., Antone A., The trafficking of Moldovan minors in Italy, *Lex et Scientia International Journal*, XVIII, 2, 2011 pag. 107-146.
- Giannini M.C., Di Filippo L.C., The situation of Moldovan minors as victims of trafficking for sexual exploitation, assistance and legislation concerning trafficking in human beings, *Lex et Scientia International Journal*, XX, 1, 2013 pag. 87-100.
- Greta (Group of Experts on Action against Trafficking in Human Beings), 3rd General Report on Greta's Activities, Council of Europe, April 2014.
- Greta (Group of Experts on Action against Trafficking in Human Beings), 4th General Report on Greta's Activities, Council of Europe, 201-2013.
- ILO, Operational indicators of trafficking in human beings, September 2009.
- International Centre for Migration Policy Development, Legislation and the Situation concerning Trafficking in Human Beings for the Purpose of Sexual Exploitation in EU Member States, 2009.
- International Centre for Migration Policy Development, Study on the Assessment of the Extent of Different Types of Trafficking in Human Being in EU countries, 2010.
- Osce (Global Initiative to Fight Human Trafficking), Analysing the Business Model of Trafficking in Human Beings to Better Prevent the Crime, 2010.
- Osce, Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment, 2013.
- Osce/Council of Europe, Proceedings of the Round Table on Combatting Trafficking in Human Beings, 18 April 2012.
- Osce, Combating Trafficking and Exploitation: Human Rights, Social Justice and the Rule of Law, Annual Report, 2013.
- Osce, Leveraging Anti-money Laundering Regimes to Combat Trafficking in Human Beings, 2014.
- Rusev, A., Human Trafficking, Border Security and Related Corruption in the EU, DCAF, October 2013.
- Thomson Reuters Foundation , the New York County District Attorney's, Office's Bankers' Alliance against Trafficking, Human Trafficking, Customer and Financial Transaction Traits that May Present Risk, The Banker's Alliance against Trafficking , february 17, 2014.
- U.S. Department of State, Trafficking in persons (Global Law Enforcement Data), Report 2014.
- UNODC, Anti-human Trafficking Manual for Criminal Justice Practitioners, 2009.
- UNODC, Global Report on Trafficking in Persons, 2013.
- UNODC, Global Report on Trafficking in Persons, 2012.
- UNODC, Human Trafficking indicators, 2014.
- USAID (US Agency International Development), Counter Trafficking in Persons Field Guide, April 2013.

REFLECTION OF THE PRINCIPLE OF LOYALTY IN MATTERS REGARDING THE ADDUCTION OF EVIDENCE IN THE ROMANIAN CRIMINAL PROCEEDINGS

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Abstract

This study aims the matter in which the Principle of Loyalty regarding adduction of evidence is reflected in the new criminal procedural legislation of Romania. It is a regulation addressing explicitly this principle for the first time, without this meaning that it had no representation in the practice of domestic courts under the previous criminal legislation. The author points out that the new regulations aim at internalizing the standard of protection established by the European Court of Human Rights concerning the right to a fair trial.

Keywords: *Principle of Loyalty, adduction of evidence, criminal proceedings, exclusion of evidence obtained illegally.*

Introduction

A new Code of Criminal Procedure came into force in Romania on 1 February 2014 containing modern elements and innovations, conferring added value to this legal act. Although the new Code of Criminal Procedure failed to always pass the constitutionality review, already existing a number of important decisions of unconstitutionality given on some item thereof, it also has the merit of trying to modernize the Romanian criminal trial by aligning, at least at the level of intent, with the European standards in the protection of fundamental human rights.

These factors also include the express declaration, with this *nomen iuris* of the Principle of Loyalty of proceedings in the adduction of evidence.

The Principle of Loyalty in the new rules of criminal procedure

The text including the regulation of the Principle is the one stated in Art. 101 of the Code of Criminal Procedure, entitled “Principle of Loyalty in the adduction of evidence”. According to the first paragraph of the article, “it is forbidden to use violence, threats or other forms of coercion, inducements and promises in order to obtain evidence”.

As explained in the explanatory memorandum of the new Code of Criminal Procedure, the establish of the Principle of Loyalty was made “in order to avoid the use of any means that could be aimed at administering of evidence in bad faith, or which could have as effect the commission of an offense in order to protect human dignity, and its right to a fair trial and privacy”.

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One shall not consider, however, violations of the Principle of Loyalty the promise of the judicial organs that if a denunciation is made, the person making it will benefit from a reduction of penalty. This because there are legal texts which explicitly establish the occurrence of the effect to reduce the penalty. For example, Art. 15 of Law 143/2000 on preventing and combating drug use¹ provides that if the person who committed one of the offenses defined by that law denounces and facilitates, during the investigation, the identification and criminal liability of other persons who have committed drug related offenses, benefits from halving the limits of the punishment provided by law. Similarly, Art. 18 of Law 508/2004 on the organization and operation of the Directorate for Investigating Computer Crime and Terrorism², states that the person who committed one of the offenses attributed by law to the judicial authority, and during the prosecution denounces and facilitates the identification and criminal liability of other participants in the crime benefits from halving the limits of the punishment provided by law. Given these legal provisions, the Prosecutor's promise that in exchange of the denunciation, the offender will receive the mitigation of punishment will not constitute a breach of the Principle of Loyalty. However, we believe that the denunciations made in the context in which its author aims specifically at reducing the limits of penalty should be weighed especially when one takes into account the indictment of a person.

The text of Art. 101 of the Code of Criminal Procedure supplements the statement of the principle, providing some explanations on the content of rule. Thus,

paragraph (2) of Art. 101 expressly explains that "methods or listening techniques that affect a person's ability to remember and report consciously and voluntarily the facts which are the subject of proof cannot be used. The prohibition applies even if the person heard consents to the use of such methods or techniques of listening".

This is the case, for example, of a person put to hypnosis in order to remember certain facts. Furthermore, the jurisprudence of the European Court of Human Rights reckoned that the use on people, during the criminal investigation, to obtain evidence, of disorientation techniques, or of sensory deprivation leading to acute mental disorders, such as exposure to continuous noise are prohibited methods of investigation³.

In close connection with the provisions of Art. 101 paragraph (2) of the Code of Criminal Procedure is also Art. 115 paragraph (2) of the Code of Criminal Procedure which provides that "persons who are in a situation which reasonably calls into question the ability to witness can be heard only when the judicial authority finds that that person is able to report consciously the facts and circumstances actually compliant with the reality". The prohibition acquires an irrebuttable status in that it expressly excludes the possibility of recourse to such techniques, even when the person subjected thereof consents to them being used. The specification is especially important given that the new criminal legislation gives higher express valence to the consent of the victim. Art. 22 of the Criminal Code defines as supporting grounds the "Consent of the injured party". Under this text, "it is justified the fact under the criminal law committed with the consent of the injured person, if it

¹ Republished in the Official Gazette of Romania, Part I, no. 163 of 6 March 2014.

² Published in the Official Gazette of Romania, Part I, no. 1089 of 23 November 2004, as subsequently amended and supplemented.

³ ECHR, Case of Ireland v. United Kingdom, judgment of 18 January 1978, www.echr.coe.int

could lawfully have affected the social value injured or endangered”. However, the consent of the injured person has no effect for crimes against life, and when the law excludes the supporting effect thereof. In this case, we believe that the use of prohibited techniques of hearing a person may constitute the offense of abusive investigation in the violence component, as defined by Art. 280 paragraph (1) of the Criminal Code, if the other conditions imposed by law are met. Given the express prohibition that Art. 101 paragraph (2) of the Code of Criminal Procedure establishes, the person eventually accused of such a crime cannot invoke in its favor the supporting grounds consisting of the victim’s consent, because the law expressly excludes its scope.

In addition to the above aspects, Art. 101 paragraph (3) of the Code of Criminal Procedure states that “it is forbidden that criminal judicial bodies or other persons acting for them to cause a person to commit or continue committing a criminal offense for the purpose of obtaining evidence”.

There will not be considered violations of the Principle of Loyalty using special investigative techniques, such as: the use of undercover investigators, investigators with real identity, collaborators and authorized participation in certain activities [Art. 138 paragraph (11) of the Code of Criminal Procedure].

Regarding these special methods, it should be emphasized that the new provisions of Art. 101 of the Code of Criminal Procedure aim at internalizing the standard of protection of human rights established by the ECHR according to which flagrant violations of the right to a fair trial take place, as the person is provoked to commit a crime to obtain evidence. The concept of challenge to which we refer is the one outlined in the jurisprudence of the European Court of Human Rights that “the

actions of the undercover investigator must not exceed the level of passive research of a criminal conduct, there must be indications that such offense was committed without the intervention”. The Court consistently considers that the right to a fair trial is violated in the event that the “careful evaluation of the evidences reveals that the prosecuting authority, through the intermediary coordinated in its actions by the undercover investigator, did not limit itself to passively investigate the criminal fact, but also exerted an influence on the person concerned as to cause the commission of a criminal offense which would not have been committed without this intervention, in order to ascertain a crime openly or to obtain evidence” - causes *Vanyan v. Russia*, judgment of 15 December 2005, respectively *Ramanauskas v. Lithuania*, judgment of 5 February 2008.

We also believe that there are violations of the Principle of Loyalty in matters of adduction of evidence the fairly frequent cases in the current social reality where the organized criminal group activity is monitored for very long durations in order to obtain evidence of its existence. We reckon that such situations require that the criminal activity be stopped immediately in order not to tolerate the existence of a threat in full swing to the stability of society only to produce evidence.

While it may seem an absolute novelty in the Romanian legislation, the new provisions of Art. 101 of the Code of Criminal Procedure are nothing but a restatement and express consecration as a principle of the provisions of Art. 68 of the Code of Criminal Procedure 1969. The text alleged prohibited the use of coercion in order to obtain evidence of a formulation similar to the current one: “is forbidden to use violence, threats or other forms of coercion, inducements and promises in order to obtain evidence . It is also forbidden to

incite a person to commit or continue a criminal offense, in order to obtain evidence”.

The doctrine developed under the previous Code of Criminal Procedure emphasized that if an evidence is relevant, conclusive and useful but was administered in violation of Art. 68 of the Criminal Code 1969, such evidence cannot be exploited in the criminal proceedings⁴.

In the jurisprudence outlined under the Code of Criminal Procedure entered into force in 1969 the courts found that violations of the Principle of Loyalty occurred in concrete situations. Thus, a decision validated by the High Court of Cassation and Justice⁵ noted that the criticism regarding the manner in which the research began, undercover investigator and undercover officers were used it is well founded. The court noted that based on alleged information - that the investigator refused to submit to the censorship of the court and critics of the accused - it was established that the defendant would be the leader of an organized crime group specializing in drug traffic - marketed drugs and, consequently, the undercover collaborator, codenamed G.G., was contacted, who repeatedly asked him to sell him various amounts of risk drug, which the defendant did, and that on the date when it was arrested in the car it had commissioned, they found the amount of 389.9 grams of cannabis resin. The same court stated that according to the provisions of Art. 6 paragraph (1) HRFR, in order to receive a fair trial the defendant must be ensured the actual fairness of the criminal proceedings, a procedure requiring precise guarantees related to the advertising of the criminal proceedings before the court, and also implicit guarantees concerning the obligation of loyalty in the gathering of evidence by

police and judicial authorities. It is understandable that a fair trial cannot tolerate wickedness or violent processes and that, in any case, the right of defense must be guaranteed, and this is why the use of evidence gathered as a result of challenges is contrary to the Convention.

Addressing issues of disclosure of evidence and challenges or committing of crimes must meet the requirements necessary to ensure the adversarial of proceedings of evidence adduction and legality of weapons. In those circumstances, the Court held that it is obliged, finding irregular processes, to remove the evidence obtained in this way, given the provisions of the domestic legislation, respectively, the provisions of Art. 64 paragraph (2) and Art. 68 of the Code of Criminal Procedure 1969. In this context, the Court drew a distinction between an instigation to commit an offense - which is forbidden and is contrary to the Principle of Loyalty - and the instigation to obtain evidence, of a criminal conduct that is permissible to fight organized crime. The findings of the court was based on the fact that, prior to the referral ex officio, no investigation was carried out upon the indicted on the commission of any offense under criminal law, that the data or information that should have been the basis for prosecution and wiretaps were not subjected to the censorship of the court and critics of the defendant - not being filed, though the court requested them, and that material acts of sale by which it is argued that the defendant would have given for hire risk drugs to an undercover collaborator, have occurred only after the defendant had been contacted by it, when the prosecution was not initiated when a first sale had already taken place, and only after being asked insistently the sale of drugs by this collaborator. The

⁴ I. Neagu, *Tratat de procedură penală*, 3rd Edition III, Legal Publishing House, Bucharest, 2013, p. 452.

⁵ Criminal Section Decision no. 1852/2009, available at <http://legeaz.net/spete-penal-iccj-2009/decizia-2852/2009>

conclusion was that the defendant was subjected to an instigation for the sale of drugs, and therefore, all evidence were dismissed - the reports drawn up by the investigator and the undercover collaborator, the ambient audio - video recordings and records of phone calls during 13 August 2008 - 25 August 2008 that only shows the conducting of material acts on the sale of risk drugs and do not evidence the possession of risk drugs with the purpose to sell. The court concluded that in this case, even if the accused was a drug consumer and there existed data in this regard, nothing required the investigative authorities not to ascertain only this illegal fact or the possession of risk drugs with the purpose to sell.

In another solution in the legal practice, validated by the decision of the High Court of Cassation and Justice ⁶, it is stated that the undercover investigator P., police officer within the S.C.C.O.N., organized the purchase from the indicted of a quantity of cannabis. Thus, on 17 March 2006, the collaborator T., a private person, bought from the indicted the amount of 1.5 grams of cannabis, for which he paid the sum of lei 200. The operation was organized and verified by the investigator. Nothing indicates that without their intervention the defendant would have sold the drugs.

Moreover, there was no evidence at the file that the defendant had been known at the time as drug seller or consumer, and its criminal record showed that he had never been convicted. There is only a report concluded on 16 March 2006 by a policeman within the S.C.C.O. N. showing that he was notified that the defendant consumes and sells drugs, without mentioning who made the referral in order to be verified. Accordingly, the court held that the defendant was provoked to commit the crime for administering incriminating evidence, in

violation of the provisions of art. 68 paragraph (2) of the Code of Criminal Procedure 1969. Consequently, the court dismissed the evidence obtained by using the undercover investigator and collaborator, because, by their activity, they have led the accused to commit an offense that otherwise, in the absence of maneuvers used, would not have committed.

The court reviewed the case in the light of the existence of evidence that the defendant would have committed the offense even if it had not been instigated. It was found that the file contains only the report drafted on 16 March 2006 by a police officer showing that he was notified that the defendant consumes and sells drugs, without mentioning who made the referral in order to be verified. Because the non disclosure of the source is permissible in order to protect it, or to use it on another occasion, the first instance checked the other evidence assessed as well. The analysis was done by reference to the ECHR jurisprudence in cases E. and L. v. the United Kingdom and J. v. the United Kingdom where the European Court showed that when the information disclosed by the prosecution authorities do not allow to determine whether the defendant was or was not the victim of an instigation, it must be checked whether the right of defense was adequately protected, namely the compliance with the principles of adversarial, equality of arms, unhampered, legality and loyalty in the adduction of evidence was analyzed, guaranteed by Art. 6 § 1 and 3 point d) of the Convention. From this point of view, the domestic court found that the procedure was not fair to the defendant in the burden of proof by witnesses with protected identity D.I. and D.V. These witnesses were heard only during the prosecution phase. During the trial phase, although several steps were taken, they could not be heard because D.I.I.O.C.T.

⁶ Criminal Section Decision no. 626/2010, available at: <http://legeaz.net/spete-penal-iccj-2010/decizia-626-2010>.

[Directorate for Investigation of Organized Crime and Terrorism] - N. Territorial Service, which was required to present them, did not find them. At their hearing in the prosecution phase, the defendant or his attorney had no opportunity to question them. These witnesses were heard in June and December 2006 after the beginning of the prosecution, which requires that the defendant should have been informed of the accusation and the right to defense, and if it wasn't found, the file would contain evidence that it was sought. Or, the evidence that it was sought are from August and September 2007, well after the beginning of prosecution and hearing of witnesses. The domestic court invoked the ECHR rules according to which, in order to grant the right to a fair trial, all evidence must be, in principle, adducted before the defendant, in open session, for a preliminary ruling, as stated, as a principle, by the European Court in a constant jurisprudence (G. v. France, judgment of 22 June 2006 L. v. Italy, judgment of 27 February 2001, V.M. and Others v. the Netherlands, judgment of 23 April 1997).

However, the domestic court also found that Art. 6 of the European Convention on Human Rights does not require that the accused or its lawyer have the right to participate in the hearing of a witness and to submit questions during the prosecution stage of the proceedings if the defense has this right before the court. Use as evidence of statements made during prosecution phase is not in itself incompatible with Art. 6 of the Convention, provided that the rights of the defense were respected, i.e. if the defendant had an adequate opportunity to challenge or question a witness giving statements against him, either during its hearing, or in a subsequent phase the procedure (C. v. Italy, judgment of 5 December 2002, B. and Others v. Lithuania, judgment of 28 March 2002). In the case of D. v. Romania, the judgment of 8 March 2007, the European Court stated that

in case of impossibility to obtain the presence of a witness in court, the court may, subject to the rights of the defense, take account of the depositions taken during prosecution, especially as these they may appear to be corroborated by other evidence adducted.

The court concluded that in the cause analyzed, neither the defendant or its lawyer could not interrogate the two witnesses, neither in the prosecution stage or during trial, so that a conviction of the defendant highly based on this testimony would be incompatible with Art. 6 of the Convention. Moreover, it should not be overlooked that the identity of these witnesses is protected, so that for this reason, it cannot be highly founded on a conviction of the defendant on their testimony. In the case of K. v. the Netherlands, judgment of 20 September 1989, the European Court stated that the undeniable difficulties of the fight against drug trafficking cannot be ignored, in particular on the discovery and the adduction of evidence, nor ravages of drug trafficking in society, but it considered that these difficulties cannot lead to restricting so much the right of defense of any accused.

In its jurisprudence (F. and S. v. Italy, judgment of 7 August 1996, G. v. France, judgment of 22 June 2006, Z. v. France, judgment of 13 April 2006, C. c. Italy judgment 21 March 2002), the European Court pointed out that Art. 6 authorizes the court to found its conviction on the deposition of a witness of the prosecution whom the defendant or its lawyer could not interrogate at any stage of the proceedings only if it is impossible to locate the witness, being necessary to prove that due care was taken and that the witness was actively sought, and the testimony is not the only element serving the basis of the judgment. Or, several request for witness presentation have been made in the present case, and D.I.I.O.C.T. announced that they are working abroad, without additional data and no evidence that they

were actively sought. For all these reasons, it ruled in favor of its acquittal.

Therefore, the national courts reported their solutions to the European standards even before the entry into force of the new Code of Criminal Procedure which expressly defines the Principle of Loyalty. In this way, the premises of its compliance consistent with the new regulation seem generous.

Our assertion seems even more true in so far as in the new criminal law the Principle of Loyalty has reverberations throughout the criminal proceedings, and various provisions of the Code of Criminal Procedure are meant to ensure its compliance. For example, art. 110 paragraph (5) of the Code of Criminal Procedure enshrines the rule according to which during the prosecution, the hearing of the suspect or the accused is recorded with audio or audiovisual means.

However, for the same purpose, the new Code of Criminal Procedure provides that the verification of compliance with the Principle of Loyalty upon the adduction of evidence in the prosecution stage takes place in the preliminary hearing. At this stage, the preliminary chamber judge is called upon to verify the legality of evidence during prosecution.

To the extent that the preliminary chamber judge ascertains violations of the Principle of Loyalty, it excludes the evidence from the evidence of the case.

Even in the explanatory memorandum accompanying the new Code of Criminal Procedure stresses that the institution of exclusion of evidence unlawfully or unfairly adducted knows a detailed regulation, being acquired by the legitimacy theory that places the debate in a wider context, given the functions of the criminal proceedings and the judgment resulted. Given the nature of this institution (taken in the continental law system from the common-law tradition) and

the jurisprudence of the European Court of Human Rights, the evidence adducted with certain infringements of the legal provisions may exceptionally be used if this does not prejudice the fairness of the criminal process as a whole.

In close connection with the sanction of exclusion of evidence illegally obtained is another new institution introduced - the exclusion of derivative evidence (the doctrine of “distance effect” or “fruit of the poisonous tree”) that seeks the removal of evidence adducted legally, but which are derived from illegally obtained evidence. This sanction becomes incident in cases where there is a necessary causal link between the evidence adducted illegally and the derived evidence adducted subsequently, and the judicial authorities used principally and directly the data and information obtained from the illegal evidence, without any other alternative source and without definite possibility for them to be discovered in the future to legally manage the evidence derived.

Conclusion

All regulations concerning the need to comply with the Principle of Loyalty of adduction of evidence in the criminal proceedings, the new Code of Criminal Procedure entered into force on 1 February 2014 in Romania ensure a modern regulation that tends to assimilate in the internal judicial practice the standards of protection regulated by ECHR. It is only a first step, which although it is indispensable for achieving this goal, is not sufficient, requiring awareness of the need to internalize an adequate level of protection of human rights including matters of guaranteeing the right to a fair trial.

References

- ECHR, Case of Ireland v. United Kingdom, judgment of 18 January 1978, www.echr.coe.int
- I. Neagu, *Tratat de procedură penală*, 3rd Edition III, Legal Publishing House, Bucharest, 2013, p. 452.
- Criminal Section Decision no. 1852/2009, available at <http://legeaz.net/spete-penal-iccj-2009/decizia-2852/2009>
- Criminal Section Decision no. 626/2010, available at: <http://legeaz.net/spete-penal-iccj-2010/decizia-626-2>

NEW PROCEDURAL RULES REGARDING THE ENFORCEMENT OF CRIMINAL JUDGMENTS¹

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Abstract

Whether it is perceived in the doctrine as a distinct stage of the criminal trial or as a sub-division of other stages, the enforcement of final criminal judgments represents an important procedural stage in the actual execution of the criminal justice. Unlike in civil trials, the official and mandatory character of the criminal procedural juridical relations is expressed in the enforcement stage as well, when the specific judiciary activity is launched automatically and it is carried out by official bodies according to their own rules. This study focuses on the analysis of the current normative framework regarding the activity of enforcement of final criminal judgments. The analysis refers exclusively to the criminal procedural norms applicable in this matter without taking into consideration the substantive law (included in the Criminal Code, the Law no. 253/2013, the Law no. 254/2014 and other laws as well) regulating the extra-procedural activity, the actual enforcement. Hence, the topics approached herein will refer to issued raised as a result of res judicata in criminal matters. The enforceability of the judgements and the moments when the judgements remain final, the judiciary bodies involved in the activity of enforcement as well as some common and specific provisions regarding the enforcement.

Keywords: *enforcement, criminal judgment, authority, procedure.*

Introduction

In the enforcement of the final criminal judgements a distinct judiciary function is undoubtedly being used, which, unfortunately, was not distinctively regulated in the article 3 of the Code of Criminal Procedure on the principle of separation of the judiciary functions².

In this stage of the criminal trial the specific activity refers to the *post judicium*

activity, after the case was settled and thus the judiciary actions are brought to an end.

The enforcement may only be considered as a procedural stage if we consider the criminal trial notion in its broader sense, as suggested in the Art. 1 of the Code of Criminal Procedure and which includes not only the activity carried out in a criminal matter (when the judiciary actions are carried out as well), but also the activity carried out in relation to a criminal matter (when the substance is not solved).

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² The implicit existence of this judiciary function is recognised in the doctrine, to this end see I.Neagu, M.Damaschin, *Tratat de procedură penală, Partea Generală* (Treaty of Criminal Procedure, General Part), Hamangiu Publishing House, p.19 and p.62; B.Micu, A.Păun, R.Slăvoiu, *Procedură penală (Criminal Procedure)*, Hamangiu Publishing House 2014, p.15.

The judiciary activity carried out in the procedural stage of enforcement of final criminal decisions is governed by its own rules following the pattern of some specific principles: mandatory, enforceable, jurisdiction and continuity.³

But same as any other procedural activity, the enforcement shall comply with the general principles and limitations in the application of the criminal procedural law and is included in the purpose of the criminal trial indicated in the Art. 1 para. 2 of the Code of Criminal Procedure.

1. General remarks regarding the res judicata in criminal matters, the enforceable character and the time when the criminal judgements become final

The res judicata represents, generally speaking, the legal situation arising from the final and irrevocable solution pronounced in a conflict presented in court.

In criminal matters, as an expression of the fundamental principle of officiality, used in the enforcement stage according to the rule of obligativity, the judgement becomes automatically a res judicata at the time when it remains final, according to one of the ways indicated in the Art. 51-552 Of the Code of Criminal Procedure.

Consequently, the final criminal judgement becomes res judicata as an effect of the law.

The res judicata in the criminal law represents the final judgments issued by the judges, in fact and in law, on the charge making the object of the criminal trial⁴ (V. Dongoroz, Curs, op. quoted, p. 343).

In criminal matters, the res judicata generates two effects, one positive and one negative.

The positive effect of res judicata consists in giving rise to the subjective law (*potestas agendi*) on which the competent bodies rely in order to enforce the judgments.

The negative effect of res judicata consists in preventing a new criminal trial and a new criminal action against the same person and the same identity.

Unlike the civil procedure, the prevention is conditioned upon the existence of a double identity:

- of facts (material grounds);
- of persons.

In criminal matters, the cause identity (the legal ground) is prevented by effect of the law, according to the Art. 6 of the Code of Criminal Procedure: the prevention generates effects *even if the fact for which a final judgment was issued received a different juridical classification*.

This prevention is absolute and may be invoked as an exception (the res judicata exception) or using the main way (as grounds for appeal), even after the judgement that ignored it becomes final [art. 426 letter i) Of the Code of Criminal Procedure – as a distinct reason to challenge the judgement requiring its cancellation].

In the current Romanian criminal procedural system, the prevention arising from the negative effect of the res judicata is regulated both as a fundamental principle of enforcement of the procedural law (art.6 – the *ne bis in idem* rule) and as a distinct cause of prevention of the initiation or

³ N.Volonciu, *Tratat de procedură penală, Partea specială* (Treaty of Criminal Procedure, Special Part) vol. II, 3rd edition, Paideia Publishing House, 1997, p.379-380; I.Neagu, M.Damaschin, *Tratat de procedură penală, Partea Specială specială* (Treaty of Criminal Procedure, Special Part), Universul Juridic Publishing House, 2015, p.584; D.Lupaşcu, *Punerea în executare a pedepselor principale* (Enforcement of Main Punishments), Rosetti Publishing House, 2003, p.13.

⁴ V. Dongoroz, *Curs de procedură penală* (Course of Criminal Procedure), 2nd edition, 1942, p.343 apud I.Neagu, M.Damaschin, *Tratat de procedură penală Partea Specială* (Treaty of Criminal Procedure, Special Part), Universul Juridic Publishing House, 2015, p.585.

continuation of a criminal action, as a result of the lack of object of the action, art. 16 letter i) of the Code of Criminal Procedure.

In other law systems, as the Italian system, the prevention is used for acts made by ignoring it, as a procedural sanction in itself, called preclusion.

In the penal system, the judgments become enforceable as of the date of becoming final – art. 550 para (1) of the Code of Criminal Procedure.

The moment when the criminal judgments become final is explicitly stated in the law, being subject to different regulations depending if the judgements are pronounced by the first court (art. 551 of the Code of Criminal Procedure.), the appeal court or as a result of a challenge (art. 552 of the Code of Criminal Procedure.).

As an exception, the non-final judgments are enforceable when explicitly stipulated by the law. When these judgments are pronounced on the merits, the suspensive effect triggered by the appeal does not apply: the provisions of the non-final judgments regarding the preventive measures [art. 399 para (4) of the Code of Criminal Procedure], the interim measures [art.397 para (4) of the Code of Criminal Procedure] etc.

When they do not refer to the merits, the non-final, but enforceable judgments, the suspensive effect triggered by the appeal does not apply: the decision to take or to extend a preventive measure (art.204 para (3) of the Code of Criminal Procedure), the decision whereby a measure of medical safety was applied temporarily (art. 248 para (8) of the Code of Criminal Procedure) etc..

When a criminal judgment becomes final the criminal trial (in the sense of the activity in which the criminal action is carried out) ends. The trial (in the broader sense) will potentially continue with the enforcement of the criminal judgments, but without any criminal action.

This is the reason why the “final and irrevocable” term, correct and accepted in civil matters, cannot be used in criminal matters, as it is a pleonasm.

The judgments pronounced by the first court remain final (art. 551 of the Code of Criminal Procedure.):

1. as of the date of pronouncement, when the judgments is not challenged or appealed against;

2. as of the date of expiry of the deadline for appeal or for submitting the complaint against the judgment:

a) when no appeal or challenge was filed in due term;

b) when the appeal or the complaint, if any, was withdrawn within the deadline;

3. as of the date of withdrawal of the appeal or complaint, if any, if occurred after the expiry of the deadline for appeal or complaint against the judgment;

4. as of the date of pronouncement of the judgment whereby the appeal or complaint, if any, was rejected.

The judgment of the appeal court remain final as of the date of its pronouncement, when the appeal was admitted and the trial ended before the court of appeal (art. 552 para 1 of the Code of Criminal Procedure).

The judgment pronounced after the complaint against the first judgment was filed remains final as of the date of its pronouncement, when the complaint was admitted and the trial ended before the court that tries the complaint (art. 552 para 2 of the Code of Criminal Procedure.).

2. Aspects regarding the competent body to enforce criminal judgments

In order to identify this topic of the procedure we need to point out that, according to the sense mentioned, we focus on the activity of enforcement of the provisions regarding the criminal part of the final judgment and the enforcement of a part

of the civil provisions of the criminal judgment (regarding the return of assets and the capitalisation of the non-seized assets as well as the documents declared as false).

Pursuant to the Art. 581 of the Code of Criminal Procedure, the provisions from the criminal judgment regarding the civil damages and the judiciary expenses due to the parties shall be executed as required by the civil law.

The enforcement of the criminal judgments requires a judicial body to carry out the judicial function corresponding to this stage of the criminal trial.

This judicial body is the authority of enforcement.

Even if in the actual enforcement activity we come across other players (the prosecutor, the police officers, the gendarmerie, the administration of the place where the person is held etc.), the enforcement authority represents the only entity to carry out the judicial function of enforcement.

The enforcement authority shall mean the entity that enforces the final criminal judgment and which has the main competence to solve all incidents relating to the enforcement.

Pursuant to the art. 553 para (1) of the Code of Criminal Procedure, the judgement pronounced by the criminal court remained final in the first court, the court of appeal or the superior court shall be enforced by the first court that tried the case.

Practically, any court in our judiciary system (civil or military) may act as the court of enforcement, except for the supreme court.

Hence, pursuant to the art. 553 para (2) of the Code of Criminal Procedure, the judgments pronounced in first court by the High Court of Cassation and Justice shall be enforced by the Tribunal of Bucharest or the Military Tribunal as the case may be.

It must be noted that, although at the level of the High Court of Cassation and

Justice there is no military section anymore, the specialised competence in case the perpetrator belongs to the military shall be reactivated at the level of the enforcement court.

Considering these provisions, the enforcement court may enforce judgements that were not pronounced by it, but by a superior court.

To this end, in order to enforce the judgements remained final at the court of appeal or at the hierarchically superior court, this shall send to the enforcement court an excerpt of the respective judgement, which is required for the enforcement, as of the day of pronouncement of the judgement by the court of appeal or by the hierarchically superior court, as the case may be.

There is only one exception to the general rule of establishing the enforcement court, namely in case of judgments regarding preventive measures, interim measures and safety measures: these shall be enforced by the judge of rights and freedoms, the preliminary chamber judge or by the court that issued the measures, as the case may be [art. 553 para (4) f the Code of Criminal Procedure].

When the judgment of the court of appeal was changed by decision of the High Court, pronounced in case of recourse for cassation, the supreme court shall send an excerpt of it to the enforcement court (the first court to try the case) for the enforcement of the judgment.

Given that the enforcement, as a stage of the criminal trial, is made up of two categories of activities, these are carried out by the enforcement court, in two ways:

- the concrete activities of enforcement are carried out via a gracious way (unilateral, non-contradictory) by the judge delegated to enforce the judgment;

To this end, one or several judges of the enforcement court is/are delegated (by administrative means) to carry out the

activities required in order to enforce the judgments.

- the incidents occurred during the enforcement (jurisdictional procedures) are solved by the enforcement court (or the equivalent court) in a panel made up according to the law, in a hearing, by way of litigation.

Art. 597 and 598 of the Code of Criminal Procedure regulate a general procedure (similar to a judgment activity) for solving these incidents.

Hence, if during the beginning or the actual enforcement of the judgment there is a situation of request for clarification or preclusion, the delegated judge may notify it to the enforcement court, which shall act according to the provisions of the art. 597 and 598 of the Code of Criminal Procedure.

In this respect, the contradictory character does not represent a principle governing the whole judiciary activity corresponding to this stage of the trial, but only the activity of solving (by way of litigation) the incidents occurred in relation to the enforcement.

In case of punishments and measures whereby the convict is not jailed, the judge delegated for the enforcement of the judgment within the enforcement court may delegate (this term is not the most suitable according to the art. 201 of the Code of Criminal Procedure and it refers to a hierarchically inferior body only) certain tasks to the judge delegated for the enforcement of the judgment to the equivalent court in the jurisdiction where the person concerned lives.

3. Considerations regarding the enforcement of the main punishments

The sentence to time in jail and the life time sentence shall be enforced by means of a *warrant of enforcement* issued by the judge delegated by the enforcement court.

The warrant is issued at different moments, after the court where the judgment remains final: the enforcement warrant is issued the day when the judgment remains final at the first court or the day of reception of the excerpt from the hierarchically superior court where the judgment remained final.

The enforcement warrant is a written procedural document drafted in three original copies.

In terms of content, the enforcement warrant is a *mandatory document*, containing the following *elements*: the name of the enforcement court, the issuing date, the details of the convict, the number and date of the judgment to be enforced, the name of the court that pronounced the judgment, the punishment established and the applied law, the additional punishment applied, the time of retention and custody or house arrest, which was deducted from the duration of the punishment, the mention whether the convict is a reoffender and the mention regarding the fact that the injured party was notified about the fact that the convict was left free, as the case may be, the arrest and detention warrant, the signature of the delegated judge and the stamp of the enforcement court.

If the convict is free, then the delegated judge will issue together with the enforcement warrant an order whereby the convict is forbidden to leave the country (the order is sent to the competent body that issues passports and to the General Inspectorate of the Border Police).

The enforcement warrant for a jail punishment or life detention punishment represents the mandate whereby the bodies in charge of the enforcement, always others than the body that issued the warrant, will execute the orders (as an expression of the judiciary power – *imperium*) referred to in the warrant.

Pursuant to the art. 555 para (1) of the Code of Criminal Procedure, the warrant is

the document comprising two distinct orders: the arrest order and the detention order.

These orders must be mentioned in the enforcement warrant, by the judge in charge of the enforcement, whether the convict is free or not.

In addition and separately, pursuant to the art. 555 para (2) of the Code of Criminal Procedure, in case the convict is free, the judge in charge of the enforcement of the judgment shall issue, together with the enforcement warrant, an order whereby the convict is forbidden to leave the country.

Thus, the third order issued in the procedure of enforcement of the jail punishment or life detention punishment has a potential character (if the convict is out of jail only) and is not included in the enforcement warrant.

The enforcement court sends two copies of the enforcement warrant, if need be, to the police unit where the convict's residence is, when the convict is free or to the place of detention when the convict is arrested.

The police unit has the following duties: based on the enforcement warrant, it shall arrest the convict, on the day of reception of the enforcement warrant; it may have access into a person's home or residence without the latter's permission and into a legal person's offices without its legal representative's permission; it shall hand over a copy of the warrant to the convict and shall accompany the respective person to the closest place of detention, where it shall hand over the other copy of the enforcement warrant.

When the warrant is to be enforced on a convict who takes care of an under aged person, a person placed under interdiction, a person who because of the age, disease or other reasons is in need of help, the police staff has the obligation to inform the competent

authority in order to take the required protection measures.

In case the person against whom the warrant was issued is not found, the police staff needs to mention this in a report and take the necessary measures in order to have the person tracked down and inform the border authorities.

If the person against whom the warrant was issued refuses to obey, they shall be forced to abide by it. A copy of the report and a copy of the enforcement warrant shall be sent to the court that issued the warrant.

The commander of the detention place has the following duties: hands over to the arrested convict a copy of the enforcement warrant; mentions in a report the date when the convict started to serve their sentence; sends a copy of this report to the enforcement court.

The enforcement warrant or the order forbidding the convict to leave the country may be sent to the competent bodies by fax, email or by any other means able to forward a written document in a form that enables the recipient authorities to establish the convict's identity.

In case of postponement of the enforcement of the sentence or suspension of serving the sentence under surveillance, throughout the duration of the surveillance, the surveilled person may submit a justified request to the enforcement court asking it to allow for the person to leave the Romanian territory.

The enforcement court provides a solution to the request in the board room, where after hearing the supervised person and the probation officer, it issues a final decision.

In case it admits the request, the court shall establish for what period the supervised person is allowed to leave the Romanian territory, as required in art.557 para(8) of the Code of Criminal Procedure.

Although it is a main punishment, the criminal fine is not enforced by means of an enforcement warrant.

This punishment is executed by the convict paying, *entirely*, the fine and presenting the payment document, in original, to the enforcement court, within 3 months from the date when the judgment remained final.

The criminal fine shall be paid to the tax administration where the convict is registered. The criminal fine shall not be mistaken by a civil fine, as the principle of ablation (payment of half of the minimum fine within 48 hours) does not apply.

When the person convicted to pay the fine is unable to pay the whole amount of the fine within the legal term, the enforcement court may, upon the convict's request, allow for a gradual payment of the fine, within maximum 2 years in monthly instalments – art. 559 para (2) of the Code of Criminal Procedure.

In case the fine punishment cannot be entirely or partially executed *for reasons unrelated* to the convict, with the latter's consent, the court shall replace the obligation of payment of the unpaid fine with the convict's obligation to perform unpaid community work, except for the case when because of health reasons, the convict is unable to perform this work.

Pursuant to the art. 64 para (1) of the Code of Criminal Procedure, a day of fine equals a day of community work.

The competent court to make this decision is the enforcement court.

This court is notified by the body that, according to the law, enforces the fine (the tax administration) or by the convict. The court may be notified automatically as well.

When the court decides to replace the fine with unpaid community work, it will mention two *entities* in the community where the person is to perform the unpaid community work.

More precisely, the entity and the type of activity to be performed will be decided by the probation officer, not by the court itself.

The obligation to perform community work starts to be enforced when a copy of the decision is sent to the *probation service*.

Although the fine was replaced by unpaid community work, the payment of the fine corresponding to the remaining fine-days leads to the termination of the community work.

If the convict does not execute the community work obligation as required by the court, the *enforcement court* replaces the fine-days for which the community work was not executed with a corresponding number of days in jail.

Moreover, the replacement of the unexecuted fine-days with a corresponding number of days in jail is decided when the convict commits a new crime which is uncovered before the obligation of community work is fully executed.

The days replaced by time in jail are added to the punishment for the new crime. The competent court to decide on the replacement is here the first court that tries the new crime.

In both cases, the court that replaces the unpaid community work with time in jail is notified automatically or by the body that according to the law, enforces the fine or by the probation service.

In case the fine punishment is not executed, entirely or partially, for reasons related to the convict, then the fine is replaced by time in jail.

Pursuant to the art. 63 of the Code of Procedure, in order for the fine to be replaced *directly* with time in jail, the failure to pay the criminal fine (as an objective element) needs to be accompanied by ill faith (as a subjective element) of the person that refuses to pay the fine.

It is only the fulfilment of the two conditions (proved, not presumed) that enables the court to replace the fine.

Moreover, the fine punishment is replaced directly with time in jail in cases when, although the failure to pay the fine is not due to reasons related to the convict, the latter *does not agree* to perform unpaid community work.

The replacement is decided, in both cases, by the *enforcement court*.

Pursuant to the art. 586 para (2) of the Code of Criminal Procedure, the court is notified automatically or by the entity in charge of the enforcement of the fine.

The convict is summoned to appear in court for the hearing, and if the convict is not accompanied by an attorney the court appoints one to assist the convict.

The convict found in detention will be brought to the court.

If the convict pays the fine during the case solving, the notification will be rejected as unjustified.

4. Certain incidents regarding the execution of the jail and life detention punishments. The parole

Considering the substantive provisions⁵ that regulate the respective institution, the probation has a material and immediate effect of the release of the convict before serving the whole punishment in jail.

If in the period between the release from jail and the end of the duration of the punishment the convict did not commit a new crime, the parole was not cancelled and no reason for cancelation was found, pursuant to the art.106 of the Code of Procedure, the punishment is considered to have been fully executed.

The material conditions to be complied with for parole are:

- the convict served part of the punishment in jail;

- the convict serves the sentence in a semi-open or open regime;

- the convict fulfilled all the civil requirements set in the sentence, except for the case when it is proved that the convict was unable to fulfil them;

- the court is convinced that the convict has improved his/her conduct and may be reinserted into society.

As regards the first requirements, the part of the sentence to be executed differs depending on two elements: the total punishment and the age of the convict – art. 99-100 of the Criminal Code.

These parts vary between three quarters and one quarter of the punishment. Although the law recognises for the convicts the possibility to consider as executed (based on work performed) a period longer than the detention period, the parole may not be granted before the convict actually serves the minimum period required by law.

The time between the date of the parole and the date when the duration of the sentence ends represent the surveillance time for the convict.

During the surveillance period, the convict shall observe several surveillance measures, some of which are *mandatory*, if the remaining of the sentence as of the date of the parole is of 2 years or more, while others are *optional* – art.101 of the Criminal Code.

There is a jurisdictional procedure whereby the parole is granted. The parole is not granted automatically, but:

- upon the convict's request;

- upon the request of the parole commission operating in every penitentiary, pursuant to the art. 97 para (2) of the Law no.

⁵ As regards the analysis of these substantial provisions regarding the parole, see C. Mitrache, CR. Mitrache, Drept penal român, Parte generală (Romanian Criminal Law, General Part), Universul Juridic Publishing House, 2014, p.487-497.

254/2013 on the execution of punishments and measures depriving the individuals from their freedom, as decided by the judiciary bodies during the criminal trial.

When the convict addresses the court directly, requesting for parole, the request is accompanied by the report prepared by the commission and the documents that certify the information in the report.

According to the old regulation, the Decision no. LXVII/2007 (the Official Gazette no. 537 of July 16, 2008), the High Court of Cassation and Justice, the Joint Sections, admitting the recourse in the interest of the law established that the court shall examine the request for parole in order to see if it fulfils all the legal requirements according to the situation at the time when it is examined not when it was submitted. The clearance provided by the supreme court is fully applicable to the new regulation as well.

The compliance with the material conditions does not automatically determine the admission of the request for parole. To this end, the request for parole is assessed in terms of legality and justification.

Hence, pursuant to the art. 100 para (1) letter d) of the Criminal Code, the parole is granted depending on the *court's conviction* regarding the convict's improved conduct and possibility to reinsert into the society.

Moreover, pursuant to the art. 97 para (3) of the Law no. 254/2013 on the execution of punishment and measures that deprive the individuals from their freedom as decided by the judiciary bodies during the criminal trial, when granting the parole the court takes into consideration the convict's conduct and effort to reinsert into the society, in particular through the work performed, the educational, moral-religious, cultural, therapeutic activities, psychological counselling and social assistance activities, school training and professional training as well as the responsibilities assigned to the person, the rewards and disciplinary

sanctions and the criminal record of the convict.

The only court able to solve the request for parole in the court of the jurisdiction where the detention place is located.

Given its exclusive character, the competence for solving the request for parole is not a form of territorial competence, but a form of specialised material competence (even special).

Consequently, this competence is absolute, and cannot be changed by judiciary or administrative means and it may be invoked in case of failure to observe it, before the court able to solve the appeal.

When the court finds that the conditions for parole are not met, it issues a decision of rejection and sets a term after the expiry of which the proposal or request may be renewed.

The term may not exceed 1 year starting from the date when the decision remains final.

The decision whereby the court responds to the request for parole (admits or rejects it) is a sentence, which may be appealed against within 3 days from its communication.

The appeal is handled by the Tribunal of the jurisdiction where the detention place is located and the complaint formulated by the prosecutor does not suspend the execution of the jail term.

A copy of the final judgment is communicated to the competent probation service as well as to the police unit of the jurisdiction where the released person lives.

The parole may be cancelled, according to the art. 104 of the Criminal Code, following the same procedure of resolution, the court called upon to decide on the cancellation has a different competence depending on the reason for cancellation.

Moreover, if during the surveillance time, the convict is found to have committed another crime before being granted the release and a jail sanction was inflicted

against the convict or the new crime right before the expiry of this term, the parole is cancelled.

In this case, the court that tries or was the first to try the case for which the parole is to be cancelled shall decide on this automatically or upon the request of the prosecutor or of the probation officer.

5. Postponement of the execution of the jail sentence and of the life detention sentence

This procedural incident delays the immediate execution of the jail sentences. Compared to the prompt term in which the jail sentence or life detention sentence is enforced (24 hours from the date when it remains final), the postponement of the execution of the sentence is at present an institution without a consistent practical representation.

As it is an exceptional situation in the normal development of the enforcement procedures, the postponement of the execution of the sentence occurs in cases explicitly stipulated by the law – art. 589 para (1) of the Code of Criminal Procedure.

The postponement of the execution of the sentence or of the life detention may be decided in two cases: when there is a medical impediment; when a convict is pregnant or has a child who is less than 1 year old.

The request for postponement of the execution of the sentence for reasons other than those indicated in the art. 589 of the Code of Criminal Procedure must be rejected as inadmissible.

a) *The convict suffers from a disease established by a forensic expertise, which can't be treated within the medical system of the National Administration of Penitentiaries and which makes it impossible to have the punishment executed right away* [Article 589 (1) a) of the Code of Criminal Procedure].

The conditions which enable the postponement of the punishment's execution are: an issued final judgment; the convict suffers from a disease which makes the immediate punishment execution impossible; his/her release shall not represent a danger for the public order; his/her disease is established by a forensic expertise and can't be treated within the medical system of the National Administration of Penitentiaries; the illness specificity doesn't allow its treatment by ensuring ongoing guard within the medical system of the Health Ministry.

The current regulations are able to emphasize the clear difference between the concept of danger to the public order and that of concrete social danger (conclusively established by the judgment), no interdependence being possible between them.

The medical impediment which generates the postponement of the punishment's execution must not be *related to the convict*.

According to the Article 589, para (2) of the Code of Criminal Procedure, the postponement *can't be applied* if the respective convict caused the illness him/herself, by refusing the medical treatment or the surgery, through self-aggression actions or other harming actions, or avoids having the forensic expertise done.

The punishment execution will be postponed until the convict is in the appropriate situation for executing the punishment, but always, for a limited period of time.

The court's decision on the *sine die* execution postponement due to this reason, until recovery, it's illegal if it fails to also establish the duration.

In case the forensic expertise doesn't establish an approximate term in which this medical impediment could be removed, then the court must set a reasonable (random)

term upon whose expiring, it should check if the impairment still exists or not.

b) *A convict is pregnant or has a baby younger than one year old* [Art. 589 para (1) b) of the Of the Code of Criminal Procedure].

Obviously, this postponement case refers to women-convicts only. The men convicts shall not be subject to this case even if they would be the sole living parents of the children.

The conditions which enable the postponement of the punishment's execution are: an issued final judgment; the convict is pregnant or has a baby younger than one year old.

The existence of the case of postponement of the execution of prison punishment or life-detention, given the convict's state of pregnancy can be proved based on any medical document issued by the relevant body, the forensic expertise not being required because – in order to establish the punishment execution postponement case stipulated by Art. 589 (1) b) - of the Of the Code of Criminal Procedure – the evidence is not pre-established by the lawmaker, unlike the postponement case stipulated by Art. 589 (1) a) of the Of the Code of Criminal Procedure for whose conclusion the *forensic expertise is mandatory*.

The punishment execution shall be postponed until the cause which determined the postponement (the baby reaches the age of one year) ceases.

The convict is entitled to request the postponement again if she finds herself in the same situation as before starting the execution (is pregnant again).

The postponement of prison or life detention punishment execution can be requested by the attorney and by the convict (in person, through an authorized agent based on a special proxy or through a lawyer).⁶

The request may be withdrawn by the person who submitted it. The new express regulation transposes an older jurisprudential solution with mandatory effect⁷.

The competent court entitled to grant the postponement of the punishment execution is the enforcement court.

In case the request is based on the medical impediment, then its drafting shall not have the immediate effect of *investing the court*; the new procedure establishes a preliminary stage.

Thus, in the situation stipulated by the Art. 589(1) (a) of the Of the Code of Criminal Procedure, the request for postponement of the punishment's execution will be submitted to the *judge in charge with the enforcement* alongside the medical records.

The judge checks the competence of the court and orders, as the case may be, through sentence, the declining of the case settling competence or the performing of the forensic expertise. As soon as the expertise report is received, the enforcement court settles the case with the enforcement, according to the procedure's joint provisions, stipulated by Art. 597 of the Of the Code of Criminal Procedure.

Thus, the President of the court will order the subpoenaing of the concerned parties. There will be measures taken for assigning an ex officio lawyer, for the cases which require mandatory legal assistance. The convict, in detention or confined in an educational centre, is brought to trial. The participation

⁶ For details regarding the procedure, as it was established by the former regulations, similar, in general, see *D. Lupașcu*, Amânarea executării pedepsei închisorii sau a pedepsei detențiunii pe viață (Postponment of the execution of the punishment in jail or life detention), in *Dreptul* no. 4/2002, p.166-184; *L. Herghelegiu*, Amânarea executării pedepsei. Cereri succesive. Criterii de admitere sau respingere (Postponment of Sentence Executions. Successive Requests. Admission or Rejection Criteria), in *Dreptul* no. 9/2003, p. 214-217.

⁷ High Court of Cassation and Justice, Joint Sections. Decision to Admit the Recourse in the Interest of the Law no. XXXIV/2006 (Official Gazette no. 268 of May 30, 2007).

of the attorney is mandatory. The sentence will be decided after the prosecutor presents the conclusions and the parties are heard.

In case the prison or life-detention punishment execution postponement is ordered, then the court must ask the convict to observe the obligations provided by the Art. 590(1) (a) – (e) of the Of the Code of Criminal Procedure.

The obligations stipulated by Art. 590(2) (a)-(c) may be ordered by the court (they are optional).

The court's omission to mention the obligations leads to the cancellation of the judgment on these grounds.

When issued, the enforcement court communicates the judgment whereby the punishment execution postponement was decided: to the police body assigned within the postponement decision in order to put the person on the spot; to the gendarmerie, to the police unit in whose jurisdiction the convict lives, the bodies competent to issue the passport, the border authority, as well as to other institutions in order to make sure the imposed obligations are observed.

The decisions whereby the punishment execution postponement is ordered are *enforceable* as of the date of their issuing. The decision whereby the court decides on the punishment execution postponement may be appealed against to a higher court within 3 days from its communication.

In case the established obligations are infringed with *ill-faith*, then the enforcement court revokes the postponement and orders the execution of the jail punishment.

The police unit assigned by the court in the judgment verifies, on regular basis, the observance of the obligations by the convict and submits a monthly report in this regard to the enforcement court. In case the police unit notices infringements of the established obligations, it advises the enforcement court in this regard, *immediately*.

The enforcement court keeps the record of the granted postponements and, when the term expires, takes measures regarding the issuance of the execution of sentence and, in case the warrant was issued, takes measures for its fulfilment; in case the postponement term wasn't established, then the judge appointed by the enforcement court must inform the enforcement court over the subsistence of the postponement grounds and, when it concludes that this has ceased, it must take the measures for the issuance of the execution warrant or, as the case may be, for its implementation.

6. The interruption of the jail punishment and life-detention execution

Unlike postponement, the interruption of the jail punishment or life detention occurs only after the commencement of the execution.

The execution of the jail punishment or life detention may be interrupted in the same cases for which the postponement of the punishment execution can be ordered. The conditions in which the interruption of the punishment execution is granted are the same as those stipulated for the postponement of the punishment execution.

Those who request the interruption of the jail punishment or life detention execution are the prosecutor and the convict, and in case the interruption is based on illness, the request can be also filed by the penitentiary's administration.

The court entitled to decide if the punishment execution interruption is granted, is the court in whose circumscription the detention place is located, equivalent to the enforcement court. In case the convict has been freed following an interruption prior to punishment execution, then the court entitled to order the interruption of the punishment execution is the enforcement court.

The request for extending the previously granted interruption will be settled by the court

which ordered the interruption of the punishment execution.

The provisions regarding the request for interruption, the settlement procedure, the obligations which have to or may be ordered once the application is admitted, the nature of the decision whereby the request is solved and the remedies stipulated for the implementation of the punishment execution postponement are applied accordingly.

In case the request for punishment execution interruption was admitted, the court which granted the interruption shall have to immediately advise the enforcement court, the detention place and the police unit in this regard.

The enforcement court and the administration of the detention place keep the record of the granted interruptions. In case the jail sentenced person fails to present him/herself at the detention place as soon as the interruption term expired, then the administration shall immediately send the sentence execution copy to the police unit, for enforcement. The copy of the sentence execution warrant shall also mention how much time is left from the sentence execution.

The administration of the detention place informs the enforcement court about the date when the recommencement of the sentence execution started. The interruption period is not accounted for in the sentence execution.

In accordance with Art. 519 of the Of the Code of Criminal Procedure, the execution of the educative measure of keeping the minor in an educative centre, or in a detention centre may be postponed or interrupted in the cases and conditions provided by the law.

7. Joint provisions regarding the procedure at the enforcement court

As we mentioned, the second batch of activities which composes the procedural phase of enforcement – the settlement of the

jurisdictional incidents regarding the execution, involves the intervention of the enforcement court.

As any other court, the enforcement court carries out its activity in legally established panels, in court hearings, by means of litigation.

As this activity doesn't involve the settling of the legal actions, it is not ruled by the general provisions regarding the proceedings, appropriate to the second procedural phase, but by other provisions of *lex generalia*, specific to enforcement, named *joint provisions regarding the procedure at the enforcement court - Art. 597 of the Of the Code of Criminal Procedure*.

The activity whereby the enforcement court solves the execution incidents is not included in the *trial* activity, but in the *settling* activity; therefore, the use of the inappropriate term, even by the lawmaker, doesn't have to induce the identity of legal regime.

From a *functional* stand-point, the litigation activity carried out by the enforcement court (which may be a civil court, a tribunal or a court of appeal) corresponds to the competence of the courts to *also solve other cases stipulated by law* – Art.35(2) for law court, Art.36(3) for tribunals and Art. 38(4) for the court of appeal.

There are normative hypotheses in which the competence for solving certain incidents regarding the execution, such as sentence amendments, sentence interruption or parole etc., belongs with courts other than the enforcement court, such as the court in whose circumscription the detention place is located, corresponding with the enforcement court, or the civil court in whose circumscription the detention place is located.

Through the express will of law, the joint procedure which we take into

consideration is also applied for the incidents resolved by these courts – Art. 597(6) of the Of the Code of Criminal Procedure. In this case, the solution is communicated to the enforcement court.

The procedure which has to be observed in this phase imposes the following rules:

- the President of the panel orders the subpoenaing of the concerned parties and takes measures for assigning an *ex officio* lawyer, for cases when the legal assistance is mandatory; furthermore, when the cases of interruption of jail sentence or life-detention execution are on trial (inappropriate term used in Art. 597(1) of the Of the Code of Criminal Procedure, the penitentiary's administration where the convict's sentence is executed is also subpoenaed;

- the convict, in detention or kept in an educative centre is brought *to trial*;

- the prosecutor's participation is mandatory.

The court decides *through a judgment*, after hearing the prosecutor's and parties' conclusions.

As we mentioned, the joint procedure at the enforcement court includes the obligation of president of the panel of the enforcement court to order the subpoenaing of the concerned parties – Art. 597(1) of the Code of Criminal Procedure.

As the criminal action is no longer exercised within the procedural phase of enforcement or during the execution, being extinguished through the final judgment, the term *party* used in the joint provisions which regulate the procedure at the enforcement court doesn't refer to the procedural subjects stipulated by Art. 32 of the Code of Criminal Procedure (defendant, plaintiff, civilian responsible party), but to the subjects involved in the legal relations specific to this phase (convict, complainant, petitioner, respondent, etc.).

The ordinary remedy for the judgments issued, for the first time in this procedural phase is the appeal. The deadline for lodging an appeal is of 3 days and starts from the communication of the judgment, in all cases.

The appeal is settled by the court higher than the one which issued the judgment in a public hearing, by subpoenaing the convict. The convict, in detention or kept in an educative centre, is brought *to trial*. The participation of the prosecutor is mandatory, and the court's *decision* whereby the appeal is solved, is final.

Even though the activity carried out by the court during beginning of the enforcement or actual enforcement, in first court or in solving the appeal, doesn't represent a trial activity, by will of law the provisions which establish the *Trial* from Title III of Special chapter, providing that they are not contrary to the provisions which regulate this phase, *will be appropriately applied* – Art.597 (5) and (8) of the Code of Criminal Procedure.

But, these provisions regarding the *Trial* can only complete the provisions regarding the enforcement, but they can't replace them.

8. Appeal against the enforcement

The appeal against execution represents the procedural remedy whereby, on jurisdictional way, any uncertainty or encumbrance regarding the execution is *avoided or removed*, and any incident occurred during execution *is solved*.

At the same time, it represents the procedural way through which any execution deed or the execution itself *is challenged*.

The appeal against execution is not a remedy; therefore it can't replace, modify or change the provisions of the final judgment. This procedural remedy regards, usually, only the enforcement and not the decision itself.

In case the appeal against execution aims to modify the solution which became *res judicata*, then this should be rejected as inadmissible.

In order to prevent the alteration of the appeal against execution and its transformation in a way of challenging the decision, its use is limited to some cases, expressly stipulated by the law.

The appeal against the enforcement of a criminal sentence can be done in the following *situations* (Art. 598 of the Code of Criminal Procedure):

a) *when a judgment which is not final, has been enforced;*

b) *when the enforcement regards a different person than that stipulated in the sentence;*

c) *when an uncertainty occurs in relation with the judgment under enforcement (appeal against the title) or any encumbrance to the enforcement.*

Due to the fact that the appeal against the enforcement is not a remedy meant to modify or cancel the final judgment, even when it's promoted on the grounds under letter c), its conclusion can only be the clarification of the judgment under enforcement.

For instance, according to the former regulations which, in this regard, are identical, the erroneous deduction of the preventive arrest, in the sense that the sentence issued by the first court comprised a longer period of time than the effective custody period has drawn the incidence of this case of appeal against execution⁸.

d) *when the amnesty, prescription, reprieve or any other cause of ending or decreasing the punishment is invoked.*

In case that a deed of clemency (amnesty or reprieve) occurs after the sentence becomes final, and the judge assigned for enforcement failed to apply it

according to the provisions of Art. 596 of the Code of Criminal Procedure, the convict may file an appeal against the execution, based on this case.

The competence for solving the appeal against the enforcement is established differently, in accordance with the case on whose grounds it was invoked.

For the cases stipulated by letters a), b) and d), the competence belongs to the *enforcement court* or *to the appropriate court in whose circumscription the detention place is located*.

For the case stipulated by letter c), the competent court is the one which issued the judgment under enforcement.

In case the appeal refers to the execution of the civil provisions of the sentence, the competence belongs to either the court of enforcement [for the cases stipulated by Art. 598(a) (b)], or the court which issued the judgment under enforcement [for the case stipulated by Art. 598(c)].

The appeal against the deeds of enforcement of the civil provisions within the criminal sentence will be solved by the civil court of law, according to the provisions of the *civil law* (Art. 600 of the Code of Criminal Procedure).

The appeal regarding the civil provisions of the criminal sentence may be filed only on the grounds of the first three cases from Art. 598-of the Code of Criminal Procedure; the fourth one regards the criminal side *only*.

In case the appeal is aimed against the enforcement of judiciary fines, this will be solved by the court which enforced them.

Taking into consideration its functionality, the doctrine pertinently established that this appeal (against the enforcement) may be filed:

⁸ I.C.C.J., Dept. of criminal law, Sentence no. 167/2006, in B.J. 2006, Ed. C.H. Beck, Bucharest, 2007, p. 818-820.

- before the enforcement of the final criminal judgment, if an incident stipulated by law occurred up to this moment;

- during punishment execution, if the incident occurred during execution;

- right after the punishment was executed, but in relation with its execution.

Unless otherwise provided by law, the appeal may be filed *anytime*.

The procedure for solving the appeal against the enforcement is stipulated by Art. 597-of the Code of Criminal Procedure.

The request may be withdrawn by the convict as well as by the prosecutor, when this was filed by him/her.

In case the amnesty, prescription or any other cause of punishment ending or decreasing is invoked and provided that no data and situations result from the enforced sentence upon whose existence depends the solving of the appeal, their finding is done by the court with competence *in judging* the appeal –599(2)-of the Code of Criminal Procedure.

A new enforcement is carried out as soon as the final solution is issued following the admission of the appeal against execution.

According to Art. 599(5)-of the Code of Criminal Procedure, the further requests of appeals against execution will be rejected as *inadmissible* if there is identity of person, legal grounds, reasons and defences.

In case the same person has previously filed an appeal against execution and, later-on, files a new request invoking the same reasons, grounds and defences, the inadmissibility solution is not justified if the

first request was withdrawn by the petitioner without having the merits assessed by the court, because it would block the access to justice for solving the issues related to the enforcement of the final judgment.

Conclusions

The new laws of procedure have brought modifications regarding the enforcement of the final judgments as well. By analysing the relevant procedural provisions we may establish that they have a procedural character and there are two categories of activities included in this stage or phase of the criminal trial:

- activities regarding the means of enforcement of the final criminal judgments (the issuing of the enforcement warrant, the issuing of the order preventing the convict to leave the country, the communication of a copy of the judgment to the health directorate etc.).

- activities regarding the procedural incidents related to the enforcement and which need to be solved by jurisdictional procedures (postponement and interruption of the execution of the sentence, appeal against the execution of the sentence, parole etc.).

Irrespective of their nature, these activities shall be consistent with the strict rules of the law, their implementation starting from the key premise of the integration and appropriation of the new normative framework.

References

- I. Neagu, M. Damaschin, *Tratat de procedură penală, Partea Specială, În lumina noului Cod de procedură penală (Treaty of Criminal Procedure, Special Part, In the Light of the New Code of Criminal Procedure)*, Universul Juridic Publishing House, 2015.

- B. Micu, A. Păun, R. Slăvoiu, Procedură Penală, Curs pentru admiterea în magistratură și avocatură (Criminal Procedure, Course for Admission into Magistracy and Attorneys' Profession), Hamangiu Publishing House, 2014.
- I. Neagu, M. Damaschin, Tratat de procedură penală Partea Generală, În lumina noului Cod de procedură penală (Treaty of Criminal Procedure, General Part, In the Light of the New Code of Criminal Procedure), Universul Juridic Publishing House, 2014.
- N.Volonciu, Tratat de procedură penală, Partea specială (Treaty of Criminal Procedure, Special Part), 2nd volume, 3rd edition, Paideia Publishing House, 1997.
- D. Lupașcu, Punerea în executare a pedepselor principale (Enforcement of Main Sentences), Rosetti Publishing House, 2003.
- D. Lupașcu, Amânarea executării pedepsei închisorii sau a pedepsei detențiunii pe viață (Postponment of jail sentence or life detention sentence), in Dreptul no. 4/2002.
- L. Herghelieș, Amânarea executării pedepsei. Cereri succesive. Criterii de admitere sau respingere (Postponment of Sentence Execution. Successive Requests. Admission or Rejection Criteria), in Dreptul no. 9/2003.
- C. Mitrache, Cr. Mitrache, Drept penal român, Partea Generală (Romanian Criminal Law, General Part), Universul Juridic Publishing House, 2014.

SELF-DEFENCE IN SPECIAL SITUATIONS

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Abstract

In the reality of practical cases and in certain special situations, self-defence may present some complex forms consisting either in accidental amplification of the issue in fact when self-defence is claimed, or in the correlation in fact of self-defence to other cases which remove the criminal nature of act¹. For these reasons, we decided to analyse few of such special situations.

Keywords: *self-defence, criminal nature, state authority, acts committed on fault, deviated counter.*

1. Issue of existence or inexistence of self-defence if the attack comes from the representative of a state authority.

In time², other specialised works approached the issue of existence or inexistence of self-defence if the attack comes as well from the representative of a state authority.

Although this issue no longer represents a problem currently, we have considered presenting few theories lying on the base of its settlement.

- Abolition theory.

According to this theory, the citizen had the obligation to submit unconditionally to the orders and acts of the representative of authority, enjoying the absolute presumption of legality.

- Liberal theory.

According to this theory, it is deemed that the citizen was entitled to reject the illegal act of authority. As stated in the doctrine, this theory was sustained in France by Armand Carrel³ in the magazine "National" dated 24 January 1832, as well as in front of the jury of Sena on 13 March 1832 by the lawyer Odillon Barrat. Their assertions relied on the disposals of art. 11 of the Declaration of human and citizen rights⁴ stating that *any act exercised by a representative of the state and without the acts claimed by law, is arbitrary and tyrannical.*

- Intermediary theory.

This theory divided however the right to turn to defence depending on the aggressors, more exactly depending on the authority of aggressing agents. Thus, submission is deemed obligatory according to this theory only towards the agents

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¹ V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, Theoretical explanations of Criminal Code, vol. I, Bucharest, ed. Academiei RSR, 1969, p.358.

² PhD Thesis of D. Clcotici, entitled "Self-defence – excuse of challenge", under the coordination of prof. Gr. Rîpeanu, 1971.

³ French journalist, historian and essayist.

⁴ Declaration of human and citizen rights, 1789; The main scope of this declaration was to provide to every individual the use and maintenance of its rights.

holding orders, titles, even irregular, since the existence of order and title created a presumption of legality, and the title was owed faith. On the other hand, it was allowed the counter if illegality was *manifested*, for instance if the agent was obviously incompetent⁵.

Currently, according to the disposals of the new Code of criminal proceedings (art. 310), in case of flagrant crime, any individual may hinder the criminal and hand it over to the authority. In such a situation, we no longer deal with the unfair nature of aggression which would justify a self-defence counter.

However, as exemplified as well in the recent doctrine⁶, if the individual depriving of freedom the criminal "does not take him in front of judicial authorities and does not announce its capture, turning the detention in a private detention, the deprivation of freedom becomes unfair justifying a self-defence of the prisoner."

Another case mentioned in the specialised literature⁷ considers the detention of a representative of authority with the breach of the limits stipulated by law. Thus, it is provided as example the situation when an individual with arrest warrant opposes to its enforcement, and the police bodies are using force to immobilise the criminal. If violence exercised in this case is obviously disproportionate and useless, states the author, we shall deal with an unfair aggression, which may determine the occurrence of self-defence. The doctrine

stipulates as well⁸ that an act of authority may represent an aggression when it is obviously illegal and arbitrary⁹.

Currently, the issue of aggression coming from authority no longer generates controversy because, as long as the aggression is unfair, the counter is allowed in terms of law, although it comes from an authority.

2. Issue of solving self-defence by running.

Another issue approached by the specialised doctrine related to self-defence, is the answer to aggression by running.

It is discussed if it is still incident self-defence if under the conditions of such issue in fact, the victim of aggression, having the possibility to run to avoid the aggression, he didn't, on the contrary, he responded.

In time, there were distinct opinions related either to the possibility or to the obligation of running from the aggressor. On this decision depends the consideration of self-defence as justificatory cause.

More ancient specialists of criminal law¹⁰ analysed the manner how the victim was forced or not to run, if he had this possibility, and if he doesn't, to what extent may self-defence be claimed.

The author analyses this situation historically, bringing into discussion different opinions of some criminalists dealing with this issue. We shall present further on as well such points of view.

⁵ See I.Tanoviceanu, Treaty of law and criminal proceedings, vol. I, Bucharest, p. 900; Pop T. Compared criminal law – general part, Cluj, 1924, p. 519.

⁶ Fl. Stetanu, D. Nițu, Criminal law general part, university course, vol. I, ed. Universul juridic, 2015, p.358.

⁷ Same, p. 359.

⁸ V. Dongoroz, Criminal Law, Bucharest, 1939, p. 450.

⁹ In this respect, Chr. Hennau, G. Schamps et J. Verhaegen, 'Indispensable responsabilite' de l'entreprise, inacceptable culpabilite' collective – A propos de l'avantprojet de loi belge relative a' la responsabilite' pe'nale des personnes morales', Journal des Tribunaux, 1998, p.194.

¹⁰ PhD thesis of D. Clocotici, entitled "Self-defence – excuse of challenge", under the coordination of prof. Gr. Rîpeanu, 1971.

Thus, some authors stated that, although the victim could avoid the risk by running, however he could have killed the aggressor without being punished¹¹. Other authors stated that it was necessary to avoid counter by prays, screams, run, and if the possibility of running imposes its need, no self-defence can exist¹².

In another opinion¹³, besides the situation when someone has a position to guard, in general one cannot put in legal precept cowardice, however running is obligatory when the aggressor is a madman, a child or an agent of public force.

Also, it was considered as well that everything was an issue in fact on the discretion of the judge who may enforce an easier punishment or declare innocent the victim who did not run although he had this possibility¹⁴.

Another point of view shows that running, that is the escape of the victim in this manner, does not represent a legal obligation, but only an issue of consciousness¹⁵.

More ancient French doctrine¹⁶ appreciated that the obligation of running depended on the social class of the victim. Thus, there was no obligation of running for the aristocrat, gentleman, soldier, since running for them was shameful. However, "the runt" was even obligated to run if being in such situation.

This idea was rebutted because "never, as we know, in our books of law, this privilege was awarded to noble individuals or militaries". It is asserted that, if the victim may run without being in danger, he cannot claim self-defence¹⁷.

In our opinion, obviously running may be much better than counter in such situations, but we cannot disagree that deciding for counter instead of running as self-defence could lead in fact to not considering this justificatory case.

In our specialised doctrine was decided as well that there is self-defence when the victim may escape by running¹⁸

¹¹ Julius Clarus, famous criminalist, counsellor of the king of England Charles V, in George Bowyer, *The English Constitution: A Popular Commentary on the Constitutional Law of England*, ed. J. Burns, 1841, p. 497.

¹² F. Carrara, *Programma del corso di diritto criminale: Parte generale*, Vol.1, ed. Fratelli Cammelli, 1897, p. 308.

¹³ Luigi Majno, *Commento al Codice penale italiano*, ed 2, ed. Unione tipografico-editrice torinese, 1912, art. 49.

¹⁴ Vidal quoted by T.Pop in *Compared criminal law – general part*, Cluj, 1924, p.560.

¹⁵ I. Werbóczy, A. Wagner, *Decretum Oder Tripartitum Opus Der LandtsRechten vnnnd Gewonheiten des Hochlöblichen Königreichs Hungern*, Formica, 1599, p. 19.

¹⁶ Pierre-François Muyart de Vouglans, *Les lois criminelles de France*, ed. Mérigot, 1780, p.32-33.

¹⁷ Johannes Samuel Fridericus Boehmer, *Observationes selectae ad Bened. Carpzovii ... Practicam novam rerum criminalium imperialem Saxoniam quibus Praeaudati Auctoris accessit index locupletissimus*, Fr. Varrentrapp, 1759, quaestionem XXX nr. 59/64, p. 69 and the following.

¹⁸ V. Ionescu, *Self-defence and state of need*, ed. Științifică, Bucharest, 1972, p.37-49; In the same respect, C. Mitrache, *Romanian criminal law, general part*, 3rd edition reviewed and added, publishing house and press ȘANSA, Bucharest, 1997, p.108; during the year 2002, p.125; In judicial practice, it was decided that one cannot claim to the victim of an aggression to run from aggression; see, T.S.col.pen., dec.no.394/1961, p. 424 and dec.no.925/1965 in CD/1965, p. 321. On the contrary, I. Dobrinescu, in J.N. no. 4/1957, p. 641; I. Pascu, *Criminal law general part*, 2nd edition, Hamangiu, 2009, p. 289 states: "it is discussable in the doctrine if there is self-defence when the victim has the possibility to run from the aggressor. Quoting Antoniu (Criminal guilt, p. 272) states that " modern doctrine accepts that running, in this case, is not a proof of cowardice, but of wisdom, a proof of cooperation for the extinction of conflict"; V. Dongoroz, *Criminal law*, Bucharest, 1926, p.181: "If the victim under the condition of self-defence had the possibility to escape from aggression by running, is he in self-defence if he decides not to run and to attack the aggressor? Controversy. We believe that it is, since no text of law, no principle of law or moral proclaims as rule of conduct running in front of danger, cowardice. On the contrary, the one who faces a material, actual and unfair aggression against himself or another deserves not only our admiration for his courage but the gratitude of a society to which it has done a veritable favour. If the aggressor runs without attacking we do no longer deal with self defence, but with revenge from the victim". Attention" in the same work, p.187-188, V. Dongoroz wonders if "Challenge excludes self-defence?" and gives the following example: A slaps or curses B; B being thus challenged to take out

The alternative of running is not possible in all situations, and this decision depends from one individual to another, but also on the real circumstances of the issue in fact.

4. May self-defence be incident for the acts committed on fault?

Considering the act of defence committed on fault, French practice stipulated that self-defence cannot be incident but for the actions with intent but not for the acts committed on fault in self-defence¹⁹. Authors of specialised literature²⁰ rejected such direction, in the judicial practice, the victims of an aggression even stating that they rebutted with intent and not on fault in order to enjoy the effects of self-defence.

The supporters of the possibility that defence is done as well on fault appreciate that the presence of subjective element in case of defence has nothing incompatible with the possibility of committing an act on fault, the victim being aware of the existence of aggression and commits an action meant to remove it. The result appeared in such situation is not the one anticipated.

It is provided as example to these arguments the situation when the accused followed with the axe by the victim sees a vehicle parked in the neighbourhood and tries to get rid of the aggressor leaving with that car. The accused handles however mistakenly the gearshift therefore, instead of driving ahead, the vehicle drives backwards and hits thus the

aggressor who is heading towards the car, causing him a seriously body injury or death.

In the opinion of the author²¹ of example, there is no reason to refuse the justificatory effect of self-defence under the conditions that the same act would be justified in case of act with intent.

We support as well this point of view and the idea according to which as long as the justification is allowed and indeed considers in principle a defence and a result with intent, this however does not remove the same justification in case of a guilty result as well.

Indeed, we consider as well that the contents of art. 19 par. (2) of the new criminal code is controversial since the expression of the legislator "act to remove an aggression" tends to lead to the interpretation that the act committed in defence must be with intent. However, as other authors showed as well, an extensive interpretation of this formulation is not opportune, as it must be understood in strict sense, namely that of the action committed to remove an aggression, and not of fact overall²². Even a judgement of the former Supreme Court admitted self-defence even in case of praeterintentionate defence²³.

We appreciate that the proposal of *de lege ferenda* in terms of amending the legal text in the version "act to remove an aggression committed with intent or on fault" is opportune for the legislator to uniform such different points of view related to this interpretation.

the weapon. A the challenger is in self-defence, if, for avoiding the bullet of B kills B. If B had taken out the weapon without a previous challenge, obviously A would have been in self-defence, but the fact that A challenges B excludes for A self-defence."

¹⁹ J.H. Robert quoted in F. Streteanu, quoted work, p. 364.

²⁰ M.L. Rassat, J.H. Robert, F. Desportes, F. Le Guehec, J.P. Delmas Saint Hillaire quoted in F. Streteanu, quoted work, p.364.

²¹ Fl. Streteanu, quoted work, p. 365.

²² In the same sense, same.

²³ T.S., s.pen., dec. no. 2515/1976, in RIL, p. 235.

5. Deviated counter (error in personam / aberatio ictus)

In time, the doctrinaires analysed the situation when defence was directed towards an innocent third party, as a consequence either of the error of the victim over the aggressor, or of the deviation of hit. The solutions may be obviously different. It may be stated that there is no self-defence but a state of need of the victim, or an irremovable error which determines the absence of liability.²⁴

The specialists²⁵ decided for the variant when the defence committed under such conditions entails a state of need.

If the victim hits mistakenly another individual than the aggressor, it should be examined if a fault may be incumbent upon the one who rebuts or if the deviation of defence is accidental. In the first situation, since it is determined that the victim acted with obvious fault towards the third party (s.n.), it will be enforced the punishment for manslaughter for a manslaughter on fault or bodily injury on fault and in the second situation, the hit of the third party must be deemed as caused in state of need.

A supported opinion must be analysed if the victim hits a third party obviously imprudently or has taken advantage of the fact of being aggressed using afterwards self-defence.

If the victim is forced by the conditions of defence to react in such a manner as endangering a third party, his act will be deemed committed in a state of need²⁶.

In another opinion, it is considered that self-defence represents only a particular enforcement of the general theory of need, the

murder or assault committed in case of deviation of the hit or error over the individual must be considered as self-defence²⁷.

The former Supreme Court decided that an individual facing a material, direct, immediate, unfair attack, while defending himself, instead of hitting the aggressor, hits mistakenly a third party, and this error is not incumbent upon him under any circumstance, the act must be considered committed in self defence²⁸.

It was omitted the opinion according to which self-defence cannot be claimed in such situations since firstly considering the drafting of the legal text defence must be always directed only against the aggressor.

Also, the same opinion shows that one cannot support either the state of need, because in such situation the imminent risk faced by the individual who rebuts must be avoided only by such counter.²⁹

Analysing as well the disposals related to the error of fact, these cannot be enforced either. The hitting of third party on the occasion of counter, due to causes not incumbent upon, states the same author, cannot lead to the conclusion that the one who rebuts is in one of the situations ruled by the criminal code. Also, the deviation of assault cannot represent either an error of fact.

We do not agree with the arguments of the said opinion.

Thus, one of the essential traits of the crime is that the act is committed on fault.

Or, if it is determined that the act of the victim and with consequences on a third party lacks a subjective element, then the act is not a crime.

²⁴ PhD thesis of D. Clotocici, entitled "Self-defence – excuse of challenge", under the coordination of prof. Gr. Rîpeanu, 1971.

²⁵ V. Dongoroz, Criminal law, 1939, p.433; Tanoviceanu, Treaty of law and criminal proceedings, vol I, ed. a II-a, 1924, p. 920.

²⁶ Same.

²⁷ P.I. Pastion, M.I. Papadopolu, Criminal code annotated, ed. Librăriei Socec&Comp., 1922, p. 448.

²⁸ T.S.Col.pen.decision no. 888 dated 26 June 1962 in J.N. no. 1/1963, p.173.

²⁹ PhD thesis of D. Clotocici, entitled "Self-defence – excuse of challenge", under the coordination of prof. Gr. Rîpeanu, 1971.

In our opinion, if the one who defends himself commits the act, although he could have anticipated, but he ignored without reason a potential result, although he didn't anticipate although he should have and could anticipate such result, he may be held criminally liable for a crime committed on fault. The form of guilt of intent is no longer debated since it would remove from the beginning the argument of error or deviation of assault.

Conclusion

It isn't discussable the fact that self-defence may be corroborated with the error of fact and also that the victim assaults mistakenly another individual than the aggressor or appreciates erroneously the gravity of assault committing mistakenly an excess of defence.

Selective specialised references

Romanian doctrine. Treaties, courses, monographies, studies published in specialised magazines

- Antoniu G., Commentary in Preliminary explanations of the new criminal code.
- Antoniu G., Commentary in Preliminary explanations of the new criminal code, vol. I, ed. Universul Juridic, Bucharest, 2010.
- Antoniu G., Noul Criminal code, vol. I (art.50-56) C.H.Beck Publishing House, Bucharest, 2006.
- Bulai C., Bulai B., Manual of criminal law – general part, Universul juridic publishing house, Bucharest, 2007.
- Buzea N., Criminal offence and culpability. Doctrine, legislation, jurisprudence, Sabin Solomon Typography, 1944.
- Dobrinescu I, in J.N. no. 4/1957, p. 641.
- Dongoroz V., Criminal law, Bucharest, 1926.
- Dongoroz V., Criminal law, Bucharest, 1939.
- Dongoroz, Kahane S., Oancea I, Fodor I, Iliescu N, Bulai C, Stănoiu R, Theoretical explanations of Criminal code, vol. I, Bucharest, ed. Academiei RSR, 1969.
- Ionescu V, Self defence and state of need, Scientific publishing house, Bucharest, 1972.
- Mitrache C., Romanian criminal law, general part, 3rd edition reviewed and completed, ȘANSA Publishing and press house, Bucharest, 1997.
- Niculeanu C., Definition and essential traits of crime.
- Pascu I, Criminal law general part, 2nd edition, Hamangiu, 2009.
- Pastion P.I., Papadopolu M.I., Criminal code annotated, ed. Librăriei Socec&Comp., 1922.
- Pop T., Compared criminal law – general part, Cluj, 1924.
- Streteanu F., Nițu D, Criminal law general part, university course, vol. I, ed. Universul juridic, 2015.
- Tanoviceanu I, Treaty of law and criminal proceedings, vol I, ed. a II-a, 1924.
- Pop T. Compared criminal law – general part, Cluj, 1924.
- Tanoviceanu I., Treaty of criminal law and criminal proceedings, 2nd edition, Curierul judiciar Typography, Bucharest, 1924.

Foreign doctrine. Treaties, courses, monographies, studies published in specialised magazines

- Boehmer J.S.F., *Observationes selectae ad Bened. Carpzovii ... Practicam novam rerum criminalium imperialem Saxoniam quibus Praeaudati Auctoris accessit index locupletissimus*, Fr. Varrentrapp, 1759, quaestionem XXX nr. 59/64.
- Bouzat P., Pinatel J., in *Traité de droit pénal et de criminologie*, t. I, II et III, ed. Revue internationale de droit comparé, Paris, 1963.
- Bowyer G., *The English Constitution: A Popular Commentary on the Constitutional Law of England*, ed. J. Burns, 1841.
- Carrara F., *Programma del corso di diritto criminale: Parte generale*, Vol.1, ed. Fratelli Cammelli, 1897.
- Hennau Chr, Schamps G. et Verhaegen J., 'Indispensable responsabilité de l'entreprise, inacceptable culpabilité collective – A propos de l'avantprojet de loi belge relative à la responsabilité pénale des personnes morales', *Journal des Tribunaux*, 1998.
- Majno L., *Commento al Codice penale italiano*, ed 2, ed. Unione tipografico-editrice torinese, 1912.
- Merle R., Vitu A., *Traité de droit criminel*, ed. Cujas, 1967.
- Munoz Conde F., *Un caso limite entre justificación y exculpación: la legítima defensa putativa*, *Revista de Estudios de la Justicia*, N° 11.2009.
- Muyart de Vouglans P-F, *Les lois criminelles de France*, ed. Mérigot, 1780.
- Pannain R., *Manuale di diritto penale: Vol. I, Parte generale*, ed. Unione tipografico-editrice torinese, Torino, 1962.
- Werböczy I., Wagner A., *Decretum Oder Tripartitum Opus Der LandtsRechten vnnnd Gewonheiten des Hochlöblichen Königreichs Hungern*, Formica, 1599.

Jurisprudence

- T.S, s.pen., dec. no. 2515/1976, in RII.
- T.S.Col.pen. decision no. 888 dated 26 June 1962 in J.N. no. 1/1963.
- T.S. Col.pen, decision no. 306/1957 in Leg.pop. no. 15/1957.
- T.S. Col.pen., decision no. 821/1957 in Leg.pop.no. 10/1957.
- T. Regional Oltenia, dec.pen. no. 6493/1959 in Leg.pop. no. 3/1960.
- T.S., col.pen., dec.no. 925/1965 in Collection of decisions 1965.
- T.S., col.pen., dec.no.123/1959 in Leg.pop. no. 9/1959.
- T.S., col.pen., dec. no. 1329/1962 in Collection of decisions 1962.
- T.S.col.pen., dec.no.394/1961, p. 424 and dec.no.925/1965 in CD/1965.

THE POSTPONEMENT OF EXECUTION OF THE PUNISHMENT AND THE SUSPENSION OF SENTENCE UNDER SUPERVISION FOR THE CRIMES OF FAMILY ABANDONMENT AND THE PREVENTION OF THE ACCESS TO GENERAL COMPULSORY EDUCATION

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Abstract

In addition to the general conditions in which the court may order a judicial individualization measure without depriving a person of its freedom, the legislator created for certain criminal offenses, some regulations derogating from this regime. For these crimes, for reasons related to the protection of family life, if the defendant is aware of his crime, by fulfilling his obligations, the legislator presumed in an Absolut way that there is no requirement to effectively enforce the sentence and execute the punishment, in such cases the court being obliged to postpone the execution of the punishment or to order the suspension of sentence under supervision.

Keywords: *the postponing of the execution of the punishment, suspension under supervision of the sentence, abandonment of family, the prevention of the access to general compulsory education.*

1. Introduction

The imposition of a punishment and its effective enforcement are not likely to ensure that these measures will achieve the purpose of the punishment and the social reintegration of the person who has committed an offense in each case. Often the detention environment transforms the persons subject to such manner of punishment in more dangerous criminals, and in many cases imprisonment doesn't contribute to the social reintegration of offenders, but on the contrary, to their social isolation. Also in economic terms, imprisonment is expensive, involving significant financial costs for the state. In some specific cases, reported to the gravity

of the crime and to the person of the offender, enforcing a punishment is not justified.

In these circumstances, the legislator has created some mechanisms of judicial individualization of the punishment that allow this, if certain conditions set by law in a limitative manner, are met: the postponing of the execution of the punishment and the suspension of the execution of the punishment. In the event of committing certain offenses, the legislator went further on, practically imposing on the court to rule in the sense of applying an execution measure without depriving a person of its freedom, in the cases where the conditions provided for by law are met¹.

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¹ C. Bulai, B. Bulai, *Manual de Drept Penal. Partea Generală*, București, Ed. Universul Juridic, 2007, p.233.

2. Content

2.1. The legal provisions

According to Art. 378 of the Criminal Code, it constitutes the offense/crime of family abandonment the following actions: when the person who has the legal obligation of providing support to the person entitled to the support, commits one of the following actions:

- a) the departure, the banishment or letting unaided, and by these actions exposing him to physical or moral suffering;
- b) failure to fulfill the obligation of support as provided by law, with bad faith;
- c) failure to pay, for 3 months, the alimony established by a judicial way, with bad faith;

shall be punished with imprisonment from 6 months to 3 years or a fine.

With the same punishment is sanctioned the failure to execute, acting in bad faith, by the convicted person, the periodic obligations established through a court judgment, in favor of the persons entitled to receive support from the victim of the offense.

Criminal proceedings shall be initiated upon prior complaint of the injured party.

If, until the decision of conviction becomes definitive, the defendant fulfills its obligations, the court may rule, if appropriate, case by case, the postponing of the execution of the punishment or the suspension under supervision of the sentence, even if the conditions stipulated by law for this are not met.

Regarding the crime of preventing access to compulsory education, it is incriminated in Art. 380 of the Criminal Code as follows: the parent or person entrusted by law with the custody of a minor, that unduly withdraws or prevents by any means a minor to attend compulsory education, shall be punished with

imprisonment from 3 months to one year or a fine .

If, until the decision of conviction becomes definitive, the defendant ensures the resumption of class attendance by the minor, the court may rule, if appropriate, case by case, the postponing of the execution of the punishment or the suspension of the execution of the punishment, even if the conditions stipulated by law for this are not met.

The old legal regulation/legal provisions also stipulated the obligation of the court to order the conditional suspension of execution of the punishment for the crime of family abandonment (the crime of preventing access to compulsory education having no counterpart in the old Code). Thus according to Art. 305 para. (4) - (5) of the old Criminal Code (1969), if the parties haven't reconciled, but during the trial the defendant fulfills its obligations, the court, when determining the guilt of the defendant, rules in the sense of a suspended conditional sentence, even if the conditions laid down in Art. 81 are not met. The revocation of the conditional suspension occurs only if, during the probation period, the convicted person commits the crime of abandonment of the new family again.

2.2 Conditions

In case the conditions laid down in Art. 378 para. (5) and Art. 380 para. (3) of the Criminal Code are met, the court is obliged to rule in the sense of postponing of the execution of the punishment or suspension under supervision of the sentence. Unlike the general background of these measures, the legal texts mentioned above do not establish a facultative choice for the court, but an obligation. The court nevertheless retains the possibility to determine which of the two institutions best fits the crime and the defendant's degree of dangerousness. Although the legal text does not provide for,

we consider that nothing prohibits the court to rule in the sense of waiving the application of a punishment if it considers that it wouldn't be appropriate to set such a penalty and the other conditions laid down in Art. 80 of the Criminal Code are met.

Therefore, in order to rule in the sense of the postponing of the execution of the punishment or the suspension under supervision of the sentence for the two types of criminal offences, the following conditions have to be met:

- to have committed in the consumed form a crime of abandonment of family or the crime to prevent access to general compulsory education.

The offense must be typical, attributable and unjustified. For example if the person liable for providing the legal support is acting in good faith and doesn't have the objective possibility to actually pay the support alimony, the solution required is acquittal. Likewise, a parent cannot be convicted for the crime of preventing the child to attend school, if that parent is abroad and the actual care and support of that child is performed entirely by the other parent.

Also, for the offense/crime of family abandonment, the court cannot rule in the sense of postponing of the execution of the punishment or the suspension under supervision of the sentence, if the person entitled to support/alimony support withdraws his/her complaint. In this case the court shall rule cessation of the criminal trial.

The legal provisions regarding the postponement of the execution of the punishment and the suspension of sentence under supervision are applicable only when the crime/offense is in a consumed form, the only attempt for any of the two offenses not being incriminated by law.

- the defendant has to have fulfilled its legal obligations, in the crime of family abandonment, and for the crime of

preventing access to compulsory education – to have provided that the minor had resumed attendance of classes, between the time calculated from the preparation of the indictment, until the judgment becomes final.

If the defendant meets its obligations, or ensures the resumption of school attendance during the criminal investigation, before the preparation of the indictment, the prosecutor will proceed to the dismissal of the case, the defendant's conduct having the value of a non-punishment clause. In the old regulation there was no provision of such a cause for non-punishment. Therefore, if the defendant performed his duties during the criminal investigation, the prosecutor should have notified the court, which will have ruled in the sense of conditional suspension (of course if the court didn't assessed that the offense doesn't have the concrete degree of social danger of an offense, in which case it would dropped the charges against that person).

Also we consider that if the defendant meets its obligations, or ensures the resumption of school attendance during the investigation, but the prosecutor still pursues a criminal trial, the court will be obliged to pronounce the termination of criminal proceedings under Art. 16 lit. h of the Criminal Procedure Code. The court is obliged to ascertain the incidence of a cause that removes the functional ability of the criminal action (the existence of a cause of non-punishment in this case), even if this cause wasn't found by the prosecutor, in these conditions the court not being able to rule in the sense of postponing the execution of the punishment or the suspension of sentence under supervision.

-the defendant is of full age.

According to Art. 114 of the Criminal Code, towards the minor who, at the time of the offense, is aged between 14 and 18, and non-custodial or custodial educational

measure shall be taken. Since the legislator has ruled against the possibility of juvenile sentencing, the court obviously could not postpone or suspend the execution of punishment under supervision.

Regarding the two offenses covered by this study, we consider excluded the possibility that a minor would commit the crime of preventing access to compulsory education. But we do not exclude the possibility that a minor is liable to pay alimony support to his minor child, thus committing the crime of family abandonment if he does not pay acting in bad faith.

If the above conditions are satisfied the court will be obliged to rule in the sense of postponing the execution of the punishment or the suspension of sentence under supervision (as shown above court may also rule in the sense of waiver of penalty) even if the conditions provided for in Art. 83 or Art. 91 of the Criminal Code are not met.

Therefore nothing will prevent the court to postpone the application of the punishment if it establishes for the crime of family abandon a sentence of 3 years, even if according to Art. 83 para. (1) of the Criminal Code, the fixed penalty ought to be of 2 years at most. Also the postponement or suspension under supervision is mandatory, even if the defendant was previously convicted, regardless of the nature of the offense committed, the form of guilt or the penalty sentence imposed.

Being a compulsory measure, the court shall order the postponement or suspension, even if reported to the person of the defendant, his previous conduct before committing this crime, his efforts to

eliminate or mitigate the consequences of his offense/crime and his means of correcting, the court would appreciate it necessary to enforce the sentence.

At the same time the court will choose a non-custodial way of judicial individualization, even if the defendant has evaded prosecution or trial, or tried thwarting finding the truth or the identification and criminal accountability of the author or participants.

Regarding the condition on the agreement to perform unpaid community work we consider that we must make a distinction between the methods of individualization that the court will take.

If the court decides upon the postponement of execution of the punishment, the legislator leaves it to the judge of the case the choice of imposing the obligation on community work. If the court considers that the reintegration of the accused can be made only by applying this obligation, his consent is necessary. Otherwise, we believe that the court shall decide upon postponement, with or without the consent of the defendant in this respect, because Art. 378 para. (5) and Art. 380 para. (3) of the Criminal Code have priority towards Art. 83 par. (1) c².

If the court considers it necessary to decide suspension of sentence under supervision, then it is compulsory to oblige the defendant to perform community work for a period between 60 and 120 days. In this case, the condition of the agreement to provide unpaid community work must be fulfilled, because otherwise there would be a violation of the Constitution and the European Convention on Human Rights³.

² A. Risnita, I.Curt, *Renuntarea la aplicarea pedepsei. Amanarea aplicarii pedepsei*, Ed.Universul Juridic, Bucharest, 2014, p.170. On the contrary, M. Udriou, *Drept Penal. Partea Generală. Noul Cod Penal*, Bucharest, Ed, CH Beck, Bucharest, 2014, p.255.

³ A. Vlăsceanu, in G. Antoniu (coordinator), *Explicații Preliminare ale Noului Cod Penal*, Bucharest, Bucharest, Ed.Universul Juridic 2011, p.192.

As emphasized in the legal literature, ignoring the conditions laid down in the general part of the Criminal Code shall not cause the creation of new institutions. Therefore if in the case of a penalty fine the only solution is postponement of application of punishment, because suspension under supervision for a fine would be a hybrid institution that borrows the subject from postponement institution and the procedure from the suspension institution⁴.

However, if the defendant fails to fulfill his legal obligations required for the offense of family abandonment, or doesn't provide for the resumption of school attendance, for the offense of preventing access to compulsory education, until the final judgment, the court will be able to rule in the sense of postponement of application of the punishment or suspension of sentence under supervision, but only if the conditions laid down in the general part of the Criminal Code are met. The provisions of Art. 378 par. (5) and Art. 380 par. (2) of the Criminal Code are derogatory in favor of the defendant, and do not allow to reach the conclusion that, if the obligations are not fulfilled the defendant could not benefit of a non-custodial modality of judicial individualization⁵.

Problems may arise if besides the crime of family abandonment or preventing access to general compulsory education, the defendant has committed other competing crimes.

In this regard we consider that the distinctions made under the old legislation should remain valid. The court shall order, as a mandatory rule, postponement of application of the punishment or suspension under supervision of the sentence if the

conditions prescribed by the Art. 378 par. (5) or Art. 380 par. (3) of the Criminal Code are met. With regards to the competing offense/crime the court may order postponement of application of the punishment or suspension under supervision of the sentence if the conditions of the general part of the Criminal Code, namely Art. 83 and 91 of the Criminal Code are met. The court cannot rule on postponement or suspension with regards to all offenses/crimes under Art. 378 par. (5) or Art. 380 par. (3) of the Criminal Code, because the exceptional conditions laid down in these legal texts with regards to all offenses/crimes are not met. Therefore for each offense/crime, the court will rule by a separate non-custodial modality of judicial individualization, and the probation periods will run in parallel. Merging of the punishments and the imposition of an increase of penalty will be made only if the two measures will be revoked.

If for the second offense/crime the court considers that the conditions with regards the postponement of application of the punishment or suspension of sentence under supervision are not met, the court shall order its effective execution, without this influencing in any way on the solution given with regards the crime of family abandonment or preventing access to general compulsory education. In this regard, the application of the punishment will be postponed, or execution of sentence will be suspended. Of course the requirements and the supervision measures will remain without object and cannot be executed. Merging these punishments and applying an increase of penalty can be achieved only in the event of revocation of

⁴ A. Rîșniță, I.Curt, *read*, p.168.

⁵ To the same effect, according to the old legislation, solution which is maintained in present times as well, the Court of Appeal decision 512/1998, in I.C.Morar, *Suspendarea condiționată a executării pedepsei. Culegere de practică judiciară*, Bucharest, Ed. CH Beck, 2007, p.176-177.

the postponement or suspension of the execution⁶.

2.3. The term of surveillance

According to art. 2 of Law no. 253/2013, the term of surveillance or the supervision period designates the time frame in which the person towards which one of the following measures has been taken: the postponement of application of the punishment, the suspension of sentence under supervision, the release on parole or a non-custodial educational measure (in the case of minors), must comply with the obligations or surveillance measures ordered by the court in its task.

In case of postponement the surveillance term is 2 years, while in the case of suspension under supervision the surveillance period is between 2 to 4 years without being shorter than the length of sentence given.

The surveillance term begins to run from the date of the final judgment of the court, and being a substantial term, the period shall be calculated on full days.

Regarding the crimes of family abandonment or preventing access to general compulsory education there are no derogations with regards the term of supervision.

2.4. Surveillance measures and obligations

Art. 85 of the Criminal Code states that during the term of supervision, the person towards which the postponement of execution was ordered, must meet the following supervisory measures:

a) to report to the probation service, at the dates set by it;

b) to receive visits from the probation officer assigned with his supervision;

c) to notify in advance, when moving to another address and any travel periods of over 5 days;

d) to communicate when changing jobs;

e) to communicate any information and documents, in order to enable control of his sources of livelihood.

The court may require that the person towards which the postponement of execution was ordered to carry out one or more of the following obligations:

a) to attend a school/training course or vocational training;

b) to perform unpaid community work for a period between 30 and 60 days under the conditions set by the court, unless that, due to health reasons, the person cannot perform the work;

c) to attend one or more social reintegration programs run by the probation service or organized in collaboration with institutions from the community;

d) to accept control measures, treatment or medical care;

e) not to communicate with the victim or members of his/her family, with the people with who he/she committed the crime or with other persons, determined by the court not to be approached;

f) not to be in certain places or at certain sports events, cultural or other public gatherings, determined by the court;

g) not to drive certain vehicles determined by the court;

h) not to hold, to use and to carry any type of weapons;

i) not to leave Romania without the court's consent;

j) not to occupy or to perform public functions, his/her profession or the activity that has been used for committing the offense.

⁶ G. Antoniu, in G. Antoniu and C. Bulai (coordinators), *Practica judiciară penală*, vol. II, Bucharest, Ed. Academiei Române, 1990, p.76.

Regarding the suspension of sentence under supervision, according to Art. 93 of the Criminal Code, during the surveillance period, the convicted person must respect the following supervisory measures:

- a) to report to the probation service, at the dates set by it;
- b) to receive visits from the probation officer assigned with his supervision;
- c) to notify in advance, when moving to another address and any travel periods of over 5 days;
- d) to communicate when changing jobs;
- e) to communicate any information and documents, in order to enable control of his sources of livelihood.

The court imposes that the convicted person has to execute one or more of the following obligations:

- a) to attend a school/training course or vocational training;
- b) to attend one or more social reintegration programs run by the probation service or organized in collaboration with institutions in the community;
- c) to obey the control measures, treatment or medical care;
- d) not to leave Romania without the court's consent.

During the surveillance period, the convict will perform unpaid community work for a period between 60 and 120 days, under the conditions set by the court, unless because of health reasons, he/she cannot perform the work.

The new Criminal Code has regulated the possibility to modify or terminate the obligations and supervisory measures if during the period of supervision, some changes that require such measures occur.

2.5. The revocation of the postponement of execution and of the suspension under supervision of the sentence, for the crimes of family

abandonment or preventing access to general compulsory education

According to Art. 88 of the Criminal Code (and Art. 96 Criminal Code) the postponement of execution and of the suspension under supervision of the sentence is revoked in the following three cases:

a) If during the supervision term the supervised individual, acting in bad faith, does not comply with or does not perform the supervisory measures or obligations established by law.

b) If until the expiration of the supervision term the supervised person does not fully meet the civil obligations established by the court's decision.

c) If during the supervision term the supervised person has committed a new offense/crime, intentionally or with exceeded intention, discovered within the period of supervision, for which a conviction was ordered even after this period (if the court ruled on suspension under supervision of the sentence, the revocation will only intervene if in the case of the new offense/crime the court sentenced imprisonment, while in the case of postponement the revocation will occur even if the penalty applied is a criminal fine). If the subsequent offense is committed by negligence, the court may revoke or maintain the postponement of execution, or the suspension under supervision of the sentence.

In the case of suspension of sentence under supervision, the legislator provided in Art. 96 par. (3) a particular cause for revocation, namely if the penalty fine that accompanied the imprisonment penalty under Art. 62 was not enforced and was replaced by imprisonment under Art. 63 par. (2) or art. 64 par. (5) and par. (6), the court shall revoke the suspension and enforce the sentence, to which it will add the

imprisonment penalty with which the criminal fine was replaced.

Regarding the two offenses covered by this study, it should be noted that there is a legal provision such as that provided by Art. 305 par. 5, which stated that revocation of conditional suspension, occurs only if, during the probation period, the convicted person commits again the crime of family abandonment. Therefore, now if the court rules on suspension under supervision for any of the two offenses/crimes mentioned above, this suspension will necessarily be revoked if the convicted person intentionally or with mixed guilt (both intentionally and by negligence) commits a crime (in the case of a crime of negligence a suspension of the sentence can be imposed under Art. 96 par. 6) during the period of supervision, regardless of the nature of the offense/crime.

However, according to the majority opinion prevailing in the legal doctrine and in legal practice, we consider that the revocation will not operate if the new offense/crime is still a crime of family abandonment, or of preventing access to compulsory education and the court deferred or suspended under supervision the sentence for this new crime. Therefore, as shown in the legal doctrine, otherwise this would dispossess of content the measure of suspension imposed for the second penalty, despite the fact that the defendant has fulfilled its legal obligations and would have deserved to benefit from an actual suspension of execution of the sentence. The intention of the legislator was to exert some pressure on the defendant to determine him/her to fulfill his/her legal obligations, and once this goal achieved, the interest and justification of the penalty imposed disappears; whether this method to compel the defendant has been used once or several times, granting him/her actual freedom

becomes even necessary in order for him/her to be able to fulfill its duty/legal obligations towards his/her family⁷.

An argument in this regard is the fact that in the project for the new Criminal Code adopted by Law no. 301/2004, which however never came into force, it is expressly stated that special conditional suspension for the offense/crime of family abandonment shall be applicable only for the first conviction of the offender for this kind of offense/crime (Art. 228 par 5 of the Criminal Code). If the legislator wanted this provision to take effect, it would have been included in the new Criminal Code, applicable at this time.

Maintaining the postponement of execution or the suspension of sentence under supervision will be ordered regardless whether the offense/crime committed during the term of surveillance is different from the one for which the postponement or suspension was ordered (originally the defendant committed a family abandonment and afterwards he/she commits a crime in order to prevent access to compulsory education or vice versa) and regardless whether for the new offense the court rules on postponing the execution of punishment or suspension under surveillance.

The revocation of the suspension under supervision may be ordered in case of failure to execute, acting in bad faith, the penalty fine accompanying the imprisonment penalty. Exceptionally, one might imagine some situations when the defendant through the crime committed pursues a material benefit, for example a parent that withdraws his child from school in order for both of them to work (paid work) at building a house. In these cases the court could sentence the convicted person to pay a criminal fine and in case of failure, acting in

⁷ G. Antoniu, note II to criminal decision no. 896/1971 of the Gorj County Court in the Romanian Journal of Law (decizia penală nr. 896/1971 a Tribunalului Județean Gorj în Revista Română de Drept), nr.2/1974, p.145-147.

bad faith, this measure could be replaced with imprisonment.

Failure to respect, acting in bad faith, the measures or obligations imposed by the court (including the ones regarding community work), require the revocation of the postponement or of the suspension under supervision of the sentence, for these crimes, as well.

Regarding the revocation of postponement or of the suspension of sentence under supervision given due to failure to execute the civil obligations established by the court, there are some remarks to be made. As emphasized in the legal literature, this case of revocation is inapplicable for the offense of family abandonment in the version of unpaid alimony, because the civil action in this case is devoid of purpose given that the injured party is already in possession of an enforceable title⁸. Whereas for the other normative ways of committing the offense of family abandonment, the injured party may still pursue civil action, in case there are moral damages suffered. By fulfilling the obligations imposed for the offense of family abandonment done by leaving, it is considered that the person that is required to provide the support has fulfilled the obligations if he/she resumes providing support and care, and not if it pays any potential moral damages, because these can be determined only by court order, until then not being certain nor legally demandable. While it would be hard to imagine a practical example, at least theoretically a civil action covering moral damages, could be initiated also when the offense was done by failure to pay alimony.

We consider that for the offense/crime of prevention of access to compulsory

education, civil action is always admissible, this kind of offense being likely to cause material or moral damages. In all these cases, if the court ordered the postponement of application of punishment or the suspension of sentence under supervision, and admitted the civil action, failure to execute the civil obligations will attract revocation of the suspension⁹.

2.6. The cancellation of the postponement of application of the punishment and of the suspension of sentence under supervision for the crimes of family abandonment or preventing access to general compulsory education.

The cancellation of the postponement of application of the punishment and of the suspension of sentence under supervision consists in abolishing the court's order of imposing a non-custodial individualization modality, when this modality was struck from the beginning by a critical irregularity, because at the time of delivery of the final solution the court had no knowledge, due to circumstances that are not attributable to it, of the existence of a criminal record of the defendant, information that, if it had been known, it would have excluded the incidence of this modality of judicial individualization.

Seeing that the postponement of application of the punishment and of the suspension of sentence under supervision for the crimes of family abandonment or preventing access to general compulsory education enjoy a derogation, being disposed independently of the criminal record of the defendant, we consider that the institution of cancellation is not incidental for these two offenses.

By exception, if the court ordered the postponement of application of the

⁸ I.C. Morar, *Suspendarea condiționată a executării pedepsei, sansă sau capcană ?*, Ed. Lumina Lex, Bucharest, 2002, p.255-256.

⁹ A. V. Iugan, *Revocarea suspendării executării pedepsei sub supraveghere în lumina noului Cod Penal*, in Criminal Law Writings, nr. 2/2014, p.68-69.

punishment or the suspension of sentence under supervision, without the conditions laid down in Art. 378 par. (5) or Art. 380 par. (3) of the Criminal Code being met, it does it under the legal provisions of the general part of the Criminal Code (Art. 83 and 91 of the Criminal Code).

2.7. The effects of the postponement of application of the punishment and of the suspension of sentence under supervision for the crimes of family abandonment or preventing access to general compulsory education.

There are no derogating provisions with regards the effects of postponement of application of the punishment and of the suspension of sentence under supervision for the two offenses covered by this study.

Regarding the postponement of application of the punishment, Art. 90 of the Criminal Code determines that for the person against whom a postponement of the punishment has been ordered, the actual punishment will no longer be enforced, and that person will not be subject to any revocation of rights, prohibitions or incapacities that could result from the offense, if until the end of the surveillance period, that person has not committed a new offense, and the postponement was not revoked.

If for any of the two offenses, the court ordered the suspension of sentence under supervision, the punishment is considered as executed if the convicted person has not

committed a new crime discovered by the end of the supervision period and revocation of suspended sentence under supervision was not ordered. From the end of surveillance period starts to run the terms prescribed by law for the rehabilitation of the convicted person.

3. Conclusions

We consider objectionable the option of the legislator to incorporate in the new Criminal Code the mandatory application of non-custodial individualization modalities for the offense of family abandonment, and to extend it to another offense. This legal provision can lead to paradoxical situations in practice, situations in which a person who committed more crimes to serve the sentence for some, and for others to benefit from postponement of application of punishment or suspension under surveillance. Also, it made possible the existence of supervisory terms that run in parallel for concurrent offenses. Another criticism is the possibility for a person to commit how many crimes of family abandonment or of preventing access to general compulsory education he wants, because if during the trial he fulfill its legal obligations or assures the resumption of class attendance, he will not actually execute the punishment.

References

- G. Antoniu and C. Bulai (coordinators), *Practica judiciară penală*, vol. II, Bucharest, Ed. Academiei Române, 1990.
- G. Antoniu (coordinator), *Explicații Preliminare ale Noului Cod Penal*, Bucharest, Ed. Universul Juridic 2011.
- T. Dima, *Drept Penal. Partea generală.*, Ed. Hamangiu, București, 2014.
- V. Iugan, *Revoking the suspension of sentence under supervision in the light of the new Criminal Code/ Revocarea suspendării executării pedepsei sub supraveghere în lumina noului Cod Penal*, in *Criminal Law Writings*, nr. 2/2014.

- I.C. Morar, Suspendarea condiționată a executării pedepsei, șansă sau capcană?, Ed. Lumina Lex, Bucharest, 2002.
- I.C.Morar, Suspendarea condiționată a executării pedepsei. Culegere de practică judiciară, Bucharest, Ed. CH Beck, 2007.
- Pascu, V. Dobrinou ș.a., Noul Cod Penal Comentat, vol. I, Ed. Universul Juridic, București, 2012.
- Risnita, I.Curt, Renunțarea la aplicarea pedepsei. Amanarea aplicării pedepsei, Ed.Universul Juridic, Bucharest, 2014.
- M. Udriou, Drept Penal. Partea Generală. Noul Cod Penal, Bucharest, Ed, CH Beck, Bucharest, 2014.