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A FEW NOTES ON THE EVOLUTION OF THE COMMERCIAL SALES CONTRACT REGULATION

Dan VELICU[*]

Abstract

Today, we think that the commercial sales has a long history as institution and therefore the relocation of its regulation from the commercial code to the civil code seems to be an authentic revolution inside the European or national private law.

In fact, the modern regulation of commercial sales emerged only in the nineteenth century and a proper regulation was strengthened in that very century.

The present paper aims to analyze if this kind of revolution is an useful and necessary and if, by relocation, the institution has really disappeared.

Keywords: *commercial sales contract, commercial law, comparative legal history, civil code, codification.*

1. Introduction

As we know the sales contract was and is the most useful contract in social material transactions.

For some centuries, during the Dark Ages, when the barter was the main transactional activity, the sales seemed to be only a variety of it. However, at the end of the Middle Age, when the monetized economy emerged and the necessities of coin were covered by the discovery of the gold in the Americas, the prevalence of the sales contract was assumed.

From that time up today, nothing proved to be a challenge to the sales contract and the barter became more and more a sign of backwardness, economic liability, peripheral region or economic crisis.

As we shall see, the commercial sales contract has acquired a specific profile and regulation during the nineteenth century, but can we consider it today – when most of the material changes suppose in fact a commercial sales contract – as a specific contract which needs a special regulation? If the special hipothesis turned into a general one, do we still need a special regulation contained in a commercial code?

Therefore, it seems not to be so bizarre to renounce to all these commercial codes which belong to the past and to the social stratification of the industrialization era.

On the contrary to this common opinion, I think that the distinction between civil and commercial law deserves, at least, a summary analisys, and the recent evolutions inside the private law suggest that reality has to prevail on the ideology or on the obsessive ideea to revolutionize the law.

2. The first phase: neglecting the commercial sales contract.

At the end of the eighteenth century or, at least at the beginning of the nineteenth century, the sales contract was accepted as

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the most complex contract which needed a specific, proper and extended regulation.

In this context, there was no surprise that the authors of the Napoleonic civil code put the regulation of the sales contract in the front of all other contracts. And, more, the regulation of the barter was regarded as a secondary institution.

Practically, from now on everybody agreed that the exception became basic or common rule and the basic rule became only an exception.

However, there were only two main issues to settle at that crucial moment.

Before the Napoleonic code of 1804, in France of the *Ancien Régime* there was an essential distinction inside the private law.

On one hand, the minor material transactions were regulated by local customs, which have been codified in the north of France, or by written rules which were conserved in Southern France.

On the other hand, the so called "commercial affairs" were uniformly regulated from the seventeenth century by the royal ordinances of Louis XIV.

Inspired by the principles of the 1789 revolution, the lawyers and the lawmakers of the republican France wanted to provide an unitary civil law in order to unify the law practice in the new society.

The long debates and, finally, the adoption of the civil code in 1804 seemed to settle that first issue.

The new code gave little or symbolic space to the local customs. All the citizens were subject to these uniform rules which, at least theoretically, permitted more safety and predictability in the social transactions and, finally, unified the French nation.

However, it still remained the second issue to settle. What will happen to the commercial law inherited from the seventeenth century?

All these rules were also projected to unify the commercial customs in order to sustain the emergence of the national market and to grow the certitude and the predictability of the commercial transactions along the French kingdom.

In the post revolutionary age, the foreseeable option was to promulgate a new code – the *code de commerce* – which Napoleon did in 1807, at the climax of his imperial power.

It resulted that all the commercial law was in fact upgraded, modernized and set in the new code.

As the most of the energy was spent in order to elaborate a new civil code, a revolutionary one – and we know that Napoleon himself was more proud of it than of his military victories – in an historical era when the Enlightment movement had sustained the efforts towards codifications – the *Allgemeines Landrecht für die Preussischen Staaten* (ALR) was promulgated in 1794 and the Austrian *Allgemeines Bürgerliches Gesetzbuch* (ABGB) in 1812 – the code of commerce of 1807 appeared not as a sophisticated code which is destined to all citizens as the civil code was, but as a sectoral law in order to be use by traders which were still perceived – even the guilds were dissolved in 1791– as a distinct professional class.

Therefore, in this entire context, there is no reason to wonder that the sales contract was regulated in an extended and sophisticated way by the rules of the civil code of 1804.

Practically, the regulation of the contract was covered by 119 articles. In fact, that regulation was one of the most extensive in all the area of the specific contracts[1].

Anyway, the rules provided by the civil code which regarded the sales contract

[1] See art.1582-1701 and compare 1708-1831.

are common rules. They have to be applied in the material relations of the simple citizens but also in all other material relations which may imply the interference of a *commerçant*.

Hence, if the rules of the civil code were to be applied in this specific hypothesis – as was regarded the act of commerce – the authors of the code of commerce paid not much attention to the characteristic of the sales contract as an agreement which implies one or more traders and which can presume, on the whole, a specific regulation.

As a consequence, at that time seemed little to remain in order to regulate inside the code of commerce.

However, with the regard to the sales contract, there was an obvious exception to that conviction of the authors of the code of commerce. The code contains only one article which regulates a specific issue of the sales: the way to prove its existence.

The lawyers who elaborated the code were forced to recognize that despite the perfect and complete mechanisms of the civil code, there were some issues or at least one, that could be not regulated by the common law.

As we know by reading the civil code, in the frame of the title regarding the general regulation of the obligations, the sixth chapter – *De la preuve des Obligations et de celle du Paiement* – offered general rules regarding the modality of proving the contract and these rules were to be applied to the sales contract signed by the simple persons[2].

However, these rules couldn't be applied when the sales contract is a commercial one because it is obvious that the necessities of the trade are incompatible with the rigidity of the civil code.

Practically, the commercial activity can not develop respecting the formalities of the civil code.

Hence, if "public instruments of writing" or "instruments of writing under private signature" can be tools of proving, on one hand, there is no necessity to restrain the use of the "parole testimony", and on the other hand, there are a lot of ways to prove the existence of the duties that can not be use between simple persons as the notebook or memorandum of an exchange agent, an invoice or bill of parcels accepted, the correspondence of the parties or the books of the parties.

It seems that the obvious piece of the reality determined the authors of the code of commerce to impose specific rules on the matter.

As a consequence, the article 109 of the code, the single rule contained by the seventh title – *Des achats et ventes* –, disposed as follows: "Les achats et ventes se constatent:

- par actes publics,
- par actes sous signature privée,
- par le bordereau ou arrêté d'un agent de change ou courtier, dûment signé par les parties,
- par une facture acceptée,
- par la correspondance,
- par les livres des parties,
- par la preuve testimoniale, dans le cas où le tribunal croira devoir l'admettre".

In order to know if the contract was really a commercial sales the article 632 of the code emphasized the intermediary role of the buyer and the financial gain as main purpose of his action.

Hence, as a preliminary conclusion of our study, the French code of commerce of 1807 did not recognize in a visible manner the existence of a commercial sales as a variety of the sales contract between

[2] See art. 1316.

the commercial activities precised by the article 632.

3. The second phase: the emergence of the new concept – the commercial sales contract

Obviously, until 1815 the French private law was adopted in Rhineland, Belgium, and Holland or other provinces of the Napoleonic Empire, but also in other states like the Kingdom of Naples[3].

Not surprisingly the defeat of Napoleon didn't slow up the diffusion of the new codes.

In the postwar era, despite its origins, the French code of commerce served as a model and was adopted again in the frame of the new *Codice per lo regno delle Due Sicilie* (into force in 1819)[4] but also in Greece in 1835[5] and Wallachia in 1840, while in other countries it was upgraded and modified inside the process of modern codification.

During the same decades of the nineteenth century various reflections of the lawyers and other people involved in commercial transactions were taken in account and by 1830 the new projects couldn't be considered as simple reproductions.

From this point of view, the Spanish code of commerce – *el código de comercio* which was promulgated in 1829 and entered into force in 1830[6]–, emphasized really the frame of two concepts: the commercial contract and the commercial sales.

Its author, Pedro Sainz de Andino introduced a new title – *De compras e ventas comerciales* – which contains 26 articles.

Obviously, because the commercial law maintained its exceptional applicability, limited to specific commercial relations, the sales contract was to be regulated on principle by the civil law and if the civil law was unable to rule a specific hypothesis, the judges will apply if necessary the rules provided by the *código de comercio*.

Therefore, for the first time, at that moment we can consider that the frame of the commercial sales seemed to be complete.

First of all, the code establishes criteria to identify the commercial sales of goods: Pertenecen a la clase de mercantiles: las compras que se hacen de cosas muebles con ánimo de adquirir sobre ellas algún lucro, revendiéndolas bien sea en la misma forma que se compraron, o en otra diferente, y las reventas de estas mismas cosas (article 359).

On the contrary, according to article 360 it will be not considered commercial sales of goods:

"Las compras de bienes raíces y efectos accesorios a estos, aunque sean muebles.

Las de objetos destinados al consumo del comprador, o de la persona por cuyo encargo se haga la adquisición.

Las ventas que hagan los labradores y ganaderos de los frutos de sus cosechas y ganado.

Las que hagan los propietarios y cualquiera clase de persona de los frutos o efectos que perciban por razón de renta, dotación, salario, emolumento, u otro cualquiera titulo remuneratorio o gratuito.

[3] See Carnazza Puglisi, *Il diritto commerciale*, 45.
[4] See *ibidem*, 45.
[5] See *ibidem*, 73.
[6] See *ibidem*, 61.

Y finalmente la reventa que haga cualquiera persona que no profese habitualmente el comercio del residuo de acopios que hizo para su propio consumo. Siendo mayor cantidad la que estos tales ponen en venta que la que hayan consumido, se presume que obraron con ánimo de vender y, se reputarán mercantiles la compra y venta".

As many commercial sales are concluded in the absence of the goods the buyer's consent is under condition until the moment he can inspect the goods (article 361): En todas las compras que se hacen de géneros que no tienen a la vista, ni pueden clasificarse por una calidad determinada y conocida en el comercio, se presume la reserva en el comprador de examinarlos, y rescindir libremente al contrato, si los géneros no le convinieren.

More, "la misma facultad tendrá, si por condición expresa se hubiere reservado ensayar el género contratado".

On contrary, there is no such consent under condition if there is sample used as criteria and the goods are exactly as the sample: Cuando la venta se hubiere hecho sobre muestras, o determinando una calidad conocida en los usos de comercio, no puede el comprador rehusar el recibo de los géneros contratados siempre que sean conformes a la mismas muestras o a la calidad prefijada en el contrato (article 361).

As sometimes the time to delivery is crucial for buyer's business the last has the right to terminate the contract if the delivery is late: Cuando el vendedor no entregare los efectos vendidos al plazo que convino con el comprador podrá este pedir la rescisión del contrato, o exigir reparación de los perjuicios que se le sigan por la tardanza, aun cuando esta proceda de accidentes imprevistos (article 363).

If the parties did not establish a time to delivery, the seller will have to retain the goods at buyer's disposal at least 24 hours: Cuando los contratantes no hubieren estipulado plazo para la entrega de los géneros vendidos y el pago de su precio, estará obligado el vendedor a tener a disposición del comprador los efectos que le vendió dentro de las veinte y cuatro horas siguientes al contrato. El comprador gozará del termino de diez días para pagar el precio de los géneros; pero no podrá exigir su entrega sin dar al vendedor el precio en el acto de hacérsela (article 372).

Unfortunately, during the next decades the Spanish code did not influence the commercial codification in Europe except Portugal.

In Italy, for example the commercial code promoted by Charles Albert, king of Sardinia, remained under the influence of the French *code de commerce*. As a consequence, there is only one rule regarding the commercial sales – the article 118 – which establishes the ways to prove the existence of the contract.

Only in 1865, when the unity of the Italian state was achieved, in order to offer a new and modern an entire new regulation, the new king promoted a commercial code which was modernized.

Therefore, the commercial sales contract was, finally, regulated by a distinct text (article 95 to 105).

New institutions were added but, in fact, only the next commercial code of 1882 will offer an influential frame of the commercial sales contract.

Hence, the article 59 of the last code modifies the perspective of the French lawmakers by recognizing the validity of the *sale of other person's goods*: La vendita commerciale della cosa altrui é valida. Essa obbliga il venditore a farne l'acquisto e la consegna al compratore, sotto pena del risarcimento dei danni.

Secondly, the article 60 recognizes the validity of the sale without price if the

parties have established a way to settle later the price: La vendita commerciale fatta per un prezzo non determinato nel contratto é valida, se la parti hanno convenuto un modo qualunque di determinarlo in apresso.

They can choose a third person to settle the price – "la determinazione del prezzo puo essere rimessa all'arbitrato di un terzo eletto nel contratto o da elleggersi posteriormente" – and also, "la vendita fatta per il giusto prezzo o a prezzo corrente é pur valida; il prezzo si determina secondo le disposizioni dell'articolo 38".

The articles 62 to 65 are regarding the sales of goods that are transported on maritime ships but most important seems to be the entire article 68 which settle the rules to apply when the goods must be delivered at a precise moment and space and one of the parties will not participate to the delivery act.

Therefore, "se il compratore di cosa mobile non adempie la sua obbligazione, il venditore ha facolta di depositare la cosa venduta in un luogo di pubblico deposito, o, in mancanza, presso un accreditata casa di commercio per conto e a spese del compratore, ovvero di farla vendere.

La vendita e fatta al pubblico incanto o anche al prezzo corrente se la cosa ha un prezzo di borsa o di mercato, col mezzo di un pubblico ufficiale autorizzato a tale specie di atti, salvo al venditore il diritto al pagamento della differenza tra il prezzo ricavato e il prezzo convenuto, e al risarcimento dei danni.

Se l'inadempimento ha luogo da parte del venditore, il compratore ha diritto di far comprare la cosa, col mezzo di un pubblico ufficiale autorizzato a tale specie di atti, per conto e a spese del venditore e di essere risarcito dei danni.

Anyway, "il contraente che usa delle facolta sudette deve in ogni caso darne pronta notizia all'altro contraente".

A special rule is offered regarding the sales with an essential time to fulfill the obligation. According to article 69 "se il termine convenuto nella vendita commerciale di cosa mobile é essenziale alla natura dell'operazione, la parte che ne vuole l'adempimento, non ostante la scadenza del termine stabilito nel suo interesse, deve darne avviso all'altra parte nelle ventiquattro ore successive alla scadenza del termine, salvi gli usi speciali del commercio.

Nel caso suddetto la vendita della cosa, permessa nell'articolo precedente, non puo farsi che entro il giorno successivo a quello dell'avviso, salvi gli usi commerciali".

More, as an exception to the rules regarding the visible defects of the goods, the article 70 intervens and settles the issue: Il compratore di merci o di derrate provenienti da altra piazza deve denunciarne al venditore i vizi apparenti entro due giorni dal ricevimento, ove maggior tempo non sia necessario per le condizioni particolari della cosa venduta o della persona del compratore.

Egli deve denunciare i vizi occulti entro due giorni dacché sono scoperti, ferme in ogni caso le disposizioni dell'articolo 1505 del codice civile.

The necessity of regulate the commercial sales of goods was, finally, accepted even in some states which had not an authentic commercial code in the first half of the nineteenth century as Prussia or Austria.

Therefore, in 1861, the Diet of the German Confederation promulgated a General Code of commerce – *Allgemeine Deutsche Handelsgesetzbuch* – which entered into force the next years in the German states, including Austria in 1863 and retained an extended regulation of the commercial sales (articles 337 to 359).

Later, the new *Handelsgesetzbuch* (generally abbreviated as HGB) entered into force in 1900, by substituting the first, while in republican Austria it became compulsory after the *Anschluss* and was maintained from 1945 until now.

Thus, at the end of the nineteenth century the commercial sales – as a main institution inside the private law – was firmly consolidated.

4. The challenges of the twenty century

As it is obvious, the nineteenth century was in fact the century of the modern codification of the commercial law. Most of the states of the European continent had one or two successive codes and the intense scholar activity in this field contributed essentially to the improvements of the national regulations but also to the harmonization of the rules and principles despite the fact that at the beginning of the twenty century nobody could sustain there was an uniform commercial regulation even in the field of the sales contract.

A new trend in modernization seems to emerge on the eve of the World War One.

The Swiss lawmakers adopted two new codes: a civil one and a code of obligations.

For the first time in modern era, the distinction between civil law and commercial law disappeared and a real debate emerged between the lawyers in the interbellum period on the opportunity to follow this path.

Of course, Switzerland has non sea access so there was no need for a maritime commercial regulation, which is the most extended body of institutions in the commercial codes of the European nations, but the Swiss path appeared to be more adequate to our social relations simply by rejecting the exceptional characteristic of the commercial legislation.

In Italy, where the "fascist revolution" of the 1920' tried to be the vanguard of a new society, the debate produced finally a new civil code which entered into force in 1942. Most of the institutions of the commercial code – including the sales contract or the commercial societies – were literally absorbed by the new *codice civile* during the so called process of "commercialization of the civil law" – *commercializzazione del codice civile* – and were applied to all the subjects while the commercial maritime institutions were regrouped in the new *codice della navigazione*.

5. Conclusions

Up to now, it seems that there are two main streams in the process of modernization of the private law: one conservative, trying to preserve the existence of the Codes by adding new articles if necessary or new special laws – and France or Germany are perfect models – and another, innovative which integrate more or less in the new civil code the regulation removed from the commercial code by following the Swiss or Italian path.

At the end of the twenty century, or at the beginning of the twenty first century the Canadian province of Quebec and countries like the Netherlands, Brazil, and, recently, Romania embraced firmly that last tendency.

Despite the will to innovate and its real motivation, we must ask ourselves if this "commercialization of the civil law" does have real ground in our days.

It is not difficult, for instance, to remove the sales regulation from the commercial code and to place it inside the

civil sales frame, but all this reform does change reality?

In fact, most of these rules – which are really the fruits of a long experience – will be applied only in commercial relations just because there were created for this very context and not for ordinary civil contracts.

Secondly, when the special rules are to be applied only to professionals – as the Romanian civil code imposes sometimes[7]– the judge will have now again as preliminary task to establish if one of the parties has to be considered a "professional" in order to apply that specific or exceptional rule.

Practically, the reform didn't change the system because the social reality opposed naturally to such a "legal revolution".

As a consequence, in our case, on one hand, the will to unify the private law failed just because commercial rules were only moved in the new code in a strange way, and the establishing of the status is needed again in order to apply the proper regulation.

On the other hand, the reform failed just because its model was outdated. There is no unification in the Romanian private law if the consumer's legislation has to be considered a special one, distinct from the civil code (and I shall not add the absence of a maritime code which will permit the predictable long survival of the commercial code, a meaningless reality which let us be witnesses of the most paradoxal reform in European legal history).

Nevertheless, I shall not say that the unification is an utopian choice for the moment. But, in my view, the unification inside the private law must regard especially the absorption of the consumer's law and not of the commercial contracts regulation.

Finally, I think that the commercial sales law survived inside the new civil code and, in fact, it is completed by the regulation of the consumer's sales law.

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[7] See for instance articles 2010 and 2043 from the New civil code.

HARMONIZATION OF NATIONAL PROCEDURAL PROVISIONS CONCERNING THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Paul-George BUTA*

Abstract

This short paper looks at provisions concerning very specific aspects provided for at international, regional and national level and analyzes the level of harmonization between such. Given the importance of provisional measures (and especially of preliminary injunctions) for the protection of intellectual property rights, the provisions concerning this subject were the main focus of our analysis. Found in TRIPS, the EU IP Enforcement Directive and national Romanian statutory provisions, we've concluded that these are not directly applicable in disputes in Romanian courts and were therefore, as a result of multiple international obligations, supposed to be harmonized. We've looked at different aspects in parallel with the development of implementation mechanisms and found that, despite the aforementioned obligations, not even the Directive is fully TRIPS compliant, let alone the Romanian national statutory provisions. We've therefore concluded that, even if common sense would dictate that protection at more levels would equal more protection this is not necessarily true, given the fact that multiple harmonization requirements create more opportunity for divergent implementation results – influenced by either benign factors (different national legal traditions, different interpretations) or malign (lack of perspective and/or understanding, rush to implementation).

Keywords: *harmonization, intellectual property rights, provisional measures, preliminary injunctions, TRIPS, IP Enforcement Directive, procedures.*

1. Introduction

It is generally accepted that intellectual property is only protectable by legal means which makes the legal protection of intellectual property to be regarded as more valuable than its physical embodiment[1].

Without going into the details of it, we could shorthand legal protection in this case to mean the possibility of asserting a claim related to intellectual property rights against someone with a correlative duty to act (or abstain from certain acts)[2]. Therefore enforcement of intellectual property rights goes to the core of their value and is intrinsically linked with the very existence of such value.

There is no surprise therefore that provisions concerning the enforcement of intellectual property rights were inserted in acts existing at national, regional and international level.

Such provisions deal with both material and procedural aspects of the enforcement of intellectual property rights. Since for the purposes of comparison

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[1] Jeremy Phillips and Alison Firth, *Introduction to Intellectual Property Law*, 4th ed. (Oxford: Oxford University Press, 2006), 12-13.

[2] „legal right", Bryan A Garner (ed.) *Black's Law Dictionary*, 8th ed. (St. Paul: Thompson West, 2004), 1348

aspects of material law require a more comprehensive analysis (as they require, among other factors, that particularities of given legal systems be taken into account), for present purposes we will limit ourselves to provisions dealing with procedural aspects.

Of the procedural aspects dealt with at all levels, the ones dealing with provisional measures[3] (and especially preliminary injunctions) would appear to us as being the most salient in terms of the need of harmonization. We base this mainly (but not exclusively) on the following assumptions: (1) preliminary injunctions are the most effective tool for right-holders to maintain exclusivity, which in turn is the essence of intellectual property rights; and (2) preliminary injunctions are the first enforcement mechanism of choice since they provide relief on an urgent basis which in turn requires that foreign right-holders should be able to obtain such relief without engaging significant costs and time for researching local legal particularities in order to obtain such relief (which would no longer be reasonably fast and efficient, let alone effective).

For present purposes therefore we will focus on the procedural provisions dealing with preliminary injunctions.

The present article looks at the influences that such provisions have one on another in a unidirectional perspective, downwards from the international level in order to verify whether there is an obligation for harmonization and whether the provisions are indeed harmonized (and if so, to what extent).

We will first set out the provisions as found at the three relevant levels, analyze whether an obligation for harmonization exists in respect of the instruments where such provisions were found and, finally, check whether the provisions are harmonized (and, if so, to what extent) or not.

2. The provisions at the international level

At the international level we can note the reluctance to include procedural provisions in the WIPO-administered treaties though we can find general obligations imposed to this effect in article 2 par. (1) of the Paris Convention for the Protection of Industrial Property and in art. 15 of the Berne Convention for the Protection of Literary and Artistic Works.

More specific reference is to be found in articles 14 and 23 of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, respectively. Paragraph (2) of each of those articles indicates that „Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements".

The most detailed and complex provisions concerning preliminary injunctions for infringement of intellectual property rights are to be found however in TRIPS.

Section 3 of the third part of the treaty deals solely with provisional measures. Although the section only comprises one single article (art. 50), it is both comprehensive and self-sufficient. A proper

[3] Defined by the Court of Justice of the European Union in CJUE, *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v. Dresdner Bank AG* (C-261/90), decision of 26 March 1992 in ECR I-2149, par. 34 as "measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter".

analysis however would require that attention be also paid to the provisions in Section 1 of the same part, entitled „General Obligations".

In that sense, provisions under paragraphs 1 and 2 of art. 41 would also apply in respect of preliminary injunctions. These require that members of WTO ensure that enforcement procedures as specified in TRIPS: (1) are available; (2) to permit effective action against infringement rights covered by TRIPS; (3) are to include: (a) „expeditious remedies to prevent infringements" and (b) „remedies which constitute a deterrent to further infringements"; (4) are not applied so as to create barriers to legitimate trade; (5) provide for safeguards against their abuse; (6) are fair and equitable; (7) are not unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

Art. 50, however, contains the provisions most relevant to the scope of this article.

Paragraph (1) demands that judicial authorities have the power to „order prompt and effective provisional measures: (a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance; (b) to preserve relevant evidence in regard to the alleged infringement".

The second and fourth paragraphs deal with *ex parte* procedures and allow enforcement provisional measures to be taken *ex parte* „where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed" but with the express requirement that „the parties affected shall be given notice, without delay after the execution of the measures at the latest" and that „a review, including a right to be heard, shall take place upon request of the defendant" to decide, in a reasonable period of time, whether the provisional measures are to be modified, revoked or confirmed.

Paragraphs 3 and 5 deal with the standard of proof in such claims (judicial authorities are to be able to demand that the applicant provide „any reasonably available evidence in order to satisfy […] with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse" as well as "information necessary for the identification of the goods concerned by the authority that will execute the provisional measures".

As further safeguards against abuse par. (6) provides that provisional measures are to cease or be revoked if a claim on the merits is not filed within "a reasonable period […] not to exceed 20 working days or 31 calendar days, whichever is the longer".

Moreover paragraph (7) indicates that upon revocation, lapse or a finding of non-infringement or inexistence of a threat of infringement "the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures".

In respect of the provisions of art. 50 TRIPS it has been stated that these are to be analyzed as implementations of art. 41 par. (1) TRIPS' call for expeditious procedures[4]

[4] Sascha Vander „Article 50" in Peter-Tobias Stoll, Jan Busche, Katrin Arend (ed.) *WTO – Trade-Related Aspects of Intellectual Property Rights*, (Leiden: Martinus Nijhoff Publishers, 2009): 740.

and therefore any "delays and other domestic mechanisms endangering the effectiveness of provisional legal protection will thus cause concern to the extent that they cannot be justified by art. 41.5"[5].

Commentary of the provisions generally indicates that, as an effect of the provisional nature of the relief sought, such would only be justifiable where delay in imposing the measure would result in irreparable damage to the right-holder, where the measure would be warranted under a balance of convenience test and where there is considerable likelihood of a de facto infringement[6].

Also interestingly it has been argued that art. 50 TRIPS only applies "to the period after release by the customs authorities"[7] which would make the customs authorities' practice of allowing the continuing detention of seized goods subject to the mere lodging of a claim for interim relief questionable (the filing of a main claim for infringement of the right based on which the customs intervention was accepted being necessary). However, given that the provision of art. 50 par. (1) letter a) is merely exemplary, a wider interpretation could be allowed.

When read in conjunction with art. 50 par. (3) it is clear that the provision covers both actual and imminent infringements[8].

In order for measures to be taken *ex parte* there would need to be "special reasons" such as delay that would cause irreparable harm or a "demonstrable risk of evidence being destroyed" but „the presence of a special reason may in general be assumed to the extent that informing the defendant runs the danger of seriously impeding or excluding the enforcement of the claimant's IPRs"[9].

3. The provisions at EU level

At EU level the relevant provisions are included in Directive 2004/48 of 29 April 2004 on the enforcement of intellectual property rights.

The directive's preamble (par. (3)) indicates that "the means of enforcing intellectual property rights are of paramount importance for the success of the Internal Market" so as to underline the importance of these provisions.

Paragraphs (4) and (5) of the preamble mention the relationship with TRIPS provisions reminding that "all Member States, as well as the Community itself as regards matters within its competence, are bound by the Agreement on Trade-Related Aspects of Intellectual Property (the "TRIPS Agreement")" which "contains, in particular, provisions on the means of enforcing intellectual property rights, which are common standards applicable at international level and implemented in all Member States".

The preamble also indicates however that the "directive should not affect Member States' international obligations, including those under the TRIPS Agreement" and that the directive "does not aim to establish harmonized rules for judicial cooperation, jurisdiction, the recognition and enforcement of decisions in civil and commercial matters, or deal with applicable law".

The need for the directive has arisen, as par. (7) of the preamble indicates, since

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[5] Daniel Gervais, *The TRIPS Agreement, Drafting History and Analysis*, 2nd ed., (London: Sweet & Maxwell, 2003), par. 2.422 cit. in Sascha Vander „Article 50" in Peter-Tobias Stoll, Jan Busche, Katrin Arend (ed.) *WTO – Trade-Related Aspects of Intellectual Property Rights*, (Leiden: Martinus Nijhoff Publishers, 2009): 740, note 4.

[6] Sascha Vander „Article 50": 741.

[7] Idem.

[8] Idem: 742.

[9] Idem: 744.

"despite the TRIPS Agreement, there are still major disparities as regards the means of enforcing intellectual property rights. For instance, the arrangements for applying provisional measures, which are used in particular to preserve evidence, the calculation of damages, or the arrangements for applying injunctions, vary widely from one Member State to another. In some Member States, there are no measures, procedures and remedies such as the right of information and the recall, at the infringer's expense, of the infringing goods placed on the market".

Paragraph 22 underlines the necessity for provisions dealing with provisional measures in order to secure "provisional measures for the immediate termination of infringements, without awaiting a decision on the substance of the case", such measures being "particularly justified where any delay would cause irreparable harm to the holder of an intellectual property right". These would need however to be applied only in respect of act carried out on a commercial scale[10] (without prejudice to the possibility of Member States applying such measures also in respect of other acts).

Moreover the preamble indicates that such provisions are to observe the rights of the defense, to ensure "the proportionality of the provisional measures as appropriate to the characteristics of the case in question" and to provide "the guarantees needed to cover the costs and the injury caused to the defendant by an unjustified request".

The general obligation under art. 3 imposes that such measures are (1) available ("Member States shall provide"), (2,3) that they include measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights that are effective, proportionate and dissuasive, (4) are applied so as to avoid the creation of barriers to legitimate trade, (5) provide for safeguards against their abuse, (6) are fair and equitable and are not (7) unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

As mentioned in par. (7) of the preamble, one of the issues the EU legislator had taken with TRIPS related to the measures for the preserving of evidence.

Art. 7 of the directive therefore creates a uniform mechanism to address this.

Such measures may be requested even before the commencement of proceedings on the merits of the case by a party who has presented "reasonably available evidence to support his claims that his intellectual property right has been infringed or is about to be infringed". The court may order "prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information". Art. 7 (1) exemplifies such measures as the detailed description of the allegedly infringing products/services (with or without the taking of samples) and the physical seizure of the allegedly infringing goods (and also, where appropriate, of the materials and implements used in the production and/or distribution of these goods and the documents relating thereto).

Article 9 deals with provisional and precautionary measures and requires that courts in Member States may either (a) issue an interlocutory injunction intended to prevent any imminent infringement, (b) forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringement and/or (c) order the seizure or delivery up of the goods suspected of

[10] Defined as acts "carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end-consumers acting in good faith" – par. (14) of the preamble.

infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.

An injunction as under (a) or (b) above can be entered also against an intermediary whose services are being used by a third party to infringe an intellectual property right (however the directive indicates that "injunctions against intermediaries whose services are used by a third party to infringe a copyright or a related right are covered by Directive 2001/29/EC".

In addition to the above, where the alleged infringement is committed on a commercial scale, Member States must ensure that courts can, where the "injured party demonstrates circumstances likely to endanger the recovery of damages", order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets (to which end "competent authorities" can order the communication of bank, financial or commercial documents, or appropriate access to any such relevant information.

Just as in the case of claims for the securing of evidence, in claims for provisional measures provided by art. 9 the court may ask that the right-holder provide any reasonably available evidence as to the alleged infringement or such imminent infringement. In addition to this, in claims for provisional measures the directive specifically allows courts to demand that the right-holder furnish reasonably available evidence so as to satisfy the court with a sufficient degree of certainty that the applicant is the right-holder.

The directive provides that any of the measures mentioned above could be taken *ex parte*, "in particular where any delay is likely to cause irreparable harm to the right-holder" or, in the case of measures to secure the preservation of evidence, "where there is a demonstrable risk of evidence being destroyed". In such cases the "affected parties" shall be given notice of the measures taken at the latest immediately after execution of the measures. Moreover such parties are entitled to an *inter partes* judicial review "within a reasonable period after the notification of the measures" so as to determine whether the measures are to be modified, revoked or confirmed.

Moreover, in respect of any of the measures indicated, the directive provides that any such measure taken is to be revoked or ceases to have effect, upon request of the defendant, where the applicant does not institute court proceedings leading to a decision on the merits within a period to be determined by the court instituting the measures but not longer than the longest of either 20 working days or 31 calendar days.

Also in respect of any of the measures mentioned above, the directive allows (but does not require) the courts to make the measures subject to the right-holder lodging "equivalent security or an equivalent assurance" in order to compensate the defendant for any prejudice suffered should the provisional measures be revoked, lapse due to any act or omission by the right-holder or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right.

In such cases moreover the courts must have the authority to "order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures".

When comparing the provisions of the directive with those of TRIPS we can observe some differences, such as: the types of measures such as those enumerated by art. 7 par. (2-4) of the directive are not

indicated in art. 50 TRIPS[11], the possibility to forbid the continuation of the alleged infringement by lodging of guarantees[12], the possibility of freezing assets[13].

4. The provisions at the national level

Article 978 of the Romanian Code of Civil Procedure provides that the interim measures provided therein and concerning interim measures for the protection of intellectual property rights apply in respect of both patrimonial and non-patrimonial rights (if concerning intellectual property) and that article 255 of the Romanian Civil Code provides interim measures for "other non-patrimonial rights".

The interim measures that can be requested of the court are provided for by article 979 of the Code of Civil Procedure and generally relate to a claim that the court provisionally order the forbidding or the provisional cessation of the alleged breach of an intellectual property right (article 979, letter a)) and/or the securing of evidence (article 979, letter b)).

Although not expressly provided, as in the case of the 2nd thesis of letter a), pursuant to the first thesis, the forbidding of an infringing act can be ordered only provisionally, for a period of time precisely determined, this being of the essence of the provisional measures and the procedure of the presidential ordinance by which such measures are to be ordered.

This measure thus aims at provisionally forbidding the perpetration of the illicit action, if such action is imminent, while the forbidding for the future of the illicit action, which has already started and continues, makes the object of the measure provided by the 2nd thesis.

With respect to the provisional measures for the securing of evidence, provided by art. 979 paragraph (2) letters a) and b), these are those that the legislator considered as being the most frequent and useful for the provisional protection of the intellectual property rights and that is why it stipulated that the courts may order them "especially", therefore not exclusively. Consequently, the claimant may request, and the judge may order, the taking of provisional measures other than those expressly provided for in the statutory provision.

With respect to the conditions that need to be met in order for such interim relief to be granted, three such conditions are normally identified within the provisions of art. 979 par. (1) of the Civil Procedure Code: (1) that the claimant make credible proof of the fact that his intellectual property rights are the object of an illicit action. This means that the claimant has to prove both the act of breach of his intellectual property right and its illicit character[14]; (2) that the illicit action be either actual or imminent, only in this case the urgency for the taking of the provisional measures being justified. The mere evidencing of the actual or imminent character of the act is enough to show urgency since, where there is an express legal provision allowing such measures by way of presidential ordinance – as in this case – the court must no longer verify such condition, such being presumed by effect of law; and (3) the existence of a risk that the

[11] Although they are considered to be of the kind had in mind when enacting the provisions - Sascha Vander „Article 50": 742.

[12] Danny Friedmann, "The Effects of the Enforcement Directive on Dutch patent law. Much Ado About Nothing?", http://ssrn.com/ abstract=1706070: 22

[13] Idem: 23.

[14] Mihaela Tăbârcă, *Drept procesual civil*, vol. II, (Bucureşti: Universul Juridic, 2013), 713-718.

illicit action causes a prejudice difficult to recover. There needs to be a show of imminent harm (i.e. even one that has not yet occurred yet but will certainly occur, if the circumstances presented by the claimant do not change) but such damage does not include damage that is only possible. In respect of the possibility to repair such harm, the law does not require that such damage be impossible to repair but only that it be repaired with difficulty.

Par. (3) of art. 979 provides some supplementary conditions for the taking of provisional measures where damage is caused by means of the written or audio-visual press. In such cases the court can't order the provisional cessation of the prejudicial act unless: a) the damage caused to the claimant is severe; b) the act is not a clearly justified act in accordance with the provisions of art. 75 of the Civil Code; and c) the envisaged measure is not disproportionate as to the damage it causes.

The procedure for taking the provisional measures for the protection of intellectual property rights is provided by article 979 of the Code of Civil Procedure[15] where par. (4) provides that "*The court settles the request in line with the provisions concerning the presidential ordinance, which apply accordingly*".

Consequently, for taking such provisional measures, the court will apply the provisions regarding the special procedure of the presidential ordinance (art. 997 – 1002 of the Code of Civil Procedure), although these are to be applied only where they do not contradict (or as long as they "correspond") to those of art. 978-979.

Mention must be made of the fact that art. 999 of the Civil Procedure Code provides that the claim for interim relief is to be judged with the summoning of the respondent and with the providing for the respondent of the possibility to file a statement of defense. However, paragraph 2 of art. 999 provides that, upon receipt of the claim for interim relief the court may, in situations deemed as special emergencies by the court, order that the claim be ruled upon without summoning either of the parties and that the court may rule on the claim in chambers, relying solely on the claim as filed, on the very day the claim is filed.

5. Harmonization with TRIPS at EU level

Although the harmonization of national legislations of EU Member States in order to match the level of protection provided by TRIPS was indicated as one of the goals of the IP Enforcement Directive[16], there were eminent voices that indicated that the EU Member States were already bound to respect those rules[17] and that, prior to proposing the directive, the EU Commission did not undertake any study to suggest the EU Member States did not[18].

The issue of the effect of TRIPS on EU law was analyzed by the Court of Justice in its Opinion of 15 November 1994 regarding the competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty[19].

[15] Mihaela Tăbârcă, *Drept procesual civil*, vol. II, (Bucureşti: Universul Juridic, 2013), 745-761.

[16] Par. (7) of the preamble of the Directive.

[17] As a result not only of their own WTO membership but also as a matter of Community law since the EU was itself a member of the WTO.

[18] William R. Cornish, Josef Drexl, Reto Hilty and Annette Kur, "Procedures and Remedies for Enforcing IPRs: the European Commission's Proposed Directive", *E.I.P.R.* 25 (2003): 447.

[19] Opinion, 1/94, EU:C:1994:384, paragraph 102-103.

There the Court has indicated that: "Some of the Governments which have submitted observations have argued that the provisions of TRIPs relating to the measures to be adopted to secure the effective protection of intellectual property rights, such as those ensuring a fair and just procedure, the rules regarding the submission of evidence, the right to be heard, the giving of reasons for decisions, the right of appeal, interim measures and the award of damages, fall within the competence of the Member States. If that argument is to be understood as meaning that all those matters are within some sort of domain reserved to the Member States, it cannot be accepted. The Community is certainly competent to harmonize national rules on those matters, in so far as, in the words of Article 100 of the Treaty, they 'directly affect the establishment or functioning of the common market'. But the fact remains that the Community institutions have not hitherto exercised their powers in the field of the 'enforcement of intellectual property rights', except in Regulation No 3842/86 [citation omitted] laying down measures to prohibit the release for free circulation of counterfeit goods. It follows that the Community and its Member States are jointly competent to conclude TRIPs".

Later, in *Dior*[20] and *Merck Genéricos*[21], the Court has decided that it itself can, despite the separation of competences mentioned in Opinion 1/94, decide on the interpretation of art. 50 TRIPS even for rights not having been the subject of harmonization.

Moreover the Court has held that, in principle, "the provisions of TRIPs, an annex to the WTO Agreement, are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law", however, inasmuch as art. 50 of TRIPS contains procedural provisions, which are „ intended to be applied by Community and national courts in accordance with obligations assumed both by the Community and by the Member States", in the case of „a field to which TRIPs applies and in respect of which the Community has already legislated, as is the case with the field of trade marks, it follows from the judgment in *Hermès*, in particular paragraph 28 thereof, that the judicial authorities of the Member States are required by virtue of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPs. On the other hand, in a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50(6) of TRIPs or that it should oblige the courts to apply that rule of their own motion"[22].

[20] CJEU, *Parfums Christian Dior SA v TUK Consultancy BV* and *Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV* (joined cases C-300/98 and C-392/98), decision of 14 December 2000 in *ECR* 2000-I, p. 11307.

[21] CJEU, *Merck Genéricos - Produtos Farmacêuticos Ld[a] v Merck & Co. Inc. and Merck Sharp & Dohme Ld[a]* (C-431/05), decision of 11 September 2007 in *ECR* 2007-I, p. 7001.

[22] CJEU, *Parfums Christian Dior SA*, par. 44-48.

In what procedural provisions related to the interim protection of intellectual property rights there was, at first sight, a distinction to be made, when analyzing the utility of a directive, between the fields where there was prior harmonization and those where there was none. This means that the directive would have been useful in its harmonization aim, for those fields where there was an uncertainty as to the level of direct effect of TRIPS (were there no national provision to enable direct effect of the provisions in national law). In such cases, harmonization by means of the directive would have achieved the same result on account of the Member States' obligation to transpose the directive into their national law.

Objections raised by Cornish in that there was no prior analysis to this effect would still be valid nonetheless.

Despite the above the directive set out to secure a "TRIPS-plus" harmonization[23], an example of such being the mandatory right of information (which was optional under art. 47[24] or 50 par. (5) of TRIPS)[25].

Massa and Strowel have argued that this TRIPS-plus harmonization was diluted by the TRIPS-minus scope (making the remedies available just for infringements on a commercial scale)[26] even though the directive leaves Member States free to extend those remedies to other situations as well.

It is this last aspect that for Massa and Strowel the national legislator was to overcome by its approach in implementation. The authors have suggested that a commutative approach (which would mean enacting an umbrella law on procedures and remedies for all IPRs) was preferable to a distributive approach (which would mean interspersing amendments in each IPR law)[27].

6. Harmonization at national level

In Romania there has been little research on the compatibility of the national provisions with TRIPS[28] but significant effort has gone into analyzing the implementation of the EU IP Enforcement Directive[29].

[23] European Commission Press Release IP/03/144 and Explanatory Memorandum at p. 12 et seq. cit. in Charles-Henry Massa and Alain Strowel, "The Scope of the Proposed IP Enforcement Directive : Torn between the Desire to Harmonise Remedies and the Need to Combat Piracy" in *European Intellectual Property Review*, 26 (2004): 246, note 23.

[24] Cornish, Drexl, Hilty and Kur, "Procedures and Remedies": 449, note 4.

[25] See also Violeta Vişean, „The Implementation of Directive 2004/48/EC in Romania" in *Revista Română de Dreptul Proprietății Intelectuale*, 4 (2009): 147.

[26] Massa and Strowel, "The Scope of the Proposed IP Enforcement Directive": 246.

[27] Idem: 252.

[28] Liliana-Zoleta Köröşi, „Admisibilitatea ordonanței preşedințiale în materia proprietății industriale" in *Revista Română de Dreptul Proprietății Intelectuale*, 3 (2005): 81-113; Vişean, „The Implementation of Directive 2004/48/EC in Romania": 155-156.

[29] Octavia Spineanu-Matei, "Apărarea drepturilor de proprietate intelectuală. Compatibilitatea legislației românești cu directiva 2004/48/EC a Parlamentului European și a Consiliului din 29 aprilie 2004" in *Revista Română de Dreptul Proprietății Intelectuale*, 2 (2005): 43-57; Bucura Ionescu, „Ordonanța de urgență nr. 100/2005 privind asigurarea respectării drepturilor de proprietate industrială. Nou instrument juridic de combatere a fenomenului de contrafacere în România" in *Revista Română de Dreptul Proprietății Intelectuale*, 4 (2005): 73-81; Mihaela Ciocea, „Considerații privind transpunerea prevederilor Directivei nr. 2004/48 în legislația românească" in *Revista Română de Dreptul Proprietății Intelectuale*, 4 (2006): 59-66; Alina Iuliana Țuca, „Instanța competentă să dispună măsuri de conservare a probelor, măsuri provizorii și de asigurare în materia drepturilor de proprietate industrială" in *Revista Română de Dreptul Proprietății Intelectuale*, 1 (2008): 47-65; Vişean, „The Implementation of Directive 2004/48/EC in Romania": 140-186

It has been argued[30] that the national provisions, before implementation of the Directive, being already aligned with the provisions of the European act, were more favorable than the provisions of TRIPS in that they made the payment of security for the covering of the eventual liability of the respondent optional at the behest of the court, rather than mandatory as under TRIPS[31].

Köröşi has also shown that the provisions of art. 50 par. (4) and (6) TRIPS were not transposed in Romanian law[32] thereby making the Romanian provisions even more favorable to the right-holder[33].

She has however argued that this disadvantage (which is also at odds with the provisions of art. 9 par. (5) of the Directive) is mitigated by the direct effect of TRIPS provisions in Romania[34].

Nonetheless, the Romanian legislator has finally opted for an apparently "commutative" approach to implementation of the Directive by adopting a stand-alone Emergency Government Ordinance (no. 100/2005) which is, as some commentators have suggested, a translation of the Directive[35]. The same author declared that, contrary to Massa and Strowel, a distributive approach would have been preferable.

The scope of the implementation act is however different than that of the Directive since the EGO applies only to industrial property rights while the Directive applies to intellectual property rights. The fact that the Romanian legislator has excluded copyright and related rights from the scope of the Directive implementation act would have been, however, appreciated by Massa and Strowel[36]. Implementation in respect of copyright has however occurred by a distributive approach implemented by means of Emergency Government Ordinance no. 123/2005[37]

Ciocea argues[38] that the imposition, by means of art. 7 of EGO 100/2005 of the lodging of security for the compensation of the defendant the Romanian legislator has gone beyond the scope of the Directive (though, as seen above, such an approach had been recommended by Spineanu-Matei in order to secure compliance with TRIPS).

The implementation act is further criticized as being too broad and not providing express procedures that would properly implement the provisions of the Directive[39].

Ionescu argues that the provisions of EGO 100/2005 do not contravene TRIPS but do go further than TRIPS in providing for the right-holder (thus being seen as TRIPS-plus) in that they allow for the measures to be taken against not just the alleged infringer but also intermediaries, that they provide for a right of information, that the measures can be taken before a claim for infringement is filed and that they

[30] Köröşi, „Admisibilitatea ordonanței președințiale în materia proprietății industriale": 91.

[31] Spineanu-Matei argues that the provisions of the Directive would require the court to order the lodging of a security before ordering a measure to secure evidence - Spineanu-Matei, "Apărarea drepturilor de proprietate intelectuală": 50; We disagree with this interpretation.

[32] Köröşi, „Admisibilitatea ordonanței președințiale în materia proprietății industriale": 106-107.

[33] Spineanu-Matei, "Apărarea drepturilor de proprietate intelectuală": 50-51, 54-55, 56.

[34] Idem: 108.

[35] Ciocea, „Considerații privind transpunerea prevederilor Directivei": 60.

[36] Massa and Strowel, "The Scope of the Proposed IP Enforcement Directive": 249-250.

[37] Vișean, „The Implementation of Directive 2004/48/EC in Romania": 153-154.

[38] As does Ionescu, „Ordonanța de urgență nr. 100/2005": 77.

[39] Ciocea, „Considerații privind transpunerea prevederilor Directivei": 63.

provide for the possibility of asset freezing[40].

Ionescu importantly points out that the implementation act provides for the annulment of the measures where there is no claim on the merits filed within 20 working days or 31 calendar days, whichever is the longest, thus filling a gap in harmonization with both TRIPS and the Directive[41].

Another fault identified with the implementation act was the lack of clarity in respect of the court having jurisdiction to instate such measures, which made the procedures provided for even more reliant on the common procedures provided for by the Code of Civil Procedure[42].

Finally, with the new Code of Civil Procedure, the provisional measures were harmonized across the intellectual property right spectrum by reducing all special provisions to a reference to the procedures provided by the Code of Civil Procedure[43].

With this new development some of the aspects previously objected to were corrected – e.g. the lodging of security was again made optional, to be left to the discretion of the court.

However, since the 'special' provisions in the Code of Civil Procedure still reference the common provisions regarding the procedure for the presidential ordinance (still in the same Code of Civil Procedure but under a different heading) while only mentioning that the common provisions are to apply "accordingly", there is even more uncertainty as to the conditions to be met by a claim for such measures, the court having jurisdiction and the application of other 'common provisions' in the Code of Civil Procedure such as the 20% cap on the security to be lodged (which is generally provided for by the Code for all the cases where the law does not specifically provide an amount).

7. Conclusions

The present short article underlines a paradox in the enforcement of intellectual property rights: although providing for protection of these rights (which is paramount for their existence, which in turn is essential for the current state of the world economy and life in general) at multiple levels is meant to insure better enforcement, in fact the multiple obligations to harmonize, the uncertainty of direct effect (or direct horizontal effect) and the differences in existing national legislation and legal traditions transform even genuine harmonization efforts into opportunities to uneven the scales even more, creating significant differences in the level and efficiency of enforcement of intellectual property rights.

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[40] Ionescu, „Ordonanța de urgență nr. 100/2005": 75-76.
[41] Idem: 78-79.
[42] Țuca, „Instanța competentă să dispună măsuri": 59-60.
[43] For a general analysis see Ligia Cătuna, "Procedura măsurilor provizorii în materia drepturilor de proprietate intelectuală din noul Cod de procedură civilă. Prezentare generală" in *Revista Română de Dreptul Proprietății Intelectuale*, 4 (2012): 63-72.

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APPROPRIATING CREATIVE WORKS PROTECTED BY INTELLECTUAL PROPERTY RIGHTS

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Abstract:

The ownership, either public or private, is an expression for appropriating goods. Consequently, the appropriation takes the form of private (i.e. private property) and common forms (i.e. public property). The common law property defines appropriation as „a deliberate act of acquisition of something, often without the permission of the owner", but the intellectual property rights do not protect goods. Particularly in this case „the object" of appropriation does not represent a „res nullius" simply because the intellectual property right arises from the act of creation, therefore the appropriation of somebody else's creation becomes equivalent with stealing (plagiarism). Consequently, if we are to admit that the authors have a right of ownership over them, then ownership in intellectual property law has (it must have) other manifestations than those known and accepted in the common law of property.

Keywords: *appropriation, goods, intellectual rights, property, authors.*

1. Difficulty of properly qualifying intellectual property rights and its consequence on the „ownership" and control over intellectual creations

Trying to determine and clarify the legal nature of the rights the authors have over their intellectual creations, we should firstly consider the concept of „appropriation" and treat it with special attention. First of all we should draw attention to the fact that most of lawyers/jurists use the concept as a default one, not taking into consideration any particular explanation or demarcation. This comes from the customary use of „appropriation" in the common law of property. However, considering „ appropriation" within the frame of the special right of authors over their intellectual creations, we must delineate special uses of the concept.

Accordingly, „intellectual property law" is seen as a particular kind of law because its nature is difficult to be determined and stated categorically despite the fact that it has been enshrined as such in both conventional law and legal systems of the countries in continental Europe. The intellectual property law is still referred to as controversial as long as disputes relating to it have never ceased or been exhausted not even nowadays - neither in terms of recognizing its existence, legitimacy and necessity, nor in terms of its legal nature. There are opinions that it should not be recognized at all for the reason that copyright is the enemy of access to information and knowledge and, therefore, is an enemy of freedom[1].

From its early beginning, in France, the country that speaks and writes the most

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[1] This is the case of The Libertarians, The Pirate Party in Germany and the Nordic Countries, but also of many challengers, quite vocal lately, supporting the current known as „copyleft", in opposition to copyright, as shown.

about it, copyright was considered among the rights of property, even if it was referred to as a particular kind of property, different than the concept of property which the common law deals with[2]. Meanwhile, this status came to be denied by jurisprudence[3], in order to reaffirm it again nowadays, quite categorically[4]. However, since there are cases when the Contemporary French doctrine still challenges this qualification, most often than not the current doctrine qualifies intellectual rights of the authors as property rights.

It is worth mentioning the contribution of those specialists that considered the rights of the authors over their intellectual creations as property rights, apart from the real estate property rights and obligations; moreover, their attitude must be positively assessed as they had that perspective on copyright long before the adoption of the first international convention (in 1883) which was to consecrate the concept of „industrial rights". Thus, in a paper edited in 1874, entitled „***Embriologie juridique***", the Belgian lawyer Edmond Picard proposed the establishment of a new category, that of „intellectual rights", without being able neither to impose his opinion, nor to determine the adoption of a such legislative solution, not even in his own country, despite the reputation he enjoyed.[5] As a consequence, the Belgian law of copyright (1886), which is a rigorous application of the „intellectual property rights", does not use the concept advanced by Picard. They preferred instead the term „property" in order to denote the rights of authors, inventors or mark holders and not the one proposed by the above mentioned specialist. However, Edmond Picard continued criticizing the theory that assigns the nature of property rights to copyright, on the ground that „the desire to enter by force, hammering these new rights in the category of real estate rights is certainly a scientific heresy"[6].

Anyway, it is within the boundaries of the scientific research ethics to assign authorship of this idea to the one that used it first, while admitting that this matter had been previously tackled in similar terms long before Picard; for example, in a study

[2] Le Chapelier, in its report to the Law of Representation, on the 17th of January 1791, referred to the intellectual right as "**A property of a kind quite different from other properties**"; more than that, even the authors of the French Civil Code of 1804 avoided to regulate about this kind of property in their monumental legislative work - the reasons for this state of facts being understandable.

[3] For example, in a Decision of the Court of Cassation in France (the case of Grus, Sirey, 25 July 1887) it was recorded that „the rights of the author and the monopoly which they confer are unjustly designated as *property*, either in common language or in legal parlance". Therefore, the Court stated that, „far from being that kind of property similar to the one the Civil Code defined and regulated for the movable and immovable goods, the copyright gives the holders the exclusive privilege of a temporary use and interest. This monopoly over interests and exploitation include the right of reproduction and selling copies of the work and is regulated by law, making it subject to international conventions, as well as the right resulting from the realization of inventions, industrial designs or trademarks which constitute what is known as industrial property". The problem to which judges had to answer at that time was whether or not the President of the Republic was competent to conclude commercial treaties by himself (Article 6 of the Constitution of 1852) as a consequence of the issue of copyright, or if, because it was ownership, the competence was shared with the Parliament.

[4] It is worth noticing that in France jurisprudence had a great influence over categorizing the intellectual rights of the authors; denying their legal nature and reconsidering the authors' rights over intellectual creations as property rights, is a Praetorian work to a large extend.

[5] Edmond Picard (1836-1924) was a lawyer, Professor at the Free University of Brussels, where he had as a PhD Candidate a Romanian (Matila Ghyka, who defended his thesis in 1909); he is also known as writer, publicist, and Senator of the Belgian Socialist Party. He was one of the most esteemed Belgian specialists in "intellectual property" rights.

[6] Andree Puttemans, *Intellectual property rights and unfair competition*, (Bruxelles: Bruylant, 2000), 21.

(1869) belonging to Alfred Bertauld, professor of civil law at the University of Caen. Consequently we must say that, at the time these theories were formulated, the term „intellectual property" had not been enshrined in international conventions yet – i.e. the Paris Convention of 1883 protecting the „industrial property" and the Berne Convention of September 9, 1886 dealt with the „Protection of Literary and Artistic Works" without qualifying in any way the rights of the authors. The term „intellectual property" was to be fully recognized (internationally) once the Stockholm Convention of 1967 was adopted for the establishment of the World Intellectual Property Organization.

The same attitude (namely, denying the property nature of copyright), can be traced in the past centuries with other practitioners, such as A-Ch. Renouard, H. Desbois and P. Olagnier in France and J. Kohler and I. Kant (the latter of philosophical positions) in Germany.

Auguste-Charles Renouard, for example, criticized those opinions qualifying authors' rights as property rights, stressing the need to maintain a fair balance between the public interest and the interest of the author, while highlighting that recognition of a property right in favour of the authors does not necessarily weigh in their favour, except as a (sacred) right to reward. Thus, Renouard said: „*The author is entitled to receive from the public/society a fair price for his service*", considering that the price is an equivalent for „*the exclusive right of reproduction*". Further on, he considered that „*the immaterial world is, by its nature, rebellious to the jealous use that property involves*" because „*thinking is, by its nature, impossible to be appropriated*". We must never forget that Renouard was the one who advanced the term „copyright" as a set of prerogatives of authors and, besides that, he had an important contribution in affirming the importance of moral rights of authors! The same attitude is to be traced at Proud'hon.

Closer to modern times, Paul Olagnier, after the adoption of the Berne Convention in 1886, argued that the property right of authors can be imagined only for undisclosed works, while Henri Desbois supported, in turn, that „free public access to any creation contradicts the exclusiveness of *usus* when considering ownership".

Immanuel Kant[7] (addressing the same issue on philosophical premises, this time), discussed the relationship author/editor, on the one hand, and the relationship author/consumers, on the other hand, calling for „personal rights" of creation, awarded to the publisher not to the author, as expected, in opposition to „real rights" of the material work. Kant analysed therefore copyright as a personal right, as opposed to ownership of the tangible goods. According to the theory developed by Kant, intellectual work is a discourse that the author sends to the public by means of language, so that any impairment of the work itself represents, in fact, impairment of the author's personal rights. Kant's perspectives on „personal rights" made J. Kohler say that the „personal doctrine" (of copyright) „is the bastard child of a genius who was unfamiliar with the legal system."

Many authors have considered these „personal rights" as monopoly rights, or the rights of customers, while others determined them as rights of intangible assets, or as exclusive rights (Romanian legislative system adopting this perspective), all of which are rather

[7] Kant's reputation, not only in his hometown, Königsberg, today Kaliningrad, but in Prussia as well, was so great that it caused a whole industry of copyists to meet numerous requests of granting access to his courses purchased through his students.

preoccupied to clarify the content of this particular right than to identify its legal nature.

Thus (considering only the most important Romanian laws on the matter):

- According to art. 1(1) of Law no 8/1996 on copyright and related rights, „copyright vests in the author and embodies moral and patrimonial attributes" (similar to the complex/dual rights, not to the property rights);
- According to art. 31 of Law no 64/1991 on patents, „the patent gives its owner the exclusive right to exploit the invention over its term";
- According to art. 36 of Law no 84/1998 on trademarks and geographical indications „trade mark confers to its holder an exclusive right on the mark";
- According to art. 30 of Law no. 129/1992 on the protection of designs „for the entire duration of the design registration, the holder has the exclusive right to use and to prevent their use by third parties not having his consent".

The reasons why the Romanian legislature adopted this solution are difficult to decipher. Our opinion is that one of the possible reasons why Romanian legislator didn't qualify this particular kind of rights as ownership could be the difficulty in considering them as such owing to the particular characteristics of intellectual creations which confer upon them features that differentiate between them and common law property and make them goods with characteristics requiring a distinct legal regime.

Taking for example concepts like appropriation and the ratio of appropriation, we can see that they are crucial in the common law of property, because the rapport of appropriation creates appropriation. Therefore, our attention is focused on analysing the case of intellectual creations, where, as we have already seen, the Romanian legislator avoided systematically qualifying them as property rights.

2. Common law property and the appropriation of goods/assets in common law

2.1. Appropriation. General terms

The meanings of the term „appropriation" (Late Middle English: from late Latin *appropriatio(n-*), from *appropriare* 'make one's own'), as it is used in common law of property, should not generate confusions as they are used as such for a long period of time. Such definitions are: „The act of taking something for your own use, usually without permission"[8] or „The action of appropriating something: *dishonest appropriation of property.*

The real question here is to what extend the „appropriation" is important for the common law of property? The answer is: extremely important! Because the appropriation rapport is the key point that generates „property rights". Moreover, the common law of property approaches the concepts of „ownership" and „property" as implicitly understood: there can be no property, at least in the classical sense of the term, without an appropriation act, the rapport of appropriation creating appropriation.

Appropriation of property by the right-holder is the act which excludes or deprives others of having free access to the same asset.

As a subjective representation, the concept of property - complex concept with

[8] http://dictionary.cambridge.org/dictionary/british/appropriation - ! citatele trebuie in formatul indicat pe pagina asta de Internet: http://www.chicagomanualofstyle.org/tools_citationguide.html

historical, philosophical, sociological, and legal meanings as well - is the result of a long evolution of legal thinking in the continental law system and is constantly evolving. Therefore, in all times and in all systems of law, appropriation was and still is the legal act through which an asset (unassigned or belonging to another) is possessed; the act or fact that creates property. As a consequence, we may say that it can be no property right in the absence of appropriation.

Appropriation of assets/goods, says Valeriu Stoica*, initially manifested as simple possession, a possession which then founded the subjective religious and juridical representations reflecting the reality of this appropriation.* Both private and public property is an expression of private property, respectively a communitarian appropriation of property. Private appropriation is more than just the individual possession of the goods (personal property) and community ownership does not include any form of joint or collective possession of the goods. The relation private appropriation vs common appropriation of goods is governed, in a liberal society, by the principle of private property development[9].

Professor Valeriu Stoica, whose work we have referred to above, makes a categorical distinction between tangible and intangible assets referring to the possibility of their appropriation. Thus, he argues that „things ONLY can be appropriated, but not everything can be appropriated"; likewise, he considers that „in contradistinction to tangible goods, which are naturally likely to be appropriated, intangible assets can be appropriated only if there is a law authorizing such. In other words, in order for a tangible asset not be appropriated, a specific prohibition of the law is needed, while an incorporeal property can only be appropriates if there is a law authorizing such"[10].

The above mentioned Romanian jurist states, however, like many French jurists, that the concept of property is flexible enough to include intellectual property rights. Still we cannot but find that the Romanian legislator described the rights of authors over their creations differently, either as complex rights in relation to original creations protected by copyright, or as exclusive rights in relation to new and utilitarian creations.

Under these conditions, can we state, against the law and the qualification of these rights by special laws that the authors' rights over their creations still have the legal nature of property rights? The answer may be yes, if and only if we equate between complex rights and property rights, on the one hand and / or between the exclusive rights and property rights, on the other hand; on condition that we find all the attributes of property rights governed by special laws.

2.2. The object of private property rights / public property rights. Methods of appropriation

The first question we have to answer nowadays is: what are the objects of property rights and which forms do they take in common law? This information is to be found in The New Romanian Civil Code: art. 553 and 557 referring to assets, objects of private property rights, respectively, art.

[9] Valeriu Stoica, *Drept civil. Drepturile reale principale*, (Bucureşti: Humanitas, 2004), 15.

[10] Valeriu Stoica, *Drept civil*, 15 - *„spre deosebire de bunurile corporale, care sunt în mod natural apropriabile, bunurile incorporale devin apropriabilenumai cu autorizarea legii. Altfel spus, pentru ca un bun corporal să nu fie apropriabil este nevoie de interdicţie a legii, în timp ce un bun incorporal devine apropriabil numai dacă există o autorizare a legii*".

858-859 and art.863, referring to public property.

Thus, according to art. 553 NCC, „All the assets of private use/interest belonging to either individuals, or legal persons (private or public), including assets that make up the private domain of the state and territorial administrative units, represent the object of private property"[11]. The definition seems broad enough to include intellectual creations among the „objects" the text of the law refers to, assuming that intellectual rights over creation have the legal nature of property rights as real rights.

With reference to the object of public property, art. 859 NCC stipulates about „assets that belong to the state or territorial administrative unit, which, by their nature or by the statement of the law, are of domestic or public interest, provided they are covered by one of the ways prescribed by law". In fact, there are two categories of objects in question here:

- First category, which is the exclusive object of public property, namely: soil resources of public interest, the airspace, the waters with energy potential of national interest, beaches, territorial waters and natural resources of the economic zone as well as the continental shelf and other assets established by organic law.

And

- A second category, represented by „other assets" belonging to the state or territorial administrative units, public or private field, but only if they were acquired by one of the ways provided by law.

Our opinion is that intellectual creations belong to the second category mentioned above, as long as we admit that intellectual property rights have the legal nature of property rights. In other words, assuming that the intellectual rights over creations are property rights, they can be „object" of public property rights, representing public domain, either considered at international, or national / local level.

Special laws governing intellectual property state about „public domain" quite differently when speaking about intellectual creations. Their perspective is similar to neither administrative / financial laws, nor to the New Civil Code. Customizing the discussion to the „public domain" for intellectual creations, the law states that those works / creations which are no longer under a period of protection can be exploited freely by any user. Therefore, we are speaking about a special type of „public domain" with an open access, restricted by the condition of respecting the moral rights of authors over their creations.

As for the methods of acquiring property rights, which are in fact methods of appropriating property, art. 557 NCC states that „a property right can be acquired, under the law by convention, legal or testamentary inheritance, accession, usucapio as a result of good faith possession (for movable assets and fruits), by occupation, tradition and by court decision, when the asset is implicitly transferring property. (2) In those cases provided by law, the property may be acquired by the effect of an administrative document. (3) The law may regulate other ways of acquiring property".

Concerning the public property rights, art. 858 NCC states that „public property relates to those property rights belonging to the state / territorial administrative unit over the goods/assets which, by their nature or by the statement of the law, are of public use/interest, on condition that they are acquired as provided by the law". This

[11] Original text: art. 553 NCC, „*sunt obiect al proprietății private toate bunurile de uz sau de interes privat aparținând persoanelor fizice, persoanelo rjuridice de drept privat sau de drept public, inclusive bunurile care alcătuiesc domeniul privat al statului și al unităților administrativ-teritoriale*".

statement is consistent with the principle that authorities are prohibited everything, unless specifically allowed by the law, while for individuals, the principle is that everything is allowed, unless prohibited by the law.

As far as the methods of appropriating public property assets are concerned, the legislature passed a surprising solution, thus regulating, through art. 863 NCC, as marginal „cases of public property appropriation", the following acquisition modalities:

a) By tender, made under the law;

b) Expropriation for reasons of public utility, under the law;

c) By donation or legacy, supported by law, if the property, by its nature or by the will of the disposal, becomes of public use/interest;

d) By convention for consideration, if the property, by its nature or by the will of the acquirer, becomes of public use/interest;

e) By transfer of property from the private domain of the state to its public domain or from the private domain of the administrative-territorial unit to its public domain, under the law;

f) Other means provided by law.

Therefore, in our attempt to identify methods of acquiring property rights, we should consider the following:

- In comparison to the Law no. 213/1998, „natural way" is no longer provided as a means of acquiring public property rights. Nevertheless, our opinion is that it would be worth considering due to the fact that a natural event could produce geographical changes requiring a special assessing of the state property over goods/assets ranging from those provided in art. NCC 859 (on public property);
- in case of donation, the asset can turn into public use, by the will of the disposal;
- in case of acquiring property through „Convention for consideration", the nature of the asset and the will of the acquirer are to be taken into consideration in order for the property to migrate into public domain and become of public use;
- regarding „Convention for consideration" as a way of acquiring public property rights, it seems that it is likely to undermine the principle of entitlement to public property by the state's own methods (procurement, expropriation, donation or bound) and that the domain of application, if any, must be clarified.

That is why it is worth noticing that, unlike the rules of the old Civil Code (art. 644-645), the present Romanian law does not represent, in itself, a method of acquiring property rights. Nevertheless, the law can stipulate other ways of acquiring property (either public or private), the doctrine claiming that the present solution was adopted as a consequence, under the influence of critics that were made to the former way of acquiring property. Likewise, it is to be observed that the texts that have generated the most criticism, respectively art. 5 and 20 of Law no. 15/1990 on the reorganization of state economic units as autonomous companies are still in force, even if they provide that autonomous administrations and companies established through reorganization are the rightful owner of their transferred patrimony.

The problem arising here is whether or not any of the methods of acquiring property, covered by art. 577 NCC, is applicable to intellectual creations, even assuming that their rights have the nature of property rights? The answer is obviously negative, on the premises that the new Civil Code stipulates for the qualification of copyright as property rights in art. 577 line (3) which provide ***that the law may regulate other ways of acquiring property***.

3. Categories of intellectual creations and their characteristic features

Intellectual creations are numerous and varied as gender and target and destinations. What unites these works and how to justify their grouping in the same category, putting them under the same umbrella? What distinguishes them from the goods of common law, so that they may need special laws to protect them? Why did the authors feel the need to have their creations protected by special laws derogating from the general law and why did such protection need centuries of struggles? Why did the legislature need to decouple „intellectual property" of „ordinary property"? How and why can the property rights have contents and attributes of intellectual and moral order, when property rights are patrimonial, by nature, as defined by the Civil Code?

3.1. Object of protection by intellectual property rights

In terms of the Stockholm Convention and the TRIPs, which states upon the intellectual property rights, they are property rights related to intellectual activity in the industrial, scientific, literary and artistic fields. Creations under discussion here could be: literary artistic and scientific works; performances, phonograms and broadcasts; databases; inventions in every field of human activity; industrial designs; configuration schemes (topographies) of integrated circuits, undisclosed information; trademarks and services etc.

Therefore, all these are products of creative activity, but their destination is different: some, having aesthetic or evolutionary function (i.e. literary, artistic and scientific works), others, utility functions (inventions, topographies of semiconductor products), others, hybrid products, interweaving both aesthetic and utilitarian functions (i.e. designs and patterns) and others, the function of favouring trade and protecting consumers through the information they provide about the products marked (trademarks and geographical indications). The result of these observations is that intellectual property not only differs from the common law property, but intellectual creations differ between them as well!

3.2. Characteristics of intellectual creations

First of all we may say that the intellectual property rights deals with property that is achieved through creative intellectual activity and its object is the protection of the authors 'rights. Unlike the common law of property, or the civil law, dealing with people in general and goods made by physical effort, not involving creative activity, the legal perspective on intellectual creations, however, reflects a relationship between creators and consumers, between creators and users of intellectual creations that can be both creators and non-creators of works, between the two categories of persons and goods is an important difference that justifies a difference in treatment. Some authors say, exaggerating on purpose, in order to reveal its importance and specificity, that intellectual property right is exclusively designed for scientists and artists.

i) The most obvious link between these creations is their common origin and their divergent nature (unlike the assets in common law): they are the result of a creative effort, the result of their authors' intellectual activity which is rightfully considered an extension of the personality of the authors.

ii) Intellectual creations are characterized by their nature of intangible assets, with spiritual existence (most of the

time existing in the conscience of the author and its public), regardless of any retaining on/in some specific medium. Most often they are of ideal and abstract existence (computer programs are perhaps the best example to demonstrate the abstract character of creative intellectual property). They are and should be treated separately from their material support, even when this distinction is more difficult, as it is, for example, the case of works of fine art. Nevertheless, the common law distinguishes between and tangible and intangible assets[12], but they are not products of intellectual activity. In common law, both tangible and intangible assets have economic value, being valued in money. Claiming rights and goodwill are typical examples of intangible, even if the universality may include tangible and intangible, intellectual creations as well.

iii) In common law, the distinction between an „asset" and „the right of property over that asset" is relatively simple. When speaking about intellectual property things are not so simple, because, firstly, we need to make the distinction between intellectual creation itself and the material incorporating it. Only then we can distinguish between „creation" and „the right over creation". Just so we understand why a book buyer is not the owner of the work incorporated into the book; why the holder of a painting (which, in terms of the common law, represents a movable asset and its possession equals, according to civil law, property) is nothing but the holder of the tangible, not the rightful owner of the painting; why the owner of a car (that car including several creations and intellectual property rights, such as inventions, designs etc.) does not hold rights to these works and cannot dispose of them, even if he can freely dispose of his car that comprises all the above mentioned; why the inventor or the author of a design is the right holder of the object of his invention, but not the owner of all the products that are obtained due to the exploitation of his patent or certificate. Intellectual creation is not represented by the product itself but the idea exploited, the expression of it, the way it is described to be materialized in an object.

iv) Generally accepted common law definitions of „assets" (goods of economic value that are useful to satisfy man's spiritual or material need, susceptible of appropriation as economic rights)[13] and „heritage" (universality of rights and obligations with economic value belonging to a subject of law) are not satisfactory and applicable to intellectual property, because the intellectual creation does not necessarily need to have economic value, not even to satisfy a specific material or spiritual need, in order to be protected by the law. The fact that intellectual property rights and their object (creations) have today a major economic role, implicit economic value, or spiritual status does not change their nature, because the law does not protect individual rights on condition of economic/artistic/ scientific value. The real conditions that need to be met are as follows: originality, or, where appropriate, novelty, inventive step, industrial applicability, distinctiveness, etc. In other words, the economic value of the intellectual products is neither important nor required. Economic value, i.e. the value that represents quality and condition of the goods/assets in the

[12] The law knows two categories of intangible assets: firstly, the rights with a tangible object which are, in fact, intangible because they are not identified with their object (i.e. usufruct, debts, etc.); secondly, the absolute intangible assets. The latter case speaks about rights which are not attached to any tangible, such as a merchant's customers or intellectual property rights.

[13] Gheorghe Beleiu, *Drept civil român*, (Bucureşti: Şansa, 1995), 91.

common law[14] is not necessary when intellectual creations are involved. Intellectual creations are independently protected irrespective of any economic or artistic value. However, the economic value of an intellectual creation and the value of the creation itself are subjective and difficult to determine.

v) The result of creative work is not to be identified or confused with the product itself. Unlike other man-made goods, intellectual creations have no material substance and remain so even when they are fixed on a material (in the form of words, musical notes, lines, colours, designs etc.), or in electronic format. Property over support and property over creation are and remain distinct and subject to different legal rules, as distinct are to be treated the creation itself and the product which it materializes in The books we read are just copies of intellectual works and their purchase do not confer to the buyer any rights on the work. The copy of a paper (authorized or unauthorized) belongs to its buyer, not the work set in this paper. Thus, intellectual creations are to be treated separately from their material support, even when this distinction is difficult to be done, as, for example, in case of works of fine art.

vi) As intangible assets, intellectual creations are joined by another common feature, which is a major „fault" for them all: being spiritual products, nobody can protect them against being used by others through the means of simple possession, as it happens with tangible goods, for that they can be operated simultaneously by several people. Once the product of intellectual creation (literary, artistic or scientific, invention, design, model etc.) was made public, its creator cannot exercise, in fact, control of its use.

Consequently, materiality of the tangible good in common law (electricity being an exception, commonly invoked as an intangible good suitable to support the equivalence with the intellectual property - intangible – in order to be classified as property right) prevents possession from being exercised by several people simultaneously (except co-owners) over the same asset. In addition to that, it is noticeable that material objects having generally a well-defined functionality are unlikely to be used by several people simultaneously for the same or different purposes. We cannot speak of territorially differentiated possession over an estate, i.e. a piece Romanian land cannot be possessed, simultaneously, in Romania and in Hungary. Not even movable assets are more malleable in this regard: one and the same car, calculator, pen, etc., cannot be possessed in Bulgaria and Romania concurrently.

Possession of tangible goods involves contact between man and object, independently of the territory where such contact is made. Instead, intellectual creations, not being constrained of materiality or possession for use, can be used in different countries at the same time, by multiple users.

Moreover, what is inconceivable for material goods becomes rule with intellectual creations: the possibility of concomitant use of several people in different places without making the work/creation unavailable to others (as happens in the case of electrical energy which can be used by a consumer not independent of other potential consumers).

[14] The meaning of "good" implies economic value which is useful to satisfy man's spiritual or material need and is susceptible of appropriation as economic rights. In order to be in the presence of good, in the sense of civil law, two conditions must be met: 1) the economic value must be able to satisfy a material or spiritual need of man; 2) be capable of appropriation (attribution) as economic rights - Gheorghe Beleiu, *Drept civil român*, 97.

It is somewhat similar to the use of public goods, which is, in principle, non-competitive and may be exercised concurrently by multiple people (i.e. roads, schools, hospitals etc.). In this case, concomitant use requires, as a rule, the presence in the same place, while in the case of intellectual creations; concomitant use may be exercised in different places. The possibility of concomitant use in different places by multiple users represent a characteristic feature of intellectual works, most often this being the reason for which they were created.

vii) Intellectual creations have common features with public assets and utilities, thus explaining both the subjective position of consumers towards them and their delayed protection and legislation. Similar to public assets and utilities, whose consumption by one person does not prevent another person to do the same, intellectual creations are, in principle, non-rivalrous in the sense that their use is not competitive and the result of their usage does not represent their disappearance, more than that, their appropriation by an individual, if we admit that it is possible and necessary, does not make them unavailable for another user. Instead, public utility consumption implies the presence in the same place, whereas, intellectual creations allow concomitant use in different places.

viii) Intellectual creations quality and ability to be quantitatively unlimited makes them differ from common law property which is limited. In other words, intellectual property is unlimited, while property of tangible goods is limited. Many of the intellectual creations are ephemeral – this meaning that information technology or new solutions can change so fast that some creation could be left aside before obtaining the title of protection. The Internet practice shows us that many creations (if not all) are highly vulnerable to acts of unauthorized use.

ix) The products of intellectual are extremely mobile, especially nowadays. Unlike the assets in the common law, intellectual creations are, nowadays, able to move instantly and globally, while in ancient times, they were escorting their creator, wherever they went, even though their movement was slow. As far as their ability to move is concerned, we find that boundaries are absolutely useless, works „traveling" indifferent to both territorial limitations of the law or the means by which they propagate, being, practically, impossible to control under the current state of the art when the perfect host, the cyberspace, sets no borders or limitations.

x) Unfortunately, all the intellectual creations have a major „fault": the rights over intellectual creations are, as determined by law, transferable rights. The most common forms of capitalization of creation are contracts of assignment, licensing and franchising. Likely to be used simultaneously by multiple people, assigning rights over these creations can be held simultaneously by multiple people, the transferor being able to maintain the right of using that protected work. Once the works are in circulation/use, the authors cannot control their use any more. If the work was made public, the public is subjected to the temptation of using it whenever he pleases, or whenever he can make a profit out of it, and this temptation increases as the work is more valuable. Thus the author cannot authorize each use and cannot control unauthorized uses.

xi) On the other hand, assessing rights over intellectual creations is not completely transferable (i.e. moral rights), and more than that, it is limited (as acts inter vivos) to the economic rights, not having as a result, ipso facto, the assignment of the property rights to the purchaser. In the case of

copyright, for example, there operates not only the presumption of favouring the author's economic rights even if not expressly assigned, but also the failure to assign those rights regarding some unexpected usage of the work was not known at the time of the assignment of rights, even if the transfer was complete at the time of the occurring change. This means that the rights of the transferee are not identical in content with the rights of the transferring author. While, under certain conditions, the exercise of moral rights belong to the successors, them having the duty of ensuring compliance with the moral rights of their authors (authors, meaning persons whose succession they take), it means that neither the successors can be assigned with economic rights only.

xii) The moral side of intellectual rights over creations, which some authors consider to be bizarre even if it is consecrated by the law systems inspired by the Berne Convention, determines the difficulty in qualifying these rights. The law attaches moral and patrimonial attributes to the author's property, while the property is basically patrimonial in common law practice. Furthermore, the two categories of rights have distinct legal regimes. Therefore, it is highly artificial to bring together two distinct legal regimes which belong to two antithetical categories of *summa divisio* (moral rights are inalienable, imprescriptible and perpetual, while patrimonial rights are limited in time). The inalienable character of moral rights is the strongest argument in rejecting their qualification as property rights. According to art. 555 of the New Civil Code, „private property is the right of the owner to possess, use and dispose of property exclusively, absolutely and perpetually, within the limits established by law". In this case the right of assignment is inherent to the property right, even if it is not considered a specific feature. An appropriated good may only be affected by a temporary perpetuity. Thus, attaching the moral and patrimonial prerogatives of the author to the property rights leads necessarily to a misinterpretation of this right.

3.3. Necessity and opportunity of appropriation

Since the Romanian legislator did not qualify the authors 'rights as property rights, we can conclude that appropriation of such rights is neither possible nor necessary. Therefore, art. 577(3) has not to be considered by authors with respect to their works; as a specific feature of the intellectual creations.

At this point we agree that intellectual creations should not be appropriated, at least not in the classical sense of the concept of appropriation. According to common law, appropriation represents the act of taking something for your own use, while an intellectual creation belongs to its author through the act of creation. In other words, the author cannot appropriate something that rightfully belongs to him simply because he is the holder-creator and it would be pointless for him to make such an action. Appropriation is worth discussing only for the work of others, but in this case the act of appropriation would constitute a violation of the rights of the true author.

If we assume, however, that appropriating creations protected by intellectual property rights is possible in some particular ways for these kind of assets which are not at all similar to the ones in common law, then we find that there are assets (such as: registered as a trademark, the same sign can be registered by more applicants for different goods and/or services) that can be appropriated by more people at the same time. Then, there are cases (geographical indications/signs, for example) that cannot be appropriated by

any private or public person because they are, by definition, available to any producer in the designated geographical indication and exclusion from the use of any manufacturer is unthinkable. At the same time, it is important to mention that, speaking about indications, the manufacturer has a right of use, not a property one.

While the common law refers to appropriation (at least so it happened in the beginning) in terms of taking into possession something that does not rightfully belong to you, when speaking about „intellectual property", the asset which represents the exercise of the right is the creation of the author himself; it is an asset that never existed before it was created by its author. That is why an intellectual creation is so personal that it seems part of the author himself or an extension of its author. How to say then that the author is not, naturally, „master" of his own creation? That it does not naturally belong to him, needing an act of appropriation, while the ties between author and his work are so close that their separation is impossible and meaningless?!

Consequently, when speaking about „intellectual property rights" and only about them, we do not deal with things from the outside world within the meaning of the common law; we deal with the author's own spiritual creation. Therefore, the creation is so inseparable from its author that it makes it impossible for the associated rights to be transmitted and the appropriation to be assumed by third parties. This means that none other than the true author can be expected and can claim for himself the authorship of a work. In case the work was made by somebody else, the act of appropriation has to have legal consequences, unless this happens any time after the author's death or when the work has fallen into the public domain and can be freely used. The author of an intellectual creation, and only he alone can claim anytime and anywhere, authorship of the work and to him only the property rights recognized and granted by the mere act of creation. The successors of the author, as holders of real rights, will never have all the rights the true author used to have over his creation. Another category of users of the creations, the third parties (customers, holders) have the right to freely use a creation after the author's death or when the work has fallen into the public domain, but they will never be assumed as authors, provided they are usurpers, plagiarists or pirates. Moreover, the true author cannot transmit his authorship as „paternity" over an intellectual creation is inalienable.

Exception to the rule of inequality between the authors' rights and the intellectual rights transmitted to third parties are the trademarks and geographical indications/signs. This happens due to the fact that, most often, trademarks are likely to be chosen only from those in the public domain (that are available because they have been registered as provided by others), and the right over trademarks is more like an occupational right than a copyright in itself. In case trademarks are protected by copyright the intellectual work protected this way will belong to its author forever.

Classifying intellectual creations as „intangible assets", we may state another distinction between them and the goods/assets in common law. There is an opinion that the common law speaks only about the appropriation of tangible assets, while the intangible can be appropriated only for the cases when the law provides so, or, in the words of one of the specialist in the domain: „In order for a tangible asset not to have the ability of being appropriated, a special provision of the law is requested, while, for the appropriation of an intangible

asset authorization of the law is required"[15]. If that were the case, then the copyright (free of formalities) could not be generated by the mere fact of producing a certain work, the same as patent right, arising from the invention itself, should also be authorized; instead, they are considered distinct rights and are not subject to authorization.

Moreover, if special authorization from the law would be required in case of „appropriating" own creations, for which the author is a priori considered the rights holder, quality provided by the law since the eighteenth century, this would represent a step back in time before 1586, when the lawyer Marion Simon, baron of Druy, obtained the cancelation of a bookstore privilege from the Parliament of Paris, on the claims that: „people recognize to each other the property over works they made or invented, and following the example of God, who is the master of both heaven and earth / day and night, the author of a book is its master and as such he may have free dispose of it". Otherwise, if we accept that the rights of authors over their intellectual creations are natural rights, it is pointless to discuss the problem of appropriation in this respect. Therefore, those assets belonging naturally to an individual do not need appropriation, they only need recognition and, eventually, special protection of the law in case of abuse.

The common law of property, art. 557 NCC, stipulates that „property rights may be acquired under the law, by convention, legal or testamentary inheritance, access, adverse possession as a result of good faith possession of movable and fruit, by occupation, tradition, and by court decision, when the property itself is being transferred. (2) In the cases provided by law, the property may be acquired by the effect of an administrative act. (3) The law may regulate other ways of acquiring property". However, apart from law, none of these ways of acquiring property is common to intellectual creations. But in terms of the law, it is worth noticing that if intellectual creations, authors' rights do not originate in a certain law, them being implicitly assigned to the creation once their paternity established. The law can only recognize and protect them.

Consequently, the authors' rights do not arise due to some human authority; they are natural rights, like the rights to personal liberty, physical integrity, life and like any natural right, as any other intrinsic right that is not based on the process of legislating, they may even come in contradiction with state law. Their belonging to the category of natural rights explains why copyrights are, at least in some of their components, „perpetual".

Thus, authors' rights do not extinguish, they belong to the authors, either dead or alive, even if the term of protection established by law has passed and the creation has fallen into the public domain. In case the author has assigned his rights to the transferee, he is still considered the author of that creation, the transferee being nothing but the holder, not getting the authorship over creation. Moreover, the rights of authors have gained recognition during the Enlightenment, i.e. in the times when natural rights were conceptualized and the foundations for human rights were laid.

In conclusion, we must acknowledge that the Romanian legislator did not qualify authors' rights over their creations as property rights. The complex dual right recognized for authors of new and original creations, as well as the exclusive rights for authors of new and original creations

[15] Valeriu Stoica, *Drept civil*, 128.

cannot be regarded otherwise than the legislature did.

If we consider „appropriation" as a manifestation of the author's will to act as master of his own creation and if we admit that the rights afforded to authors had all the attributes of property rights, then and only then „appropriation" makes sense; otherwise, it is useless with the intellectual rights.

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RIGHTS CONTENT ON DESIGNS

Ovidia IONESCU*

Abstract

Our intellect characterizes us and helps us make a difference in life. Due to our intellect we can understand the world around us, our personality is shaped and developed and, depending on such development, we can learn new things that are beneficial to us both as individuals and the humankind as a whole.

Intellectual property focuses on the intellect and the protection of everything that is a creation, represents an important element of day-to-day life and ensures the adequate progress of things deriving from and related to said aspect.

Authors are the creators of intellectual property, and their creation must be protected. Furthermore, they benefit from a protection system, respectively a protection title, as well as patrimonial and non-patrimonial rights in connection with their achieved creation and in full dependence thereupon.

Keywords: *intellectual property, patrimonial rights, non-patrimonial rights, author, protection title.*

1. Introduction

The field covered by this paper is intellectual property and the themes of the study aim rights content on designs. The importance of the proposed study is to identify the effects of protection and the rights acquired by the authors as a result of mind product protection and the objectives of the paper are to introduce the reader in the intellectual protection area and understand the effects of protection and its importance by showing related structured procedure and a simpler way to understand. I intend to respond to the objectives set by showing main effects of rights on designs and models and their importance, including identification of relevant articles of Law 129/1992 on the protection of designs and models as republished. I would like to show among other aspects presented herein that state of knowledge is high in the matter addressed and the subjects reveal this.

Our intellect characterizes us and helps us make a difference in life. Due to our intellect we can understand the world around us, our personality is shaped and developed and, depending on such development, we can learn new things that are beneficial to us both as individuals and humankind as a whole.

Intellectual property focuses on the intellect and the protection of everything that is a creation, represents an important element of day-to-day life and ensures the adequate progress of things deriving from and related to said aspect.

Authors are the creators of intellectual property, and their creation must be protected. Furthermore, they benefit from a protection system, respectively a protection title, as well as patrimonial and non-patrimonial rights in connection with their

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achieved creation and in full dependence thereupon.

Law no. 129/1992, as republished, on the protection of designs and models distinguishes between the author of the design or model and the holder of the registration certificate of the design or model.

Thus, Art. 3 of this law states:

"**(1)** The right to be issued a registration certificate belongs to the author of the design or model or his/her successor in title for designs or models independently created.

(2) If several people independently created a design or model, the right to be issued the registration certificate belongs to the person who filed the first application for registration.

(3) If the design or model was created as a result of contracts with creative purpose or by employees in their work duties, the right belongs to the person who commissioned."[1]

The conclusion that can be drawn from this article is that the right to have a registration certificate issued belongs to the author of the design or model or his/her successor in titles for designs or models independently created or if the model or design has been created as a result of a contract with creative purpose or by employees in their work duties, the right belongs to the person who commissioned it - in the absence of contrary contractual provisions explicitly or implicitly stipulating the creative purpose.

With regard to the above, let us take an example in order to clarify convincingly: a person invents a product and puts it up for sale, it being successful in the outlet market. To be sure that product is to be marketed, will be recognized by the consumer, will have the quality of the initial product and the creator will be acknowledged all the rights of creation, it is necessary that the person who created it is protected in terms of acknowledging that, in terms of product appearance - it belongs to that person, that person has the right to market the product and product quality is recognized, having thus the right to be paid for the product created.

In doctrine, according to Professor Viorel Ros designs and models "are combinations of lines or colours presenting an original character or shapes in volume which gives the product its own and new features, which distinguish it from other products"[2], and "Products of the spirit must also be protected outside the national borders of their author, when used according to their vocation, in other states"[3], and thus "Productions of the spirit are, of course, the most direct and personal creation, the most legitimate and less likely to be appealed <property>".[4]

Law no. 129/1992 on the protection of designs and models, as republished[5], in art. 2 d), defines design or model as „appearance of a product or a part thereof, rendered in two or three dimensions, resulting from the combination of the main features, particularly lines, contours, colours,

[1] Law 129/1992 on the protection of designs and models, republication 3 in the Official Gazette no. 242/04.04.2014.

[2] Viorel Ros, *Intellectual property law,* Global Lex Publishing House, Bucharest, 2001, p.474.

[3] Viorel Ros, Dragos Bogdan, Octavia Spineanu – Matei, *Copyright and related rights,* All Beck Publishing House, Bucharest, 2005, p.24.

[4] Viorel Ros, Dragos Bogdan, Octavia Spineanu – Matei, *Copyright and related rights,* All Beck Publishing House, Bucharest, 2005, p.7.

[5] Law 129/1992 on the protection of designs and models, republication 3 in the Official Gazette no. 242/04.04.2014.

shape, texture and/or materials of the product itself and/or its ornamentation".

The protection of the intellectual property also provides economic development, encouraging legality of competition, favouring the creative spirit of the individual and trade of products created both domestically and internationally and it contributes to the development of commercial relations.

The balance between creation and its knowledge at international level (which encompasses marketing) can only be kept by a more complex and complete legal system, better implemented in as many countries as possible. Therefore the international treaties have a very important role, and their implementation at national level, however in a closer implementation.

Creating a design or model also implies the birth of their protection rights and the need of its registration through a legal procedure. Given that in the matter of designs and models there is plurality of protection, the author of a design or model will have rights arising both from his/her capacity as author and rights arising from their registration with the State Office for Inventions and Trademarks (OSIM)[6].

Thus, Art. 5 of Law 129/1992, as republished on the protection of designs and models provides in paragraph 2 that: "**(2)** The protection of registered design or model under this Law shall not exclude or prejudice the protection of copyright thereof."[7]

Therefore, by making a design and model two distinct categories of rights are born, namely: non-patrimonial rights and patrimonial rights. Non-patrimonial rights are perpetual and patrimonial rights are limited in time.

According to art. 5 paragraph 1 of Law no. 129/1992 on the protection of designs and models, as republished, rights on a design or model acquired under this legislation, shall not prejudice the rights on unregistered designs or models[8], trademarks and other distinctive signs, patents and utility models, typefaces and topographies of semiconductor products. Also, the protection of design or model registered under this law, does not exclude or prejudice its protection by copyright.

Non-patrimonial copyrights, known as moral rights of the author are inalienable and imprescriptible rights arising from copyright acknowledged by most legislations of the states[9] and whose content is not expressed in monetary form. Non-patrimonial copyrights is a legal expression of the link between the work and its creator, they precede patrimonial rights, survive them and have permanent influence exerted on them.

Non-patrimonial rights are independent of patrimonial rights, the author of a design or model keeps these

[6] Gabriel Olteanu, *Intellectual property law,* 2nd Edition, C.H.Beck Publishing House, Bucharest, 2008, p.214.

[7] Law 129/1992 on the protection of designs and models, republication 3 in the Official Gazette no. 242/04.04.2014.

[8] For details on unregistered designs or models, see Ciprian Raul Romitan, *Protection of unregistered Community design,* in "Revista română de dreptul proprietății intelectuale", no.1/2009, pp.182-189.

[9] In the copyright system, moral rights of the author are almost ignored, they are not protected separately. According to art. 4 - 142 of the US Copyright Act, the author has exclusive rights he/she can exercise in contractual conditions such as to guarantee the integrity, but if an author transfers his/her rights without imposing such terms, he/she loses such rights. According to this law, moral rights of the author are a form of property right called right of publicity (e.g., the California Civil Code, Section 3344 regulates the right of publicity).

rights even after assignment of his/her patrimonial rights[10].

The moral rights are exclusively acknowledged to the author and he/she enjoys in principle the following moral rights:

a. Right of authorship (paternity right);

The right to claim recognition of authorship of a design or model is called in the doctrine "the right to paternity of the work" and is enshrined in art. 3 paragraph 1 of Law no. 129/1992 on the protection of designs, republished, being based on the need to respect the natural link between the author and his/her work. Thus, this right is exclusively recognized to the creator. If the design is a collective achievement, the performers are acknowledged as co-authors[11].

The right to authorship is the most important prerogative which forms the intellectual rights in general and consists in the acknowledgement of rights of true author of a design. This right cannot be the object of a waiver or alienation by acts inter vivos, unlike the right to be issued the registration certificate for the design or model which is transmissible, as shown in the analysis of art. 3 paragraphs 1 of the law.

In accordance with Art. 50 of the same law indicated above, "unlawful acquirement, in any way, of the authorship of the design constitutes an offense and is punishable with imprisonment from 3 months to 2 years or a fine."

b. Right of disclosure, i.e. the right to decide if, when and how the work will be disclosed to the public;

Art. 30 of Law no. 129/1992 on the protection of designs and models, republished, states that "Throughout the duration of the design registration, the holder has the exclusive right to use and to prevent their use by a third party who has not his/her consent. The holder has the right to prevent third parties from performing, without his/her consent, the following acts: reproduction, manufacture, sale or offering for sale, marketing, importing, exporting or using a product in which the design is incorporated or to which it applies or storing such a product for those purposes."[12]

Thus, the disclosure of the design or model, bringing it to the attention of third parties, time and method for disclosure to the public, belong to the author, but to benefit from protection, he/she must obey and fall into the legal rigors and procedures.

c. Right to decide under what name the work will be disclosed to the public (right to name);

Right to a name is provided in art. 41 par. 1 of the Law no.129/1992 on the protection of designs and models, republished, which states that "The author has the right to have his/her surname, first name and capacity mentioned in the registration certificate, and any documents or publications concerning design or model."[13]

The author has thus the right to have his/her surname, first name and capacity mentioned in the registration certificate issued by the State Office for Inventions and Trademarks - OSIM.[14], and any other documents or publications on design, and

[10] Ciprian Raul Romitan, *The moral rights of the author*, Universul Juridic Publishing House, Bucharest, 2007, p.48.

[11] Viorel Ros, *works cited,* p.521, Ioan Macovei, *Intellectual property law treaty*, C.H. Beck Publishing House, Bucharest, 2010, pp. 260-261.

[12] Law no. 129/1992 on the protection of designs and models, republished.

[13] Law no. 129/1992 on the protection of designs and models, republished.

[14] State Office for Inventions and Trademarks is the specialized body of central government, sole authority in Romania in ensuring the protection of industrial property, in accordance with national legislation and the provisions

these data will be recorded in the employment record of the author.

d. Right to claim the observance of the integrity of the work, known as the right to inviolability of the work,

The same art. 30 of the above mentioned Law regulates this feature of the work.

e. Right to withdraw the work (right of withdrawal).

Art. 36 d) of Law no. 129/1992 on the protection of designs and models, republished, provides that "exclusive exploitation right arising from the registration of design ceases d) by waiver of the holder of the registration certificate", i.e. by withdrawal of work.[15]

The above rights must be recognized to the authors of designs and models on the basis of the principle of unity of art[16] and in the specific protection they are supplemented with the following rights:

a. right to be granted a specific protection title, recognized by art. 3 of the law mentioned;

b. right to transfer the rights upon issuance of the registration certificate, a right provided by art. 30 and art. 34 of the law;

c. exclusive right to exploit the registered design or model, a right provided by art. 30 of the law;

d. right to have full name and authorship mentioned in the registration certificate to be issued by OSIM, and any documents or publications concerning design or model, as stipulated in art. 37 of the Law;

e. priority right of first deposit[17].

Concurrently, art. 41 par. 2 of Law no. 129/1992 on the protection of designs and models, republished, provides that data in the registration certificate for the design or model be recorded in the employment record.

Patrimonial rights are rights acknowledged to the creator of a work, in the case of our analysis, of a design or model which is the economic component of copyright and which can be transferred to another person, for consideration or for free[18].

If the author of the design or model is also the holder of the registration certificate, he/she will be the exclusive holder of the patrimonial rights[19]. In this case, as provided in art. 39 par. 1 of Law no. 129/1992 on the protection of designs and models, republished, which states that "The author, holder of the registration certificate of the design or model, enjoys patrimonial rights established under contract with people who exploit the design or model.", the author-holder of the registration certificate of the design or model enjoys patrimonial rights established under contract with persons who exploit that design or model. In the event of an

of international conventions and treaties to which Romania is a party, in accordance with provisions of GD no. 573/1998 on the organization and functioning of OSIM, as amended, art. 68 of Law no. 64/1991 on patents, republished, art. 96 of Law no. 84/1998 on trademarks and geographical indications, republished and art. 48 of Law no. 129/1992 on designs, republished. The organization, functioning and powers of OSIM are provided in GD no. 573/07.09.1998 on the organization and functioning of the State Office for Inventions and Trademarks, as amended by GD no. 1396/2009.

[15] Law no. 129/1992 on the protection of designs and models, republished.

[16] Viorel Ros, *works cited*, p.520.

[17] For details, see Badea Liliana, *Establishment of regular national deposit on industrial designs* (Case Study), paper presented at the Seminar "Industrial property protection in the context of new regulations", Tulcea, August 30 - September 2, 2004.

[18] European Union, *Terminology glossary on intellectual property (industrial property, copyright and related rights)*, a PHARE programme for OSIM and O.R.D.A., 2005, p.52.

[19] Viorel Ros, *works cited*, p.521.

assignment contract, the author's patrimonial rights are established in the contract, according to art. 39 par. 2 of Law no. 129/1992, republished, which states that, "In case of concluding a contract of assignment, the author's patrimonial rights are established in this contract."

If the author of the design or model is not also the holder of the registration certificate, his/her patrimonial rights are limited. The author has, as mentioned, only those rights based on his/her employment contract or contract of assignment of the patrimonial rights on design or model.

Art. 2 letter c of Law no. 129/1992 on the protection of designs and models, republished, defines "registration certificate" as "title of protection granted by the State Office for Inventions and Trademarks for registered designs."

From the analysis of art. 3 paragraph 1 of the law, according to which the right to have registration certificate issued belongs to the author of design or his/her successor in title for the designs and models independently created, it results that the right to have the registration certificate of a design or model issued, is transferable.

Utilization of a registered design or model may be made personally by the holder of the right, by reproduction, distribution, importation for sale, public exhibition or indirectly, by assigning the right of utilization. According to art. 38 par. 1 2nd sentence of Law no. 129/1992 on the protection of designs and models, republished, rights arising from the registration may be transferred in whole or in part. The transfer may be made by succession, assignment or license.

Transfer by succession of patrimonial rights on designs or models is subject to common law, and in terms of duration and territorial boundaries, the provisions of the special law, i.e. Law no. 129/1992 on the protection of designs and models, republished, shall be taken into account.

The assignment may be total if it relates to all the rights conferred by the registration certificate of the design or model or partial if it relates to only some of the rights conferred by the registration certificate. Partial assignment of rights arising from the registration certificate of a design or model determines a co-ownership regime[20].

The license may be exclusive, in which situation the licensor undertakes not to transfer the rights of exploitation of the design or model to others, or non-exclusive if the licensor retains a right to exploit the design or model and/or may grant the right to exploit the design or model to others also. However, the license may be total if it relates to all the rights conferred by the registration certificate, or partial if it relates to only some of the rights conferred by the registration certificate.

Note that, according to art. 38 par. 3 of Law no. 129/1992 on the protection of designs and models, republished, transfer of rights shall be registered with OSIM in the Register of designs and models and produces effects to third parties only from the date of publication in the Official Bulletin of Industrial Property (BOPI) of OSIM[21] of notice of transfer. The registration of transfer of rights on designs or models in dispute is suspended until the date of the final judgments on rights (par. 4).

[20] Gheorghe Bucsa, *Protection of designs and models. Case studies and case law,* OSIM Publishing House, Bucharest, 2008, p.54.

[21] It has 12 annual issues and includes applications for registration of designs and models submitted to OSIM, lists of registered certificates, changes in legal status etc.. For details, see Gheorghe Bucsa, Tiberiu Popescu, *works cited*, pp.49-50. For further study, see also Stefan Cocos, *The a, b, c of protection and enhancement of industrial property*, Rosetti Publishing House, Bucharest, 2004, pp.210-212).

Although Law no. 129/1992 on the protection of designs and models, republished, makes no reference on this point, having regard to the provisions of art. 55 of the legislation analysed, according to which, in the case of legal persons, registration certificates of designs and models in force represent intangible assets and may be registered in the property of the holder; transfer of patrimonial rights for these persons can be done by division, merger, liquidation, absorption[22].

In art. 37 special law also provides that holders of registration certificates of designs or models may mention on products the sign D or the letter "D" uppercase, enclosed in a circle, accompanied by the holder's name of by the certificate number.

According to art. 34 par. 10 of Law no.129/1992 on the protection of designs and models, republished, as of date of publication of the application, the natural person or legal entity entitled to have the registration certificate issued, shall temporarily enjoy the same rights conferred on the holder. This provisional protection lasts until the issuance of registration certificate unless the application was rejected or withdrawn[23].

The exclusive right of exploitation arising from the design or model registration provided for in art. 30 of the law referred to above shall cease in the following cases:

a) at the expiry of the validity date (period of validity of a design or model registration certificate is 10 years from the establishment of the regular deposit and can be renewed for 3 successive periods of 5 years);

b) by cancelling the registration certificate. Date of cancellation of registration certificate is the date the court judgment ordering or finding the nullity of the registration certificate, becomes final[24];

c) by holder's forfeiture of rights for failure to pay fees for maintenance in force of the design or model registration certificate;

d) by waiver of the registration certificate holder[25].

As a conclusion on the above, we can say that the exclusive right of exploitation is temporary (as mentioned above, the validity of a registration certificate is 10 years from the date the regular deposit is established and can be renewed for 3 successive periods of 5 years) and territorial (exclusive exploitation rights is limited to the territory of the state which issued the registration certificate).

According to art. 30 of Law no. 129/1992 on the protection of designs and models, republished, the following deeds constitute infringement of the exclusive right of exploitation of the design or model: reproduction, without right, of the design or model for the manufacture of products with identical appearance, manufacture, offer for sale, sale, import, use or storage of such products for circulation or use, without the consent of the holder of design or model registration certificate, in the period of validity thereof[26]. All disputes arising from the infringement of the exclusive right of exploitation, in accordance with art. 43 of

[22] Viorel Ros, *works cited,* p.536.

[23] See Ioan Macovei, *works cited,* p.262.

[24] Teodor Bodoaşcă, *Intellectual property law,* C.H. Beck Publishing House, Bucharest, 2006, p.313.

[25] According to art. 35 par. 3) of Law no.129/1992 republished, O.S.I.M. grants a grace period of 6 months for the payment of fees for maintenance in force, which are subject to penalties. Failure to pay such fees shall cause the forfeiture of rights (paragraph 4). Under paragraph 5) the forfeiture of rights shall be published in the Official Bulletin of Industrial Property of OSIM.

[26] See Viorel Ros, *works cited,* p.522.

the law fall within the jurisdiction of the courts under common law.

Concurrently, according to art. 52 par. 4 of Law no.129/1992 on the protection of designs and models, republished, for damages caused, the holder is entitled to damages under common law, and may request the competent court to order the seizure or, where appropriate, the destruction of counterfeit goods. This applies to materials and equipment used directly in the crime of counterfeiting.

The infringement proceedings[27] fall also in the jurisdiction of the courts and also action for unfair competition, whose conditions of exercise are regulated by Law no. 11/1991 regarding control of unfair competition[28]. Art. 2 of this legislation defines the unfair deed as any deed or fact contrary to fair practices in industrial or commercial activity. In order that unfair competition action be admitted, it is necessary to fulfil the prerequisite on action in tort[29].

Under art. 53 of Law no. 129/1992 on the protection of designs and models, republished, holder of a registered design or model may request the court: to order precautionary measures when there is a risk of infringement of rights on a registered design or model and if the breach is likely to cause irreparable harm or if there is a risk of destruction of evidence. In taking precautionary measures ordered by the court, establishment by the applicant of a sufficient security to prevent abuse may be requested. For ordering precautionary measures common law provisions[30] are applicable.

In accordance with art. 35 par. 2 of Law no. 129/1992 on the protection of designs and models, republished, throughout the period of validity of the registration certificate the holder has the obligation to pay fees for its maintenance in force. For the payment of fees for certificate maintenance in force, OSIM granted a grace period of 6 months, instead charging increases. Under paragraph 3 of the same article, failure to pay such fees shall cause the forfeiture of rights.

We should mention that the Romanian legislator, as well as legislators in other states of the European Union has not provided the obligation for the certificate holder to exploit registered design or model. Therefore, the inaction of the holder of registration certificate does not attract penalty of forfeiture of rights for non-exploitation[31].

2. Conclusions

The main focus in the present paper was about the content of the rights on designs or models, with the expectation of

[27] See Ciprian Raul Romitan, *Crime of counterfeiting industrial design or model*. *Need to have an expertise ordered*. *Case Law* in "Revista română de dreptul proprietăţii intelectuale", no. 1/2006, pp. 49-51; Ciprian Raul Romitan, Elena Tanislav, *Counterfeiting industrial models and designs*, in "Revista română de proprietate industrială", no. 2/2003, pp. 68 71; Gheorghe Bucsa, Liliana Badea, *Case studies on attempted counterfeiting of industrial designs and models*, in "Revista română de proprietate industrială", no. 2/2004, pp. 35 37; Mirela Radu, *Counterfeiting industrial property, theoretical aspects*, in "Revista română de proprietate industrială", no. 5-6 / June, 2001, pp. 82-87.

[28] Published in the Official Gazette no. 24 of January 30, 1991 with subsequent amendments and supplements. See Mioara-Ketty Guiu, *Unfair competition offense*, in "Revista de drept penal", no. 3/2003, pp. 43-47; Catalin Paraschiv, *Unfair competition offense*, in "Dreptul" no. 3/1997, pp. 63-65.

[29] Gabriel Olteanu, *works cited,* p. 217.

[30] For further study, see Alina Iuliana Tuca, *The competent court to order measures of preserving evidence, interim and assurance measures in the field of industrial property rights*, in "Revista română de dreptul proprietăţii intelectuale", no. 1/2008, pp. 44-62.

[31] Ioan Macovei, *works cited,* p.264.

an optimal impact of these results, in terms of presentation of elements that define the procedure, what needs to be followed and what must be done so as their author benefit from their protection.

A suggestion for future activities would be a comparison of application of design and model protection in different countries, depending on their accession to international conventions, to see the implementation of international conventions at national level and alignment of countries to these so as an uniform national or international protection be implemented.

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THE THEORY OF ESSENTIAL FACILITIES. THE PRINCIPLE OF ACCESS TO INVENTION IN CASE OF ABUSIVE REFUSAL TO LICENSE

Irina CUCER LISNIC[*]

Abstract

Essential facilities designate specific inputs which are essential for the production of other downstream goods.

Inputs are situated upstream and so are eligible for intellectual property protection. In order to foster competition in the downstream, holders of these inputs should be forced to give access to potential users, by offering them operating lidcenses. In other words, one must respect the exclusive right of intellectual property holder to freely exploit his invention or must he be sacrificed in favor of downstream competition ?

In the present analysis we intend to analyze some of either controverted or less known judicial aspects related to the theory of essential facilities.

Keywords: *compulsory licenses, essential feature, dominance, abuse, input, effective competition.*

1. Generalities

It has been widely assumed that the compulsory licenses for the intellectual property rights, based on art. 102 of the Treaty establishing the European Union, stand as an example for the cases of essential facilities. According to the logic on which the theory of "essential facilities" is based, the owner of a facility which cannot be reproduced by way of the ordinary process of innovation and investment and in the absence of which the competition on a market is impossible or restricted, must share it with a rival.

Hence, the term essential facility means the entirety of material and non-material installations owned by a dominant and non-reproducible enterprise; as a result the third parties` access to these installations is indispensable for them to carry out their activity on the market, and it concerns the situation when one may obtain a forced access to an intangible asset owned by a dominant enterprise.

The theory has its origin in the American competition case law from the beginning of the last century when a conflict of access to railroad infrastructure had to be resolved[1]. In this case, St. Louis was the only area with railroad infrastructure which granted access to the railroad infrastructure of other areas and the association with *Terminal Railroad Association of St. Louis* owned a fraction of the operation of the railroad in St. Louis, as a result, it actually controlled the entire access to such infrastructure, which caused it to be called to trial in order to be obligated to grant access to other operators in exchange for

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[1] Case *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912).

reasonable and non-discriminatory tariffs. The USA Supreme Court compelled *Terminal Railroad Association of St. Louis* to grant access in exchange for reasonable tariffs on the grounds that the railroad is a public utility and the association *Terminal Railroad Association of St. Louis* acted as a cartel, with the risk of excluding other users of the railroad. At that moment, The Court referred to the competition aspect of the business and did not introduced the term essential facility, it being applied subsequently, the theory assigning it three cumulative conditions in order to be applied: the use thereof is indispensable for an operator which provides a specific service, it is impossible or at least difficult to multiply the infrastructure in this case and, finally, the functional control exercised by way of monopole or a group of associates acting unitary. The subject matter was not fighting the monopoles, but merely the abuse of a dominant position for vertical integration, which imposed the intervention of the competition authorities.

In Europe, the theory of essential facilities was applied for the first time in 1992[2], following a complaint of B&I (an Irish ferry operator), when the Commission established that Sealink (a British ferry operator, which was also the harbour authority in Holyhead, Wales) abused its dominant position when it modified its schedule in such way that this modification affected the loading and un-loading operations of B&I, following the reduction of the available time. In other words, the Commission held that the deed of the owner of an essential facility to use its power on a market in order to consolidate its position on a related market is an abuse according to art. 82 of the EEC Treaty [art. 102 of TEEU]. This happens when such owner grants his competitors access on the related market under conditions that are less advantageous than his own services, without any objective justification. The Commission ruled by way of decision that Sealink to adopt a different schedule or return to the initial one. The Commission assessed that there is a risk of an "irreparable prejudice" to be produced due to increasing the interruptions in the loading and un-loading procedures as well as the effects of such on the services offered.

The term essential facility is not directly connected with the actual completion and efficient competition. The actual competition is defined as the competition exercised on the market, whereas the efficient competition means the best potential competition on the market. It is possible that a non-competition situation, meaning the absence of actual competition, to meet the criteria of an efficient competition. The theory showed[3] that several markets reserve for themselves an efficient competition and the CJEC[4] explicitly says that the purpose of the competition policies is to preserve on the market the possibilities of an efficient or potential competition. This means the possibility of third enterprises to compete with the enterprise in the dominant position, the latter not having the right to compromise the actual competition and thus having particular obligations including to allow the competitors to create an actual competition. This is why one observed that an enterprise in a dominant position might attempt an assault upon the competition even in the absence of an abusive practice considering the obligation pointed above, to ensure an actual competition on the market. In this context, if the enterprise owns an essential

[2] Case *Be-I Line v. Stena-Sealink,* CJEC, 11 iun. 1992 (IP/92/478).
[3] Marie – Anne Frison Roche, *Régulation versus concurrence, in Au-delà des codes*, Dalloz, Paris, 2011, p. 171-185.
[4] CJEC 21 feb. 1973, case *Euroemballage-Continental Can c/Comision Europenne*, no. 6/72.

facility, it also has the correlative obligation to maintain the market competition.

One observed that such logic resembles the one in the domain of asymmetric regulations, used in case of networks industries[5], where the dominant position of the enterprise is not a consequence of its merits, but one of public power, situation in which, even in the absence of an abuse, such company must license third parties.

The background of the theory of essential facilities is the notion of abuse and monopole. If we were to refer it by comparison to the property law in the Civil Code, transposing this definition to the intellectual property law, we might say that the intellectual property is a material good that belongs to a person and the competition law is an easement of such good. The owner of the good may use it in an absolute manner but the limits of exercising the ownership right have been introduced under art. 556.

The theory of the abuse is comparable to the abuse of dominant position.

The essential facilities assign the specific inputs, indispensable to producing other downstream goods. The inputs are thus situated upstream and may benefit from the protection of the intellectual property, and in order to favour the downstream competition, the owners of such inputs should be compelled to allow the access of the potential users, by way of offering them operating licenses.

In other words, must one respect the exclusive right of the owner of the intellectual property to exploit freely its invention or should one sacrifice it in favour of the downstream competition?

This problem occurred in numerous contemporary businesses regarding the competition law and there have been considerable discussions on this topic. In order to address the question, we remind that a patent gives the owner an exclusive right to prevent the use by third parties, more specifically to produce or to sell without the owner`s authorisation during the legal protection period of 20 years as of constituting the regulated deposit.

The European competition law acknowledges the intellectual property, but if such concerns an input which is indispensable to the downstream production, a license refuse in this sense is deemed as abusive behaviour, considering the dominant position on this market. Such classification of an abuse based on art. 102 of the TEEU lead to the theory of the so-called essential facilities.

In a dynamic vision, the innovative enterprise owns an essential facility generated by an invention and finds itself in a forceful position for its direct competitors and enterprises situated downstream which need access to such essential resource. The problem is extremely delicate and it is up to the competition authorities to analyse the enterprise`s action which owns the facility whether it is guilty of abuse of dominant position meaning if an increase of the prices requested by such suppresses the technological competition and thus the efficiency.

The use of essential facilities theory in European case law accredited the thesis of the expropriation of the owner of intellectual property rights in the superior interest of the competition, but the articulation between the two domains is much more complex.

In USA, where the intellectual property law is deemed intangible under the competition requirements, the problem was brought into question in the 70s in the famous case *FTC v. Xerox*, when FTC[6] imputed to the photocopy machines

[5] Marie – Anne Frison Roche, *op. cit*, Dalloz, Paris, 2011, p. 171-185.
[6] Federal Trade Commission of USA.

manufacturer that it created a portfolio of thousands of patents, which increased on annual basis, that lead to a sort of monopole over the photocopy machines markets, thus blocking the entry of other competitors on this market. *Xerox* was accused of restrictive and market monopole practices[7] and FTC`s objective was to allow competition. By way of decision ruled on February 17, 2003[8] the American justice condemned *Rank Xerox* forcing it to ensure access to competitors to the parts and computer programs thus to form an efficient market competition.

The guidelines of JD[9] and FTC in this domain are based on three principles:

- the intellectual property is treated in the antitrust domain as any other form of property;
- there is no assumption that an intellectual property right automatically creates a market power;
- protection by license of an intellectual property right is *a priori* pro-competition but there is no obligation for the owner of the intellectual property right to license third parties in order to ensure competition on the same market.

The Supreme Court mentioned in the case of *Verizon Communications v. Law Offices of Curtis V. Trinko* that the enterprise has no obligation to license competitors save for particular situations, when its refusal may have anti-competition consequences.

In European case law, as of the case of *Volvo*[10], but even more significant the case of *Magill*[11], the principle of access to work subject to an abusive refusal of license grounded by the theory of essential infrastructure has been materialised.

This principle works for the particular situation of an enterprise in a dominant position owning a material or non-material infrastructure, non-reproducible and to which the access of competitors is indispensable for carrying out their activity.

The fundamental feature of an "essential facility" case is that once the abuse was identified, there is an obligation to offer access to the facility.

In general, it is pro-competition to allow the companies to keep for their exclusive personal use the goods they acquired or built, and to expect from the other companies to acquire and to build their own products corresponding to their use, in case they need such goods to be competitive. The possibility to be compelled to share a facility, whose cost is substantial, must always have a certain effect of discouragement of the investments. Nevertheless, in case there is an abuse of exclusion according to art. 102, paragraph b of TEEU, more specifically if a dominant company owns or controls the access to something that is essential to allow its competitors to compete, it may be pro-competition for the company to be compelled to allow access to a competitor, (only) in case its refusal to proceed so has serious enough effects on the actual or potential competition. This obligation occurs, even when the refusal is proven, only when the competitor cannot obtain the products or the services from another source and it cannot build or invent by itself, and only in case the owner has no legitimate justification for the refusal. In other words, the exception applies only when the "dominant" competition is possible, and when such is possible, only in case it allows

[7] Antitrust Litigation, 203 F. 3d 1322.
[8] Case *Verizon Co. v. Law Office of Curtis V. Trinko,* US Supreme Court, LLP 358, US 905.
[9] Department of Justice of USA.
[10] CJEC, 5 October 1988, *AB Volvo c/ Erik Veng (UK) Ltd*., Nr. 238/87, *Rec.* p. 6211.
[11] CJEC, 6 April 1995, *RTE etITP Ltd c. Commission*, 241 et 242/91, Rec., p.743.

access to this facility. Anyway, these conditions are necessary, but not enough, for a duty to contract.

We mention that based on art. 102 paragraph b of TEEU, there is an obligation to allow the first license in non-discriminatory terms under the aforementioned requirements. It is not an abuse to deny the access solely because the claimant would be in a better position, should it allow access to it, or because another competitor might occur. The refusal to distribute a facility, irrespective of it importance, is not normally an abuse, which we shall explain when we address the "additional abusive behaviour".

We remind that the enterprise is dominant on the market by supplying a product or a service that is essential to the competitors which operate on a secondary (marginal) market and there is no real or possible source for such product or service, or if there is no satisfactory substitute for such, and the competitors could not produce it by themselves. Objectively, the competitors cannot offer their services on the secondary market without access to that product or service. If they can offer their services, even if with serious disadvantage, the advantageous facility cannot be elementary.

The refusal to supply the product of the service would cause damage to the consumers (this requirement is expressly provided by art. 102, paragraph b, which is, at least usually, and probably, always, the relevant provision in art. 102).

The damage caused to the consumers may occur because the refusal creates, confirms or strengthens the dominant position of the company on the secondary market (as seller on that market, and not only because of its control over an essential factor of production). This usually represents the "limitation" or reduction of the existing competition in a way it would not have been thus restricted. Nevertheless, if the competition on the main market has already been restricted by the intellectual property rights of the dominant company, isn`t there an abuse from the company to exercise such? The prejudice caused to the consumers can be also produced by preventing the apparition of a new type of product or service that offers clear advantages for the consumers, which would compete with the product of the dominant company.

However, there is no objective justification for the refusal to contract.

There are no set criteria to determine the appropriate price in case of obligatory forced access to the elementary facility by compulsory license.

The phrase "essential facility" does not create another different type of breach of the right or the legal norm. In addition, it does not create an abuse where, otherwise there would not be an abuse. A dominant company is never obligated to compensate its competitors for the disadvantages they have (of course, save for those the company itself created).

If there is an obligation to allow access, then there is also an obligation to allow access in on-discriminatory terms, and these terms may correspond to the terms imposed by the dominant company for its operations (because terms less favourable would cause a certain degree of blocking, against the provisions under art. 102, letter b). If this kind of operations does not exist, but art. 102 letter c applies, it suffices that these terms to meet the requirements under art. 102 letter c.

In case *Oscar Bronner*[12] one argued that it is necessary to demonstrate that the owner of the intellectual property rights

[12] CJEC, November 26, 1998, case *Bronner c. Media Print* C7/97.

prevents the apparition of a new product for which there is a potential demand, situation in which the theory of essential facilities is applied.

We remind that in the case of *Magill*[13] the Court of Justice deemed as abusive the refusal expressed by the Irish television channels to broadcast the programs grill of *Magill* in view of it editing a weekly guide to regroup the TV programs of six national channels. The denial to make available to *Magill* the TV programs was deemed discriminatory and not allowing a license to reproduce was deemed as not reasonable, which constitutes itself an abuse of dominant position of the Irish television channels on upstream market and obstructing the apparition of a new offer for the one which is not a direct competitor in a downstream market.

Also, in the case of *IMS*[14] the Court found that this enterprise comprised a data base regarding the sales in German pharmacies under the form of a 1860 modules structure and a derived 2847 modules structure, which became a standard due to its practical aspect based on the German postal codes and the free distribution thereof to pharmacists; in the same time NDC decided to opt for the use of this structure but IMS refused to sell its data base and the Court applied the theory of essential facilities deeming that the owner of the infrastructure must ensure the access to competitors in order to make the competition possible.

The difference between this and the previous case, in grounding the defence, is that the essential facility was granted to a company that operated on the same market, and not as in the previous decisions, on a downstream market.

In cases of *Microsoft*, the courts have changed the grounds for the sentencing thereof, insisting on the idea of the prejudice caused to the consumers by affecting the technical progress.

If, in the case of *Volvo,* the actual behaviours which can be deemed abusive are indicated (the arbitrary refusal to deliver spare parts to the independent repairers, fixing the prices of the spare parts at a inequitable level, the decision of not producing spare parts for a certain model, although many cars of the same model were in circulation), in the case of *Magill* there is a general rule connected to the exceptional circumstances which can be qualified as abuse of dominant position generated by a refusal of license of intellectual property rights.

Thus, the Court showed that there is no real or potential substitute to the weekly television guides which Magill wants to publish and that the television channels were the only brute source of information regarding the programs, as raw material indispensable to make a weekly television guide, and the refusal to license constitutes an obstruction to the apparition of a new product (...)"for which there is a potential demand from the consumers[15]" and finally, that "this refusal was unjustified". By "raw material" it was considered the information owned by the television channels as a simple raw material, regardless of its nature and without out any interest in the intellectual property rights.

There are thus three conditions to classify a refusal to license as abusive:

– an obstruction to the apparition of a new product for which there is a potential demand from the consumers, which means

[13] CJEC, April 6, 1995, case *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities*, **C**-241/91 P și C-242/91 P.

[14] CJEC, case 418/01 IMS *Health GmbH & Co. c. NDC Health GmbH & Co. KG* (2004) ECR I-5039.

[15] CJEC, April 6, 995, *RTE et ITP c/ Commission*, cited case.

the indispensable character of the product protected by intellectual property rights;

– the absence of an objective justification of the refusal to license to be examined whether it is objective and proportional, always grounded on "exterior factors of the dominant enterprise[16]";

– the total exclusion of the competition on the derived market, more specifically, following the refusal to license by the owner of the intellectual property right, it reserves for itself a monopole on a derived market, except for the market of the product covered by the intellectual property right. This way, it is forbidden to extend a monopole to a derived market, such being deemed as abusive.

The appreciation of the connection between the main market and the derived market assumes a sufficient connection that is appreciated on a practical basis so that the responsibility of the owner of the dominant position on the main market to be disjointed towards the adjacent one; in this sense, the dimension of the derived market is of significant importance.

In case of *Tiercé Ladbroke*[17], TPI CE stated that "the refusal to license cannot be revealed as a breach of art. 86 of the EEC Treaty [art. 102 of the TEEU] unless it concerns a product or a service which is either essential for exercising the activity in question, in the sense that there is no real or potential substitute, either it is a new product whose apparition is obstructed and which has a potential and constant demand from the consumers".

According to above, it appears that a judicial obligatory license mechanism was instituted at European level, the Commission deeming that it has the right to set forth the conditions of license and to impose thereof, which under the aspect of contractual freedom is a measure which must be appreciated as exceptional, accepted as a necessity in regulating the markets[18].

This aspect was theoretically analysed[19], having been deemed that such an intervention to create obligatory licence without legal support cannot be but exceptional, interpreted *strict sensu* and should be expressly provided in the legal norms.

However, this matter is not easy to accomplish because the intellectual property is subjected to norms at national level, thus the mechanism on non-voluntary license should be provided by the national legal texts, which may lead to legislative fragmentation and different interpretation, but more specifically it is contrary to the competition law norms which are of European essence, including the praetorian way in which the European judge acts, who took the liberty to interfere in the existence and exercise notions of the intellectual property rights.

In our opinion, we deem that we are in the presence of a rule of competence and based on grounds, in order to achieve a unique internal market and the observance of the competition principle, the competence falls under the Commission and the CJEU regarding the exercising of the intellectual property rights. The refusal to license must be deemed as a reference to exercising the intellectual property rights, and not the existing thereof.

In this context, we ask ourselves whether the system of obligatory license, which is not grounded on a text of law, can fall discretionary in the hands of the European authorities, in the absence of *non-*

[16] JOCE, Nr.C 45 of February 24, 2009, p. 7, point 28.
[17] TPI, June 12, 1997, *Tiercé Ladbroke s.a. c/ Commission*, 504/93, p. 923.
[18] M. A. Frison Roche, *Contrat, concurrence, régulation*, RTD civ. 2004, p. 451.
[19] P.Y. Gautier, *Le cédant malgré lui" : étude du contrat forcé dans les propriétés intellectuelles*, D.Aff., 1995, p. 123.

subjective principles to guide their means of action?

The question remains opened and obviously pertains by the competition and promotion policies of the technical progress.

We join the theoretically opinion which states the absence of an indispensable precision to remove the arbitrary aspect in the aforementioned assessment.

2. The conditions of the essential facilities theory

In order to accede to a principle of access to the infrastructure protected by intellectual property rights, save for Magill case, in which we find it in an incipient form, clarifications have been subsequently brought in a continuous evolution of the case law.

Thus, the conditions which must be observed in order to apply this principle have been delimitated, in the case of IMS the conditions of application from the case-law regarding the abusive refusal to licence as well as in the case of *Oscar Bronner*[20] are indicated, although it does not concerns intellectual property rights. In the case of *IMS*[21] it was mentioned that the conditions must be met cumulatively, more specifically: the existence of an obstruction to the apparition of a new product for which there is a potential demand from the consumers, the exclusion of the competition on the derived market and the absence of an objective justifications to deny the license. Without direct indication, there is also a forth condition, more specifically the one regarding the indispensable feature of the product or service for which the access is requested, but such is self-understood from the previous three conditions.

We shall further examine these conditions:

a. The indispensable feature of the product or service

This must be deemed as a prior condition, in the absence thereof the enunciated principle cannot be applied to an actual situation. In the case of *Oscar Bronner*, CJEC stated that "in order to invoke the case of Magill in sense of the existence of an abuse according art. 86 of the EEC Treaty [art. 102 of the TEEU], not only the refusal of the service must be in such way that it removes any competition whatsoever on the market from the service petitioner, but it must also not be objectively justified, unless, but in equal measure, the service itself is indispensable for carrying out its activity, in the sense that there is no real or potential substitute to this service." One finds that by the way of stating the grounds, the theory of essential infrastructure in the intellectual property law was complied with. One must also note that in the case of *Oscar Bronner* the court used the phrase of absence of a real or potential substitute with reference to a service indispensable for carrying out an activity, by referring to a service or a product constituting the upstream market owned by an enterprise in a dominant position following the monopole conferred by an intellectual property right. Regarding the assessment of the indispensable feature, one must understand it depending on the proven facts, depending on the inexistence of an alternative solution to that service or product. The alternative solutions, regarding the case law, must concern a "real

[20] Cases *Oscar Bronner GmbH & Co. KG contre Mediaprint Zeitungsund Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG et Mediaprint Anzeigengesellschaft mbH & Co. KG., Nr.* C-7/97, Rec. p. I-7791, point 41.

[21] CE, July 3, 2001, No. 2002/165/CE, No. COMP D3/38.044, *NDC Health c/ IMS HEALTH*, JOCE Nr. L 59 du February 28, 2002 p. 18, point 45 si 56.

or potential" substitute, which makes the term substitute to be very broad so that the products and the services can be even less advantageous.

The absence of alternative solutions does not suffice in order to establish the indispensable feature of the product or the service, it is necessary to ascertain "the existence of regulatory or economical technical obstructions which would make impossible or at least very difficult for an enterprise to try to operate on the said alternative products or services market, to cooperate, in the end, with other operators[22]. Depending on these, one may establish whether the obstruction is nullifying for the derived market in the development of a new alternate product or service.

We deem that an enterprise is in absolute impossibility in case of economical non-viability of development of an substitute for the product bearing intellectual property rights in order to have access on the derived market. We deem that the term regulatory obstruction has a legal source, i.e. legislative, by which the enterprises receive a monopole in carrying out their economical activities, such as: power grids, methane gas, railroads and others. Besides these legislative sources there may exist regulatory ones, norms or certificates particular to the activity or product in the respective case.

As regards the intellectual property, the source is legislative by way of allowing the owner of the intellectual property rights by the lawmaker a monopole of exclusive exploitation of its creation. The term technical obstruction is more complicated because it refers to a third party`s impossibility to enter on a derived market, in other words, to accede to technical means to allow it to create and develop an infrastructure which challenges the one from which it requests access. This wide meaning competes with the regulatory obstruction in case there are technical norms for a product, regarding putting in on the market, with certain particular characteristics.

We reiterate that in the case of *Microsoft*[23], it had a dominant position on the operating systems market and denied the supply of operative data Sun Microsystems which would allow it to operate on the derived market of server operating systems. Actually, the data concerned "the protocol specifications of server to server communications". The Court defined the inoperability as "the capacity for two computer programs to change information and to mutually use this information so that each computer program to be allowed under the means provided". These data were extremely specialized and hermetic, thus Sun Microsystems, in order to activate in a viable manner on the server operation market, had to come up with operation systems capable to communicate with the Windows operating systems found in every informatics environment, considering the extremely powerful position Microsoft had in this domain, which determined the Commission to deem these data as "extraordinary characteristics"[24], protected by the intellectual property, and Microsoft owned more than 90% of the market and *Windows* is the "fact norm" for these operation systems, thus any competitor cannot trade in a viable manner its products if it is unable to achieve a high degree of operability with such. This means there is no other way but to know what Windows created, whereas its information is

[22] CJEC, April 29, 2004, *IMS Health,* caz precitat.

[23] Case *Sun Microsystems, Inc. v. Microsoft Corporation, U.S. District Court, Northern District of California, San Jose*, nr. 97-CV-20884.

[24] European Commission, March 24, 2004, Nr. COMP/C-3/37.792, *Microsoft*, point 429.

irreplaceable. As regards the term economical obstructions, this means that creating an alternate product or service is not economically profitable when comparing it to the economic efficiency of the original product or service.

Thus, the European Commission sentenced Microsoft on March 24, 2004 for abuse of dominant position following the limitations of the inoperability regarding the operation systems for servers and sales connected to *Media Player*. From this case, it appears that voluntary limitation of inoperability was the result of a strategy for committing an abuse of dominant position targeting the transmission by way of crossbar effect of the market power in the domain of operation systems for PC to operation systems for servers. The Commission retained that it had a dominant position following the entry barriers set up by own networks in the domain and the enterprise`s practices which indicate the said strategy. The Commission deemed that the interface protocols are necessary for the viability of every alternate offer to the extend *Windows* was not yet the market standard but was becoming cvasi-inexorable and that meant that although the Microsoft strategy did not have as immediate effect the elimination of competition, this still induced a significant risk in this sense. This is why the Commission deemed that such practices obstruct the innovation and are in the detriment of the competitors, which are to pay extremely high prices, and in the same time lead to decreasing the consumers` freedom of choice. Microsoft`s refusal to allow licenses to the competitors meant that those competitors are prevented from developing advanced versions of their products. The penalty consisted of a 500,000 EUR fine together with the obligation to supply to the competitors information regarding the interoperability in order to transmit information protocols of client to server and server to server communication and to authorize the use thereof for the development and distribution of competitive products on the operation systems market[25]. In motivating the decision, the court showed that a dominant operator has specific obligations in preserving a structure of the actual competition, *a fortiori* which means the European vision in applying the theory of essential facilities and granting obligatory licenses: "although the enterprises are mainly free to choose their commercial partners, a dominant enterprise`s refusal to deliver may, in certain circumstances, act as an abuse of dominant position."

In the case of *Oscar Bronner*, the Court stated that the economic obstruction cannot be deduced from the fact that reproducing the infrastructure was not profitable and consequently, the economical activity of the license petitioner must be reported in quantitative terms to the one of the infrastructure owners.

Following the analyze of the aforementioned cases it appears that an abuse of dominant position by not allowing a license to competitors may exist only if the existence of the competitive enterprises is compromised and it limits the technical development on the consumers` detriment in a direct and/or indirect manner thus by affecting the actual competition`s structure. At the same time, one must notice that the enterprise in the dominant position cannot use any price to allow the third parties access to the essential facility found on its property, because it would commit another abuse of dominant position. But this price aspect is hard to quantify and regulate by the competition authorities, because there

[25] TPICE, Decision of September 17, 2007 in the case of *Microsoft Corporation c. Commission* (case T-2001/04).

are no criteria regarding the amount of the technological advance comprised in the essential facility, which creates a legal uncertainty[26] with effects on the innovation determination on behalf of the essential facilities owners, these not being certain that they can benefit from the innovation effort.

Thus, to invest in an alternative product or service that is not profitable may be considered an economical obstruction, if the profitability is appreciated in the conditions thereof. In this sense, one may proceed arithmetically by establishing the development and functioning costs of an alternative product or service by an enterprise which cannot obtain profit from its economical activity. However, the problem of the economical obstruction is more subtle, because the economical obstruction makes that any investment in an alternative product or service to be an economical nonsense.

We deem that the difference depending on the nature of the obstructions must not be made absolute in the performed analysis, which is how the judges have proceeded in the aforementioned cases, where they gathered information and finally ruled only upon the economical obstruction, the other two not being defined. At the same time, we notice that the obstruction in the creation of an alternate product or service actually means barriers in entering on a market limited by the product or service protected by the intellectual property, owned by the enterprise in the monopole position. OCDE performed a synthesis on this problem[27] which defined the term of entry barrier pointing out that "the important thing in the actual cases is not to know whether an obstruction responds to the definition of the entry barrier like in other case, but to question oneself with regards to a pragmatic manner over the possibility, opportunity and measure in which an entry can intervene taking into account the actual situation of every business".

b. The risk of excluding the competition on the derived market

The main problem consists of distinctly identifying the two markets, the main one and the derived one, which, in the case of *IMS Health*[28], the court stated that "it is determinative to be able to identify two stages of different production, connected by the fact that the upstream product is an indispensable element for providing the downstream product", in other terms, one may identify an upstream input market. Such market can be but potential, "in the sense that the enterprise in the monopole position which operates in this market to not trade in an autonomous manner the inputs in this case, but to exploit them in an exclusive manner on a derived market, restraining or completely removing the competition on this secondary market".

Following these arguments, it appears that the enterprise in the dominant position operates on the main market, but not on the derived market. What happens when it operates on the derived market as well? Does the principle of essential infrastructure still apply?

In our opinion, the condition of the distinct markets is no longer complied with and thus, the principle cannot be invoked. Under this aspect, we deem the European case law confusing in the case of IMS where the supply is made on the same market of

[26] The legal uncertainty is a general principle of the European law established by the CJEC in the case of SNUFAP v. The High Authority CECA on March 22, 1961 and implies the expectancy of the rule and its stability. In this case, the uncertainty concerns the expectancy of the resources flow resulting from innovation.

[27] OCDE, The competition and the entry barriers, Synthesis, February 2007, available on http://www.oecd.org/

[28] CJCE, April 29, 2004, C – 418/01.

the product, but it is used as argument the obstruction of the new product protected by intellectual property rights.

c. The condition of the existence of the obstructions at the apparition of a new product

The condition was mentioned in the case of IMS, according to which "the enterprise requesting a license must not limit oneself to reproduce products or services which are already offered on the derived market by the owner of the intellectual property rights, but to intend to offer new products or services which the owner cannot offer and for which there a potential demand from the consumers". According to the formulation, the condition of the new product sets a double protection: of the interests of the owner of the intellectual property rights and of the interests of the consumers.

The novelty, by reference to the product already offered by the owner, implies the delimitation of the notion. We deem that it means the existence of certain sufficient elements of particularity of the product already offered by the owner on the derived market. To impose the novelty seems to be a condition much too severe for the petitioner by reference to the novelty of the product covered by the intellectual property law. In reality, we deem that there is novelty when a consumer can find differences between this product and other competitors` products; to this it must also be added the potential character of the consumers` request which at the moment of requesting the access to the essential facility, they are not satisfied with the equivalent products already existing on the market.

The condition of the new product allows the attenuation of the problem of the particular merit acknowledged to the owner of the intellectual property rights to deny the access of third parties which only aim at proposing a product already offered by the owner. In case law and doctrine, the condition of the new product was deemed to materialize the idea of the competition on merits.

In the communication of the Commission regarding the application of art. 102 of TEEU[29] it has been set forth that: "according to the caselaw it is not illegal for an enterprise to occupy a dominant position and this enterprise may participate at the competition game through its merits". This is why it looks unjust that the creation effort supplied by an enterprise to obtain a place on the derived market to be reduced up to zero by obligations set in order to cede a license over its right, whereas the third party did not place any effort to obtain a place on the derived market. This is also the subject matter of art. 102 of TEEU which does not protect the less successful enterprises than the dominant enterprise.

As regards the novelty by reference to the consumer`s request, we deem that it has been pursued that this condition to remedy the appreciation difficulties regarding the novelty criterion, in the sense of appealing to a less subjective criterion and not connected to the owner and the competitors on the derived market, but which would allow the consumers to distinguish between the offered products and the ones already existing and to request them which leads to amelioration of the allocation of the possible resources.

The novelty criterion in the analysed context is different from the novelty which characterises the patented inventions, having distinctiveness in the competition law. Because the abusive refusal to license can only be applied in the derived products of the essential infrastructure, in this sense,

[29] JOCE No. C 45 du February 24, 2009, p. 7, point 1.

in the case of IMS, it was estimated that "the refusal to license cannot be deemed abusive save for the case the enterprise which requested the license does not expect to limit only to substantially reproducing the goods and the services which are already offered on the derived market by the owner of the intellectual property rights, but also has the intention to produce goods or services with different characteristics which may compete with the goods or the services of the owner of the intellectual property rights and thus, to meet the specific needs of the consumers which are not satisfied with the existing goods and services". Therefore, the novelty cannot be assimilated to the absence of the ability to be replaceable in the sense of the competition law. If the new product cannot non-replaceable to the already offered product, there is no risk of competition between the rightful owner and the license petitioner. In the case of *Microsoft*[30], the Court insisted on the fact that the damage brought to the consumers is primary in order to characterise the obstruction of the apparition of a new product and consequently, it deemed the novelty condition needs to be appreciated, according to art. 82 paragraph 2, letter b of the EEU Treaty, according to which the practices consisting in the limitation of the markets production or the technical development causing damage to the consumers are abusive.

In other words, the condition of the new product is nothing but an element amongst all the others which should be viewed per ensemble.

3. The additional abusive behaviour as a condition of the remedy principle by compulsory licenses

According to the case law, the refusal to license is illegal only to the extent that is has an "additional abusive behaviour". In addition, the Court retained that allowing the compulsory license assumes in all cases the existence of *exceptional circumstances*.

The additional condition is justified because, on one hand, the dominant position is never illegal. Thus, even if the dominant position is based on intellectual property rights, the competition law cannot end this position by way of allowing compulsory licenses. On the other hand, a dominant enterprise`s denial to license an intellectual property right could not normally be an abuse because it would mean that the dominant enterprises be actually prevented from acquiring and exercising the intellectual property rights for their own use. However, it cannot be deemed as illegal the deed of a dominant enterprise that uses the owned intellectual property rights according to the purpose for which such were conceived.

Thus, a compulsory license can be requested only in certain circumstances, and a simple refusal to allow a license over an intellectual property right is not illegal based on art. 102. To support the contrary, it means to consolidate a rule which would contradict the concept of intellectual property, as well as the principle provided under art. 102 which states in all cases the existence of an abuse.

Obtaining and exercising the intellectual property rights are deemed as pro-competition, even when the owners are dominant enterprises, because they will not be encouraged to obtain new patents, unless they are free to exercise the rights they own.

[30] TPICE, September 17, 2007, case *Microsoft Corp. c/ Commission*, Nr. T-201/04, *Rec.* p. II-3601, point 332.

However, the case law does not explain "additional abusive" as well as the way it is accompanied by the refusal to contract. Save for the fact that a refusal to license cannot be itself an abuse, the case law does not offer a clear approach for any future cases. The Court simply resumes at offering a few examples of situations whose subject matter is "additional abusive behaviour". There are the typical situations of essential facilities found on two markets in which the dominant enterprise monopoles a clearly identifiable main market. There is also the example which was presented in the case of Magill, regarding the granting of television licenses, where the refusal to license prevents the consumers from a new type of product, which was not produced by the dominant company and for which there is a clear unsatisfied demand. In the decision in the case of *Microsoft*, the Court ruled that there might be a compulsory license in case the refusal would limit the technical development of the competitors, thus causing damages to the consumers. As a result of a lack of adequate explanations, it was deemed necessary to conceive an enumeration of all the circumstances which in courts` view have set exceptional circumstances. It appears that there is no clear rule.

It is obvious that the refusal to allow a license can be deemed illegal only to the extent that it is directly connected by an "additional abusive behaviour". An abuse that lacks any connection would affect the legality of the refusal to license. Based on art. 102 letter b, the additional abusive behaviour must imply a serious damage caused to the consumers and can also manifest outside the market to which the intellectual property right refers to.

As already explained, the characteristic of the essential facility is that when an abuse is identified, the remedy implies not only the cease of the abuse but also the compulsory access to that license. Therefore, automatically it must be a relation between the abuse and the compulsory access.

The relation between the refusal to license and the additional abusive behaviour, which makes the refusal to license illegal, must argue why a compulsory license is an adequate remedy for the additional behaviour.

Therefore, the connection is explained by the fact that the refusal makes the other behaviour possible, strengthens or aggravates its anti-competition and exploitation effects. Probably the connection is the fact that to simply end the other abuse does not suffice and would not be an efficient remedy. The compulsory license must be the adequate remedy for the additional abuse.

So, we are in the presence of an "additional abusive behaviour" if the dominant enterprise would refuse to license in other way than in anti-competition conditions (for example, save for the condition that the owner of the license not to challenge its intellectual property rights) or in exploitation conditions (for example, in case it would insist on royalty payment of the license owner`s rights or on excessive prices) or in the case it would refuse to license for an intellectual property right even if it would have committed to allow the license in view of a standard to which it agreed. A remedy at the market level by allowing a compulsory license seems more efficient and less bureaucratic than continuing the surveillance by a competition authority in order to ensure that the initial abuse would not repeat itself. Continuing the surveillance may though be necessary in cases of setting excessive and discriminating prices.

The behaviour or the additional element must be a behaviour forbidden by

art. 102 of TEEU. Practically, the dominant enterprise must commit deeds or cause effects among the ones punishable by art. 102. Otherwise it would be in the presence of a normal result of the exercise of the intellectual property right on the market. The additional element cannot simply be an economical monopole, because such is, at least temporary, many times, the result of the application of an intellectual property right. The behaviour must bring an anti-competition effect which would cause damages to the consumers.

All the elements that prove the simple dominant position cannot constitute the condition of "additional abusive behaviour". However, the behaviour, and not the market situation, constitutes an abuse. The characteristics of the market determined by the legal monopole conferred by the intellectual property right, may lead, temporary or permanently, to an economical monopole, may explain the dominant position, but they cannot constitute an abuse. Thus, the fact that simple intellectual property right represents an unique source difficult to duplicate or "reinvent", very valuable, does not equivalates to an "abusive behaviour", characteristics which generate a considerable competition advantage.

The case of Bronner is an important case for the "essential facilities", especially due to the general attorney`s opinion, although the intellectual property is not the subject matter. A newspaper editor who had the only home delivery service in Austria refused to offer home delivery services of a competitor newspaper. The Court said that the refusal would be illegal only if it would eliminate the entire competition by the petitioner, without objective justification, and if the service would be indispensable because there would not be a real or potential replacement. But there were alternatives to home delivery and it was possible to develop a competitor system of home delivery. There was no prove that it would be non-economical for the competitors, acting together if it would be necessary, to create the second home delivery system with a coverage similar to the existing one.

For example, in the case of *Volvo vs. Veng* and *CfCRA vs. Renault* the Court stated that the freedom of an intellectual property right to refuse to license is the core of its right and that the refusal to license cannot be contrary to art. 102. The Court retained that "one must note the fact that exercising an exclusive right by the owner of a registered draw or a model as regards the car body board can be forbidden by art. 82 [art. 102 of TEEU] if such implies, from a dominant position enterprise, certain abusive behaviours, such as the abusive refusal to supply with spare parts to the independent repairers, establishing inequitable prices for the spare parts or the decision to cease the production of spare parts for a certain model, even if many cars of such model are still in circulation, provided that such behaviour would affect the trade changes between the member states".

In this case, the general attorney argued that the refusal to license might be illegal should the excessive prices be combined, which is contrary to art. 102 paragraph a of TEEU. In the conventional theory regarding the compulsory granting of licenses, as an aspect of the right to essential facilities, this commentary would be hard to digest, because the excessive prices have nothing to do with the essential facilities. Also, the excessive prices for the products intended for the dominant market would constitute an abuse for the same market for which the compulsory license was granted. It had always retained that in the cases of essential facilities there must always be two markets. If there would not

be two markets, the dominant company would be compelled to share the competitive advantage with a direct competitor.

Thus, the case *Volvo vs. Veng* suggest a principle that applies to the exploitation abuses, more specifically if an identifiable abuse was committed, the compulsory access by way of license would be an efficient and adequate remedy.

In the case of Microsoft, the Court retained that the additional abuse must not necessarily prevent the development of a new product for which there is a clear and unsatisfied demand. The abuse might "limit the technical development" of a competitor according to art. 102 paragraph b of TEEU, if the damage caused to the consumers is obvious enough. This finding is important because it complements one of the omissions of the conventional law over the "additional abusive behaviour". This consolidates the theory pursuant to which the additional abusive behaviour can be any kind of abuse forbidden by art. 102 of TEEU. In addition, it becomes clear that at. 102, paragraph b of the TEEU offers a comprising and clear definition of the exclusion abuse, which is necessary for the judicial security.

In the case of *IGR Stereo Television*[31], IGR, a group owned by all German manufacturers of television equipments, was also the owner of certain patents for stereo receivers necessary to equipping the German televisions with stereo reception systems. They unified their patents for a stereo television system and the German authorities approved their system. IGR licensed only its own members, establishing that licensing other traders would occur subsequently and only in limited quantities. The patent was used to stop the distribution by Salora, a Finnish company of stereo television in Germany. The Commission appreciated that the intellectual property right does not justify the refusal to license. The case is not well known, but it is important because it shows that in case of agreements to share technologies, each party can have a legal obligation to grant licenses to third parties.

FGR Stereo v. Salora is, consequently, an important precedent in cases in which companies agreed to set a standard, based on the fact that the licenses for certain patents can be essential to allow the use of the standards as well as in cases of patents clusters and participative associations.

Thus, the condition of the existence of the "additional abusive behaviour" must refer to an abuse according to the provisions of art.102 of TEEU instead of the simple exercise of the intellectual property rights, even if there are prejudices caused to consumers, makes a clear interpretation.

If there would be a duty to contract, even if there were no abuses committed, simply to create a bigger competition, this would represent a regulation rule, which does not comply with the principles of the competition law. All cases of essential facilities implied identifiable abuses. In case the abuse is discriminatory, the obligation to contract in non-discriminatory conditions is clearly the adequate remedy. In case there is a refusal to contract for the first time, the abuse must consolidate the dominant position or to disadvantage the competitors in a new way. In these situations, a prejudice caused to the consumers would result from the refusal to contract, and the refusal would limit the production, commercialization or technical development of the competitor or the newcomers. In each of these cases, the

[31] The Commission, Report XI on the Competition Policy, 1982, p. 63.

obligation to contract may clearly be the adequate remedy.

In conclusion, the principle of essential facility is in fact a remedy principle. We have not identified clues out of which to result that the case-law of the Union`s courts suggests that the Union`s law would impose, in accordance to art. 102 of TEEU, an obligation to allow access to a facility, simply because it is essential. This fact is contrary to the principles according to which a dominant position is not illegal and that it will not apply a remedy if an abuse was not committed.

4. Arguments pro and con to the theory of essential facilities

The demarcation line between the inherent and extrinsic limits of protection, between keeping the functionality of the industrial property system and the salvation of the free competition, between the protected technology and the replacement technology becomes more fine because it is the intellectual property right itself which provides rules by opening the protection system through exclusive rights to a real competition between the dependent complementary technologies towards the intra-technological competition. Such device of inherent limits favouring the intra-technological competition should be efficient if the exclusive right does not degenerate in a very broad monopole right in order to be individually exploited by a single enterprise.

Normally it is about saving the possibility of the development of secondary markets, the diversification of protected products based on products that are dependent partially, technically and economically on the firsts. In the end, the problem that the law seeks a solution to is similar to the one subsidiary to the rules defining the patented invention in front of the exclusion of very wide real knowledge in order to be *internalized* in an useful way through an exclusive right granted to a single owner such as findings, scientific theories or mathematics methods, etc. The provisions of art. 52 para. 2 letter a and c of the CBE does not aim only to maintain the public domain of knowledge but also to avoid the appropriation of knowledge whose application is very wide and unpredictable to be usefully entrusted to an individual and exclusive exploitation. The theory emphasized the very broad blocking effect that a patent produces on discoveries, scientific theories, mathematical methods or plans and principles of intellectual activities and on the other hand the transaction costs required for operating a very wide exclusivity.

The case law in the matter of competition law sentences an enterprise which owns an exclusive right and dominates a market to license the third parties who want to create new products, dependent on a protected product on a derived market where the dominant enterprise has no firm objectives but where there is a certain or probable demand[32]. These solutions are much commentated and do not need further explanations[33].

One recalls that competition law cannot intervene if its particular application criteria are met, namely the existence of a dominant position in the market and the fact

[32] CJEC of October 5, 1988, Case no. 238/87, *Volvo/Veng*, Rec. 1988, 6211, p. 9; *idem* October 5, 1988, Case no 53/87, *CICRA/Renault*, Rec. 1988, 6039, p. 16; CJEC of April 6 1995, Case no C-241/91 P si C-242/91 P, RTE and ITV *Publications/Commission*, Rec. 1995 I 743, p. 48 and the subs.; TPI of September 17, 2007, Case no. T-201/04, *Microsoft/Commission*, Rec. 2007 II p. 621.

[33] Microsoft Decision: abuse of dominant position, refusal to license TPI of September 17, 2007, Case no. T-201/04, *Microsoft/Commission*, Rec. 2007 II, p. 621, 637.

of abuse characterized by the use of an invention for which there is an actual or real potential demand on a neighboring market and the dominant enterprise refrains itself to satisfy without valid justification. The crucial problem of this case-law is not that it does not allow third parties to penetrate the exclusive right by a license application which the owner will not refuse without abuse. Consequently these licenses will not allow them to make direct intra-technological competition to the dominant enterprise, but only to serve or develop secondary markets for complementary or substitution derivatives thus to enter into a barriers and technological diversification competition.

Often the problem is better to grasp and define the nature and importance of the knowledge to which access must be granted in order to maintain effective competition through merit, in every market. Consequently, the only fact, although the owner of the information did not disclose it, concerning its person, its enterprise and its business has by definition a factual or legal monopole on such information without this meaning that there is a dominant position on the market information. Such an approach would deny *a priori* any possibility of competition for obtaining the concerned information. Therefore, the information must have particular qualities and in any case we must preserve the assimilation in Magill case law to an essential facilities theory. The dangers related to the investments uncertainty or sub-remunerations, innovative inputs also reduce the risks of innovation require an approach and focuses on specific restrictions on competition rather than a statutory approach as found in the essential facilities theory.

In the field of intellectual property, the theory of essential facilities should be used with reluctance, as did the US competition authorities, considering that as a brake on development.

However, a compulsory license is not in complete contradiction with the intellectual property protection because it also causes an innovation effort to overcome competitors amid the dissemination of knowledge in the technical field.

Therefore, a policy of compulsory license is a compromise between the interests of innovators and society as a whole.

Such compulsory licensing implied the issue of the prevalence of competition law on intellectual property law, with major consequence of legal uncertainty given the unfounded access requests of the opportunistic enterprises and damage innovation. More surprising is that such a theory was taken over in European law after the American Supreme Court has abandoned it.

According to the American case law[34], the concept of essential facility designates an indispensable resource owned by an innovating company that would allow competitors to carry out their activity on the relevant market, but it is impossible to be acquired by reasonable means (financial, technical and temporal). If the court reaches such a conclusion, it can force the holder of the facility to open their access under reasonable conditions, so to ensure the competition.

In Europe, the competition policies applied the theory of essential facility to the intellectual property rights in a much broader way, on the idea that the inventor has a competitive advantage vis-a-vis the subsequent enterprises, requiring arbitration. Yet, a compulsory license in

[34] Case *United States v. Terminal Railroad Assn. of St. Louis*, 224 U.S. 383.

profit competitors may compromise innovation.

The European case law has applied the theory of essential facilities by dragging from physical infrastructure to intangible assets, when the US Supreme Court reiterated its rejection of the theory. The two opposing views exist because there are different views on competition, as one gives importance to the market structure or the analysis of innovation concerns. The European vision admitted the obtaining of a forced access to an intangible asset, owned by a dominant enterprise in the form of compulsory licenses, which caused the competition law to prevail on intellectual property rights. It was considered that [35] the application of the theory of essential facility to intangible assets creates a climate of legal uncertainty regarding the possibility of opportunistic enterprises to have unfounded access to such structures which affects the companies` innovation concerns.

The theory of essential facilities, by its logic, is not irreconcilable with the essence of intellectual property, since it aims to impose mandatory sharing and forced contract, while the main objectives of intellectual property rights aim to provide exclusivity to its owner. The theory of essential facility, allowing limitation up to suppression of the intellectual property right owner to prohibit the exploitation of its right by third parties, allows this way for the idea that the refusal itself to license constitutes an abuse of a dominant position to be validated. Moreover, the exclusive right of exploitation is reduced to a mere right to be paid.

Another negative effect of the application of the theory of essential facilities to intellectual property rights is represented by the diminishing of the concerns to create, to innovate. To this it is added the uncertainty of the conditions for the application of essential theories for a very wide interpretation made by the European Commission and Court of First Instance of the European Union, as was done in the Microsoft case where the CFI considered that the risk is simple enough to be considered competition is exclusive. Finally, this theory has as negative effect the practical difficulties of setting the price of access to resource.

This theory comes to accentuate the current phenomenon of regulation of the intellectual property law by competition law, which has not happened in the past, with the consequence of increased legal uncertainty for the creator, creation of killer patent portfolios, scientific incompetence of competition authorities, etc.

Opposite to the analyzed case-law trends, we notice that the intellectual property and the competition are not absolutely incompatible as long as the intellectual property does not degenerate into abuse or abusive monopole.

We consider that both the legislator as well as the courts must turn their attention to the notions of *abuse* and *unfair monopole* and ensure regulations or interpretations that are consistent with the theory of abuse of rights, but also excluding the possibility that the enterprises less inventive to call upon vexatious measures.

All that implies a right implies the possibility of misuse and the abuse must be excluded in order to allow the coexistence of rights.

We believe that intellectual property is a two-edged weapon: it stimulates the innovation by protecting a monopole, but also blocks access to goods under monopole, goods which may be necessary

[35] Frédéric Marty, Julien Pillot, *Politiques de concurrence et droits de propriété intellectuelle: La théorie des facilités essentielles en débat, disponibil pe : http://www.gredeg.cnrs.fr/working-papers/WP-anciens/Old/Intangibles_facilites _essentielles_contentieux_concurrenti els.pdf*

to produce other goods needed in the market.

In other words, the monopole may have the effect of preventing third parties to innovate. It is a movement that creates a vicious cycle which imposes a regulation of intellectual property in a new way to overcome these drawbacks.

This way we wish to say that it would wrongly blame the competition law which sought a solution to prevent abuse of rights in case of monopole caused by intellectual property and which is only a palliative in waiting for a regulation of the intellectual property law and that's why competition law intervention should be limited to exceptional circumstances.

We believe that competition law is best to a quality innovation stimulation that will positively be passed on to the consumer.

The technical compulsory license can bring a balance within the intellectual property law by reference to competition law, although it constitutes a limitation of the intellectual property law, the introduction of compulsory license has the effect of producing an incentive to innovation that would allow innovators to remunerate their investments and ultimately, to encourage the dissemination of knowledge within the company. The legal license is considered as having a high degree of difficulty in terms of setting the tariff access to essential facility. Therefore, a rigorous theoretical framework in which the legal uncertainty generated by limiting intellectual property rights to be reviewed is necessary for an optimum dosage of legal and judicial measures.

In conclusion, three fundamental principles must prevail in the case of essential facilities theory[36]:

- the obligation of the owners of an essential resource to share its use with third parties should only be exceptional especially when the monopole comes as an innovation effort of its owner;
- the irresistible need of third parties to use that resource and the fact that they do not seek merely to share the monopole rent to be proved;
- the refusal to license a third party shall not itself be deemed illegal and should not be condemned save for proving the abuse of dominant position of the monopole holder to remove the competitors from the market.

5. Granting licenses in other cases of abuse

The principle of remedy is not limited to any particular type of abuse. Apart from cases of suppression of a new and desirable type of product, a compulsory license could be an adequate remedy for establishing excessive prices, contrary to art. 102 lit. a, as suggested by the Court, and of course in cases of discrimination. As already mentioned, compulsory licenses would be appropriate where the company has committed itself to grant licenses to a standard. Where a dominant enterprise makes two products that must work together, it may be required to be licensed all intellectual property rights involved in the interface that make them work together, so as to allow competitors to make each product compatible with the other (but not to copy any of the products). This would be a natural part of a judicial remedy in a case of "binding", under art. 102 lit. d or in a case of "grouping". In a case of fraud or "patent thicket" (the deliberate multiplication of questionable patents in order to obstruct competitors), a compulsory licensing for all patents may be the only effective remedy. Where a dominant enterprise acquires

[36] Areeda Ph. (1988), *Essential facilities: an epithet in need of limiting principles, Antitrust Law Eview*, vol. 58.

unduly intellectual property rights, it may be requested to license third parties. In addition, if an intellectual property right has been used to complement or enhance an exclusionary abuse committed in another way, the right cannot be used to obtain unlawful indirect result.

It is well established in European competition law that a behavior which in isolation could be legal, it can be illegal if combined with illegal behavior in one strategy of exclusion. However, in cases where the abuse is the monopolization of a second market, the essence of the abuse is blocking the current competition and where there is competition to be blocked, there is normally no abuse. Intellectual property rights provide even to a dominant enterprise the right to refuse to open a market for its competitors.

The theory of remedy also clarifies in a useful way, the issue of imposing compulsory license indecisions on interim measures. In accordance with the established practices, the provisional measures should be taken to maintain or restore a situation as it was before the alleged abuse to occur. According to the theory of remedy, the abuse should not be a refusal to grant licenses, but another type of behavior. The provisional measures, if they were justified, would be necessary to restore the situation as it was before starting that other behavior. If no license was given or promised, then no license should be decided by way of interim measures. This means that interim measures should not be imposed in cases where abuse prevents the development of a new type of product for which there is a clear and unsatisfied demand because, by definition, a license in this case would change the previous situation. But provisional measures would constitute as appropriate action if a dominant company would obstruct or reduce existing competition, where the other conditions for interim measures were complied with. Therefore, the theory of remedy explains and confirms the view of the President of the Court of First Instance, that 'the Commission would not normally have to decide to grant a compulsory license in an interim measures decision. However, if it would be appropriate that by interim measures to end obstruction or handicap competition created by the alleged abuse, the fact that they could be removed only if permitted licensing of intellectual property rights, it should be allowed this to make the provisional measures ineffective.

It should be recognized that it would be difficult to use a compulsory license as a remedy in cases of excessive pricing under art. 102 lit. a. The essential difficulty is to establish appropriate royalty rate. It must be small enough to allow licensees to sell the product or service at a lower price than the dominant enterprise, and not just to be on the "price umbrella" safe of the dominant company in order to share his excessive prices.

Art. 40 para. 1 of the TRIPS Agreement recognizes that the practice or concession conditions in licensing of intellectual property law that restricts competition may have adverse effects on trade and hinder the transfer and dissemination of technology can be regarded as illegal. The agreement recognizes the compulsory licensing scheme granted by public authorities concerning a patent in exchange of an adequate remuneration of internal law and provides a procedure preceding the grant of a compulsory license agreements, measures which aim to prevent such licenses relating to the hindered competition.

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PERSONAL INSOLVENCY

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Abstract

In 2014 a draft bill on personal insolvency reached public debate, stirring controversy in both financial and academic environment. The current paper aims at analyzing the merits and weak points of the draft bill.

Keywords: *insolvency, debtor, creditor, restructuring, bankruptcy.*

1. Introduction

The international insolvency proceedings' regulation extends now not only to trade entities, but also to the municipal and individual proceedings.

Many European countries have a long standing practice in restructuring the financial situation for individuals who are unable to efficiently cover their debts.

2. Content

Personal insolvency, also known as "personal bankruptcy" (which is scientifically inaccurate) has been generating significant doctrine and ethical controversy, even in jurisdictions with an old and constant practice. The inaccuracy comes from the fact that –traditionally-the notion of bankruptcy proceedings ends with the dissolution / liquidation of the entity (such as in trade companies' case). Of course, this rule could not apply accordingly in insolvent individuals.

Therefore, this notion appeared from the need to protect the indebted citizen, a more understanding approach than the one which characterized the nineteenth century: the debtors prison.

Almost two centuries ago, in order to obtain a bank loan, Romanian traders had to be registered with the Trade Register, to be debt-free and not been sentenced to the debtors' prison.

The drastic approach from the nineteenth century (which characterized that historical time) left a strong imprint on society, as we see it reflected even in the literature of the time. The work of Charles Dickens would have clearly had another profile, would the author not been scarred as a child by his family's sentence in the debtors prison, after unnecessary expenses his parents made.

Therefore, individual insolvency requires a 'personal' approach, different from the "technical" one (appliccable to trade companies) because the regulation borderline touches upon individual rights and freedom and because, without aiming at that, the proceedings also affect the rights of third-party individuals, who need not be affected.

We cannot help wondering if regulating this procedure isn't a form of legislative regression after the human

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rights' expansion from the twentieth century.

Also, the current Romanian legislative bill breaks the rule according to which liability is personal, given the fact that the procedure affects third-party individuals who are dependent on the subject of the procedure (e.g.: minors, etc.). Given the fact that liability occurs where there is lack of responsibility, and dependent individuals had no contribution to the subject's deteriorated financial situation, one may notice that the grounds for liability is missing (the prejudicial deed).

The need for such regulations has been extensively debated in Romania. The procedure itself -theoretically- supports the individual debtor (non-trader), and its main creditors (in this historical stage) are the banks and the financial institutions. Under these circumstances, banking associations have been putting substantial pressure on the (not only) Romanian legislative against such proceedings.

This regulation blocks the banking creditors' direct foreclosure, including banks in the wider cathegory of guaranteed creditors.

This is one of the reasons why there were several attempt to regulate the issue in Romania, all far from materializing, given the existing agreement between Romania and the International Monetary Fund.

Critics argue that such a regulation could undermine the bank loan payments discipline, stating that that the credit discipline contributes to strengthening the country's financial stability.

As a consequence, the Romanian National Bank estimates an increase in the level of guarantees required by the financial and banking institutions for offerring a loan.

Studies conducted by the European Commission concluded Romania is a country with very weak protection for overindebted individuals.

Another aspect of the issue generated by personal insolvency is that of managing and protecting personal data during the restructuring plan's implementation, given the fact that international law takes stronger measures for securing data.

In other legal systems, the procedure was regulated by separate laws (e.g.: Australia, Italy), or as a mere section included in the insolvency proceedings law (e.g.: Germany, France, Czech Republic, Austria).

At the moment, the Romanian legislation, doctrine and consequently, practice are almost absent, with just the recently published project-bill to debate on.

Personal insolvency aims at ensuring a balance between the protection of the good faithed debtor and defending the creditors' interests.

Should the restructuring procedure end with full debt coverage, the good-faithed debtor (confirmed with such conduct) is given the chance for a „fresh start", as stated in Chapter 11 of the US Insolvency Code.

The doctrine follows two contrary directions: the strict enforcement of the "*pacta sunt servanda*" principle and sharing the debtor's responsibility with the contracting creditors. The first opinion denies the need to regulate this institution, while the second deems it as necessary.

There are three models for individual insolvency: the North-European one, the German one and the Latin one.

The advantages of regulating the procedure are: foreclosure suspension for procedures in progress on commencement of the proceedings; ceasing the flow of interest and penalties for late payment; all debs become chargeable and liquid and termination of all debtor's proxies (mandates).

The subject of the procedure will be an individual without entrepreneurial activities, insolvent, which will reimburse debts according to a plan and/or due to asset capitalization.

The terms to meet for undergoing this procedure are: residence in Romania; assets or sources of income in Romania; the individual does not act as an entrepreneur at the time of application and the absence of debt resulting from commercial activities conducted in their own name.

The debtor is deemed to be unable to pay its debts, two or more claims, towards two or more creditors within 30 days of the due date.

The creditor might also apply for insolvency for an individual debtor, but will need to prove that the debtor is unable to pay its due debts and its claim against the debtor exceeds the amount of Lei 25000.

In other legal systems, the threshold is Pounds 750 (in the UK) or AUD 5000 (in Australia).

In case the procedure is initiated at the debtor's request, they will state the reasons for which they are unable to pay the due debts on their own responsibility .

The request to initiate the procedure will be accompanied by a report of available income and assets, including data on revenues expected to be achieved over the next five years and information on their income in the last three years, along with the debt situation and details of the involved creditors. All statements are given on own responsibility.

The debtor needs to highlight individual assets with a value over Lei 1000 they alienated in the four years before the application and draft a proposal for the debt payment plan.

In order to support the debtor and based on the above-quoted principle of joint liability of the creditor and debtor, at the debtor's request, creditors must provide a written statement on their claims against the debtor, to assist in preparing the report on property and income, highlighting the amount of debts, interest and other costs.

The only party allowed to suggest a plan is the debtor, even though it might add an extra responsibility for them.

This regulation generates a theoretical dilemma: if the debtor oneself is able to draw up a viable and efficient debt payment plan, then:

a. How did one become insolvent (excluding fraud)? and

b. Why would the whole procedure be necessary, if they can manage their financial restructuring alone? Under these circumstances, isn't the procedure a form of law abuse (to suspend foreclosure) and an additional, unnecessary expense?

Regarding the above-mentioned procedural expenses, these will be covered from the debtor's assets, and if the funds are insufficient, the court shall not be able to dismiss the application for commencing the proceedings on these grounds only, and the source of the funds will be a budgetary one.

From this point of view, one could conclude that the legislative applies the principle of (social) solidarity by covering private costs from budgetary sources, while this is a quite unfair to other taxpayers.

Concerning the application of the "good faith test", we might consider that the draft which is currently under consideration adopts the North-European model, given the fact that the court will refuse to open the insolvency proceedings in case the failure to pay is due to the debtor's fraudulent or irresponsible behavior.

The theoretical dilemma is generated by the exact definition of the debtor's irresponsible behavior of (the fraud is ruled by law).

How can one deem as irresponsible behavior the acts of an individual who freely exercises personal rights and

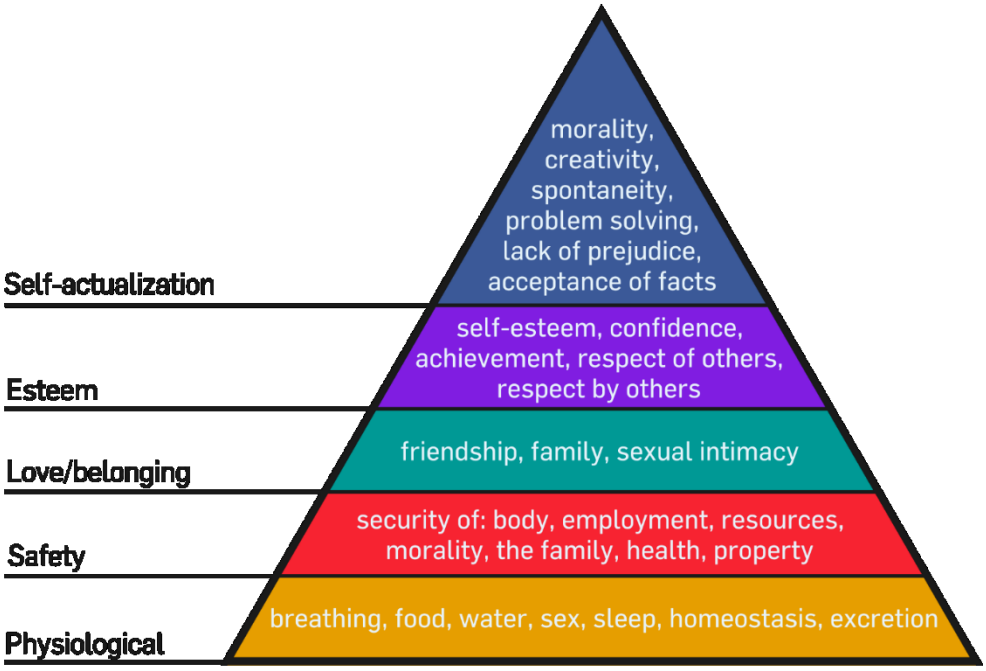
freedom, who cannot anticipate that (in 3 or 4 years) will undergo a strict financial evaluation procedure?

In the 21st century, the exercise of most individual rights (e.g.: access to culture, to higher education, etc.) is financially conditioned, so the draft bill does not state how one will appreciate the responsible / irresponsible investment in cultural or professional improvement, for instance.

Regarding the „personal" feature of these proceedings, one must emphasize that, given the complex character of the human being, a "technical", accounting assessment of previous expenses and of those recommended during the restructuring plan implementation cannot be a rigid, accounting one.

The individual features of the subject are a factor which must be taken into account in assessing the necessary costs of living, such as the bill indicates.

Abraham Harold Maslow's pyamid of needs[1] suggests a landmark which is necessary, but not sufficient in auditing financial statements of the previous three years and planning for the future.



The draft bill states that the judicial administrator shall approve the minimum allowance for the debtor and the people who depend on them which shall cover basic needs, and cannot be larger than the minimum wage.

Other reasons for dismissing the insolvency proceedings commencement application are: if the individual is in (financial) default or has undergone a similar procedure in the past 7 years.

By means of the restructuring plan, an unsecured creditor should receive

[1] Abraham Harold Maslow, The Pyramid of needs, source: Wikipedia.

compensation of at least 40% of the nominal value of its claim as recorded in the list, unless they agree in writing to a lower percentage.

One of the most controversial effects of the procedure regulated by the current project is the automatic cancellation of donations and other transactions carried out by the debtor free of charge within three years prior to the personal insolvency proceedings' commencement.

Such justified and very suitable measure in commercial insolvency cannot, however, be copied *mutatis mutandi*s in the personal insolvency proceedings.

It unreasonably affects the rights of an individual (quite solvent at the time who freely exercises their rights on private property), and of the beneficiary of the donation who did not know and could not anticipate the reinstatement of the parties in the initial situation by returning the property to the initial owner.[2]

In addition, any transaction with a related person (spouse, partner, children, grandchildren, parents, grandparents, siblings, their spouses, partners and children who live with them, as well as any other individuals who live with them and depend on the subject of the insolvency proceedings) will be considered a suspicious transaction according to the definition from the Romanian Insolvency Code.

As a result of commencing the personal insolvency proceedings, the debtor shall comply with the instructions on the judicial administrator regarding the assets which are subject to the procedure, will provide all the information requested, will not be able to alienate their assets and is required to identify additional sources of revenue, in case they are unemployed.

The debtor must refrain from any transactions and behaviors that may lead to the restructuring plan's failure (while the notion „improper behavior" is not deemed a proper definition), must submit the judicial administrator all amounts collected from legacies, donations, compensation and the extraordinary income and must not take on new responsibilities that they cannot meet to the due date (again, the notion of "new responsibility" is not defined in the draft bill).

The debtor may not refuse a reasonable opportunity to obtain income, and must inform the court and the judicial administrator on any and all changes of residence or their professional activity.

These last ideas of the draft bill (although possibly justified by the need to prevent the debtor from failure to observe the timetable) are more similar to the criminal measure of Court supervision (Court order), regulated in article nr. 215 of the new Criminal Procedure Code. But, such measures are justified in the criminal supervision area, based on the assumption of alleged crimes and aimed at controlling the social threat that the alleged criminal poses[3].

Another restriction of personal freedom may be the fact that should the a legal document by means of which the individual debtor refuses to accept a gift or inheritance without the judicial administrator's consent is not valid.

[2] One should take into consideration the irrevocable feature of a donation (from the Civil Code), with very few exceptions, which are not to be found in such cases.

[3] Article nr. 215 from the new Romanian Criminal Procedure Code states: […].

b) one must inform the authority of any change in their residence.

f) one must periodically inform the authority of their financial means.

k) one must not issue bank cheques.

Another unfounded consequence stated by the draft personal insolvency bill which breaches a number of rights is the fact that the debtor against whom personal insolvency proceedings were initiated and completed may not be the sole associate in a limited liability company for five years from the moment the personal insolvency proceedings end.

Or, the purpose of the procedure is that the individual becomes once again become a viable taxpayer, so that, the measure is unjustified, since it can not be a sanction for fraudulent acts, and, therefore, appears as an unjustified limitation.

As an exception to the rule that a debtor subject to personal insolvency proceedings may be acting as an entrepreneur (authorized), the insolvency proceedings may commence should the creditors agree, the main debt does not exceed Lei 45000 and the debtor has no more than 20 creditors at the time of the application is initiated.

The recorded claims shall be analyzed and reviewed by the judicial administrator within 15 days of the end of claims registration period, who shall draft a list of the debtor's assets within 20 days of the personal insolvency proceedings commencement.

Considering the fact that the draft insolvency bill aims at protecting the interests of debtors and sanctioning the less diligent creditors, the unrecorded claims cease to exist on the date the plan is actually enforced.

As a common feature of this project bill with the regulation concerning the municipal insolvency proceedings[4], we find the lack of a proper ending.

Namely, the draft bill does not state which is the consequence of failure in reimbursing all debt at the end of the period indicated by law.

If in commercial insolvency, failure to reimburse debt and restructure leads to bankruptcy (liquidating the entity), in the case of the other two subjects of law, the individual and the municipality, in which cases, liquidation is not an option, there is a legislative void.

Clearly, individual insolvency proceedings is resumed, and is not to be restarted, while the situation remains difficult for both creditors and debtor, with a lack of perspective of protecting and promoting the interests of both parties.

3. Conclusions

In terms of a rigorous multidisciplinary regulation, personal insolvency proceedings have the potential to be, along with the municipal and the commercial one, a legal solution for the high indebtedness level.

Such a law should observe the limits of individual rights and freedom (not only of the debtor, but also of those depending on them).

But more than that, it should be efficient, and so it should have a purpose (a trading one for creditors by covering liabilities), representing not merely a procedural extra cost and an opportunity for law (judicial) abuse, but a fair and advantageous solution for both debtor and its creditors.

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JURIDICAL WILL IN CONTRACTS

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Abstract

In the business law, almost all judicial relationships of private law are obligational juridical relationships which are made up of legal acts and facts. The most important legal act is the contract since it is the basis of the social life in any community meaning that it represents the most important economic and juridical instrument for the participants to a contract. The persons are free and equal in society and, consequently, no power is valid and fundamental unless it relies on their consent, namely on a contract. So, the existence of a civil contract relies on the principles of consensualism, a perception based on moral rules to observe one's promises, to have good faith and to observe the interests of your fellow creature. The exterior manifestation, the expression or declaration of the juridical will constitutes the consent of such person in making the structure of contract. The declared will must correspond to the person's real will and the adoption and declaration of the juridical will must take place consciously. Any contract that does not derive from juridical will is null and the civilizing character is inexistent. The principles giving sense to consensualism is the one of agreement between parties so as to produce legal effects by itself and it is enough for the conclusion of a contract, regardless of the form in which it is exteriorized, a principle expressed by the Latin adagio pacta sunt servanda.

Keywords: *business law, principles of consensualism, juridical will, contract.*

1. Introduction

The liberty of contract principle has been initially taken over by the private international law in terms of the conflict of laws, and then it was consecrated in the internal law of the European states starting with Napoleon's Civil code, a codification work massively taken over by the Romanian Civil Code of 1864, then in the New Civil Code which take effect from 2011. We might say that by the recognition of the liberty of contract and the fact that the subjects of law are free to conclude or not any contracts and to establish their content in an unhampered manner being able to modify or extinguish the assumed obligations, the science of law has evolved from the rigidity of the quiritarian Roman law to the flexibility of consensualism from the modern era of law.

Will is undoubtedly one of the words having a high frequency in the current language mainly due to the fact that this term is associated to the human being's will to tend to something, to achieve something, to attain certain goals, to obtain the things necessary for the daily life, to fulfill a dream etc.

In the field of law, the will is met very often in cases such as the will of state incorporated into the juridical norm (the juridical norm being the expression of such will), the individual (unilateral) will that may manifest to achieve some agreements

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or to exceptionally produce legal effects by itself; the legal effects of human being's actions or inactions differ sometimes depending on the fact whether they are voluntary or involuntary.[1]

The principle of the free will in contractual matter means the liberty to conclude contracts but not in the sense of a perfect free will, but in the sense of liberty conditioned by the social life and the legal norms[2].

The word given by exteriorization of will in any contract represents the formation of the legal act, a fact leading to its definition as being the manifestation of will performed with the intention to produce legal effects, namely to create, modify or extinguish a judicial relationship and it contains three notions[3]: it is a manifestation of will which must come from a conscientious person since it is a product of such person's thought; the will must be manifested, namely exteriorized, so as to be efficacious from a juridical viewpoint; the manifestation of will is made to produce legal effects[4] to create, modify or extinguish a certain juridical situation.

This definition highlights the fact that the manifestation of will expressed to produce legal effects is the essence of the legal act, this will constituting the fundamental element of the legal act.

2. Content

The juridical will is a psychological act[5] and both from the psychological viewpoint and the juridical viewpoint the will is a complex element[6]. The will is complex from the psychological viewpoint because its formation represents a complex psychological process comprising a series of stages. The will is complex from the juridical viewpoint because its structure is made up of two elements: consent and cause and, consequently, the correlation between consent and juridical will is of the part-whole type.

When speaking of a contract, an offence or any legal act, one must take into account the psychological will which really took place in the consciousness of the subject of law in question. But the law has mechanisms that filter it by resorting to a series of extremely accurate juridical concepts and this way the will is turned into completely something else than the de facto will, namely an ideal will that the subject of law should have had and which has a logical nature and not a psychological one.

The will manifested by the contracting party must not be erroneous or determined by a vice of consent such as an error, an act of violence or by fraudulent maneuvers; the expression of will has to be the result of one's own decision, of autonomy without being influenced in any way or the result of a constraint or dubious methods. Only this way, the will incorporated into a contract really is one's own psychic process, a capacity of the contracting party to propose goals and to attain them.

Pacta sunt servanda principle, conventions must be observed, a principle relying on keeping one's word lays at the

[1] Ion Dogaru, *Legal valences of will,* (Bucharest, Stiintifica si Enciclopedica, 1986), p. 11.
[2] Constantin Statescu, Corneliu Barsan, *Civil law. General theory of obligations*, (Bucharest, All, 1993), p.19.
[3] Ion Deleanu, *Legal fiction,* (Bucharest, All Beck, 2005), p. 249.
[4] Liviu Pop, *Treaty of civil law. The general theory of obligations,* (Iasi, Chemarea, 1994), p. 60.
[5] Mircea Djuvara, General Theory of Law. Law rational, sources and positive law, (Bucharest, All Beck, 1999), p. 228.
[6] Denisa Barbu,*Genocidul,infracțiunile contra umanității și cele de război. Repere în Codul penal român în raport cu Statutul de la Roma*, (Iasi, Lumen, 2015), p.19.

bottom of the entire organized society[7] expressing the rule of consensuality of conventions according to which parties' will is sufficient for the validity of a convention, except when we speak of real or solemn contracts, and the execution of obligations is made as they were assumed. The convention or contract, the legal act having the mission to civilize states, peoples, and persons, represents the basis of life in any community.

The theory of autonomy of will was enunciated and developed in the individualism climate of the 18th century by J.J. Rousseau and I. Kant.[8] In the Kantian philosophical system, autonomous will is a categorical imperative which justifies by itself: the most profound aspect of the human being is their free will. In order to have free wills, they must reciprocally limit themselves so as to ensure the social order. This order is the result of a social contract but not of a contract which intervened sometimes in history, as they thought, but of a contract resulted from the human mind itself.

The theory of autonomy of will[9] was considered for a long time as a postulate of the social life. Later on, mainly in the 20th century, they noticed that this theory contains numerous errors and exaggerations such as: the affirmation that the human being was initially free and that they gave up a part of their liberty by a social contract for social coexistence is pure fiction; will may not be autonomous since the human being lives in society and the social life imposes numerous obligations; there are no absolute liberties but only concrete liberties, namely determined by action or inaction.

The contemporary legislation and doctrine[10] based on the ideas, principles and norms of the continental law system identify two qualification criteria of the civil contract, more precisely the consensus and the legal purpose. The latter is considered as a subjective orientation of consensus and is totally subjected to parties' discretion to produce juridical-civil effects. Based on these criteria of uniform qualification of civil contracts, contractual agreement becomes binding for the parties regardless of other objective factors such as the form taken by the agreement or the effective transmission of right based on it, or especially the recognition by the legislator of such case in quality of content of contract sanctioned by the positive law. In other words, the construction of the civil contract relies on the principles of consensualism[11], the perception based on moral rules to keep one's word, to have good faith and to observe the interests of your fellow creature.

To be considered as a source of law, the will must be conscientious and rational. The consent, as an element of exteriorization of will, must be vice-free and expressed in full knowledge of facts. The theory of consent vices reinforces the free character of will. Thus, the consensus lacks the juridical sense where will is not free since it cannot create law.

The real will expressed with the intention to generate legal effects is the only one creating law, the altered or putative will is considered not to have existed upon the

[7] Alain Supiot, *Homo juridicus*, translation Catalina Teodora Burga, Dorin Rat, (Bucharest, Rosetti Educational, 2011), p. 138.

[8] Eugeniu Sperantia, *Introducere in filosofia dreptului*, (Sibiu, Cartea Romaneasca, 1944), p. 157.

[9] Robert-Henri Tison, *Le principe de l'autonomie de la volonte dans l'ancien droit francais*, (Paris, Domat, Montchrestien, 1931), p. 15.

[10] Zephaniah Benjamin, *What is the will ?*, (Bucharest, Enciclopedica Romana, 1969), p. 12.

[11] Gabriel Boroi, *Civil law. The general part. a second ed.*, (Bucharest, All Beck, 1999), pp. 162-163.

occurrence of consent. The sanction of expressing such a will is the cancelation of the likeness of law generated this way[12] (theory of nullity).

Internal will creates law. The exteriorization of will is a logical condition for the creation of contract whereas the interior one may not disclose its valences. In case of contradiction between the real and expressed will, the former prevails because will shall be appreciated as it must (*sollen*) be, and not as it is (*sein*), described. Real will remains the essence and the exteriorized will remains the phenomenon.

To manifest in the law and to produce legal effects, the will must be exteriorized either by words, written documents or by any other material means. If it was not exteriorized, psychological consciousness does not mean anything in law. Incontestably, the manifestation of will does not have a juridical significance either unless there is also a psychological will behind it. In the light of this psychological will which was the source, the legal ground resides in the external manifestation in that two parties contracted something after they have thought about it and the volition acts took place from the psychological viewpoint and this is manifested at the exterior by words, sometimes even written words. This external manifestation is the only proof of will: will is intangible without this filtration through the external manifestation. Consequently, what we must consider as essential in law is not the psychic will but the external manifestation of such will.[13]

The rational individual defines liberty by themselves through their will to get engaged judicially thus creating their own juridical reality.14 In the private law this is characterized by the fact that will is the intellectual fundament of the contract and the source of its binding force.he role of law is only limited to the guarantee of execution of contract and sanction is the only role of state in a contract. The explanation resides in the fact that the human being is a free individual whose activity may not be limited but by their will (intrinsic element) and not by the juridical norm (extrinsic element). At the same time, will is considered as the unique source of justice. The contract as a paradigm of voluntary self-limitation of individual freedom is not only the source of rights and obligations, but also embodies the idea of justice since only the contract, by self-accepted limitation, ensures the liberty of conscious will. The contract is genetically superior to the juridical norm, consequently the juridical norm may not limit individual's liberty but to the extent to which it guarantees the preservation of one's fellow-creature's liberty.

The requirements related to the form or registration of contracts as well as the rules of invalidity of contracts, most of them being an image of public limitation[15] of individual liberty, are tightly correlated and they are present in a large number of juridical norms.

The general conditions regarding the form of contract establish the form that the consensus must have so as to be acknowledged by the public authority[16], regardless of parties' will. In this case, even if the registration of a contract takes place after the conclusion of agreement related to

[12] Octavian Capatana, *Treatise of Civil Law, vol I*, (Bucharest, Academia RSR, 1989), pp. 234-235.
[13] Mihail Niemesch, *General Theory of Law,* (Bucharest, Hamangiu, 2014), pp. 156-157.
[14] Alex Weill, *Les obligations*, (Paris, Dalloz, 1971), p. 50.
[15] Véronique Ranouil*, L'autonomie de la volonte: naissance et evolution d'un concept*, (Paris, Presses Universitaires de France, 1980), p. 61.
[16] Jean Jaques Rouseau, *Du contract social*, (Paris, Flamarion, 1992), p. 126.

the contractual clauses, the failure to make it shall lead to the nullity of contract from the viewpoint of the public authority and shall deprive the parties of the possibility to defend in court.

The juridical consequence of parties' failure to reach an agreement regarding all the essential clauses of contract differs from the consequences of the principle of formalism, namely the failure to conclude a contract means its inexistence as a juridical fact generating civil rights and obligations.

The form of expression of will upon the conclusion of a contract is analysed in tight connection with its content conditions knowing that in the Romanian law the rule of consensuality operates according to which parties' consensus17 is sufficient for the valid elaboration of a contract. We may not also overlook the issue of proof of the juridical operation in the sense of negotium juris for which purpose they require the written ascertainment of parties' will (the document is required ad validatem) or the existence of an inception of a written proof which completed by other evidence proves this operation. In the cases when the written form of contract is required under the sanction of absolute nullity (ad validitatem), the will of contracting parties shall be expressed and mandatorily be ascertained in writing.

"We may legitimately think that the Contract law is a universal law adapted to all epochs and all peoples, places and circumstances, that it is founded on the fundamental principles of good and evil coming from the natural reason and that they are unalterable and eternal".[18]

If the contract represents an adhesion to certain special juridical objects, it creates general situations meaning that when a person concludes such a contract or they become a borrower, seller or buyer they understand to be applied all the dispositions from the juridical norms referring to the specific legal object – loan, sale-purchase, entire chapters from the civil law comprising the provisions related to the specific legal acts as well as other entire chapters of law interpretation that the specialists in the domain constitute in an enormous quantity of information that make up thick treatises of civil law.

The question is whether the individual who concluded a contract and who most of the time does not have juridical knowledge may know all this huge volume of clauses incorporated automatically in their document. Most often, even an experienced lawyer could not provide them all, the more so as most individuals who are profane could not do this. The entire legislative system of a state, and not only, is involved in every manifestation of an act of will of each inhabitant of such state but, of course, not by an act of psychological will. When concluding a legal act, individuals think of a very limited number of conditions and for the rest they understand the law shall apply or they are constrained to obey it. Consequently, the effect of the legal act is, to a very limited extent, the product of the individual's psychological will and much more the product of hypothetical will as the individual had to have it when they consented to the conclusion of the legal act. Thus, between the legislative systems of a state and the individuals that are subject to the laws there is a continuous stream of legal communication.[19]

[17] Ioan Albu, *Contract and contractual liability*, (Cluj-Napoca, Dacia, 1994), p. 27.

[18] Wesley Addison, *Traite des contrats*, 1847, apud Patrick S.Atiyah, *Essays on contract*, (Oxford, Clarendon Press, 1986), p. 17.

[19] C.R.Butculescu, *Considerations regarding Law as an instrument of communication*, Juridical Tribune, vol. 4, Issue 2, December 2014, (Bucharest, ASE, 2014), pp.22-23.

Exemplifying for this purpose is the obligation of execution, a case in which will produces future effects even between living persons. Relevant is the situation when a person is lent a sum of money that they undertook to reimburse upon maturity the contract establishing implicitly that if they fail to fulfill such obligation they shall be liable to the rigour of the law. Upon maturity, if they failed to pay, the will that they manifested in their legal act long ago would produce effects upon maturity. Though they no longer want, they must pay the amount due. Thus, the psychological will disappeared much but the juridical will continues to subsist and produce effects. Another example may be given in case of the inexistence of will in infants and mad people, and yet as a person it produces juridical effects by the acts of their representatives since we do not speak of psychological will.

3. Conclusions

In conclusion, *the juridical will* requires the entire society to keep their word given in contracts, the observance which any contract is governed by the principle of free will or also known as the principle of liberty of contracts, according to which the parties are free to conclude any convention, to establish any clause by mutual agreement, to modify or to extinguish any obligation. The principle of free will manifests, in terms of content, by consensualism meaning that the parties are free to adapt the contract pursuant to their juridical will necessary upon the conclusion of a legal act and which supposes the fulfillment of two conditions: the existence of a will and the juridical intentionality thereof. According to the principle of consensualism, contracts may be validly concluded and produce legal effects by the simple consent of the parties, regardless of the form in which the consent is expressed. Based on the principle of free will, the parties create by themselves, exclusively by their will, the juridical norm meant to govern their juridical relationships agreed upon and mutually advantageous.

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ALTERNATIVE DISPUTE RESOLUTION

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Abstract

Alternative dispute resolution (ADR) includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party.Despite historic resistance to ADR by many popular parties and their advocates, ADR has gained widespread acceptance among both the general public and the legal profession in recent years. In fact, some courts now require some parties to resort to ADR of some type, before permitting the parties' cases to be tried. The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute.Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (hereinafter „Directive 2013/11/EU") aims to ensure a high level of consumer protection and the proper functioning of the internal market by ensuring that complaints against traders can be submitted by consumers on a voluntary basis, to entities of alternative disputes which are independent, impartial, transparent, effective, simple,quick and fair.Directive 2013/11/EU establishes harmonized quality requirements for entities applying alternative dispute resolution procedure (hereinafter "ADR entity") to provide the same protection and the same rights of consumers in all Member States.Besides this, the present study is trying to present broadly how are all this trasposed in the romanian legislation.

Keywords: *alternative dispute resolution, complaints, consumers, EU regulation, national legislation.*

Introduction

At present, at **European Union** level, differences between Member States regarding complaints systems both in terms of sectors covered by these and quality procedures are noticed. These differences represent a barrier to the internal market and is one of the reasons why many consumers do not purchase goods and services from another Member State and do not have confidence that potential disputes with traders could be solved in an easy, quick and inexpensive manner. Given these issues, it was considered important to implement common principles in all Member States for solving consumer complaints.

In this regard, in May 2013, *Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)* and *Regulation (EU) no 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No*

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2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) were adopted.

Directive 2013/11/EU of the European Parliament *and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (*hereinafter „Directive 2013/11/EU") aims to ensure a high level of consumer protection and the proper functioning of the internal market by ensuring that complaints against traders can be submitted by consumers on a voluntary basis, to entities of alternative disputes which are **independent, impartial, transparent, effective, simple, quick and fair**.

Directive 2013/11/EU establishes **harmonized quality requirements** for entities applying alternative dispute resolution procedure (hereinafter "ADR entity") **to provide the same protection and the same rights of consumers in all Member States**.

The Directive requires Member States to facilitate consumer access to procedures for alternative dispute resolution (hereinafter 'ADR procedures') in case of national disputes and cross-border referring to contractual obligations in contracts for sales or contracts for services in all commercial sectors. In this respect the following requirements that the ADR entities must meet are established:

- **expertise**, **independence** and **impartiality**: the natural persons in charge of ADR should possess the necessary expertise, including a general understanding of law and be independent and impartial;
- **transparency**: ADR entities should make publicly available on their websites, on a durable medium upon request, and by any other means they consider appropriate, clear and easily understandable information on the entity and the procedure;
- **effectiveness**: ADR procedures should be effective by fulfilling certain requirements such as the procedure to be available and easily accessible online and on paper for both parties irrespective of where they are, to be free of charge or at moderate costs for consumers, the outcome of the ADR procedure to be available to the parties within 90 calendar days of the date on which the ADR entity has received the complaint;
- **fairness**: in this respect criteria that ADR procedure must meet are established, such as: the parties have the possibility of expressing their point of view, of being provided by the ADR entity with the arguments, evidence, documents and facts put forward by the other party, any statements made and opinions given by experts, and of being able to comment on them; the parties are notified of the outcome of the ADR procedure in writing or on a durable medium, and are given a statement of the grounds on which the outcome is based;
- **liberty:** an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.

In order to provide an effective tool for solving consumer complaints when purchasing goods and services online and that the ADR procedure to be available and easily accessible online to both parties, Regulation no. 524/2013 provides for an online dispute resolution platform (hereinafter 'ODR platform') so that consumers and professionals benefit of a single point of entry for online alternative dispute resolution through ADR entities that are connected to the platform.

From the IT perspective, the ODR platform will be an interactive website, free of charge and available in all official languages of the European Union. This platform: will provide a complaint form to be completed and submitted online by the applicant; will inform the defendant about the complaint; will identify relevant ADR entities, etc. Therefore the Directive 2013/11/EU and Regulation (EU) no. 524/2013 are two interrelated and complementary legislative instruments.

To ensure that ADR entities meet the quality requirements, the Directive provides for the designation of one or more **competent authorities**, and the appointment of a competent authority as a **contact point** for the European Commission.

Currently, **in Romania**, in disputes between consumers and traders, when both traders and consumers are resident in Romania, consumers may contact:

a) public authorities in charge of consumers protection, such as National Authority for Consumers' Protection, Ministry of Transport, Ministry of Health, National Authority for Management and Regulation in Communications, National Tourism Authority which solve the complaints free of charge;

b) mediators, according to Law no. 192/2006 regarding mediation and the mediation profession;

c) courts.

In case of cross-border disputes between consumers and traders, consumers may contact the European Consumer Centre. European Consumer Centres Network is a network established at EU level in order to strengthen consumer confidence, advising Europeans on consumer rights and facilitating the resolution of the problems in an amiable way.

Transposition and implementation in Romania

The Directive 2013/11/EU was transposed into national legislation by *Government Ordinance no 38/2015 regarding alternative dispute resolution between consumers and traders* (hereinafter "GO no 38/2015").

GO no 38/2015 establishes the legal framework in order to allow consumers to submit voluntarily complaints against traders to ADR entities that solve them in an independent, impartial, transparent, effective, fast and fair manner. GO no 38/2015 takes over all the quality requirements imposed by the Directive 2013/11/EU.

According to the national legislation, an ADR entity may propose a solution that will become binding on the parties if it is accepted by both parties and/or impose a solution which is binding on the parties. If the ADR entity offers both solutions, it is the consumer who chooses if the entity proposes or imposes a solution. GO no 38/2015 stipulates that ADR entities designate natural persons who meet the conditions of expertise, independence and impartiality to conduct ADR procedures.

Considering the provisions of point 24 of the recital of the Directive according to which ADR entities can function "within the framework of national consumer protection authorities of Member States where State officials are in charge of dispute resolution. State officials should be regarded as representatives of both consumers' and traders' interests.", GO no 38/2015 provides that ADR entity may be any central government authority or autonomous administrative authority with responsibilities in consumer protection field. Therefore, excepting the financial area, ADR procedures can be performed only by central authorities or autonomous administrative authorities. In this way it was

meant to ensure that principles of independence and impartiality are respected, given that point 41 of the recital of the Directive provides: "ADR procedures should preferably be free of charge for the consumer. In the event that costs are applied, the ADR procedure should be accessible, attractive and inexpensive for consumers. To that end, costs should not exceed a nominal fee."

Thus, any other entity, except public institutions, would have to obtain funds, most likely from traders to operate and impartiality and independence would be very difficult to guarantee.

Setting up ADR entities

An ADR entity will be set up within the National Authority for Consumers Protection. This entity will be impartial and independent of the market surveillance and control activities. The entity will be run by a Director and 25 employees will be implied in the procedures. The procedures carried out by this entity will ensure coverage of all the country and will also cover all the fields of activity, except if other specialised ADR entities are set up.

For the financial field, given its complexity and the impact of banking services on consumer, a Centre for Alternative Dispute Resolution in the banking system will be set up. The work of this centre is coordinated by a Steering College. The Steering College is composed by a representative of National Bank of Romania, of National Authority for Consumers' Protection, of Romanian Banking Association, of a consumer association and an independent person.

Nevertheless, any public authority or autonomous administrative authority may set up ADR entities in their field of activity.

As competent authority and contact point with the European Commission the Ministry of Economy, Trade and Businesses was designated.

Currently, measures are being taken in order to ensure that ADR entities are set up and function at the beginning of 2016.

Conclusions

Romanian legislation transposing Directive 2013/11/EU is recent, the implementation process is not completed yet, so until the effective functioning of the system of alternative dispute resolution involved are still steps to go.

In this respect it is necessary, besides the actual existence of the legal framework, to take place and a more ample information, more extensive, on this new activity, especially in the legal professions.

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- GO (Governmental Ordinance) 38/2015 regarding alternative dispute resolution between consumers and traders.

THE CONTROL EXERCISED BY THE COURT OF JUSTICE IN LUXEMBOURG ON INTERNATIONAL AGREEMENTS TO WHICH THE EUROPEAN UNION IS A PARTY

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Abstract:

The European Union as subject of international law can conclude external agreements, under a procedure which is the object of art. 218 of the Treaty on the Functioning of the European Union (TFEU). Regarding the legal force of such agreements, the Court of Justice of the European Union ruled that they were part of the EU legal order. In addition, pursuant to provisions of art. 216 para. (2) TFEU, these agreements „link Union institutions and their Member States". However, it should be noted that the competence of the Court of Justice in Luxembourg reflects also its ability to rule, at the request of a Member State, the European Parliament, the Council or the Commission on the compatibility of an international agreement with constitutive treaties, whether prior to the entry into force of an international agreement or later. Considering this aspect, in the contents of our study, we shall highlight, by using the specialized doctrine and case law in the field, the role that the Court of Justice of EU has in the field of control over international agreements. This analysis will consider the control aimed at formal validity (compliance with the procedure of adoption), on the one hand, and the control on the substance (compliance of the agreement with EU primary law).

Keywords: *European Union, international agreement, Court of Justice of the EU, „constitutional" review, a posteriori control.*

1. General aspects

Through this study, we propose an analysis of CJEU competences on the control of international agreements[1] to which the EU is a party. To achieve this goal, we shall conduct a thorough study of the French, English and Romanian doctrines, an important place being reserved to historical jurisprudence, but also to recent jurisprudence of the Court of Justice of the European Union. In this research, we shall resort to a range of research methods, specifically: the logical method, the comparative method, the historical method and the quantitative methods. Thus, in analyzing the CJEU jurisdiction in international agreements to which the EU is a party, we shall use, in particular the historical method, but also the logical method in the approach to capture structural and dynamic aspects from historical and evolutionary perspective. In deciphering considerations and grounds of regulations and goals pursued by the solutions proposed by the court in Luxembourg, we shall use, predominantly, the logical method for

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[1] For details regarding international agreements to which the EU is a party, see **Augustin Fuerea**, *Manualul Uniunii Europene,* ediția a V-a, Fifth edition, revised and enlarged after the Treaty of Lisbon (2007/2009), Universul Juridic Publishing House, Bucharest, 2011, p. 173-175.

capturing their theoretical and practical implications, and synthesizing research results in conclusions drawn and presented at the end of the analysis.

We shall start from the fact that the proposed research is a current approach, given the realities Romania is currently facing and which have very profound and various consequences on the Romanian society after 2007, which is increasingly and firmly anchored in the context of universal and regional international society of the stage. EU legal order (i.e., including international agreements to which the EU is a party) is of particular importance for the evolution of the organization, for which, we believe that efforts are needed to acknowledge peculiarities that it involves, their understanding and learning in order to adopt and implement them, including by specialists in our country[2].

2. Constitutional review

The European Union, as subject of international law can conclude external agreements under the procedure laid down in art. 218 TFEU. According to the Court, once published in the Official Journal of the European Union, the agreements to which the EU is a party „are part of the Community legal order"[3]. In addition, pursuant to provisions of art. 216 para. (2) TFEU, these agreements "link Union institutions and their Member States". However, as stated in the legal doctrine[4], this binding effect resulting from art. 216 para. (2) „must be, however, relativized" and this because, in the jurisdiction of the Court of Justice in Luxembourg, it is found also its ability to rule, at the request of a Member State, the European Parliament, the Council or the Commission on the compatibility of an international agreement with constitutive treaties, whether prior to the entry into force of an international agreement or later. Given the Court's judgment in *Kadi* Case[5] where the Court referred to the „constitutional principles of the Treaty"[6], in doctrine, such control was described as a „constitutional review"[7].

Thus, art. 218 TFEU provides that „a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice on the compatibility of an envisaged agreement with provisions of the Treaties. In the case of a negative opinion of the Court, the agreement shall enter into force only if it is amended or if Treaties are revised. In other words, in practice, a negative opinion given

[2] See **Elena Emilia Ștefan**, *Reflections on the principle of independence of justice,* CKS-*eBook* 2013, p. 671 (http://cks.univnt.ro/ cks_2013.html).

[3] ECJ Judgment, 30 April 1974 *R. & V.Haegean v./Belgian State*, 181/73, pt. 5 (http://www.ier.ro/sites/default /files/traduceri/61973 JO181.pdf)

[4] **Quentin Lejeune**, *L'application des accords internationaux dans l'Union européenne: entre défiance et confiance à l'égard du droit international,* p. 9 (http://www.lepetitjuriste.fr/wp-content/uploads/2014/04/IHEI-L_application-des-accords-internationaux-dans-l_Union-europe%C2%B4enne-9677695_1.pdf?aa0226).

[5] ECJ Judgment, 3 September, 2008, *Kadi*, Joined Cases C-402/05 P and C-415/05 P, (http://curia.europa.eu/juris/document/document.jsf?text=&docid=67611&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=223391), the expression repeated in the ECJ judgment, 18 July 2013, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, pt. 5

(http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5cd74ae9dd6b746869ad9c018185ba940.e34KaxiLc3qMb40Rch0SaxuOchj0?text=&docid=139745&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=221729).

[6] Pt. 285, *Kadi, cited above*.

[7] **Robert Kovar**, *La compétence consultative de la Cour de justice et la procédure de conclusion des accords internationaux par la Communauté Economique européenne*, Mélanges Reuter. Le droit international: unité et diversité, 1981, pp. 357-377-quoted by Quentin Lejeune, *cited above*.

by the Court leads to the impossibility of ratification of the agreement or to its ratification, but only after the revision of Treaties. In both cases, however, this would lead to a blockage in the European Union, at least for a certain time, if we also consider the fact that the revision procedure involves, in certain stages, the unanimity vote. However, regulating the capacity of the Court to give an opinion prior to ratification of the agreement, is a way to overcome another blockage that may arise, namely that that would result, as the Court[8] observed since 1975, from the "legal challenge of the issue of compatibility with the Treaty, of international agreements that commit" the Union.

The issuance of a negative opinion results, naturally, in the impossibility of entry into force of the Agreement which was the subject of that opinion. The case law of the Court in Luxembourg is constant regarding the issuance of negative opinions when it finds the establishment, by agreement, of a court system, different from that regulated at EU level.

Thus, in Opinion 1/76[9], the Court concluded that the *Draft Agreement establishing a European Fund for retention of inland waterway vessels* is not compatible with the Treaty. The draft established a judicial system that assigned certain competences to a body (background Court), which by its composition, was different from the Court of Justice established by the Treaty. The Court had to decide, in the field of the European Fund, on actions brought against Fund bodies or against states, and on actions undertaken for failure of obligations brought against the States on which the Statute would have had binding status (and not against the Community, at the time, as it was). However, the Court would have been competent to rule on prejudicial actions of which it would be informed by national courts, under certain conditions. With respect to these actions, it was mentioned the fact that they could have as object not only the validity and interpretation of acts adopted by bodies of the Fund, but equally, the interpretation of the Agreement and the Statute. Regarding this last point, the Court stated, since 1974[10], that an agreement concluded by the Community with a third country is, in respect of the Community, an act adopted by one of the Community institutions, and under the provisions of Community Treaties, the Court within the Community legal order is competent to decide preliminary rulings on the interpretation of an international agreement"[11]. Under these conditions, there would be the issue whether provisions on jurisdiction of the Fund Court are consistent with those of the Treaty relating to the jurisdiction of the Court. According to the Court, „the establishment of a judicial system such as that provided by the statute, which on the whole ensures effective legal protection of individuals, cannot elude imperatives arising from participation of a third State. The need to establish actions and proceedings which will ensure equally for all individuals, compliance with law in the activities of the Fund, can justify (...) the establishment of the Tribunal. Although, initially, the Court approved the concern to

[8] ECJ Opinion, November 11, 1975, 1/75 (http://www.ier.ro/sites/default/files/traduceri/61975V0001.pdf)

[9] ECJ Opinion, 26 April 1977 (http://www.ier.ro/sites/default/files/traduceri/61976V0001.pdf). For details, see **Mihaela Augustina Dumitraşcu**, *Dreptul Uniunii Europene şi specificitatea acestuia,* Universul Juridic Publishing House, Bucharest, 2011, p. 50.

[10] ECJ Judgment, 30 April 1974, *Haegemann*, 181/73, pt. 18 (http://www.ier.ro/sites/default/files/traduceri/61973J0181.pdf).

[11] Id.

organize, within the Fund, a legal protection adapted to difficulties of the situation, the Court was obliged to have some reservations about the compatibility of the "Fund Tribunal" structure with the Treaty"[12].

The Court had the same position in 1991, when it issued another negative opinion[13], this time on *the Draft Agreement between the Community, on the one hand, and the European Free Trade Association (EFTA), on the other hand, on the creation of the European Economic Area (EEA),* draft which provided, inter alia, a review mechanism on the interpretation of the Agreement, representing, otherwise the action brought by the Commission before the Court. In fact, the judicial system that was meant to be established, aimed at three objectives, namely: 1. settlement of disputes between Contracting Parties; 2. settlement of internal conflicts within EFTA and 3. strengthening the legal homogeneity within the EEA. These powers would „be exercised by a Court of the European Economic Area (EEA Court), which would be independent, but would be integrated from functional perspective, in the Court of Justice, and by an independent Court of First Instance of an EEA, operating, though, by the EEA Court or by the Court itself"[14]. According to the draft, provisions of the Agreement were to be interpreted in accordance with the jurisprudence of the Court of Justice, prior to signing the agreement. In addition, „in the application or interpretation of provisions of that Agreement or of provisions of the ECSC and EEC Treaties, as amended or supplemented, or of acts adopted pursuant to those treaties, the Court of Justice, the EEA Court, the Court of First Instance of EC, the Court of First Instance of the EEA and Courts of EFTA States will take due account of the principles arising from decisions ruled by other Courts or Tribunals, so as to ensure an interpretation of the Agreement as uniform as possible[15]. In this context, the main issue which the Court had to solve was to examine whether „the judicial system envisaged is likely to undermine the autonomy of the Community legal order in pursuit of its specific objectives"[16]. Once the problem defined, the Court grounded its reasoning on the particularity of the Community legal order that is based on „a community of law"[17] and concluded that „the jurisdiction conferred upon the EEA Court under the agreement may affect the division of powers defined by the Treaties and thus, the autonomy of the Community legal system which is enforced by the Court of Justice (...). This exclusive jurisdiction of the Court of Justice is confirmed[18], including by the Treaty," whereby Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement, other than those provided for therein"[19]. „Therefore, the assignment of this competence to EEA Court is incompatible with Community law"[20]. The result of this negative opinion was, naturally, the following: the

[12] Pt. 21 of Opinion 1/76.

[13] Opinion ECJ, 14 December 1991, 1/91 (http://www.ier.ro/sites/default/files/traduceri/61991V0001.pdf).

[14] http://www.ier.ro/sites/default/files/traduceri/61991V0001.pdf on the jurisdiction of the EEA Court, see also section 5-12 of the Opinion.

[15] Pt. 8 and 9 of the Opinion.

[16] Pt. 30 of the Opinion.

[17] **Quentin Lejeune**, *op.cit.*, p. 10.

[18] Pt. 35 of the Opinion.

[19] Id.

[20] Pt. 36 of the Opinion.

Agreement was revised and the new draft agreement was the subject of another opinion[21] of the Court, this time of a favorable one.

In 2011, the Court maintained its position on the establishment of a parallel judicial mechanism, even if, it was about the establishment of a specialized court. Opinion 1/09 had as object the compatibility examination of the *Draft agreement on the European and Community Patents Court with European Union law*. Under the agreement, the European and Community Patent Court would be an institution outside the institutional and judicial Union, having legal personality under international law. Competences of the Tribunal would be, some of them exclusive „in relation to a number of actions brought by individuals in the field of patents, particularly actions for infringement or potential infringement on patent, revocation actions and specific actions for damages. In this regard, Member States' courts are deprived of these competences and keep, therefore, only tasks that do not fall within the exclusive competence of the European and Community Patents Court"[22]. The Court, in the exercise of its functions, had to interpret and apply EU law[23]. The Court's reasoning has as starting point reiterating „the fundamental elements of the legal and judicial system of the Union, as established by the founding Treaties and developed by the Court"[24], namely: 1. unlike ordinary international treaties, the founding treaties of the Union established a new legal order, completed with its own institutions, for which the States have limited their sovereign rights in areas increasingly more extensive and the subjects of which comprise not only Member States, but also their nationals and 2. the essential characteristics of the Union legal order thus constituted, are in particular, its primacy over the law of Member States and the direct effect of a whole series of provisions applicable to Member States and their citizens. The Court held that, „unlike other international jurisdictions on which the Court has ruled until present time, the European and Community Patents Court has the task to interpret and apply not only the international agreement provided, but also law provisions of the Union. In addition, the Court found that by creating this jurisdiction, courts should be deprived of the possibility or, where appropriate, of the obligation to refer to the Court for preliminary reference in the patent field, given that the draft agreement provides a mechanism of preliminary references which reserves only to the European and Community Patents Court, the possibility of reference, depriving national courts of this possibility"[25]. Given that a Member State is bound to fix the damage caused to individuals by breaches of EU law which it is responsible of, and that, if a breach of EU law is committed by a national court, the Court may be referred to in order to find a violation of obligations by the Member State concerned, the Court noted that a decision of the European and Community Patents Court that would violate EU law, could not be the subject of proceedings for infringement and could not draw any

[21] ECJ Opinion, April 10, 1992, 1/92 (http://www.ier.ro/sites/default/files/traduceri/61992V0001.pdf).

[22] Press release no. 17/11, 8 March 2011 (http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-03/cp110017ro.pdf).

[23] About the existence of constant law, see **Elena Anghel**, *Constant aspects of law*, în proceedings-ul CKS-eBook 2011, Pro Universitaria Publishing House, Bucharest, 2011, pag. 594.

[24] Pt. 64 of the Opinion.

[25] Press release no. 17/11, *cited above*.

patrimonial liability of one or more Member States. Therefore, the Court held that „by the fact that it assigns exclusive jurisdiction to settle a number of actions brought by individuals in the Community patent field and to interpret and apply EU law in this area in favor of an international court which is outside the institutional and judicial framework of the Union, the envisaged agreement would deprive the courts of Member States, of powers concerning the interpretation and application of EU law[26]„. The Court, therefore, concluded that the envisaged agreement, through which a European and Community Patents Court would be settled, is not compatible with EU law.

As a conclusion, we can say that proceedings of the opinion issued by the Court, before the entry into force of the Agreement to which the EU is a party, help to ensure integrity and compliance with EU treaties. As mentioned above, the opinion of the Court may intervene also after the entry into force of international agreements to which the EU is a party.

3. A posteriori control

Regarding the control exercised by the Court after the entry into force of an agreement to which the EU participates, control exercised through the action for annulment, in the specialized literature, several arguments were outlined to support the theory according to which this type of control is purely theoretic, in practice being impossible to accomplish. Thus, it is argued that the existence of a procedure of *a priori* opinion precludes the possibility of the Court to review the compatibility of the agreement with EU law, *a posteriori*[27]. On the other hand, the Court's declaration of incompatibility of an agreement entered into force with European Union law, leads to international liability of the European Union, and this because the Union cannot rely internationally on the judgment in annulment delivered by the Court because, according to Vienna Convention on Treaties (1969) and the Convention on the Law of Treaties concluded by states and international organizations (1986), a State or an international organization cannot exempt from liability by invoking its own internal rules. And last but not least, according to TFEU, only acts of the Union's institutions[28] may be subject to an action for annulment[29].

However, in practice, the situation is different. There are opinions in the specialized literature[30] that support the argument that the Court cannot exercise *a posteriori* control on agreements to which the EU is a party as long as a regulated procedure of *a priori* opinion „distorts the content of the Treaty because if it was not asked, the Court would see failed the power to rule *a posteriori*"[31]. At the same time, it was discussed, including the fact that the

[26] Id.

[27] **Quentin Lejeune**, *op.cit.*, p. 12.

[28] Art. 288 TFEU: To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions (...).

[29] Art. 263 para. (1) TFEU: the Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, the Commission and the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and the European Council intended to produce legal effects to third parties. It also controls the legality of acts of bodies, offices or agencies intended to produce legal effects to third parties (...).

[30] **Eugène Schaeffer**, *Monisme avec primauté de l'ordre juridique communautaire sur le droit international*, Annuaire de droit maritime et aérospatial, 1er janvier 1993 n ° 12, pp. 565-589.

[31] **Quentin Lejeune**, *op.cit.*, p. 12.

Luxembourg Court did not distinguish between „act" and „agreement" as it ruled since 1971: „the action for annulment must (...) be open regarding all provisions adopted by the institutions, irrespectively of their nature or form, which are intended to have legal effect"[32]. According to the Court, „to determine whether the contested measures are acts within the meaning of Article 173[33], it is necessary (...) to examine their substance. According to the jurisprudence of the Court, acts or decisions which may be the subject of an action for annulment (...) are those measures which produce binding legal effects likely to affect the interests of the applicant by modifying in a specific manner, its legal status"[34]. On the other hand, „the form in which acts or decisions are made is, in principle, irrelevant regarding the possibility of attacking them, by an action for annulment"[35]. Furthermore, in Opinion 1/75[36], the Court stated explicitly on the *a posteriori* control, as follows: „since the question whether the conclusion of a particular agreement falls or not within the competence of the Community and if, as appropriate, these powers were exercised in accordance with the Treaty, being in principle susceptible of being submitted to the Court of Justice, directly under Article 169[37] or Article 173[38] of the Treaty or by the proceedings for preliminary ruling, it must be, therefore, admitted that the Court may receive the preliminary procedure of Article 228[39]„. In Opinion 1/91, the Court considers that such a control is justified by the existence of a „legal order that must be protected"[40]: „The EEC Treaty, although concluded as an international agreement, constitutes the constitutional charter of a community of law"[41]. Regarding this last point, we recall the observation of the General Advocate Maduro P., from his Conclusions presented on 16 January 2008 in *Kadi* Case, „although the Court takes great care to respect Community obligations under international law, it seeks, first of all, to preserve the constitutional framework created by the Treaty. It would be wrong to conclude that, since the Community is bound by a rule of international law, Community Courts must bow to that rule and apply it unconditionally in the Community legal order"[42].

Therefore, the practice does not preclude the possibility of the Court of Justice in Luxembourg to achieve a „constitutional review"[43] on international agreements to which the Union is a party. It should be noted that even at EU level, there is a difference between acts authorizing the conclusion of agreements and enforcement provisions of the agreement. Moreover, the Court itself distinguishes between „act authorizing the signing of the agreement"

[32] ECJ Judgment, 31 March 1971, *the Commission of the European Communities v./Council of the European Communities – "European Agreement on Road Transport"*, 22/70, pt. 42.

[33] The current 288 TFEU.

[34] ECJ Judgment, November 11, 1981, *International Business Machines Corporation v./Commission of the European Communities,* 60/81 pt. 9 (http://www.ier.ro/sites/default/files/traduceri/61981J0060.pdf).

[35] Id.

[36] *Cited above*.

[37] The current art. 260 TFEU.

[38] The current art. 263 TFEU.

[39] The current art. 218 TFEU.

[40] **Quentin Lejeune**, *op.cit*., p. 12.

[41] Pt. 21 of Opinion 1/91.

[42] Pt. 24 of the Conclusions (http://curia.europa.eu/juris/celex.jsf?celex=62005CC0415&lang1=ro&type=TXT&ancre=).

[43] **Quentin Lejeune**, *op.cit.,* p. 13.

and „act concerning its conclusion": „the act authorizing the signing of the international agreement and that stating its conclusion are two distinct legal acts involving completely distinct obligations for stakeholders and the second act is not in any way the confirmation of the first. Under these circumstances, the lack of action for annulment of the aforementioned first act does not constitute an obstacle to bringing such an action against the act of concluding the agreement envisaged, and it doesn't make inadmissible an opinion which raises the question of its compatibility with the Treaty"[44]. Therefore, the provisions on international agreements are likely to be cancelled. From the case law of the Court in the area, we stop at two cases that dealt with the conclusion of international agreements to which the EU is a party. The first case[45] refers to the signing by the European Commission, of an agreement with the United States, in the competition matter. The Court that was not requested an opinion before the entry into force of the Agreement, recognized its jurisdiction to control the act signed by the European Commission: „it is clear from the text of the agreement that it seeks to produce legal effects. Consequently, the act whereby the Commission sought to conclude the agreement must be the subject of an action for annulment"[46]. The Judgment of the Court was seeking the annulment of that act, because the Commission was not competent to sign the act as that power was conferred upon the Council.

In the second case[47], the Court declared partially void the act concerning the conclusion of the framework agreement on bananas (the Uruguay Round), for breach of the principle of non-discrimination.

If the two previous cases dealt with the review exercised *a posteriori* by the Court, over the acts authorizing the conclusion of an agreement, we shall still remember two actions that have focused on the *a posteriori* review exercised by the Court on acts of enforcement of an international agreement to which EU is a party, namely *the Hellenic Republic v./Council of the European Communities*[48] and *the Hellenic Republic v./Commission of the European Communities*[49]; in both cases, the Court submitted to control, the special aid granted to Turkey by the EEC Association -Turkey Agreement.

Through this type of control, the Court, with its judgment, may prevent the Union to apply in its legal order, the agreement that was the subject of annulment, which, internationally, means that the EU does not execute its obligations, following, however, to be held accountable, but as noted in the specialized literature, the Court may „be prudent"[50], resorting to general principles of

[44] ECJ Opinion, December 6, 2001, *the Cartagena Protocol*, 2/00, section 11 (http://www.ier.ro/sites/default/files/traduceri/62000V0 002.pdf).

[45] ECJ judgment, August 9, 1994, *the French Republic v./Commission of the European Communities*, C-327/91 (http://www.ier.ro/sites/ default/files/traduceri/61991J0327.pdf).

[46] Pt. 15 of the judgment ruled in C-327/91, *cited above*.

[47] ECJ Judgment, 10 March 1998, *Germany v./Council of the European Union*, C-122/95 (http://www.ier.ro/sites/default/files/ traduceri/61995J0122.pdf).

[48] ECJ Judgment, 27 September 1988, *the Hellenic Republic v./Council of the European Communities*, 204/86 (http://www.ier.ro/sites/ default/files/traduceri/61986J0204.pdf).

[49] Judgment of the ECJ, 14 November 1989, *the Hellenic Republic v./Commission of the European Communities*, 30/88 (cited by Quentin Lejeune, *op.cit.,* p. 14).

[50] **Joël Rideau**, *Ordre juridique de l'Union Sources écrites*, JurisClasseur Europe Traite, 30 novembre 2006, par. 403 (cited by Quentin Lejeune, *op.cit.*, p. 14).

international law, such as the principle of consistent interpretation[51].

4. Conclusions

We believe that the Court in Luxembourg, through the control that it can have on international agreements to which the EU is a party, behaves, in terms of international law, as a national constitutional Court, if we consider the opinion of the General Advocate P. Maduro expressed in the Opinion from *Kadi* Case[52], namely: „the ratio between international law and Community law is governed by the Community legal order itself, and international law can interact with this legal order only under the conditions set by the constitutional principles of the Community".

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[51] For details see, **Elena Emilia Ștefan**, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ,* Pro Universitaria Publishing House, Bucharest, 2013, p.318.

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VALUES AND VALORIZATION

Elena ANGHEL[*]

Abstract

I live with the feeling that, in the past few years, Romania has been a drifting ship. We do not know where is it going, nor the place it will arrive at. Like any individual endowed with reason, I wonder why chaos took over this society and, if I would have the power to change anything, what would be the solution to less troubled waters. I think we lost our way because we forgot to always refer to the values that should guide us ... or because we refer too often to non-values. I think we could find our way and stop wandering if we will rely our evolution on values, if we will teach our children from a young age what values and non-values are and if we could run our existence in the spirit of a real value horizon.

People live together, not just coexist, as so deeply professor Gheorghe Mihai highlighted[1]*. Coexistence is specific to herds, packs, hordes; but human community means collaboration, cooperation, consensualisation, which implies a consciousness towards values. "What is missing now to the human society is a behavior that relates to a code of virtue"*[2]*.*

Moral values are the support for the legal values. Unfortunately, today, it seems to me that values are inverted and that the belief in the perfectibility of the individual (and therefore the perfectibility of law) is increasingly being questioned. Contemporary society is characterized by lack of motivation, lack of a strategy and the absence of any ideals. In this context, I believe that the individual today feels the necessity of some value referrences more acutely, whilst the society needs a law deeply based on moral values. As morality itself contributes to the valorization of the law, I think that moral appeal is more necessary today than yesterday, as a remedy for the individual and, consequently, the law to overcome their crisis.

For all these reasons and also because I share the view that "the concrete law is not viable without values and these values are always expressed in the defining principles of a law system"[3]*, I felt the need to write about values and valuation.*

Keywords: *value, valuation, law crisis, principle, ideal.*

INTRODUCTION

The rules of cohabitation within the society are not spontaneously produced by the intuition. Mircea Djuvara noted that „the concept of value is present within all the legal relations and therefore it can be said that the law in its integrity is nothing but a research of values. They are classified in increasingly higher values, having the same nature as the very idea of obligation, being set out as unconditional values"[4].

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[1] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, page 164.

[2] Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *Teoria generală a dreptului*, C. H. Beck Publishing House, Bucharest, 2006, page 11.

[3] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, page 167.

[4] Mircea Djuvara, *Teoria generală a dreptului (Enciclopedie juridică)***,** (General Theory of Law (Legal Encyclopedia)), All Publishing House Bucharest, 1995, page 216.

First of all, the values concern the process of creation of the law by being valorized by means of the enacted rules of law. The lawmaker creates the ideas within an axiological area. The law always starts from the social actions, but it also means legal consciousness, ideals and social values. Ion Craiovan noted that an action becomes a value as soon as it falls under the dynamic field of our interests and opinions[5]. Each and very rule outlines social values, defined as „appreciation criteria, standards, norms" which are values representing "fundamental principles of choice" for human life. As soon as the values acquire legal expression, they are promoted and protected by the rules of law they translate. Within the society, the values motivate the individual, guide it and grant reference models and systems to it. Therefore, we speak about the perception of the values in what concerns the individual and the valorization function of the values on the human inwardness.

The specific element of the society is the praxio-axiological cooperation of its members. Gheorghe Mihai deeply outlines that people do not coexist, the people live together[6]. The coexistence is specific to the herds, packs or hordes; but the human community means collaboration, cooperation, unity which implies the value awareness. The individuals, as free beings endowed with sense and consciousness, choose their behaviors, measure their actions, relate to behavior standards and assess the consequences of their actions. Therefore, „the feature of the individual of being free, able to choose based on a rational purpose is the one that differentiates so radically the animal from the human being".

CONTENT

The axiological dimension of the law represented a point of interest for the whole philosophy of the law. Ioan Humă outlines that the legal axiological condition is the key condition of the law. The substance of the law lies not only in the normative dimension of the law, but also in the valuable contents which confer the axiological meaning to the field of the law. Therefore, the field of the law and especially its regulatory framework "falls under the scope of the creative tension between what it actually is and what it should be, between the reality and the ideal and between the fact of life and the value. To remove the law from the axiological field means to reduce it to a pile of facts, of things belonging to the entropic fact of life and not to the human action able to model the social reality and the human being itself"[7].

The principles of the law are the expression of the values promoted and defended by means of the law. According to J. Locke, „the principles have such an influence on our opinions that we usually judge the truth and weigh the probability by means of them to such extent that all that is not compatible with them is so far from us

[5] Ion Craiovan, *Tratat de teoria generală a dreptului*, (The Treaty on the General Theory of Law), Universul Juridic Publishing House, Bucharest, 2007, page 480.

[6] Gheorghe Mihai, *Fundamentele dreptului*, (The Basis of Law), vol. I - II, All Beck Publishing House, Bucharest, 2003, page 164 and the following ones.

[7] Ioan Humă, *Teorie şi filosofie în orizontul de cunoaştere a fenomenului juridic*, în Studii de Drept Românesc, (Theory and philosophy in the horizon of the knowledge of the legal phenomenon in Romanian Law Studies) year 17 (50), no. 3-4/2005, page 264.

that we do not even think it can be possible"[8].

Such great is the importance of the values, that they classify any positive law from the axiological point of view. However, the people do not cohabit only legally, but also morally, politically and religiously. The law does not exhaust the wealth of the horizon of the values: besides the independent legal values which build the rules of law, there are also other values, namely non-legal values which are necessary for the human coexistence and which the law takes over, legalizes, promotes and defends by means of its rules. „The philosophy of the value is the only one which can justify both the general human nature of the value and the fact that the different types of value are complementary, so that if the human being does not cultivate values it is unilateral, poor and in the end comes to be inauthentic"[9].

Therefore, the legal axiology does not investigate only the legal values. Since it aims the legalization of the other social values, the principles represent the field where the law meets the philosophy, moral, politics and the other social fields. The circumscription of the content and of the purpose of the general principles of law inevitably engages the theory in formulating valuable statements which are opened to the philosophical horizon so that the real penetration of their meanings necessarily implies the philosophical meditation: the philosopher is the one who "queries the whole law, the concept of the law while the lawyer "queries the concreteness of the law"[10]. Ion Craiovan noted that the philosophical universe of the value, „attracts, repulses or causes reluctance, but it proves to be unavoidable by the human being within its permanent attempt of self-definition and construction"[11].

Ioan Humă outlined that the philosophical truth is different from the scientific truth due to the fact that, by studying not the thing itself but its impact on our spirit, the philosophical truth confers value[12]. Notwithstanding, the author establishes that the two subjects are complementary: „the science of the law certifies the philosophy of the law and the latter is nourished by the living truths of the former".

The ethics also represents an axiological criterion of the law. There are several law principles that claim the defense of certain values coming from the moral; therefore, the fairness, dignity, the good and the useful thing, the truth and the good faith are categories of the moral. Sometimes, the doctrine assesses the individual itself as a value, seeking answers to the question of whether the individual as a distinct personality is or has value. Therefore, according to Ion Craiovan, „the human being creates values and creates itself by means of the values which become coordinates of the human action and

[8] *Apud* Dumitru Mazilu, *Teoria generală a dreptului*, (General Theory of Law), All Beck Publishing House, Bucharest, 1999, page 126.

[9] Ioan N. Roşca, *Introducere în axiologie. O abordare istorică şi sistematică*, (Introduction to axiology. An historical and systematic approach), Fundaţia România de Mâine Publishing House, Bucharest, 2002, Foreword.

[10] Gheorghe Mihai, *Fundamentele dreptului*, (The Basis of Law), vol. I - II, All Beck Publishing House, Bucharest, 2003, page 7.

[11] Ion Craiovan, *Tratat de teoria generală a dreptului*, (The Treaty on the General Theory of Law), Universul Juridic Publishing House, Bucharest, 2007, page 478.

[12] Ioan Humă, *Teorie şi filosofie în orizontul de cunoaştere a fenomenului juridic*, în Studii de Drept Românesc, (Theory and philosophy in the horizon of the knowledge of the legal phenomenon in Romanian Law Studies) year 17 (50), no 3-4/2005, page 260.

ontological determinations of the human condition".

The moral values represent the basis of the legal values. In our opinion, the two social fields, namely the law and the moral are complementary in the field of the law and they merge in order to achieve the scopes of the society without being mutually exclusive. However, within the accepted legal principle, the existence of the law was sometimes perceived as a subsidiary intervention: „the law exists as long as the individuals are incapable of morality, in its meaning of virtue"[13]. We believe that the substance of the law is not the coercion, the perfection being achieved by means of the valorization function of the moral within the law. First of all, the law is claimed in order to educate, to valorize and to prevent (this is why the majority of the individuals comply with the normative prescription) and only to the extent necessary the law is claimed in order to coerce and to punish.

The distinction of perspective between the law and the moral in terms of the value consists in the fact that "the moral admission of the value of the human life is universal and absolute and no speculative derogation of it can affect its substance, while the legal admission of the same vale is suddenly neither universal nor absolute as long as the same lawmaker falls in contradiction in the same respect"[14]. Therefore, we understand that what is important is the admission of the values, not the way they emerge within a positive law system which changes from an era to another, but within their logical anteriority, the everlasting values of the founding principles of the positive law being the ones that really matter. In what concerns the political influence, the principles of law are "the result of the continuous and necessary observations of the social needs and none of these principles represents just the result of the abstract speculation"[15]. Before being embodied into a principle of law, a certain principle represents the object of the political ideologies; up to the extent the idea takes shape in the common legal consciousness of the society, the concept sets oneself up as a principle of law, being then translated into the rules of law. According to Ion Craiovan, the political values such as peace, freedom, equality, independence express the aims of the social-political system, the content and the structure of the power, the mechanisms of exercising the political leadership and ideologies[16].

According to Montesquieu, to pretend that the justice exists only if the positive law discloses it would be as absurd as if someone pretended that the radii of the same circle were not equal before drawing the circumference.

The draw up of the list of all values would have no practical use. However, we believe that the values such as justice, legal security, social order, peace, social progress, freedom, equality, human dignity, property, democracy, rule of law, national sovereignty represents the invariabilities of the legal judgment. We distinguish between legal, moral, political, religious, aesthetic, economic and philosophical values. The legal accepted principles notes the existence of the scope values which are sought by means of the action and of the instrument

[13] *Idem*, page 33.

[14] Gheorghe Mihai, *Fundamentele dreptului. Teoria răspunderii juridice,* (The Basis of Law. The Theory of the Legal Liability), vol. I - II, All Beck Publishing House, Bucharest, 2003, page 55.

[15] Mircea Djuvara, *op. cit.*, page 242.

[16] Ion Craiovan, *Tratat de teoria generală a dreptului*, (The Treaty on the General Theory of Law), Universul Juridic Publishing House, Bucharest, 2007, page 482.

values by means of which we are able to reach the scope value[17]. The scope values, „although spiritual creations of the society, arising from cohabitation, live by means of their subjective interpretation of the human experience which engages them in dreams, aspirations and ideals of life". For example, according to Djuvara, the scope value is the justice which „orders by means of its own authority. It must be heard for ourselves and inside ourselves without reference to any other purpose, because there cannot be any other purpose higher than it"[18].

The philosophy of the law often attempted to classify the values in a particular hierarchy. Each of those who approached the study of the values of the law classified within this hierarchy the values which they considered to be the most important. Therefore, there is a multitude of systematizations, claiming a diversity of "higher rank" values. As far as we are concerned, we move away from the attempt to classify the values, wondering under what criteria we might consider that a certain value is more important and other less important for the universal human being? Therefore, we agree with the words of the professor Craiovan: „the originality and irreducibility of the values lead to the failure to admit the superiority of rank, and at most, to temporary priorities depending on the human social needs related to them"[19]. It is shown that the hierarchy of the values should not be understood as a mechanical subordination of the values, likely to cancel the specific of each value.

Throughout the evolution of thinking, the values were "ranked" depending on the importance they granted to the human community, according to the aspirations of the respective historical moment. For the Romanian lawyers, the law was the art of the good and of the equitability, Toma d`Aquino defined the law by means of the idea of equality, according to Kant the law means the individual freedom, to Bentham the utility, to Duguit the solidarity, while the positivists remained to the state law. Most of the philosophers considered the ideal of justice to be the supreme value. Mircea Djuvara wrote that „our sense does not conceive anything higher than the idea of justice; we necessarily understand that there cannot be any another interest above justice; the ideal of justice is higher than any other ideal, is an ultimate ideal in this respect"[20]. François Terré noted the ambivalence of the law: the law is a mediator between the right thing and the wise thing, it tends to reconcile the aspirations of the law with the requirements of the society[21].

J.-L. Bergel also admits the possibility to classify the general principles of law depending on their value, arguing that: everything related to the social order prevails over the personal interest; the requirements of the public order prevail over the non-retroactivity of the law or of the individual property; the fundamental freedoms have priority over any other legal categories. Basically, the conjugation of the principles of law depends to some extent on their specialty or generality, so that the principles applicable to a certain subject shall have precedence over the general principles[22].

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[17] Gheorghe Mihai, *Fundamentele dreptului. Teoria răspunderii juridice,* (The Basis of Law. The Theory of the Legal Liability), vol. I - II, All Beck Publishing House, Bucharest, 2003, page 43 and the following.

[18] Mircea Djuvara, *op. cit.*, page 441.

[19] Ion Craiovan, *Tratat de teoria generală a dreptului*, (The Treaty on the General Theory of Law), Universul Juridic Publishing House, Bucharest, 2007, page 481.

[20] Mircea Djuvara, *op. cit.*, page 214.

[21] François Terré, *Introduction générale au droit*, 7th edition, Dalloz Publishing House, 2006, page 47.

[22] Jean - Louis Bergel, *Théorie générale du droit*, 4th edition, Dalloz Publishing House, 2003, page 109.

Paul Roubier outlined the necessity to explain the law based on the theory of the values. The definition of the rule of law fundamentally involves an essential dimension, as the law is a normative science situated in the field of the "should be" and subject to the law of the purpose. The law is not an explanatory discipline, it does not describe the reality on the indicative mood but on the imperative, the law is founded on valuable judgments and its assessments are always set by reference to an ideal[23].

Paul Roubier noted the existence of the three-dimensional theory of law, in the sense that each of the three main thinking movements – the positivism, the natural law and the realism – explained the concept of the law by reference to a certain value. Each of the values discovered by these accepted legal principles correspond to a certain stage in the evolution of the society, as follows: the positivism considers that the key value is the legal security, the value of the justice prevails in the field of the natural law, and the realism seeks the purpose of the law within the social progress. According to Roubier, the trilogy of the legal security, justice and progress represents the hierarchical order of the values.

According to Rickert, there are certain principles that give meaning to the history and they consist precisely of the fundamental values that govern the development of the humanity. The accepted legal principle shows that „in formal terms, they are timeless by means of their validity, regardless of the historical transformation, but their content depends on the historical life. Therefore, in what concerns the history, the system of the values has an open character"[24].

The historical continuity of certain values asserts their importance and the absolute nature, regardless of the changes recorded from a society to another. By being located within the natural law, these values are absolute and represent a legal constancy. The evolution of the ideals emerges from the consciousness of the society, however, to a certain extent it can lead to a re-valorization of the law. Therefore, by being related to a particular system of positive law, the social values established within the content of the rules of law may be subject to "transformations", rearrangements. Therefore, in terms of the axiological dimension, the Romanian constitutional system was established in 1991, the supreme values being referred to in art. 1 of the Basic Law. By means of the review of the Constitution in 2003, the democratic traditions of the Romanian people and the ideals of the Revolution of 1989 supplemented these values. Thereby, certain ideals, aspirations and values were taken over from the natural law and were expressly provided by means of the rules of law, by being transformed from real sources into formal sources of law.

Mircea Djuvara showed that the ascertainment of the ideal built by the society must be the beginning of any scientific research of the law. According to Gheorghe Mihai, the value „is not natural, as the properties of the things, it is not based on the real world, but on the ideal world, of the pure validity"[25]. However, although the individuals are similar by means of the values they receive, they are still different

[23] Paul Roubier, *Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales*, 2nd edition, Dalloz Publishing House, 2005, page 163.

[24] *Apud* Ioan N. Roşca, *Introducere în axiologie. O abordare istorică şi sistematică*, (Introduction to Axiology. An Historical and Systematical Approach), Fundaţia România de Mâine Publishing House, Bucharest, 2002, page 27.

[25] Gheorghe Mihai, *Fundamentele dreptului. Teoria răspunderii juridice,* (The Basis of Law. The Theory of the Legal Liability), vol. I - II, All Beck Publishing House, Bucharest, 2003, page 42 and the following.

by means of their valorization, due to the fact that „each and every value is valorized by means of the actions". Therefore, the human being is endowed with responsibility, is aware of the values that the rules of law engage, adopts them and chooses between the legal and the illegal, the licit and the illicit actions. By means of the actions, the human being decides to adopt a certain legal conduct and commits to translate the values admitted by it.

Therefore, the value represents the mark of the responsibility and the validity of the rules of law falls under the conditions of the acceptance. Those who disregard the rules of law defy the values involving them. Therefore, the fulfillment of the law depends on whether it is accepted and assumed as a value and a rule by the members of the society. The coercion is not the one which essentially ensures the force of the law, but the power to valorize the rules of law imposed on the individuals. In this regard, the understanding of the fulfillment of the law is an act of assessment and search of the justice and of the other acknowledged values.

Ion Craiovan distinguishes between the action of valorization and the action of preference, as follows: the action of valorization, by being emerged within the social consciousness prevails over the actions of preference which occur within the individual consciousness[26]. The value is a "generic human quality", although it is inner: it is repeated in the individual consciousnesses which live it, as if it belongs only to a single individual; the value remains universal by means of its structure, no matter the historical time. The values propose to the individual "a complex of coded solutions that store the collective experience of the group to which it belongs, anticipate and humanize its creations".

The law is „generated and structured within and directed towards the inseparable connection with the constellation of values of the historical time in which it is developed and in certain conditions the law itself accedes to the statute of value"[27]. The author conceives the culture as a merger between the knowledge and the value. The knowledge is not sufficient in order to grant an unitary view to the act of culture, therefore the value appears as a "fulfillment of the knowledge" in relation to the human being, its aspirations and needs. In the first place, the culture, by involving valuable judgment, represents the crystallization of the knowledge and in the second place the embodiment of the value. The elements of the knowledge are "capable of valorization within the humans' area by means of their very essence and genesis, therefore they are potential or actual values of the human being".

Petre Andrei distinguishes between the process of knowledge and acknowledge (valorization) of the values. Therefore, the process of knowledge is theoretical and results in making existential judgments; it grants us the "explanatory theoretical values" on the top of which the value of the truth is laid. The process of acknowledge is a practical process which results in valuable judgments. The valorization, preceded by the knowledge, consists in the "research of the correspondence, matching between a middle value and a scope value which we consider as a feasible fact". Within the valorization process the individual is engaged intellectually, emotionally and volitionally. The result of the valorization process is an absolute, general and supra-individual value consisting of all the values

[26] Ion Craiovan, *Tratat de teoria generală a dreptului*, (The Treaty on the General Theory of Law), Universul Juridic Publishing House, Bucharest, 2007, page 480 and the following.

[27] *Idem*, page 31.

that create the culture: the cultural ideal[28]. In the same time, as stated in the literature: (...) empowering people through their involvement in community life can be perceived as a factor related to democracy, to the development of the society[29].

The values, ideals and aspirations of the society find their expression in the content of the rules of law. A certain concept, a certain value, such as equality may be a subjective right considered essential. Therefore, we speak about the subjective right to equality. In addition "certain subjective rights are selected based on the criteria of values due to their importance and registered as fundamental rights"[30]. Equally, the same value, by being one of the basis of the law, may achieve the content of the principle of the objective right. „Therefore, the equality and freedom, as the basis of the social life need to find their legal expression. Therefore, the legal concepts of the equality and the freedom which shall become basis (principles) of law emerge, thus resulting in the emergence of the rules of law"[31].

The qualification of these ideas, concepts and values depending on their importance and consecration within the legal, national or supra-national order is not an easy task. The long discussions prior to the draw up of the European Union Treaty on the coverage of the "values of the Union" proved the difficulty of such a process, determined by the meaning to be granted to the concept of "value"[32]. Therefore, difficulties were encountered in trying to establish if one of the ideas should be considered as values or objectives, the replacement of the „values" with „principles", of the „human rights" with the „fundamental rights or fundamental freedoms" emerged, the area of the objectives of the Union extended. Basically, it was considered that the values able to accomplish the following two requirements should be recorded as values of the Union: the fundamental behavior and the basic legal content which is clear, without controversies, so that the member states know their obligations and the penalties which emerge in case of the failure to fulfill the obligations. That way, the former "principles" become "values" in the Treaty of Lisbon and, for the first time, the rights of minorities are mentioned[33].

Ion Deleanu noted that, „by means of an original feed-back circuit, once the law is created, it becomes mandatory to the state which is a subject of law, like other subjects. In order for the law to have the power to become mandatory, several minimum terms are indisputable; the postulation of the genuine and persuasive moral and political values of the global civil society and of the individual, by means of

[28] Petre Andrei, *Filosofia valorii*, în Opere sociologice, (The philosophy of the value, in Sociological works), vol. I, Academiei Publishing House, Bucharest, 1973, *Apud* Ioan N. Roşca, *Introducere în axiologie. O abordare istorică şi sistematică*, (Introduction to Axiology. An Historical and Systematical Approach), Fundaţia România de Mâine Publishing House, Bucharest, 2002, page 78-79.

[29] Elena Emilia Ştefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ,* Pro Universitaria Publishing House, Bucharest, 2013, page 18.

[30] Ioan Muraru, Elena Simina Tănăsescu, *Drept constituţional şi instituţii politice*, (Constitutional Law and Political Institutions), 12th edition, vol. I, All. Beck Publishing House, Bucharest, 2005, page 139.

[31] Nicolae Popa, Mihail C. Eremia, Simona Cristea, *Teoria generală a dreptului*, (General Theory of Law), 2nd edition, All Beck Publishing House, Bucharest, 2005, page 103.

[32] Roxana Munteanu, *Elemente de noutate în Tratatul instituind o Constituţie pentru Europa*, în Studii de drept românesc, (Novelty Items in the Treaty Establishing the Constitution for Europe in Romanian Law Studies) year 17 (50), no. 1-2/2005, page 99-142.

[33] Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene* (Introduction to European Union Law), Universul Juridic Publishing House, Bucharest, 2011, page 86.

the rules of law; the establishment of a democratic environment; the strengthening of the state responsibility principle; the establishing of control means over its activity; the creation of a coherent and stable legal order; the strict promotion of the legality and of the constitutionality principle; the conversion of the human being into the cardinal axiological mark"[34].

CONCLUSIONS

The importance of the principles of law and their related values is suggestively expressed by Gh. Mihai in the following lines: „The algebraic equations and the chemical schemes are also beautiful, the demonstrations of the geometry and the sociological investigations are fascinating, but neither of them breaths the human beauty in the same way the legal truths succeed in doing it, by means of which we aspire to live surrounded by the good and the right things. The people need not only the harmony and the balance but how could they hope to spend effectively the other needs if the balance and the harmony are missing and are altered?"[35]

If the specialized literature records a consensus over the importance of the existence of the principles, the determination of the number of the general principles leads to many disputes. The four principles of natural law established by Grotius – the obligation to repair the damage caused by own actions, the fulfillment of the undertaken commitments, the respect towards the assets belonging to another persons, the fair punishments of the offenders – were gradually supplemented by tens of principles, by revealing a real passions of the theorists to list principles. Gh. Mihai noted in the works of the doctrinarians the existence of at least one hundred principles, classified in four levels: essential for *omni et soli*, essential for the Romanian law in force, essential for a branch of the law, essential for the legal institutions. Furthermore, the difficulty increases when the principles are to be stated; for example, the author shows that the principle of freedom was granted 47 statements within the works published in 2004.

According to Gh. Mihai there is one single principle which organizes the law and which does not need any acknowledgement: the principle of justice. The justice, as an ontological principle is registered in the spiritual essence of the human being. This principle of „what it should be" is multidimensional and its dimensions lead to another dispute: the representatives of the monism assert the single dimension of the principle; the representatives of the pluralism argue that „the basis is represented by a plurality of principle, without agreeing on their number"[36]. In what concerns the dimensions of the principle of justice, Gh. Mihai claims the equality, freedom and responsibility. The independence of justice is not only a desiderate of the Constitution`s editors, it is a reality, it has practical application, so it is not only a state of mind [37].

[34] Ion Deleanu, *Drept constituţional şi instituţii politice*, (Constitutional Law and Political Institutions), vol. I, Europa Nova Publishing House, Bucharest, 1996, page 113.

[35] Gheorghe Mihai, *Fundamentele dreptului*, (The Basis of the Law) vol. I - II, All Beck Publishing House, Bucharest, 2003, page 6.

[36] *Idem*, page 179-181.

[37] Elena Emilia Ştefan, *Reflections on the principle of independence of justice,* published in the proceeding of the Conference Challenges of the Knowledge Society, The 7th Edition, „Nicolae Titulescu" University, Bucharest, 17-18 may 2013, *CKS*- eBook 2013, page 671.

The multitude of opinions can be justified as follows: we are situated in a field which confers a generous space to the creative role, so that each and every researcher makes all the efforts in order to bring something new, by exceeding the level of the knowledge already settled. However, we must not forget that the principles represent a guarantee for the stability of the legal order, a requirement which should not be sacrificed in favor of the creative vanity. What is really important is the existence of the principles: „a principle, whatever it may be, in relation to which all individual relations are arranged, is essential for the maintenance of the society; the significance of this principle, the things it allows or prohibits do mot matter, but its existence is fundamental for the social body"[38].

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[38] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *op. cit.*, page 57 and the following.

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CONSIDERATIONS ON POLITICAL PARTIES

Erhard NICULESCU*

Abstract

Political parties are the engine of social life, without which citizens would not be able to express political will. According to the law of political parties, they fulfill a public mission guaranteed by the Constitution. That is why, considering the subject very current, we considered it important to analyze in this study, in the notion of political pluralism: the concept of political party but also its constitutional dimension. To this end, the study shows the view of the doctrine combined with the jurisprudence of the Constitutional Court.

Keywords: *Constitution, political party pluralism, citizen, jurisprudence.*

1. Introduction

Political parties have had an overwhelming role in the modernization of political life[1]. Strictly, parties are more than a century and a half old[2]. According to Giovanni Sartori relationship between citizens and parties is defined as: "citizens in Western democracies are represented by the parties[3]". It is stated that the term *party* was used to designate factions that divided the ancient cities and clans of the Middle Ages and clubs of deputies from the revolutionary assemblies and committees which prepared the census election in constitutional monarchies[4]. In the U.K. political parties emerged in the form of affinity groups in Parliament, associated with networks of relations in the country, groups that divided in terms of governance in fact[5].

Therefore, we explain further, what the political parties are, combining doctrine, case law and the jurisprudence of the Constitutional Court of Romania. As rightly pointed out in doctrine, the concept of political party allows the correct interpretation of art. 8 of the Constitution in the sense that political parties contribute to defining and expressing the political will of the citizens[6]. We speak of this view of the special relationship that exists between the state and political parties. State expresses the community, while political parties express ideologies and interests of social groups that coexist within the nation[7].

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[1] Cristian Ionescu, *Compared Constitutional Law*, Ed.C.H.Beck, Bucharest, 2008, p. 25.

[2] Dan Claudiu Dănişor, *Constitutional Law and Political Institutions*, Ed.Europa, Craiova,1995, p. 93

[3] Giovani Sartori, *Representational Systems*, in International Encyclopedia of the Social Sciences, vol.13, 1968, p. 471.

[4] Dan Claudiu Dănişor, *op.cit.,* 1995, p. 93.

[5] *Constitutional documents of the United Kingdom of Great Britain and Northern Ireland*, Translation and notes E.S.Tănăsescu, N. Pavel, Ed. All Beck, Bucharest, 2003, p. 15.

[6] Ioan Muraru, Elena Simina Tănăsescu, *Constitutional Law and Political Institutions*, edition 14, vol II, Ed. CH.Beck, Bucharest, 2013, p. 23.

[7] Dimitri Georges Lavroff, *Les partis politiques*, Presses Universitaires de France, Paris, 1970, p. 101.

According to Dan Claudiu Dănişor there are two phases of the approach of defining political party[8]. A first phase insists on doctrinal element of the party and its function in the state or its base class. A second phase emphasizes more on the institutional element of the political party.

As far as we are concerned, we understand the parties as *associations*, social groups. Social groups are of two kinds: some voluntary as for example: companies and associations in general, whose role is so great today; others are natural, such as primitive tribe and clan which are naturally constituted, as was the Roman *gens*, like family, as are the nations today[9].

According to the jurisprudence of the Constitutional Court of Romania[10] in the sense of the constitutional text to which it is devoted, the *right of association* is a recognized prerogative of the citizen, whose exploitation is the expression of conscious and free will. The Court shows that association occurs by consideration of the common reasons that close associates and ensures communication between them, ideological or professional etc.; is essential the existence of a system of common values and interests as a premise and some final common goals. In addition, the argument held by the Court that: "the option of association is based on the conviction that achieving the desired purpose is only possible due to the concerted action of a organized and structured community, therefore, logical and functional." The conclusion of the above highlighted decision is that "in a state of law is not possible to convert the right of association into an obligation."

2. Content

2.1. Doctrinal and legal definitions of the political party

Dimitrie Gusti said that "*political party* is one of the most suggestive and interesting collective personalities (...) is a free association of citizens, permanently united by interests and common ideas of a general nature, association which seeks in a full public light to reach the power to govern in order to create a social ethical ideal."[11]

According to Vasile Gionea "*political party is an association of people* who are organized based on common interests or views to conquer the power of state with the vote of the people."[12] Lucreţiu Pătrăşcanu defined the party as "*a group of people who defend certain class interests and struggle for political power: the determinant element of its structure is the nature of the interests it represents and for whose satisfaction unfolds its entire activity. By their content, class interests determine also adherence or lack of adherence of a political body to a social or political system within which it works, as also all interests set their objectives pursued and the decide the means by which it intends to use to*

[8] Dan Claudiu Dănişor, *op.cit.,* 1995, p. 93 and next.

[9] Mircea Djuvara, *General Theory of Law. Rational Law, Origins and Positive Law*, Ed. All Beck, Bucureşti, 1999, p. 298.

[10] Decision of the Constitutional Court of Romania no. 83 from February 10, 2005, published in the Official Gazette no. 36 from April 27, 2005.

[11] D. Gusti, *Political Party in Doctrines of the Political Parties*, Romanian Social Institute, National Culture, Bucharest, 1992, p. 4.

[12] Vasile Gionea, *The Role of Political Parties in the State of Law, in Political Parties,* the Center for Constitutional Law and Political Institutions, Public Company "Official Gazette", Bucharest, 1993, p. 5.

achieve them, in relation to the existing rules of law. "[13]

In another opinion is stated: "*political parties and groupings contribute to the expression of suffrage*. *They are formed and carry out their work freely*. *They must respect the principles of national sovereignty and democracy*."[14] A party consists of groups and individuals who perceive the need to orient a certain conception regarding government policy and are interested to guide the evolution of the global society in a certain direction.[15] One author states that, whatever definition we embrace a common denominator is detectable in the ability of political parties to form the means by which citizens exercise their right to participate in the current policy configuration and administration of sovereignty.[16]

From the definitions of the political parties highlighted so far, stand off some features that once understood, will help us to deepen the concept of political party:

- political parties are associations or permanent groups of individuals united freely by common political beliefs and ideological affinities;

- political party is a legal entity (moral) has an independent organization; has corporate assets; works to achieve a legitimate aim;

- by definition, the political party tends to assume responsibilities in the exercise of power;

- parties are distinguished from mere political clientele, factions, clans or camarilla; parties differ in their willingness to exercise power by pressure groups and clubs that do not participate in elections and parliamentary life, but pressure on parties, government etc.

- peculiarity of parties is to personify a trend, to make taking shape a conception of man and society and fight to conquer power by attracting voters;

- legally, the political party is an association and the incorporation and operation are subject to legal conditions set for any association; therefore any political party acquires legal personality from the moment of its registration.[17]

Political parties are defined in the Organic Law no. 14/2003: *"the political associations of Romanian citizens, with the right to vote, that participate freely in the exercise of their political purpose, fulfilling a public mission guaranteed by the Constitution"*. The law also expressly states that political parties are public legal entities. Previously, in the Law no.27 / 1996 parties were defined as *"associations of Romanian citizens with the right to vote* (....)". Also, in the old regulation there was the provision that: political parties are public legal entities. Tudor Drăganu considered that the expression "*political parties are public legal entity*" is a legal nonsense because what characterizes public legal entities is that they can issue binding acts by way of unilateral expressions of the will, attribute lacked by the political parties.[18]

In addition, we note that in the Romanian Constitution political parties are not defined, but only mentioned, in the context of political pluralism. From this

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[13] Lucrețiu Pătrășcanu, *Fundamental Problems of Romania*, Ed. Socec, Bucharest, 1944, p. 24.
apud Mihai Bădescu, *Constitutional Law and Political Institutions*, revised and enlarged second edition, V.I.S.. Print, Bucharest, 2002, pp. 286-287.

[14] Roger-Gerard Scwartzenberg, *Sociologie politique*, vol. I, Ed. Lumina Lex, Bucharest, 1997, p. 315.

[15] Daniel- Lewis Seiler, *La politique comparée*, Armand Colin, Paris, 1982, p. 94.

[16] Ioan Stanomir, *Constitutionalism and Post-communism. Comment of the Romanian Constitution,* Ed. Bucharest University, 2005, pp. 19-20.

[17] Mihai Bădescu, op.cit., 2002, pp. 287-288.

[18] Tudor Drăganu, *Political parties are moral entities of public law?,* Public Law Journal no. 2/1998, p. 1 and next.

point of view, as shown by an author, constituent legislature consciously avoided a normative constitutional definition (omnis definitio periculosa est) of the political parties from at least two reasons:

a.) If political parties are the expression of the separation between state and society in a democratic political system, it requires a separation of the state and the party, the party-state is characteristic of totalitarian regimes. Therefore, a definition at the constitutional level would present many inconveniences, both to legislate subsidiary and for the existence and functioning of political parties to form party system in Romania.

b.) The political parties, even if they have a major influence on the exercise of state power as institutional structures, these remain in the civil society area, being the expression and even the most efficient carrier of pluralism (political) of society. Reason which does not justify a normative constitutional definition of the political parties.[19]

2.2. Political and constitutional dimension of the political party

As shown in doctrine, political parties are a product of representative liberal democracy.[20] The parties through their activities and actions, by the perception and exercise of the constitutional role these have, largely establish the constitutional regime and quality of life.[21] Constant presence of associative phenomenon for political purposes to impose and develop scientific interest especially in the matter of modern parties, maintain aimed to unravel concerns: the distinct nature and sustainable associations generally of the party type, in particular, based on their mode of formation; role and objectives of the parties, their concrete forms of involvement in the functioning of the state; factors that accredits parties as actors linking social body, coagulated state in the nation, the fundamental institution of the political system.[22]

Position and location of parties in contemporary Constitutions have a great importance and has multiple meanings and not coincidentally in the Romanian Constitution, the concept of political parties appears in the title *"General Principles"* and in the context of supreme values of the political pluralism and in two fundamental constitutional principles of the organization of the state power: democracy and sovereignty.[23] Therefore, political parties are directly related to fundamental rights. According to art. 21 of the German Constitution, "parties will participate in the development of the peoples' political will." In the revised Romanian Constitution, we expressly find the notion of party, political party or other forms of association in articles such as art. 8 paragraph (2); art. 40 paragraph (3), art. 73 paragraph (3) letter b; art. 146 letter k; art. 9; art. 62 paragraph (62); 64 paragraph (5) and so on. According to art. 73 paragraph (3) letter b) of the Constitution, the organic law regulates: *"organization, operation and financing of political parties*".

The constitutional role of the political parties in our country is approved by the provisions of art. 8 paragraph (2) which states that parties *contribute to defining and expressing the political will of the citizens*.

[19] Varga Attila, Some aspects of the constitutionality of political parties, Journal of Public Law, Supplement on 2014, pp. 123-124.

[20] Mihai Bădescu, op.cit., 2002, p. 294.

[21] Varga Attila, op.cit., p. 122.

[22] Constantin Nica, Parties- Vital Actors of Democratic Political Systems, Public Law Journal, Supplement on 2014, pp.116-117).

[23] Varga Attila, op.cit., p. 123.

If we interpret this text, we can conclude that the political will is the will of the citizens and the party is the mean that contributes to the defining and expressing of the political will. These goals of the parties to contribute *to defining and expressing the political will of the citizens,* determines otherwise and their constitutional status, i.e. the set of principles and rules governing the formation and the rights and obligations of the parties in a pluralistic and democratic state.[24]

According to the jurisprudence of the Constitutional Court, the parties do not have a direct mission in forming or expressing the political will; general will as political will results from the vote and is expressed by the representatives and by referendum, and by voting is elected the parliament and not the parties, parties having only the role of mediation between the electorate and parliament for its establishment by the voters.[25] The characterization of the party as fulfilling a public mission guaranteed by the Constitution is not contrary to art. 8 paragraph (2).[26] "Defining and expressing the political will is a mission, as it refers to citizens in general can only be public. Party is a public legal entity and its mission can only be public, since regards a public interest and pursues the formation of a general political will of which it depend representativeness and legitimacy necessary to implement its political program." [27]

Referring to another interpretation that we can make to art. 8 paragraph (2) of the Constitution, in accordance with the provision that *political parties contribute to expressing the political will of the citizens,* we show that we should corroborate with art. 30 on freedom of expression to shape this constitutional role of political parties. The Constitutional Court jurisprudence has established that "the party expressing the political will of citizens, according to art. 8 paragraph. (2) of the Constitution is the political realization of freedom of expression provided for in art. 30 of the Constitution. Otherwise, it would mean that this freedom is different as exercised by citizens in an associative structure or outside such a structure, which is contrary to art. 30 of the Constitution".[28]

According to the doctrine[29] the contribution that parties have in defining and expressing the political will of the citizens is not only a right of the parties but also an obligation. Therefore, the author shows that the law allows the Bucharest Court to declare the termination of the party if it does not designate candidates, alone or in alliance in two successive legislative election campaigns, in at least 18 constituencies or did not have any general meeting for 5 years, according to article 47 of the law on political parties. These directives were judged by the Constitutional Court as being compliant with the Constitution, because the purpose of the party is defining for it and includes inter alia, the obligation to participate with candidates in the election, such an activity is the natural result of institutional expression of the political will of the members of that association, not to exercise that power entails the impossibility of the

[24] I. Muraru, E.S. Tănăsescu, *Romanian Constitution. Comment on articles*, Ed. C.H. Beck, Bucharest, 2008, pp. 84-85).

[25] Romanian Constitutional Court Decision no. 46/1994, published in Official Gazette no. 131/1994.

[26] Constitutional Court Decision no. 35/1996, published in Official Gazette no. 75/1996.

[27] Romanian Constitutional Court Decision no. 35/1996 cited above.

[28] Romanian Constitutional Court Decision no. 59/2000, published in Official Gazette no. 418/2000.

[29] Claudiu, Dănişor, Pluralism and Political Parties under art. 8 of the Constitution of Romania, Pandectele Române Journal no.5 / 2008, p. 58.

association to have the status of a political party.[30]

As shown unduly in the doctrine, there can be identified two dimensions of the relationship, connection of the parties with the fundamental rights: freedom of establishment and functioning of political parties and the purpose of political parties.[31] The earlier Organic Law of Political Parties, was Law no. 27/1996 which was amended by Law No.14 / 2003.[32]

Chronologically speaking, however, we mention that prior to 1989 there was no law on political parties, as it exists today. All modern type political systems in Romania were characterized in terms of institutional and functional plan – except the period between January 21, 1941 and August 23, 1944, by: existence of party pluralism and free competition between them (during 1865 – February 11, 1938 August 23, 1944 and December 30, 1947, December 28, 1989-present); the exclusively constitutional role of the single party (between December 1938 / January 1939- September 5, 1940, September 6, 1940 - January 20, 1941, December 30, 1947 – December 22, 1989).[33]

However, Decree Law No. 8 / 31.12.1989 on the registration and operation of political parties and public organizations in Romania[34] was the first bill after the 1989 Revolution which have paved the way for multi-party system, though it had only a number 5 articles. This bill is closely related to the Decree-Law no. 2 / 12.27.1989 regarding the establishment, organization and functioning of the National Salvation Front Council. In 1996 with the adoption of the political parties law no. 27/1996, Decree-Law No. 8 / 31.12.1989 was recalled. We can talk about at this time of reactivation of historical parties, such as the National Liberal Party or Christian Democratic National Peasants' Party or Romanian Social Democratic Party, which were registered at the Bucharest Court or the establishment of other new parties such as: Romanian Ecologist Party or Democratic Union of Hungarians in Romania etc.

The Decree-Law No. 8 / 31.12.1989 on the registration and operation of political parties and public organizations in Romania is expressly stipulated in article 1 that: "*In Romania the formation of political parties is free*". It also provides an exception that refers to fascist parties or those that spread ideas contrary to the constitutional and legal order in Romania. Therefore, this act does not state the definition of a political party but specifies that the registration and operation of political parties shall be made in accordance with the provisions of this Decree-Law.

The Political Parties Law no.27 / 1996 has established more stringent legal conditions, among other things, on the establishment of political parties, which led to a sensible reduction in their number.[35] On the other hand, art. 8 paragraph. (2) in conjunction with the appropriate constitutional text of freedom of

[30] Constitutional Court Decision no. 147/1998, published in Official Gazette No. 85/1999.

[31] Varga Attila, op.cit., p. 123.

[32] Political Parties Law no. 27/1996, published in the Official Gazette no.87 / 1996, amended by Law no.14 / 2003, published in the Official Gazette Part I, no. 25/2003 and republished in the Official Gazette no. 347 / 12.05. 2014.

[33] Constantin Nica, op.cit., p. 116.

[34] Decree-Law No. 8 / 31.12.1989 on the registration and operation of political parties and public organizations of Romania, published in Official Gazette no. 9 / 31.12.1989.

[35] Ioan Muraru, Elena Simina Tănăsescu, op.cit., 2013, p. 32.

association, political parties are introduced as topic of constitutional order.[36]

3. Conclusion

Political parties were born from the need to express human desires and aspirations outside of each of us, ordinary people, for a better life. Along the way, political parties have gained recognition and legal protection. As shown in this study, political parties have not only a political dimension but also constitutional protection, being the form of expression of political pluralism.

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THE TRAFFICKING IN HUMAN BEINGS PREVENTION: A CRIMINOLOGICAL PERSPECTIVE[1] PART TWO

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Abstract

Our study aims to prospect new criminological perspectives on trafficking in human beings starting from the role of indicators, the econometric principles of cost-benefit analysis, the theory of rationale choice, up to reach a new model about the 5 P's strategies.

Keywords: *trafficking indicators, Rational Choice, Interdisciplinary/Transnational, 5 P's strategy.*

1. New Criminological Perspectives on Trafficking in Human Beings Prevention

a) The Role of Trafficking Indicators according to a Dynamic Multidisciplinary Dimension: Trafficking Indicators, Risk/Vulnerability Factors, Risk Situation

The Trafficking in Human Beings prevention has been always associated to a numerous trafficking indicators specified and identified in the operative activity and formalized when the trafficking has already happened, as the following by:

a.1) UNODC Human Trafficking indicators 2014 (indicators divided in general, children, domestic servitude, sexual exploitation, labour exploitation, begging and petty crime)

GENERAL INDICATORS

people who have been trafficked may:

- believe that they must work against their will
- be unable to leave their work environment
- show signs that their movements are being controlled
- feel that they cannot leave
- show fear or anxiety
- be subjected to violence or threats of violence against themselves or against their family members and loved ones
- suffer injuries that appear to be the result of an assault
- suffer injuries or impairments typical of certain jobs or control measures
- suffer injuries that appear to be the

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result of the application of control measures

- be distrustful of the authorities
- be threatened with being handed over to the authorities
- be afraid of revealing their immigration status
- not be in possession of their passports or other travel or identity documents, as those documents are being held by someone else
- have false identity or travel documents
- be found in or connected to a type of location likely to be used for exploiting people
- be unfamiliar with the local language
- not know their home or work address
- allow others to speak for them when addressed directly
- act as if they were instructed by someone else
- be forced to work under certain conditions
- be disciplined through punishment
- be unable to negotiate working conditions
- receive little or no payment
- have no access to their earnings
- work excessively long hours over long periods
- not have any days off
- live in poor or substandard accommodations
- have no access to medical care
- have limited or no social interaction
- have limited contact with their families or with people outside of their immediate environment
- be unable to communicate freely with others
- be under the perception that they are bonded by debt
- be in a situation of dependence
- come from a place known to be a source of human trafficking
- have had the fees for their transport to the country of destination paid for by facilitators, whom they must pay back by working or providing services in the destination
- have acted on the basis of false promises
- age-generally younger people of both genders are prone to be trafficked for all purposes
- Gender - in sexual exploitation mainly female. in other forms of trafficking, victim types vary according to nature of exploitation etc.
- location of origin - developing economies, locations in crisis or transition;
- documentation - travel or identity documents held by others;
- last location - location associated with exploitation of commercial trafficking processes;
- transport - escorted travel even for short distances;
- Circumstances of referral - referred after recovery by no, client rescue, self-referral, etc.

CHILDREN

children who have been trafficked may:

- have no access to their parents or guardians
- look intimidated and behave in a way that does not correspond with behavior typical of children their age
- have no friends of their own age outside of work
- have no access to education
- have no time for playing
- live apart from other children and in substandard accommodations
- eat apart from other members of the “family"
- be given only leftovers to eat

- be engaged in work that is not suitable for children
- travel unaccompanied by adults
- travel in groups with persons who are not relatives the following might also indicate that children have been trafficked:
- the presence of child-sized clothing typically worn for doing manual or sex work
- the presence of toys, beds and children's clothing in inappropriate places such as brothels and factories
- the claim made by an adult that he or she has "found" an unaccompanied child
- the finding of unaccompanied children carrying telephone numbers for calling taxis
- the discovery of cases involving illegal adoption

SEXUAL EXPLOITATION

people who have been trafficked for the purpose of sexual exploitation may:

- be of any age, although the age may vary according to the location and the market
- move from one brothel to the next or work in various locations
- be escorted whenever they go to and return from work and other outside activities
- have tattoos or other marks indicating "ownership" by their exploiters
- work long hours or have few if any days off
- sleep where they work
- live or travel in a group, sometimes with other women who do not speak the same language
- have very few items of clothing
- have clothes that are mostly the kind typically worn for doing sex work only know how to say sex-related words in the local language or in the language of the client group
- have no cash of their own
- be unable to show an identity document the following might also indicate that people have been trafficked for sexual exploitation:
- there is evidence that suspected victims have had unprotected and/or violent sex.
- there is evidence that suspected victims cannot refuse unprotected and/or violent sex.
- there is evidence that a person has been bought and sold.
- there is evidence that groups of women are under the control of others.
- advertisements are placed for brothels or similar places offering the services of women of a particular ethnicity or nationality.
- it is reported that sex workers provide services to a clientele of a particular ethnicity or nationality.
- it is reported by clients that sex workers do not smile.

LABOUR EXPLOITATION

- people who have been trafficked for the purpose of labor
- exploitation is typically made to work in sectors such as the following: agriculture, construction, entertainment, service industry and manufacturing (in sweatshops).
- **people who have been trafficked for labor exploitation may:**
- live in groups in the same place where they work and leave those premises infrequently, if at all
- live in degraded, unsuitable places, such as in agricultural or
- industrial buildings
- not be dressed adequately for the work they do: for example, they may lack protective equipment or warm clothing
- be given only leftovers to eat
- have no access to their earnings
- have no labor contract
- work excessively long hours
- depend on their employer for a number

of services, including work, transportation and accommodation

- have no choice of accommodation
- never leave the work premises without their employer
- be unable to move freely
- be subject to security measures designed to keep them on the work premises
- be disciplined through fines
- be subjected to insults, abuse, threats or violence
- lack basic training and professional licenses
- the following might also indicate that people have been trafficked
- for labor exploitation:
- notices have been posted in languages other than the local
- language.
- there are no health and safety notices
- the employer or manager is unable to show the documents required for employing workers from other countries.
- the employer or manager is unable to show records of wages paid to workers.
- the health and safety equipment is of poor quality or is missing.
- equipment is designed or has been modified so that it can be operated by children.
- there is evidence that labour laws are being breached.
- there is evidence that workers must pay for tools, food or accommodation or that those costs are being deducted from their wages

DOMESTIC SERVITUDE

people who have been trafficked for the purpose of domestic servitude may:

- live with a family
- not eat with the rest of the family
- have no private space
- sleep in a shared or inappropriate space
- be reported missing by their employer even though they are still living in their employer's house
- never or rarely leave the house for social reasons
- never leave the house without their employer
- be given only leftovers to eat
- be subjected to insults, abuse, threats or violence

BEGGING AND PETTY CRIME

people who have been trafficked for the purpose of begging or committing petty crimes may:

- be children, elderly persons or disabled migrants who tend to beg in public places and on public transport
- be children carrying and/or selling illicit drugs
- have physical impairments that appear to be the result of
- mutilation
- be children of the same nationality or ethnicity who move in
- large groups with only a few adults
- be unaccompanied minors who have been "found" by an adult of the same nationality or ethnicity
- move in groups while travelling on public transport: for example, they may walk up and down the length of trains
- participate in the activities of organized criminal gangs
- be part of large groups of children who have the same adult
- guardian
- be punished if they do not collect or steal enough
- live with members of their gang
- travel with members of their gang to the country of destination
- live, as gang members, with adults who

are not their parents

- move daily in large groups and over considerable distances
- the following might also indicate that people have been
- trafficked for begging or for committing petty crimes:
- new forms of gang-related crime appear.
- there is evidence that the group of suspected victims has moved, over a period of time, through a number of countries.
- there is evidence that suspected victims have been involved in begging or in committing petty crimes in another country.

a.2) ILO OPERATIONAL INDICATORS OF TRAFFICKING IN HUMAN BEINGS, 2009 (subdivided in 4 macro-areas regarding adult or children victims for sexual exploitation or for labor exploitation):

a.2.1) INDICATORS OF TRAFFICKING OF ADULT FOR SEXUAL EXPLOITATION3

a.2.2) INDICATORS OF TRAFFICKING OF ADULTS FOR LABOUR EXPLOITATION

a.2.3) INDICATORS OF TRAFFICKING OF CHILDREN FOR SEXUAL EXPLOITATION

a.2.4.) INDICATORS OF TRAFFICKING OF CHILDREN FOR LABOUR EXPLOITATION

And each macro-area divided in his turn in specific/detailed indicators, further on distributed in strong, medium and weak indicators

a.2.1) INDICATORS OF TRAFFICKING OF ADULTS FOR SEXUAL EXPLOITATION (Deceptive Recruitment, Coercive Recruitment, Recruitment by Abuse of Vulnerability, General Exploitation, Coercion at destination, Abuse of Vulnerability at Destination):

INDICATORS OF DECEPTIVE RECRUITMENT

STRONG INDICATOR

- deceived about the nature of the job or location

MEDIUM INDICATORS

- deceived about conditions of prostitution
- deceived about content or legality of work contract
- deceived about family reunification
- deceived about housing and living conditions
- deceived about legal documentation or obtaining legal migration status
- deceived about travel and recruitment conditions
- deceived about wages/earnings
- deceived through promises of marriage or adoption

WEAK INDICATOR

- deceived about access to education opportunities

INDICATORS OF COERCIVE RECRUITMENT

STRONG INDICATORS

- abduction, forced marriage, forced adoption or selling of victim
- debt bondage
- threats of violence against victim
- violence on victims

MEDIUM INDICATORS

- confiscation of documents
- isolation, confinement or surveillance
- threat of denunciation to authorities
- threats to inform family, community or public violence on family (threats or effective)
- withholding of money

INDICATORS OF TRAFFICKING OF ADULTS FOR SEXUAL EXPLOITATION

INDICATORS OF RECRUITMENT BY ABUSE OF VULNERABILITY

MEDIUM INDICATORS

- abuse of difficult family situation
- abuse of illegal status
- abuse of lack of education (language)

- abuse of lack of information
- control of exploiters
- difficulties in the past
- difficulty to organize the travel economic reasons
- false information about law, attitude of authorities
- false information about successful migration
- family situation
- general context
- personal situation
- psychological and emotional dependency
- relationship with authorities/legal status

WEAK INDICATOR

- abuse of cultural/religious beliefs

INDICATORS OF EXPLOITATION

MEDIUM INDICATORS

- bad living conditions
- excessive working days or hours
- hazardous work
- low or no salary
- no respect of labour laws or contract signed
- no social protection (contract, social insurance, etc.)
- very bad working conditions
- wage manipulation

INDICATORS OF COERCION AT DESTINATION

STRONG INDICATORS

- confiscation of documents
- debt bondage
- forced tasks or clients
- isolation, confinement or surveillance
- threats of violence against victim
- violence on victims medium indicators
- forced into illicit/criminal activities
- forced to act against peers
- forced to lie to authorities, family, etc.
- threat of denunciation to authorities
- threat to impose even worse working conditions
- threats to inform family, community or public under strong influence
- violence on family (threats or effective)
- withholding of wages

INDICATORS OF ABUSE OF VULNERABILITY AT DESTINATION

MEDIUM INDICATORS

- dependency on exploiters
- difficulty to live in an unknown area
- economic reasons
- family situation
- personal characteristics
- relationship with authorities/legal status

WEAK INDICATOR

- difficulties in the past

a.2.2) INDICATORS OF TRAFFICKING OF ADULTS FOR LABOUR EXPLOITATION (Deceptive, Recruitment, Coercive Recruitment, Recruitment by Abuse of Vulnerability, General Exploitation, Coercion at Destination, Abuse of Vulnerability at Destination):

INDICATORS OF DECEPTIVE RECRUITMENT

STRONG INDICATOR

- deceived about the nature of the job, location or employer

MEDIUM INDICATORS

- deceived about conditions of work
- deceived about content or legality of work contract
- deceived about family reunification
- deceived about housing and living conditions
- deceived about legal documentation or obtaining legal migration status
- deceived about travel and recruitment conditions
- deceived about wages/earnings
- deceived through promises of marriage or adoption

WEAK INDICATOR

- deceived about access to education opportunities
- deceived about travel and recruitment conditions
- deceived about wages/earnings
- deceived through promises of marriage or adoption

INDICATORS OF COERCIVE RECRUITMENT

STRONG INDICATOR

- violence on victims

MEDIUM INDICATORS

- abduction, forced marriage, forced adoption or selling of victim
- confiscation of documents
- debt bondage
- isolation, confinement or surveillance
- threat of denunciation to authorities
- threats of violence against victim
- threats to inform family, community or public
- violence on family (threats or effective)
- withholding of money

INDICATORS OF RECRUITMENT BY ABUSE OF VULNERABILITY

MEDIUM INDICATORS

- abuse of difficult family situation
- abuse of illegal status
- abuse of lack of education (language)
- abuse of lack of information
- control of exploiters
- economic reasons
- false information about law, attitude of authorities
- false information about successful migration
- family situation
- personal situation
- psychological and emotional dependency
- relationship with authorities/legal status

WEAK INDICATORS

- abuse of cultural/religious beliefs
- general context
- difficulties in the past
- difficulty to organize the travel

INDICATORS OF EXPLOITATION

STRONG INDICATOR

- excessive working days or hours

MEDIUM INDICATORS

- bad living conditions
- hazardous work
- low or no salary
- no respect of labour laws or contract signed
- no social protection (contract, social insurance, etc.)
- very bad working conditions
- wage manipulation

WEAK INDICATORS

- no access to education

INDICATORS OF COERCION AT DESTINATION

STRONG INDICATORS

- confiscation of documents
- debt bondage
- isolation, confinement or surveillance
- violence on victims

MEDIUM INDICATORS

- forced into illicit/criminal activities
- forced tasks or clients
- forced to act against peers
- forced to lie to authorities, family, etc.
- threat of denunciation to authorities
- threat to impose even worse working conditions
- threats of violence against victim
- under strong influence
- violence on family (threats or effective)
- withholding of wages

WEAK INDICATOR

- threats to inform family, community or public

INDICATORS OF ABUSE OF VULNERABILITY AT DESTINATION

MEDIUM INDICATORS

- dependency on exploiters

- difficulty to live in an unknown area
- economic reasons
- family situation
- relationship with authorities/legal status

WEAK INDICATORS

- difficulties in the past
- personal characteristics

a.2.3) INDICATORS OF TRAFFICKING OF CHILDREN FOR SEXUAL EXPLOITATION (Deceptive Recruitment, Coercive Recruitment, Additional Exploitation, Coercion at Destination Abuse of Vulnerability at Destination):

INDICATORS OF DECEPTIVE RECRUITMENT

STRONG INDICATOR

- deceived about the nature of the job or location

MEDIUM INDICATORS

- deceived about access to education opportunities
- deceived about conditions of prostitution
- deceived about content or legality of work contract
- deceived about family reunification
- deceived about housing and living conditions
- deceived about legal documentation or obtaining legal migration status
- deceived about travel and recruitment conditions
- deceived about wages/earnings
- deceived through promises of marriage or adoption

INDICATORS OF COERCIVE RECRUITMENT

STRONG INDICATORS

- abduction, forced marriage, forced adoption or selling of victim
- debt bondage
- isolation, confinement or surveillance
- threats of violence against victim
- violence on victims

MEDIUM INDICATORS

- confiscation of documents
- threat of denunciation to authorities
- threats to inform family, community or public
- violence on family (threats or effective)
- withholding of money

INDICATORS OF COERCIVE RECRUITMENT

STRONG INDICATORS

- abduction, forced marriage, forced adoption or selling of victim
- debt bondage
- isolation, confinement or surveillance
- threats of violence against victim
- violence on victims

MEDIUM INDICATORS

- confiscation of documents
- threat of denunciation to authorities
- threats to inform family, community or public
- violence on family (threats or effective)
- withholding of money

INDICATORS OF ADDITIONAL EXPLOITATION

STRONG INDICATOR

- hazardous work

MEDIUM INDICATORS

- bad living conditions
- excessive working days or hours
- low or no salary
- no social protection (contract, social insurance, etc.)
- very bad working conditions
- wage manipulation

INDICATORS OF COERCION AT DESTINATION

STRONG INDICATORS

- confiscation of documents
- debt bondage
- forced into illicit/criminal activities
- forced tasks or clients
- isolation, confinement or surveillance
- threats of violence against victim

- under strong influence
- violence on victims

MEDIUM INDICATORS

- forced to act against peers
- forced to lie to authorities, family, etc.
- threat of denunciation to authorities
- threat to impose even worse working conditions
- threats to inform family, community or public
- violence on family (threats or effective)
- withholding of wages

INDICATORS OF ABUSE OF VULNERABILITY AT DESTINATION

STRONG INDICATOR

- dependency on exploiters

MEDIUM INDICATORS

- difficulties in the past
- difficulty to live in an unknown area
- economic reasons
- family situation
- personal characteristics
- relationship with authorities/legal status

a.2.4) INDICATORS OF TRAFFICKING OF CHILDREN FOR LABOUR EXPLOITATION (Deceptive Recruitment, Coercive Recruitment, Abuse of Vulnerability, General Exploitation, Coercion at Destination, Vulnerability at Destination):

INDICATORS OF DECEPTIVE RECRUITMENT

STRONG INDICATOR

- deceived about access to education opportunities
- deceived about the nature of the job, location or employer

MEDIUM INDICATORS

- deceived about conditions of work
- deceived about content or legality of work contract
- deceived about family reunification
- deceived about housing and living conditions
- deceived about legal documentation or obtaining legal migration status
- deceived about travel and recruitment conditions
- deceived about wages/earnings
- deceived through promises of marriage or adoption

INDICATORS OF COERCIVE RECRUITMENT

STRONG INDICATORS

- abduction, forced marriage, forced adoption or selling of victim
- debt bondage
- threats of violence against victim
- violence on victims

MEDIUM INDICATORS

- confiscation of documents
- isolation, confinement or surveillance
- threat of denunciation to authorities
- threats to inform family, community or public
- violence on family (threats or effective)
- withholding of money

INDICATORS OF RECRUITMENT BY ABUSE OF VULNERABILITY

MEDIUM INDICATORS

- abuse of cultural/religious beliefs
- abuse of difficult family situation
- abuse of illegal status
- abuse of lack of education (language)
- abuse of lack of information
- control of exploiters
- difficulties in the past
- difficulty to organize the travel
- economic reasons
- false information about successful migration
- family situation
- general context
- personal situation
- psychological and emotional dependency
- relationship with authorities/legal status

INDICATORS OF EXPLOITATION

STRONG INDICATORS

- excessive working days or hours

MEDIUM INDICATORS

- bad living conditions
- hazardous work
- low or no salary
- no access to education
- no respect of labour laws or contract signed
- very bad working conditions
- wage manipulation

INDICATORS OF COERCION AT DESTINATION

STRONG INDICATORS

- confiscation of documents
- debt bondage
- forced into illicit/criminal activities
- forced tasks or clients
- isolation, confinement or surveillance
- threats of violence against victim under strong influence
- violence on victims

MEDIUM INDICATORS

- forced to act against peers
- forced to lie to authorities, family, etc.
- threat of denunciation to authorities
- threat to impose even worse working conditions
- threats to inform family, community or public
- violence on family (threats or effective)
- withholding of wages

INDICATORS OF ABUSE OF VULNERABILITY AT DESTINATION

MEDIUM INDICATORS

- dependency on exploiters
- difficulties in the past
- difficulty to live in an unknown area
- economic reasons
- family situation
- personal characteristics
- relationship with authorities/legal status

a.3) EUROPEAN COMMISSION INDICATORS

The third series of indicators is linked to the proposal of the Italian Presidency (September 2014), in relation to combatting trafficking in human beings, to prepare an "Handbook on trafficking in human beings-indicators for nvestigating police forces". The iniziative represents a fundamental point of reference and an essential source of information on the phenomenon in order to to realize an update list of indicators on trafficking, focusing on the investigative and law enformement profiles and offering specific indicators for the traffickers. The revised list of indicators extrapolated by the practice, is classified in relation to the type of exploitation and include new indicators of traffickers, divided according to editing activities police offices, investigative tools, national action plans and current forms of international police cooperation adopted by Member States for preventing and combatting tafficking in human beings.

Both sets of indicators :

a.3.1) those relating to the victim

and

a.3.2) those relating to the traffickers are suddivided into:

a.3.1.a) Indicators common to all types of exploitation

a.3.1.b) Indicators for each type of exploitation (sex, labour, other…)

a.3.1.a) Indicators of Vitim of Trafficking common to all form of exploitation

- Needy condition for various reasons (economic, family, discrimination)
- Deception about working and/or living conditions
- Specific methods of transport and arrival (in group and without knowing each other, following pre-established routes, having different reference persons in the various phases, etc.)

- Subjugation to traffickers (for trust, fear of threats and/or physical or psychological violence)
- Deprivation of self-determination capacity (in terms of movement, working conditions and hours, choice of accommodation, interpersonal relations, ability to turn to authorities, etc.)
- Isolation as regards communication (taking away/deprivation of means of communication)
- Unavailability of identity documents (due to lack/deprivation) or availability of forged documents
- Total or partial withholding of the money earned (debt bondage)
- Reticence and/or inconsistent/contradictory statements
- Vulnerability and exploitation linked to irregular presence on the national territory concerned
- Vulnerability through not knowing the language and the laws of the country of destination
- Vulnerability and exploitation following threats of retaliation against the victim's relatives, also in the event of reporting to the authorities
- False statements of legal age to avoid measures to protect minors
- *Missing-person cases, homicides*

a.3.1.b.Indicators of victims of trafficking for sexual exploitation

- Trauma
- Cultural conditioning
- Isolation, uprooting
- Being convinced of being unable to abandon prostitution for various personal or social reasons
- Impossibility of avoiding prostitution even if in unfavourable physical conditions (pregnancy, illness, unprotected sex)
- Existence of a loving relationship with the trafficker
- *Recurring reports of minors prostituting themselves*
- Availability of counterfeit documents proving the existence of (fictitious) kinship relations between victims and traffickers
- Forced marriages and marriages of convenience with citizens of the destination States.

a.3.1.b. Indicators of victims of trafficking for labour exploitation

- Large number of immigrants in the place of accommodation
- Large numbers living at the place of work
- Obligation to lodge in a given place
- Deprivation of freedom of movement throughout the working day, with impossibility of leaving the work place
- Continuous monitoring during the working day (also through video-surveillance systems) and leisure time
- Impossibility of exercising fundamental freedoms, including trade-union freedoms, in the workplace, and of benefiting from the envisaged welfare and social security guarantees
- Not knowing the identity of employers/guards and knowing only their fictitious names
- Frequent transfers in the national territory
- Legal and economic working conditions considerably below the minimum standards laid down by legal contractual rules
- Forced labour in seriously unsafe/unhealthy places, impossible/difficult access to health services
- Impossibility of choosing an employer and negotiating working conditions and wages
- Partial deprivation of wages (due to unreasonable deductions, failure to comply with collective agreements, payment of the "debt bondage")

- Acceptance of work arrangements enforced by means of violence, threat or intimidation
- Possible punishment at work, including the use of violence
- Possible (sexual or non-sexual) violence for the purpose of subjugation and control

- *Fictitious possession of bank accounts which are used by the traffickers*

- *Obligation to pay the employer or pay for work permit to get the job*

DOMESTIC WORK

- *Servitude condition*
- Forced cohabitation
- Forced activities other than work (sex)

a.3.1.b. Indicators of victim of trafficking for other types of exploitation (begging, perpetration of criminal activities, trafficking in organs)

- *Daily forced employment in criminal activities (bag-snatching, pickpocketing, burglary, vehicle theft, shoplifting, drug pushing) for several hours during the day*
- *Forced hospitalisation*
- *Forced cohabitation, sometimes also paying*
- *Impossibility of living and moving autonomously*
- *Presence of a "controller"*
- *Forced begging for several hours each day, inter alia to pay the debt bondage for the travel*
- *Vulnerability due to disability or other psychological or physical condition of inferiority (for instance, pregnancy) for the purpose of begging*
- *Vulnerability for being a member of a minority for the purpose of begging and/or perpetrating illegal activities*
- *Reports of non-compliance with compulsory education laws for under-age victims*
- *Recurring reports of minors involved in begging and/or illegal activities*
- *Illegal international adoption of foreign minors*
- Extreme poverty or conditions of need

a.3.2.a.Indicators of traffickers common to all forms of exploitation

- Recruitment, transport and use of physical and/or psychological violence, threat and intimidation
- Recruitment with misleading promises of better working and/or life conditions
- Recruitment of children by paying sums of money to their parents
- Management of administrative and/or logistical and/or working aspects (confiscation of identification documents, provision of falsified documents, finding housing, searching of criminal connections in other countries, planning route, transfer and transport patterns across states and arrival in the country of destination, determining and controlling the working conditions)
- Preventive indoctrination of victims, including how to behave with law enforcement authorities
- Control/prevention of victims' movements and communications (taking away/depriving the means of communication)
- Organising into criminal "cells" sometimes of different nationalities, with specific expertise in each phase of trafficking
- Transfer of the victim to other criminal groups (for or without payment)
- Membership of traffickers in family-run criminal groups
- Total or partial withholding of the victim's earnings for "debt bondage" or as a result of extortion
- Threats of retaliation against the victim's family, including in the event of reporting to the authorities

- Violence against victims for punishment (sexual assault, kidnapping, injuries, homicides)
- Management of remittances abroad
- Corruption
- Statement of false relationships for custody of child victims

a.3.2.b) Indicators of traffickers for the purposes of sexual exploitation

- Management of prostitution working hours
- Coercion into prostitution using cultural pressures
- (Sexual/non-sexual) violence against victims for the purpose of subjection and control
- Total control of earnings
- Sentimental bond with the victim instrumental to the exploitation
- Impeding the possibility of repatriation and of resorting to police authorities or care services
- Recruitment of victims regularised through forced marriages and marriages of convenience
- Use of the internet and social networks to recruit victims and procure customers
- Intimidating power of the association bond
- Control of victims, including through the administration of drugs and alcohol
- Use of the internet /social networks to maintain open lines of communications among traffickers to escape interception
- Procurement of forged documents attesting to (fictitious) family relationships between victims nd traffickers

a.3.2.b.Indicators of traffickers for the purposes of labour exploitation

Relating to the trafficker:

- Allocation of workers to employers and negotiations on working conditions and wages
- Enslavement of victims in their work place: they are constantly monitored by a video surveillance system
- Use of violence, threats and intimidation to impose illegal working conditions, to control and sanction
- Wages are subject to illegitimate partial deductions
- The identity of employers/supervisors is hidden
- Supervision of the victims' leisure time
- Impeding the possibility of repatriation and of resorting to police authorities or care services
- Handling of bank accounts forcibly opened in the name of victims to gain economic, tax, welfare and pension benefits due to workers
- Relating to the employer:
- Work organisation and employment of workers by using violence, threats, intimidation
- Coerced labour in seriously unsafe/unhealthy places
- Steady recourse to intermediaries or unlawful supply of labour
- General tolerance of illegal labour recruiters or guards in the work place
- Wages below the legal minimum and serious violation of labour laws and of social insurance and accident prevention legislation
- Prevalence of illegal workers
- Management of work supply such as "fast fashion workers" under extremely competitive conditions
- Use of "employment agencies" to recruit seasonal workers, with job postings (with board and lodging) on the web which, in fact, turn out to have much lower standards than those advertised
- Seasonal jobs offers resulting in regularisation through residence permits paid by the mployee, which allow access to the whole Schengen area labour market

DOMESTIC WORK

- Servitude conditions
- Forced cohabitation
- Request for non-work (sexual) related activities

a.3.2.b) Indicators of traffickers for the purposes of other types of exploitation (begging, coercion into criminal activities, trafficking in organs)

- Management of places and conditions of use
- Management of accommodation facilities
- Management of assignment to "controllers"
- Administrative management
- Partition of the territory
- Continuous control of the victims, including through violence, threats and intimidation
- Selection of victims in relation to their criminal use
- Management of illegal international adoptions of foreign children
- Exploitation of children in order to obtain public subsidies
- Exploitation of disabled people also in other Member States

All these "trafficking indicators", obviously found in the post-trafficking phase, are traditionally utilized in order to detection and prosecution, but considering them from another analysis perspective, they may be used also for the prevention phase if linked to the "*risk/vulnerability / factors*".

The Trafficking in Human Beings is basically a commercial activity finalized to profit and, consequently, strongly influenced by social, economic, cultural, environmental, situational and, not last, political factors. The economic law of supply and demand "rules" in this way also in the Trafficking in Human Beings and if the demand may change according to trafficking for labour or trafficking for sex, the supply of trafficking may be seriously influenced by the risk factors that create or facilitate the vulnerability to be trafficked. Among the risk or vulnerability factors can be mentioned:

Risk factors

- poverty
- corruption
- financial transaction
- money laundering
- weak rule of law
- political oppression
- lack of social and political opportunities
- lack of human rights and/or discrimination based on caste, ethnicity, gender, religious affiliation, among other biases
- lack of access to education and jobs
- gender stratification
- family disruptions (as seen in death resulting from armed conflict or hiv/aids, leaving children with no adult support)
- family dysfunction (caused by drugs, alcohol, or violence) that leaves children outside of parental care and renders them particularly vulnerable
- dislocation and/or danger caused by civil unrest, internal armed conflict, war, or militarism
- economic disruptions to family finances caused by natural disasters (such a droughts or floods that cause a rural family to be without food stocks or income) or environmental degradation
- domestic violence (driving women and children to run away and live in the streets)
- institutional factors (such as the failure of the state to register the children of the poor—in such cases, the state cannot keep track of the children's welfare)
- presence of traffickers, recruiters, loan sharks, and other predatory individuals within a community

The vulnerability can modify over time, often as a result of the convergence of

factors, so that the "poverty" alone does not necessarily create vulnerability to be trafficked, but combined with other factors, their confluence can produce a higher risk for being trafficked. In this situation, the so-called "poverty-plus," its possible specify as the "plus factor" (like illness or family dysfunction) operates in order to increase the vulnerability of the "poor".

It's clear that at this point the potential trafficking indicators adding up to the risk or vulnerability factors give life, according to a dynamic-multidisciplinary perspective, to a risk situation that realizes the transformation of the potential victimization into the real victimization

The traditional use of the trafficking indicators is, according to this new perspective, modulated through the help of the risk/vulnerability factors in order to specify those factors "*attivatori*" (the plus factor), that is those factors that show a major etiological weight and, therefore, a specific target for the activities prevention with cost saving and realization of major benefits respecting completely the econometric principles of the cost/benefit/analysis (*c/b/a*).

T I + R/V/F = RS

Trafficking Indicators+Risk /Vulnerability Factors = Risk Situations

b) The Econometric Principles of the Cost – Benefit – Analysis (c/b/a) and the Theory of the Rational Choice of the Criminal Behavior applied to the Trafficking in Human Beings Prevention

Starting from the *cost / benefit / analysis*, transferred to the criminal activity it's obvious that if the traffickers (single or criminal group) operate as business, with the clear objective to reduce the costs and the risks and increase the profits, it may be interesting to understand, deepen and explain the decision-making process of the potential human traffickers and consequently to realize a prevention policy**.**

According to a criminological perspective, the theory of the rationale choice of criminal behavior offers an excellent explanation of the traffickers activities, in the sense that they behave "rationally" and act in a calculated manner to maximize their economic welfare. In other words a person (the trafficker) commits an offence when the utility expected to be reached with his crime exceeds what could derive by spending time and resources in other activities. All this means that the trafficker chooses to be involved in trafficking human beings when the utility expected from his activities is superior to the one produced by a lawful activity, minus the costs incurred for realizing it, namely the probability of being arrested and condemned, the severity of punishment and other variables, such as profits deriving from illegal activities, all in a cost-benefit-analysis view. Utilizing this "*business matrix*" of trafficking in human beings, it would be possible to open a new and promising front against Trafficking and to make the Trafficking in human beings a higher risk and less profitable criminal enterprise. As to say that without robust criminal justice responses, Human Traffcking will remain a low-risk, high-profit activity for criminals, like exactly mentioned by Yuri Fedotov in his Preface to Global Report on Trafficking in Persons, Unodc, 2014 .

c) The Trafficking in Human Beings Prevention according to a Theoretical Interdisciplinary/Transnational Structure

At this point one of the best ways to understand the complexity of the Trafficking in Human Beings it may be to frame the phenomenon according two approaches convergent and integrated:

The first approach is "to think" to the Trafficking in Human Beings as a "Transactional network" whose content is constituted by economic pushes for the

author -the trafficker (exploitation/gain) and sometimes also for the victim (vulnerability/economic improvement).

The second approach is "to center" the protection of the human rights (human rights centered approach) directed to guarantee to all people the fundamental right to be free and self-determinate.

This protection might be completely assured in a *transnational vision* linked to each phase of the trafficking process:

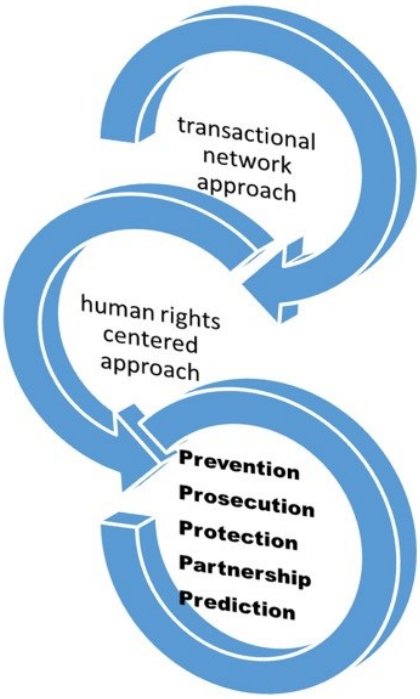
recruitment/manipulation/transit/constraint–sexual violence/destination/ sexual exploitation/method to exit from exploitation /social protection and reintegration.

It's clear that if the whole trafficking process is not concluded in a positive way for the victim, other two new phases could verify represented by a next victimization or, even, by a potential "retrafficking" or role reversal with the consequence that it would be necessary to utilize a new strategy: the prediction one.

These two approaches integrated and convergent between them must constitute, always in a transnational dynamics, the conceptual base of the *5 distinct operative moments* or strategies that remodulate, after 11 years from the adoption of the "Osce Action Plan to combat Trafficking in Human Beings", the P's approach in a more strictly criminological perspective that is ***Prevention, Prosecution, Protection, Partnership, Prediction.***

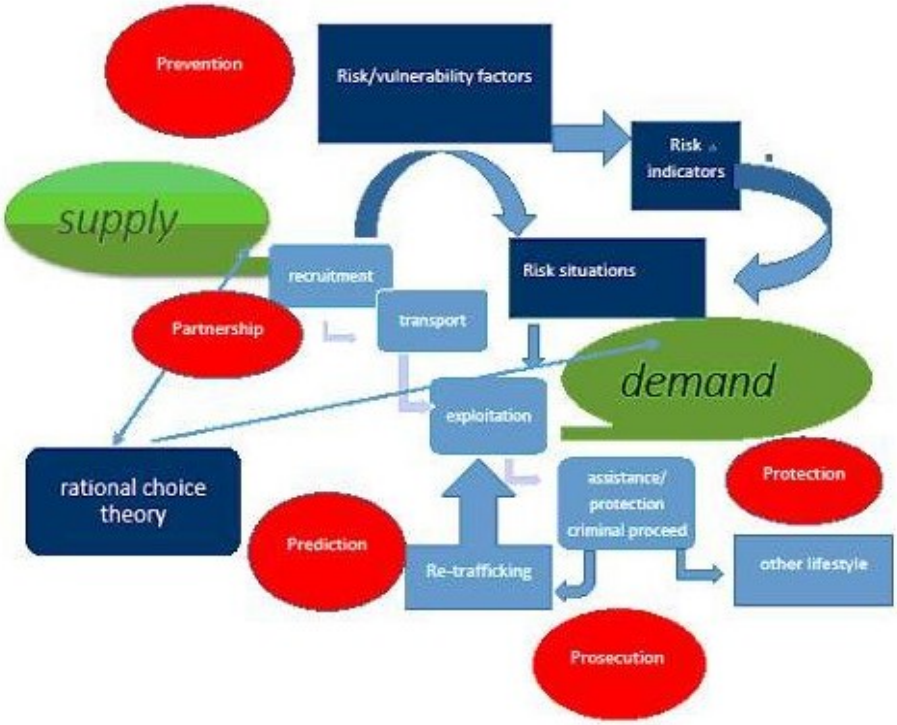
3. A New Model about the 5 P's Strategy

The actions realized by these 5 strategies must constantly interact according to a interdisciplinary / transnational dynamics in order to guarantee the monitoring, the evaluation, the comparison and the improvement of the best practice to implement following to an application / perspective concrete and actual:



This dynamic vision of the criminal policy (*Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized crime - Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims*) is perfectly in line with two excellent suggestions of different origin but in a fantastic way convergent:

"*We must improve our knowledge and understanding of this crime if we are to make good policy decisions and targeted interventions*" BAN KI-MOON UN General Secretary (in occasion of the



presentation of the Global Plan of Action against Trafficking in Persons).

"*La tratta delle persone è un crimine contro l'umanità. Dobbiamo unire le forze per liberare le vittime e per fermare questo crimine sempre più aggressivo, che minaccia, oltre alle singole persone, i valori fondanti della società e anche la sicurezza e la giustizia internazionali, oltre che l'economia, il tessuto familiare e lo stesso vivere civile*".

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Conclusions

Our research on trafficking in human beings prevention has attempted, after to have prospected the statistical official situation of the phenomenon and the different roles played by the existing indicators, to propose a new kind and more complex indicator according the principles of the cost-benefit analysis and the theory of rational choice in order to suggest a new perspective of the human being prevention form a criminological point of view.

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LEGAL TERMINATION IN PREVENTIVE MEASURES

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Abstract

This study will present the institution the legal termination of the preventive measures in light of the new code of criminal procedure, which on the one hand expanded the scope of preventive measures that can be taken against a defendant, and on the other hand has introduced new regulations which we will refer at.

We will analyze the situation of each one of the preventive measures by the time the measure will be legally terminated, with reference to the issues that were not covered by the legislature and not least showing contradictions encountered in judicial practice.

Keywords: *preventative measures, custody, reasonable time, preventive arrest, prosecution.*

1. Introduction

The realities of juridical law from the period of the 1969 Criminal procedure code have revealed a lack of promptitude while carrying out criminal trials, overloading of prosecuting offices and courts, an excessive periods of time required by the procedures, unjustified delays of trials, suspension of cases because of procedural reasons and significant social and human costs that have thus generated a lack of trust in the ranks of the trial participants regarding the efficiency of the criminal justice act.

Out of these, aspects regarding preventive arrest, the length of the procedures, the arrangement of responsibilities and evidence in criminal matters have been the subject of a number of trials at the European Court of Human Rights in which Romania has participated as a party. Taking all these into consideration, the need to eliminate the deficiencies that have caused Romania's numerous convictions by the European Court of Human Rights has become evident1.

As such, there was a need for an urgent legislative intervention that would confer efficiency to the objectives that were taken into account by the initiators of the new codes, more precisely the acceleration of the criminal procedures, simplifying them and the creation of a unitary jurisprudence in agreement with the jurisprudence of the European Court of Human Rights.

The present modification of the Criminal procedure code are in the spirit of the new trends in international criminal politics preparing the juridical-criminal conditions for a pan-European unification in terms of criminal legislation. We thus observe that the explicit reglementation of the principle of proportionality is being carried out to each preventive measure in terms of the seriousness of the accusation brought upon an individual, as well as the principle of the crucialness of such a

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[1] For further details the Exposition of reasons for the law project regarding the criminal procedure code may be consulted, www.just.ro

measure in order to carry out the legitimate purpose intended through its elaboration.

On the matter of preventive arrest measure, its exceptional character is regulated as well as its subsidiary character in relation to other preventive measures that do not deprive liberty. As such, preventive arrest can be carried out only if the adoption of another preventive measure is not sufficient in pursuing the intended legitimate purpose. As an absolute novelty for the Romanian procedural criminal legislation, a new preventive procedure has been implemented, more precisely the house arrest procedure, adopted from the Italian Criminal procedure code, that aims, by introducing this new institution, to widen the posibilities for individualization of preventive measures according to the particularities of each criminal case and according to the person that represents the accused of a criminal trial.

This study wishes to analyze the institution of right termination of preventive measures from the perspective of the new reglementations, in agreement with the European Convention of Human Rights and in the light of the criticism brought by the Constitutional Court regarding the analyzed subject. We believe that this paper is of special importance as preventive measures seek the limitation or even the deprivation of rights given to citizens that, on the other hand, are in conflict with criminal law at a given time, a situation which triggers the criminal procedure mechanism that allows these preventive measures.

Although a year has passed since the new codes were put into effect, by analyzing the judicial doctrine and practice we observe that many law problems arise when we discuss the matter of the preventative measures instutition.

2. Content

Article 5 of the European convention, art. 9 of the Pact *(everyone has the right to liberty and security of person; no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law)* and art. 6 from the Charter (everyone has the right to liberty and security of person) regulates the right to liberty and security of person for the purpose of preventing arbitrary deprivations of liberty by the authorities towards a person, as well as limiting the length of the liberty deprivation[2]. Although most of the legislations protect citizens' right to liberty, it was necessary to regulate in what situations preventative or liberty depriving measures can be taken against individuals that come into conflict with criminal law.

As such, the legislator has regulated preventive measures and other procedural measures as part of the 5th Section of the General part of the New Criminal procedure code. The procedural measures have been defined[3] as procedural criminal law institutions put at the disposal of criminal judiciary bodies and consisting of certain deprivations and constrainments, personal or real, determined by the conditions and circumstances in which the criminal trial is being carried out. In matters of functionality intended by the legislator, these measures work as legal methods for prevention or elimination of circumstances or situations that are capable of endangering the efficient carrying out of the criminal trial by the

[2] M. Udroiu, O. Predescu, *Protecţia europeană a drepturiloe omului si preocesul penal român,* Ed. C.H.Beck, Bucureşti, 2008, p.388.

[3] V. Dongoroz, et alli, *Explicaţii teoretice ale Codului de procedură penală român. Partea generală,* vol. V, second edition, Ed. Academiei, Ed. All Beck, Bucureşti, 2003, p. 308.

obstacles, difficulties and misleading factors they may produce.

By regulating these institutions, the legislator intended to protect the proper development of a criminal trial, thus contributing to attaining the immediate objective of the criminal trial, which is to promptly and completely asses the criminal acts so that any person that has committed a crime will be punished according to their culpability and that no innocent person will be held criminally responsible. At the same time, the ability to guarantee compensations for the individuals who take part in the criminal trial as a civil party was taken into account, in the event they were materially or morally harmed by the committing of a crime.

The criminal procedural code regulates the following measures belonging to this institution: preventive measures, medical safety measures, insurance measures, returning of objects and reestablishing the status quo prior to the realization of the crime.

As this paper wishes to address the institution of right termination on the subject of preventive measures, we have identified in the specialized doctrine an extensive and complete definition that meets all demands. As such, preventive measures are criminal procedural law institutions with a restrictive character, by which the suspect or the accused is prevented from engaging in certain activities that would negatively affect the carrying out of the criminal trial and the fulfillment of its purpose[4].

In article 202 of the C.p.c. the legislator has regulated the fact that preventive measures can be taken if they are necessary for assuring the proper development of the criminal trial, for preventing the circumvention of the suspect or the accused from prosecution and, last but not least, for preventing the committing of another crime. Gradually, preventive measures have went through numerous modifications regarding the category of judiciary bodies that are able to carry them out, (until 2003 there was the possibility that the preventive arrest measure could be carried out directly by the prosecutor) the terms in which they can be put into effect and afterwards prolonged or maintained, the unconstitutionality of certain legal texts. As such, in the present regulation the legislator gives judiciary bodies the option between five preventive measures that can assure, depending on case, the proper development of the criminal trial. More precisely, the measures that can be taken against a physical person are retention, judiciary control, judiciary control on bail, house arrest and preventive arrest; and the ones that can be taken against a legal person are: banning the initiation or, depending on the case, suspending the dissolution or abolition of the juridical person, banning the initiation or, depending on the case, suspending the merger, the division or the reduction of the juridical person's social capital, commenced prior to or during the prosecution, the banning of property transactions that are susceptible to provoke the minimization of the juridical person's assets or insolvency, banning the closure of certain juridical documents, established by the judicial body.

Although the legislator has specifically mentioned what the conditions of taking, prolonging or maintaining preventive measures are, jurisprudential needs have determined him or her to regulate institutions through which direct intervention upon them is possible, more specifically legal termination, dismissal and replacement.

[4] Gh. Theodoru, *Drept procesual penal român. Partea specială*, Al. I Cuza University, Faculty of Law, Iași, 1974, Vol. II, p. 194.

As this paper's objective is to analyse the institution of right termination, we will examine each preventive measure, exposing in which situation the discussed solution intervenes.

Legal termination in preventive measures represents that obstacle against the prolonging or maintain of a measure that the legislator has foreseen. By analyzing the provisions of art. 241 of the C.p.c we can see that the instances in which the preventive measures terminate, the instances for all the five measures and instances that can be applied only to the preventive measure of preventive arrest and house arrest have been regulated.

As such, the preventive measure of retention[5] can be carried out by the criminal investigation body or by the prosecutor in accordance to the provisions of art. 209 of the C.p.c. in conjunction with art. 202 of the C.p.c if there are evidence or valid indicators from which reasonable suspicion that a person has committed a crime can arise and if this measure is necessary for the proper development of the criminal trial, for preventing the circumvention from prosecution or considering the possibility or preventing another crime.

According to art. 209, paragraph 3 of the C.p.c. this measure can be carried out over a period that cannot exceed 24 hours, this interval not including the time needed to take the suspect or the accused to the headquarters of the judicial body. We can observe that the constituent legislator her/himself has felt the need to regulate in art. 23 paragraph 3 of the Constitution what is the maximum time limit in which this measure can be put into effect. By analyzing the legislations of other countries we can observe that the period of retention can be for 24 hours in Luxemburg, Greece, Canada, Columbia or Germany, in Portugal, Russia or Poland the period is for 48 hours and in Brazil 5 days.

At the same time, the legislator felt the need to make the following, absolutely essential specification, which is that in the event that the suspect or the accused has been brought in front of a prosecution body by means of a summons, the 24 hour time limit does not include the period in which the suspect or the accused has been under the summons. The judiciary organ that emitted the summons has the obligation to immediately hear the person that the summons is addressed to and the accused cannot be present at the prosecutor's office for more than 8 hours. As such, in event that a summons has been emitted and the suspect is required to appear in front of the prosecuting bodies from Sibiu to Bucharest, the period in which he or she will be led there will not be subtracted from the period of retention if this preventive measure will be carried out. Continuing with the same example, if at the headquarters of the prosecuting body there would be more than one accused, there is the possibility that the suspect will be heard after 8 hours at most, thus this period as well will not be deducted from the 24 hours of retention. By drawing a comparison with the old regulation[6] we observe that the legislator in the current regulation has deemed fit that the administrative measure of the police headquarters management will not be

[5] A parallel can be made with the French Code of procedure where retainment is defined in art. 62-2 parag. 1 as a constraining measure decided by a judiciary police officer, under the control of the judiciary authority, by which a person upon whom there are one or more plausible grounds for suspicion that she or he has commited or is about to commit a crime or offense punishable with prison is kept at the disposal of the investigators.

[6] Art. 144 paragraph 1 second point of thesis of the c.p.c. From the length of the retention period the time in which the person had been deprived of liberty as a result of the administrative measures of the police heaquarter's management, as defined in art. 31 paragraph 1, lit. B from Law no. 218/2002 regarding the organization and functioning of the Romanian Police, will be deduced.

deducted from the length of the retention measure.

In the Creangă v. Romania case[7], the European Court of Human Rights has established that the length must be set in the exact moment when the interested person had been brought at the headquarters of the criminal prosecution body and had been subjected to interrogation procedures, when the prosecutor had had enough grounded suspicions to justify measures that deprive liberty for reasons of criminal prosecution, and not from the moment when a formal retainment order had been emitted, which took place a full 10 hours after the initial moment; the Court has thus deemed that the deprivation of liberty of the interested person on the date of July the 16th 2003 from 12 pm to 10 am had no legal basis in the internal law and represented a breach of art.5 parag.1 of the Convention.

As such, the first instance in which the preventive measure of retention will be legally terminated is when the term, as stated by the law, will expire, more precisely at the end of the 24 hours, when the suspect or the accused will be released provided he or she is not retained or arrested because of other reasons. Provided that the prosecution bodies deem it is required for the accused person to be under retention for a shorter period of time, nothing prevents them from declaring this period to be, say, 15 hours. Because of this, the legislator has regulated in art. 241 paragraph 1 second point of thesis of the C.p.c. that the preventive measures are legally terminated when the terms established by the judiciary bodies will expire.

As a guarantee of the disposal of this measure over a certain period of time, retention will be disposed by means of an ordinance by the criminal investigation body or by the prosecutor, by means of an ordinance where it is required to mention the reasons that have brought the adoption of the measure, the date and time when the retention commences as well as the date and time when the retention ends. The precise establishment of the initial moment of the 24-hour term is of the utmost importance, considering the extremely strict approach of the European Court towards illegal deprivation of liberty by continued detention after the maximum duration in which a person can be deprived of liberty has ended[8]. Another guarantee provided by the legislator consists in the obligative character of informing the prosecutor about the adoption of the measure by any means possible and as soon as the measure has been taken by the criminal investigation body.

A problem that we wish to bring into attention is the prescribed solution for when the arrested defendant is taken in front of the rights and liberties judge to propose taking the measure of preventive arrest and the judge reaches the decision before the 24 hours of retention have expired of rejecting the proposal to adopt the measure of preventive arrest or of ordering that the measure of judiciary control be taken. As such, two approaches have appeared in judiciary practice, the first in which the rights and liberties judge does not reach a decision regarding the retention measure, and thus it ceases at the end of the 24 hours, and the second approach in which the rights and liberties judge orders the immediate release of the retained accused[9]. We believe that the second approach represents the

[7] www.echr.coe.int

[8] M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului si procesul penal român,* ed. C.H.Beck, Bucharest, 2008, p.422.

[9] Closure 270/2014 of the Suceava Court ordered in the criminal file no. 7655/86/2014: Rejection of the proposal of the prosecution office near the Suceava Court to take the measure of preventive arrest for a period of 21 days of

legal one and we offer a text argument, more specifically the provisions of art. 227 paragraph 1 of the C.p.c. known as the rejection of preventive arrest proposal during prosecution when the legislator regulates that in the event the rights and liberties judge deems that the legal conditions for the preventive arrest of the accused are not met, she or he rejects by canceling the prosecutor's proposal and facilitating the release of the retained accused. Thus, although the rights and liberties judge is not invested to pronounce anything regarding the preventive measure of retainment, despite that the legislator has offered him or her the possibility to order the immediate release of the retained person, as such the measure will cease before the expiration of the period stated by the law or ordered by the judiciary bodies.

The preventive measure of judiciary control or judiciary control on bail, newly introduced in the criminal procedure code by name but sharing numerous similarities with the measure of being obliged to not leave the country or the town from the 1969 code can be taken by the prosecutor, the preliminary hearing judge, the rights and liberties judge or the court if this measure is deemed necessary in order to assure the proper development of the criminal trial, to prevent the circumvention from prosecution or trial and, last but not least, to prevent another crime.

This preventive measure can be ordered during the criminal prosecution phase by the prosecutor or the rights and liberties judge for a period of 60 days that can be successively prolonged, its maximum duration cannot exceed one year, if the sentence according to the law is a fine or prison up to five years, and two years if the sentence according to the law is life imprisonment or prison for more than five years. At the same time, the preliminary hearing judge can order the carrying out of this measure for a period that cannot exceed 60 days, and the court can order the measure for the same time length, with the mention that in the preliminary hearing phase the total duration of judiciary control or on bail cannot exceed a reasonable length and, in all these cases, it cannot exceed 5 years from the moment of arraignment.

The institution of the length of judiciary control is regulated inside art. 215 of the C.p.c[1] as it was introduced through art. I point 3 of O.U.G. (emergency ordinance) NO. 82/2014 following the declaration of the unconstitutionality of art. 211-217 of the C.p.c., as the judiciary bodies were offered the possibility to order the preventative measure of judiciary control and judiciary control on bail for unlimited periods of time. As such, the Constitutional Court has deemed in decision 712/2014[10] that the interference generated by the judiciary control institution affects fundamental rights, more exactly the right to individual liberty, the right to free circulation, the right to a private life, the freedom of assembly, labor, the social protection of labor and economic liberty, is regulated by the law, more precisely by art. 211-215 from the Criminal procedure code, has the legitimate purpose

the accused VORNICU IONUȚ ANDREI, as unfounded. On the grounds of art. 227 paragraph 2 from the Criminal procedure code reported to art. 202 paragraph 4 letter b from the Criminal procedure code, orders taking the measure of judiciary control against the accused Vornicu Ionuț Andrei, prosecuted for the crime of perjury as stated in art. 273 paragraph 1 and 2 letter. d Criminal code, with aplication in art. 35 paragraph 1 Criminal code. Is ordered the immediate release of the retained accused Vornicu Ionuț Andrei provided he is not retained or arrested by other reasons. 2. Rejects the proposal of the Prosecuting office near the Suceava Court to take to measure of preventive arrest for a period of 21 days of the accused BALAN DENISIA, as unfounded. Is ordered the immediate release of the retained accused BALAN DENISIA provided she is not retained or arrested by other reasons.

[10] To be consulted https://www.ccr.ro/files/products/ Decizie_712_2014.pdf

of carrying out criminal instruction, as it is a judiciary measure applicable in the process of criminal prosecution and trial, imposes itself, as it is adequate in abstracto to the legitimate pursued purpose, it is undiscriminating and necessary in a democratic society in order to protect the values of the state law. Still, the analyzed interference is not proportional to the cause that has determined it. In this respect, the Court has deemed that it does not assure a suitable balance between public and individual interest, as it can be ordered for an unlimited period of time. The principle of proportionality, as it is regulated in the specific situation found in art.53 of the Constitution, assumes the exceptional character of restricting fundamental rights and liberties, which necessarily also implies their temporary character. Since public authorities can resort, in lack of another solution, to the restriction of practicing rights, in order to safeguard the values of the democratic state, it is logical for these grave measures to desist the moment the cause has ended. The Court also states that art.241 paragraph (1) letter a) from the Criminal procedure code regulates that the first method of legally terminating preventive measures is the expiration of the terms as stated by law, followed by the expiration of the terms as established by the judiciary bodies. By the systematic interpretation of the previously mentioned norm, in the context of the provisions of art.241 from the Criminal procedure code in its entirety, the need arises for the existence inside criminal procedural law of the length for which each preventive measure can be ordered, regardless if its depriving or non-depriving of liberty character, for which the legislator has not specified in the case of the preventive measure of judiciary control and judiciary control on bail. If in the case of liberty depriving measures the legislator has specified both the lengths for which they can be ordered as well as the maximum period of time for which they can be ordered, in the case of the preventive measure of judiciary control, the provisions of art.211-215 and 241 from the Criminal procedure case do not specify neither the length for which it can be ordered nor its maximum period. As such, the right of judiciary bodies to order judiciary control as a preventive measure for unlimited periods of time appears as evident, such a right presupposing the temporally unlimited restriction of the fundamental rights and liberties that are addressed in the content of this measure. And, according to the previously shown standards for constitutionality, such a restriction is unconstitutional, as the principle of proportionality affects the normative content of the addressed fundamental rights, in other words their substance, as it does not limit itself to the restriction of exercising them.

In the same O.U.G. 82/2014 was it established that the preventive measure of judiciary control and that of judiciary control on bail, which were currently running when the decree was put into effect, are to be continued and maintained until the carrying out of the next control: for a term of maximum 60 days after the decree was put into effect, the prosecutor, in cases that were on the preliminary hearing stage, and the court, in the trial stage, verified by default if the grounds for which the preventive measure of judiciary control and judiciary control by bail were taken still stand, or if new grounds have appeared does justify one of these preventative measure, ordered, according to the situation, the prolonging or the dismissal of the preventive measure. Provided that the judicial bodies have not complied and have not verified the grounding of the preventive measure's claims in a period of 60 days since the discussed decree had been put into

effect, the preventive measure of judiciary control or judiciary control on bail will be legally terminated.

The legislator's intervention on the issue of judiciary control length was absolutely necessary, taking into account that art. 241 parag. 1 letter a of the C.p.c was lacking applicability on this issue since the preventive measure could not be considered legally terminated on the expiration of the terms as stated by law or established by judiciary control because these could be ordered for an unlimited period of time due to the legislative void. In the present context, after the conforming of the procedural texts according to the considerations of the Constitutional Court's decisions, the preventive measure will be legally terminated at the moment of expiration of the terms as stated by law (60 days) if an extension or maintenance will not be placed into effect or if the maximum length has been reached, more specifically one, two or five years according to the procedural stage we are at. We thus observe that the prosecutor, the preliminary hearing judge and the court have the obligation to verify if the grounds that have been taken into consideration when deciding to adopt the preventive measure of judiciary control still stand, ordering accordingly either the extension or maintenance, if not, the preventive measure will be legally terminated.

At the same time, the preventive measure of judicial control will also be legally terminated if near the end of the criminal prosecution, the prosecutor will order the solution of halting or putting an end to the prosecution or in the event that the court will pronounce a decision of acquittal, of putting an end to the criminal trial, to not offer a sentence, to postpone putting the sentence into effect or to suspend the carrying out of the sentence under supervision, even if not permanently. The measure will also be legally terminated when the decision to sentence the accused has been declared as permanent. It is common-sense that the preventive measure is to be brought to an end when the criminal prosecution phase is over as the purpose of the measure is no longer available at that procedural moment.

As far as the preventive measures of house arrest and preventive arrest are concerned, the legislator has understood to regulate both the general and the particular cases of legal termination. These two preventive measures can be ordered by the rights and liberties judge, the preliminary hearing judge or by the court if the evidence lead to the reasonable suspicion that the accused has committed a crime and that one or some of the following situations are present:

- the accused has fled or has gone into hiding in order to circumvent him or herself from trial or has made any type of preparations to achieve these purposes;
- the accused has attempted to influence another participant in committing the crime, a witness or an expert, or to destroy, tamper with, hide or circumvent material evidence or to determine another person to carry out this behavior;
- the accused is putting pressure on the aggrieved party or is trying to reach a fraudulent agreement with them;
- there is a reasonable suspicion that, following the commencement of criminal actions against her or him, the accused has willfully committed a new crime or is preparing to commit a new crime;
- it can also be taken if from the evidence there arises the reasonable suspicion that he or she has committed a crime against life, by which the bodily harm or the death of a person has been provoked, a crime against national security etc., or any other crime for which the law states a prison sentence of five years or more and, on the

basis of the seriousness of the act, the way and the means by which it was committed, the entourage and environment of the accused, the criminal history and other circumstances surrounding her or his person, it can be affirmed that deprivation of liberty is necessary in order to eliminate a state of danger that targets public order.

The preventive measure of house arrest as well as that of preventive arrest can be ordered with a maximum period of 30 days in the criminal prosecution phase and can be extended only in case of necessity, if the grounds on which the decision was taken are maintained or if new aspects have appeared, the maximum duration being that of 180 days. An absolutely vital aspect is that the duration of liberty deprivation ordered by the measure of house arrest is not taken into consideration in calculating the maximum duration of the preventive arrest measure of the accused in the prosecution phase. As such, a prosecuted accused can be arrested for 360 days, 180 days in house arrest and another 180 in preventive arrest.

In the trial phase, the legislator has understood to regulate in art. 239 C.p.c what the maximum duration of the preventive arrest of the accused is during the initial trials. As such, the total duration of the preventive arrest of the accused cannot exceed a reasonable length and cannot be longer than half of the special maximum as stated by law for the crime that the court has been notified of, but it cannot exceed 5 years. As such, provided that the accused is sent to trial for the crime of homicide which is to be punishable by 10-20 years in prison, although half of the special maximum would be 10 years, the maximum duration of preventive arrest will be 5 years. This term begins either when the court is notified, in the event that the accused is sent to trial while being under preventive arrest, or when the warrant is put into effect in the event the arrest was ordered in the preliminary hearing, the trial phase or of lack thereof.

We can observe that in the criminal procedure code the institution of the maximum duration of house arrest in the trial phase is not regulated, we believe that this is solely an omission from the part of the legislator and that the provisions of art. 239 of the C.p.c will apply *mutatis mutandis* for this preventive measure as well. In the specialized doctrine[11] it is affirmed that in the preliminary hearing phase and in the trial phase the preventive measure can be ordered for an indefinite duration, intervened by the obligation the preliminary hearing judge or the court has to periodically check its legality and groundedness. Such an interpretation lies in contradiction to the considerations of the Constitutional Court's decision that has pronounced itself regarding the unconstitutionality of judiciary control, in the sense that the legislator had not regulated the maximum duration for which this measure could be ordered.

The first situation when these two discussed preventive measures are legally terminated is on the expiration of the terms as stated by law or established by the judiciary bodies or on the expiration of the 30 day term, if the preliminary hearing judge or the rights and liberties judge has not acted towards the verification of the legality and groundedness of the house arrest in this time, respectively on the expiration of the 60 day term, if the court has not acted towards the verification of the legality and groundedness of the house arrest in this time.

In the event it has been ordered for the case to return to the prosecutor, the house

[11] N. Volonciu, ş.a. *Noul Cod de procedură penală comentat*, ed. Hamangiu, 2014. P. 533.

arrest measure and the preventive arrest respectively of the defendant can be maintained even after the case has been returned to the prosecutor, for a period of maximum 30 days which cannot be greater than the difference between the maximum term of 180 days and the time the defendant spent under house arrest, respectively under preventive arrest in the same case, prior to the notification of the court by indictment; provided that throughout the duration of the prosecution the accused's house arrest was 180 days long, after ordering the return of the case to the prosecuting office the preliminary hearing judge cannot maintain the house arrest measure, because otherwise the maximum limit of house arrest during the prosecution, as states in the C.p.c. [12] would be exceeded.

Another situation in which the preventive measures of house arrest and preventive arrest are legally terminated find their applicability towards the end of prosecution when the prosecutor orders the solution of halting or giving up on the prosecution, the criminal trial being thus brought to an end in this this instance and thus a preventive measure cannot exist beyond these barriers. As such, through the ordinance by which the solution of halting or giving up on the prosecution is ordered, the prosecutor will also pronounce in regards to the legal termination of the preventive measure, even in the event that the measure was taken or extended by the rights and liberties judge.

The third situation when the institution of legal termination intervenes is when the court orders one of the following solutions: acquittal, putting an end to the criminal trial, postpone putting the sentence into effect or suspending the carrying out of the sentence under supervision, even if not permanently. The preventive measure will also be legally terminated in the appeal phase if the length of the measure has reached the length of the condemned sentence.

The fourth situation when the preventive measure will be deemed legally terminated refers to when a sentence decision is deemed permanent, as such the person that is deprived of liberty will remain incarcerated, but not because the preventive measure is being maintained, but because it has been converted to a sentence that is about to be carried out.

The legal termination of the preventive arrest measure is also put into effect if the court of appeal allows an appeal requested solely by the accused and sends the case to the first court in order for it to be rejudged, if the length of the sentence pronounced in the first court is equal to the measure of preventive arrest; in this case, as a consequence of applying the *non reformation in peius* principal, the court will not be able to pronounce a sentence longer than the initially pronounced sentence. [13]

We observe that in art. 241 paragr. 1 letter d from the C.p.c. the legislator regulates that preventive measures legally terminated only in other cases as stated by law. By analyzing the provisions of the C.p.c., we believe that by other cases as stated by law we can also consider to be the following situations:

- when the court pronounces a decision to sentence to prison for a duration that is equal to that of the retention and the preventive arrest (art. 399 paragr. 3 letter a from the C.p.c.); we deem that the legislator out of error has not mentioned here the house arrest measure as well and for identity of reason I believe it is necessary for the law to be modified. In such an event, even if the

[12] M.Udroiu, *Procedura penala.Partea generală*, ed. C.H.Beck, Bucharest, 2014, p.528.
[13] M.Udroiu, *Procedura penala.Partea generală*, ed. C.H.Beck, Bucharest, 2014, p.493.

sentence is not definitive, the house arrest or preventive arrest measure will be immediately put to an end as soon as the duration of retention and arrest become equal to the duration of the pronounced sentence.

- when the court pronounces a fine sentence that does not accompany the prison sentence or when it pronounces an educational measure (art. 399 paragr. 3 letters c and d of the C.p.c.);
- also, another case is the one included in the provisions of art. 43 paragr. 7 from Law 302/2004 regarding international judiciary cooperation on criminal matters, which shows that the measure of arrest for rendition is legally terminated if the rendered person is not taken by the competent authorities of the solicited state in a period of 30 days since the agreed upon date for rendition, with the exception of instances of *force majeure* that obstruct the rendition or the collection or the rendered person, an event in which the Romanian authorities and those of the soliciting state will agree upon a new date for rendition;[14]
- considering art. 493 of the C.p.c. legal termination of preventive measures also intervenes regarding measures taken against legal persons; preventive measures towards legal persons can be ordered for a period of maximum 60 days, with the possibility to extend it during prosecution and to maintain it during the preliminary hearing or trial phase if the grounds on which the measure was taken still stand, each extension cannot exceed 60 days.

The procedure through which a preventive measure is declared legally terminated

The ones entitled to pronounce a preventive measure as being legally terminated are the judiciary bodies that have ordered the measure, or the prosecutor, the rights and freedoms judge, the preliminary hearing judge or the court that has adopted the case. The judiciary bodies will pronounce themselves through an ordinance (the prosecutor) or through a closure/sentence/decision by default, upon request or at the demand of the administration of the detention place[15].

The judiciary organs will order the solution of legal termination of the preventive measure by ordering, in the case of the retained or preventively arrested, her or his immediate release, providing that he or she is not retained or arrested by other reasons. We thus observe another inconsistency of the legislator that does also mention the situation of the person under house arrest where for the same conditions there must be the same solution.

The rights and liberties judge, the preliminary hearing judge and, last but not least, the court will pronounce themselves by an argued closing statement made in the presence of the accused which will be mandatorily assisted by the prosecutor. It is possible for the judiciary bodies to

[14] B. Micu, A.G.Păun. R. Slăvoiu, *Procedura penală. Curs pentru admiterea în magistratură și avocatură. Teste – grilă,* ed. Hamangiu, Bucharest, 2014, p. 146.

[15] To be consulted decision 206/2015 of the ICCJ (High Court of Cassation and Justice) file nr. 1054/2/2014/a18: Accepts the appeal declared by the accused Chiriță Mihai Gustin against the closure from the date of February the 3rd 2015 pronounced by the Bucharest Court of Appeal, Second Criminal Division in file no. 1054/2/2014. It completely renders the attacked closure useless and, by rejudging: Accepts the ANP notification and deemes the measure of preventive arrest taken against the accused Chiriță Mihai Gusti as legally halted. Orders the release of the accused from the under the preventive arrest warrant no. 17/UP/25.11.2013, emitted by the Bucharest Court of Appeal, First Criminal Division. The judiciary expenses remain the responsibility of the state. The partial fee addressed to the defendant named by default until the chosen defendant had been prezented, namely 50 lei, will be suported from the funds of the Ministry of Justice. Permanent.

pronounce while not being in the presence of the accused but it is necessary for him or her to be represented by a chosen or default attorney, no harm will be produced in such a situation but it aims for the prompt solving of the demand or appeal. The judiciary bodies hold the responsibility of immediately notifying[16] the person against which the preventive measure was taken as well as the institutions with the attributes to execute the measure a copy each of the ordinance or the closure/sentence/decision by which the legal termination of the preventive measure had been deemed.

An appeal can be made against the closure by the prosecutor or the accused for 48 hours after the pronouncement for those who were present, respectively from the notification for the prosecutor or accused who were not present at the pronouncement. The appeal made against the closure by which the legal termination of this measure is not suspended from enforcement, the closure being enforceable.

3. Conclusions

We believe that we have reached our main objectives stated at the beginning of the present study and we have analyzed in depth the institution of legal termination of preventive measures, praising the legislator when he or she succeeded in regulating the discussed legislation in better conditions compared to the old regulation, but also criticizing the encountered legal inconsistencies, making *lege ferenda* proposals for this purpose.

The institution of legal termination of preventive measures, through its crucial importance, we believe will constitute a subject that shall be tackled in the future by

[16] To be consulted the Ogică v. Romania case (the decision from May 27th 2010): Friday, January the 31st 2003, immediately after the permanent decision that the pronounced sentence will expire at midnight had been pronounced (supra, point 8), the registry of the Bucharest Court of Appeal had written a letter to inform the Bucharest-Jilaba penitentiary about the conditions of the decision for the administration the take necesarry measures. A proceeding elaborated on the same day at 15:10 by the court of appeal registry had referenced the previously carried out procedures on the bases of the previously cited decision. In it it was mentioned that, on the phone, the commander of the Bucharest-Jilava Penitentiary had informed the registry that the secretariat was closed and nobody was there to receive the fax that pertained to the conditions of the decision. According to this proceeding, the commander had directed the call to the prison's on guard officer who had mentioned that a release of the claimant could not be carried out merely on the basis of a phone call, without any written document. After they had received by fax on Monday, February the 2nd 2003, at 07:52, the conditions of the decision from January the 31st 2003, the administration of the Bucharest-Jilava penitentiary had begun to partake in the necesarry procesures and, at 10:40, had released the claimant. In the case, the Court had observed that the definitive decision from January 31st 2003 had sentenced the claimant to a punishment that had the same length to that of the detention he had already executed until that date and that, immediately after pronouncing the decision, the register of the court of appeals had contacted the Bucharest-Jilava penitentiary to take the necesarry measures to foresee the release of the interested party; the Court mentiones that the recording of the failuire of these measure in the proceeding. The Court reminds that, upon the examination of the term for executing the decisions for releasing the claimants in cases in which the requested conditions for release were met at a time were the prison employee that was tasked with the neccesary operations was not present by reasons of work schedule, this did not exclude periods such as evening or night time. It cannot even moreso adopt another approach especially since, unlike the *Calmanovici* case, the registry of the court of appeal had contacter the Bucharest-Jilava penitentiary in the daytime in order to inform the definitive pronounced decision and the necessity to take the necesarry measures for the release of the claimant. The Court cannot accept that, because of the secretariat's work schedule, the administration of a prison did not take measures for receiving, on Friday, at early evening, a fax-sent document that was necessary that the release of a prisoner, being aware that the closing of the secretariat would lead to maintaing the interested party in confinement for a period of over forty-eight hours. In the opinion of the Court, such a delay cannot qualify as „a minimal inevitable delay" for the execution of a definitive decision that had the effect of releasing a person. As such, said detention is not grounded in one of the paragraphs of art. 5 from the Convention. As such, it concludes that art. 5 § 1 had been violated.

criminal procedural law experts and the judiciary practice, through the numerous encountered situations, will offer us new elements that will help draw attention to the signaled aspects.

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RELEASE OF MINORS

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Abstract

The sanctioning of minors provided in a whole new Criminal Code is kinder to those applying to one category of criminal penalties, namely educational measures. This change occurred after finding the need to recover and straightening of juvenile offenders with their age-specific means and without coming into contact with major people that could adversely affect behavior.

Keywords: *minor, release, parole, jail, prison.*

1. Introduction

The sanctioning regime applicable to minors, provided by The New Criminal Code, is overall milder than the previous one[1], because to them there will be applied only one category of criminal law sanctions, namely the seducational measures. This change occurred after finding the need to recover and redress the juvenile offenders by specific means for their age, without coming into contact with adults, that could affect their behavior in a negative way.

Custodial educational measures can be taken against a minor in the two cases provided by art. 114 para. (2) of The Criminal Code:

a) if he has committed a crime for which it was taken an educational measure that has been executed or he began executing an educational measure before committing the offense for which he is judged;

b) when the punishment provided for the offense is imprisonment for 7 years or more or life imprisonment.

Also, custodial educational measures will be applied to the minor in the following cases:

- If the minor does not comply, in bad faith, the execution conditions of the educational measure or the obligations imposed, the court decides to replace the measure with internment in an educational center, where, initially, it was taken the most severe non-custodial educational measure, for it's maximum duration provided by the law (situation provided by art. 123 para. (1) c) of The Criminal Code);
- If the minor does not comply with bad faith performance conditions or obligations imposed educational measure, even after it has been done in accordance with paragraph 123. (1) a) and b), the court has to replace the measure with internment in an educational center (situation provided by art. 123 para. (2) Criminal Code.);
- If the minor serving a non-custodial educational measure commits a new crime

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[1] Exceptiong the situation provided by the previous criminal code, when the minor was sentenced to a term of imprisonment with conditional suspension on supervision or control, which in terms of maintaining the minor in liberty was more favorable than an educational measure involving deprivation of liberty under the new code.

or he is beeing triled for a concurrent crime previously committed, the court decides to replace the initial measure with a custodial educational measure (situation provided by art. 123 para. (3) c) of The Criminal Code.).

The two custodial educational measures that can be applied to the minor are:

- Internment in an educational center for a period of 1 to 3 years;
- Internment in a detention center for a period of 2 to 5 years, and if the punishment provided by the law for the offense committed by the minor is 20 years imprisonment or more or life imprisonment, for a peroiud of 5 to 15 years.

Minors are not sentenced to imprisonment, therefore the institution of release on licence does not apply to them, not even if at the age of 18 years it is required a change of the enforcement regime, according to art. 126 of The Criminal Code, and the court decides for them to continue the execution of the educational measure in a prison.

The release on licence institution becomes applicable only if a person has committed two crimes, one during the minority and the other after turning 18 years, and, according to art. 129 para. (2) b) of The Criminal Code, he was sentenced with imprisonment, but in this case, it applies to the adult.

However, given that they are subject to a deprivation of liberty as a result of their internment into an educational center or a detention center, minors also have the opportunity to be set free before executing the whole period of the educational measure, if they have provided proves that the educational measure has achieved its purpose and the offender can reintegrate into the society.

In the previous Penal Code there were two types of custodial educational measures: the internment in a rehabilitation center and the internment in a medical-educational institute, which were being taken for an indefinite period of time, but only until the aperson turned 18 years old and could be extended for up to two years if it was necessary to accomplish the purpose of the internment[2]. After passing at least one year from the date of the internment, the minor could have been released if he had given strong evidence of improvement, of diligently into his education and of the acquisition of a professional training[3].

Unlike in the previous code's rules, currently the release from executing a custodial educational measure is ordered for the person who has reached the age of 18, so to the adult. The release posibility is no longer apreciated after a fixed period of one year, but after a fraction of at least half (1/2) of the internement duration.

Also, unlike the previous legislation, The New Criminal Code requires compliance of some obligations until the expiration of the internement's time.

2. Content

In order to obtain release, both the person interned in an educational center and the person interned in a detention center, must accomplish the following conditions:

1. They have reached the age of 18 years;

2. By the age of 18 they have executed at least half (1/2) of the length of the internment measure.

The person interned in an educational center can be released after serving a minimum period of between 6 months and 1 year and 6 months and the person interned

[2] See art. 104-106 of The Criminal Code 1968.
[3] See art. 107 of The Criminal Code 1968.

in a detention center can be released after serving a minimum period of 1 year to 2 years and 6 months, if the punishment provided for the offense is imprisonment up to 20 years, and of 2 years and 6 months to 7 years and 6 months, if the punishment provided for the offence is imprisonment for 20 years or more or life imprisonment.

According to art. 127 of The Criminal Code, for the custodial educational measures, the provisions of art. 71-73 shall apply accordingly. Therefore, the duration of the educational measure of internment shall start from the day the final decision of the court was enforced. If during the criminal trial, against the minor was taken a custodial preventive measure, the duration for which the minor was deprived of liberty shall be deducted from the period of the internement, considering that he has already served a part of the internment measure.

3. During the internement, the minor has shown constant interest in acquiring academic and professional knowledge.

According to art. 90 para. (1) of The Law no. 254/2013[4], "in the prison system there are organized educational courses for general compulsory education and there can be organized courses for other forms of education provided by the law of education". These courses are organized and conducted under the conditions set by the Ministry of National Education and the Ministry of Justice, with teaching staff insured and paid by the school inspectorate[5], and the expenses of educational attainment are supported by the Ministry of National Education and the National Administration of Penitentiaries[6].

Art. 92 of The Law no. 254/2013 shows that the professional training is provided according to the options and abilities of the interned persons, through initiating, qualification, training and specialization programs established by the prison administration, in collaboration with specialized personnel from employment agencies, and with other accredited training providers[7]. The courses are organized in spaces specifically designed in the educational or detention centers or of the accredited training providers, under the conditions set by the agreements between the prison administration and each supplier.

Expenses related to professional training are supported by the Ministry of Education, by The Ministry of Labor, Family, and Social Protection, by The National Penitentiary Administration or by other persons or institutions[8].

The interned persons that serve the measure in an open regime can participate outside the educational or detention center, on request and with the approval of the center's director, at other types of professional training than those provided in par. (1), and the expenses related thereto shall be incurred by the interned person or by other persons or instituions[9].

As we see, the executional law provides all guarantees of providing a favorable climate for the assimilations of the academic and professional knowledge by the minor, him having just the task to

[4] Art. 166 para. (1) of Law no. 254/2013 disposes that the provisions of art. 90-92 of the same Act shall apply accordingly to minors interned in an educational center or in a detention center.

[5] See art. 90 para. (2) of The Law no. 254/2013.

[6] See art. 90 para. (3) of Law no. 254/2013. Art. 141 para. (4) of Law no. 254/2013 provides that "the Ministry of National Education, through the county school inspectorates, provides qualified personnel for training activities in schools, in detention centers and in educational centers."

[7] See also art. 141 para. (5) of The Law no. 254/2013.

[8] See art. 92 para. (4) of The Law no. 254/2013.

[9] See art. 92 para. (5) and (6) of The Law no. 254/2013.

show interest in participation in these and in obtaining positive results.

4. The minor made obvious progress in his social reintegration.

After finisshing the quarantine period referred to in art. 44 para. (1) of Law no. 254/2013, for the minor admitted in an educational center or a detention center, the executing regime of the educational measure will be established according to art. 152 of Law no. 254/2013. Among with this it is developed The intervention plan, based on a multidisciplinary evaluation from an educational, psychological and social perspective[10].

Art. 169 para. (3) of Law no. 254/2013 provides that "The intervention plan establishes, based on the development needs of the interned person, the duration and mode of execution of the custodial educational measures, activities and programs for education and professional training, cultural, moral-religious, psychological and social assistance in which the interned person is included, with its consultation". The educational, psychological and social assistance has the following components: school education, vocational guidance and professional training, educational activities, psychological and social assistance, individual or group moral-religious activity, and activities for maintaining an active life, with the main purpose of social reintegration and responsabilisation of the interned persons[11].

Also the interned persons may perform work, under the conditions of the employment laws, according to their physical development, skills and knowledge, unless they endanger their health, development, their educational and professional training[12]. Work is organized by taking into account only the interest of social reintegration of the interned persons, as the article 163 para. (3) of Law no. 254/2013 states.

Progress made in the interest of social reintegration may reflect from the educational process and from the participation at the activities organized in the center, from the fact that the minor had an appropriate behavior towards other interned persons and the staff of the Centre, from situations where the minor can receive rewards[13], because he did not commit misconduct[14] or crimes during internment.

Even if to the minor it is applied certain regimes for the execution of the educational measure (closed and open regime regime)[15], unlike the release on licence, in the case of release from the educational center or from the detention center, the Criminal Code does not require that the minor had been placed in a certain regime at the age of 18, when granting the release from the center can be taken in consideration.

Although the minor who may be criminally responsible may also be obliged to repair the damages by civil law, art. 1366 par. (2) of The Civil Code provides that "a minor under the age of 14 is responsible for the damage, unless he proves that he was deprived of discernment at the time of the deed", the Criminal Code does not require the complete fulfillment of civil obligations

[10] See art. 169 para. (1) and (2) of The Law no. 254/2013.
[11] See art. 165 para. (1) and (3) of The Law no. 254/2013.
[12] See art. 163 para. (1) of The Law no. 254/2013.
[13] See art. 170 of The Law no. 254/2013.
[14] See art. 173 and art. 100 of The Law no. 254/2013.
[15] About the enforcement regimes of custodial educational measures, see art. 149 and art. 150 of The Law no. 254/2013.

established by the decision that imposes the educative measure for the minor[16].

As in the case of release on licence, there are two stages of the procedure of release from a detention or educational center: the administrative stage and the judicial stage.

Most provisions relating to the procedure for granting release can be found in The Law no. 254/2013, The Code of Criminal Procedure coming to specify only the court that will review if the conditions are accomplished.

In the administrative stage, in accordance with art. 180 para. (2) of The Law no. 254/2013, The Educational Board[17] or The Commission for establishing, individualization and change of the enforcement regime of internment measure[18], with the participation of the judge charged with the surveillance of the deprivation of liberty, as president, and a probation officer from the probation service responsible under the law, from the center's surrounding district, analyzes the situation of the interned person, in its presence.

Similar to the procedure that takes place in prison for release on licence, in the case of the release of the interned persons, The Educational Council or The Committee, meets weekly[19]. Art. 314 para. (3) of The Project of Regulation Implementing The Law no. 254/2013 shows that by care of The Service of inmates accounts, it is written the pre-constituted part of the minutes to be submitted to the court[20].

According to art. 110 of The Law no. 252/2013, inside of The Board organized at the educational center's level, respectively The Commission of the detention center, at the works regarding the proposal for the release of a minor who has reached 18 years, from the educational or detention center, attends a probation officer appointed of the probation service responsible in whose territorial jurisdiction the center is situated. He presents the assessment report containing proposals concerning the obligations provided by art. 121 para. (1) of The Criminal Code, that the court may impose on the individual case. In compiling this report, the educational center or the detention center is obliged to inform the probation service at least 14 days before the date on which the person's situation will be reviewed by The Educational Board or The Commission from the detention center[21].

[16] However, in the case of persons interned in an educational or detention center, where they were obliged to pay civil damages, which were not paid until the begining date of internement in the center, a 50% share from the percentage of 50% of the income realised by the interned person, will be used for the compensation given to the civil party for damages, as has art. 163 para. (8) of The Law no. 254/2013 provides.

[17] According to art. 145 para. (2) of The Law no. 254/2013, "The Education Council is composed of the center's director, who is also chairman of the board, the deputy director for education and the psychosocial educator in charge of the case, the teacher or head teacher, a psychologist, a social worker and the chief of supervision, registration and granting rights to interned persons ".

[18] According to art. 146 para. (1) of The Law no. 254/2013, The Commission for establishing, individualization and change of the enforcement regime of internment measure consists of the center's director, who is also chairman of the committee, the deputy director for education and psychosocial assistance, the deputy director for safety possession, the chief doctor, the teacher responsible for case, a psychologist and a social worker.

[19] See art. 314 para. (1) of The Project of Regulation Implementing The Law no. 254/2013.

[20] The pre-constituted of the minute shall contain the following mentions about the inmate:

a) civil status data;

b) conviction and crime;

c) brief description of the offense;

e) criminal records;

f) the existence of any arrest warrant or court of first instance.

[21] See art. 110 para. (4) of The Law no. 252/2013.

The probation officer has access to the documents of the minor's file from the educational center or detention center and at the request of counsel, the center has to forward copies of the documents contained in the individual file within 5 days of their request[22].

The Education Council or The Commission shall determine whether the person has shown constant interest in acquiring school and professional knowledge, has made progress in social reintegration, taking into account the previous periods of internement. Also, the prison authorities may consider the person's involvement in work, given that the work is not mandatory and it is not required by law to fulfill any requirements relating to work performed for granting release[23].

If it is established that the person serving the educational measure fulfills the requirements of art. 124 para. (4) or art. 125 para. (4) of The Criminal Code, the council or the commission proposes the release from detention center or education, which is contained in a motivated minute, that includes the opinion of the members of the council or commission regarding the opportunity of the release, along with documents proving the dates recorded in the minute[24]. The release proposal is submitted to the competent court according to art. 516 para. (2) and 517 para. (2) of The Criminal Procedure Code[25], namely the court in whose territorial jurisdiction it is placed the educational center or the detention center, with the same rank as the enforcement court. At the minute of the educative counsil or of the commission it is also attached the assessment report prepared by the probation officer[26].

If it is found that the interned person does not meet the legal requirements, the educational counciltion or the commission establish a term for reviewing it's situation, which may not be longer than 6 months, according to art. 180 para. (5) of The Law no. 254/2013. The minute stating that the interned person does not qualify for release is communicated immediately to her, and it is being signed by her. The person serving the educational measure has the option, within 30 days from recieving the minute under signature, to address the request for release directly to the court in whose jurisdiction the detention center is located[27].

Art. 180 para. (5) of The Law no. 254/2013 indicates that the provisions of art. 97 para. (4) - (8) and (10) - (13) of the same Act, relating to release on licence, shall apply accordingly.

In the jurisdictional stage, the court may be seised with the request of the educative council or the commission.

The jurisdiction belongs, according to art. 516 para. (2) and 517 para. (2) of The Criminal Procedure Code, to the court in whose territorial jurisdiction is located the educational center or detention, of the same degree as the court of enforcement proceedings[28]. According to the executional legislation, the proposal will be submitted

[22] See art. 110 para. (5) of The Law no. 252/2013.

[23] See art. 180 para. (3) of The Law no. 254/2013.

[24] See art. 180 para. (2) - (4) of The Law no. 254/2013 and art. 314 para. (4) and (5) of The Project of Regulation implementing The Law no. 254/2013.

[25] See art. 180 para. (4) of The Law no. 254/2013.

[26] See art. 110 para. (3) of The Law no. 252/2013.

[27] See art. 97 para. (11) reported to art. 180 para. (5) of The Law no. 254/2013 and art. 314 para. (6) of Project of Regulation Implementing The Law no. 254/2013.

[28] Art. 181 para. (1) of The Law no. 254/2013 incorrectly uses the phrase "court of territorial jurisdiction in which the center is located" because the center is in the territorial jurisdiction of a court, and not both institutions in the jurisdiction of a third institution.

to the court[29] in whose territorial jurisdiction is located the educational or detention center.

The court may admit the proposal or the request and decide to release the person who has turned 18 years from the center, and with it the court may impose one or more of the obligations referred to in art. 121 of The Criminal Code[30], or it may overrule it, setting a time after which the proposal or request may be renewed[31]. The term shall not be less than 6 months and runs from the final decision of overrule.

According to art. 181 para. (3) of Law no. 254/2013, the decision of the can be challenged by appeal to the court within whose territorial circumscription is located the center, corresponding in rank with the court that would have jurisdiction to hear the appeal against the decision imposing the educational measure, within 3 days from the communication, and the appeal made by the prosecutor shall suspend the execution, so the interned person is not liberated until the appeal is judged.

With the release of the educational center or the detention center the court imposes one or more of the obligations referred to in art. 121 of The Criminal Code for minors who serve the non-custodial educational measures, until the final moment of the internment measure, regardless of its size.

In the case of this release, the Criminal Code did not mention that the remainder of the term would be a surveillance period, as in the case of release on licence.

These obligations are:

a) to follow a course of educational or professional training;

b) not to exceed, without the probation service, the territorial limit determined by the court;

c) not to be in certain places or at certain sports events, cultural or other public gatherings, determined by the court;

d) not to approach and not to communicate with the victim or members of it's family, the participants in the crime or other persons determined by the court;

e) to report to the probation service at the term fixed by it;

f) to accept examination, treatment or medical care measures.

The obligations provided by art. 121 para. (1) a), c) and d) have an identical content to the obligations provided by art. 101 para. (2) a), d) and e) of The Criminal Code, where the remainder of the sentence to serve from the release on licence to the end of the sentence is of 2 years or more. The obligation from art. 121 para. (1) e) has the same content as the supervision measure provided by art. 101 para. (1) a) of The Criminal Code for release on licence.

Considering the provisions of art. 71 para. (1) reported to art. 70 para. (5) of Law no. 253/2013, the enforcement of the obligations referred to in the subparagraphs b) -d) begins on the date of the final decision in which they have been established and for those provided by letters a), e) and f) begins on the date at which the minor has been informed of their content by the probation counselor.

According to art. 99 para. (1) of The Law no. 252/2013, the liberated person for which the court imposed one or more of the obligations referred to in art. 121 of The Criminal Code, is obliged to report to the probation service within 10 days from the time of release.

[29] See art. 97 para. (10) reported to art. 180 para. (5) of The Law no. 254/2013.
[30] See art. 124 para. (5) of The Criminal Code.
[31] See art. 181 para. (2) of The Law no. 254/2013.

Although the code does not specify, observing the provisions of art. 99 of The Law no. 252/2013, which refer to the supervision of the liberated person by the probation service on and the competence of the surveillance councelor in these cases, we consider that the rules referring to supervising the execution of obligations provided in the other paragraphs of art. 121 of The Criminal Code are applicable. Alin. (3) art. 121 of The Criminal Code provides that "the monitoring the obligations imposed by the court is coordinated by the probation service."

According to art. 71 of The Law no. 253/2013, to the liberated person from serving the custodial educational measures at the age of 18 years, are applicable, in relation to the obligations established by the court, the provisions of art. 70 of the same law. Thus, if the court has imposed for released person to follow a course of educational or professional training, provided by the art. 121 para. (1) a) of The Criminal Code, the probation officer from the probation service in whose jurisdiction the person resides, receiving a copy of the judgment, decides, based on the initial assessment of the person, the course to be followed and the institution of community where it will take place. The councillor communicates its decision to this institution, together with a copy of the judgment. The supervision and enforcement of the obligations set out in art. 121 para. (1) a) of The Criminal Code, both regarding the surveilled person as well as the institution established by the probation service is performed by the competent probation service[32]. The community institution established ensures the effective follow of the course and its finalisation until the date of the internment measure, and at the end of the course, it will issue a document certifying its completion. This document is attached, in copy, to probation file[33].

If the liberated person is required not to exceed, without the probation service's permission, the territorial limits set by the court (art. 121 para. (1) b) of TheCriminal Code), the judge shall send a copy of the execution part of the decision to the County Police Inspectorate in whose jurisdiction the person lives[34].

According to art. 121 para. (2) of The Criminal Code, "when determining the obligation in para. (1) d), the court establishes, in particular, the content of this obligation, given the circumstances of the case".

When imposing the obligations provided by art. 121 para. (1) letters c) or d) of The Criminal Code (not to be in certain places or at certain sports events, cultural or other public gatherings, not to approach and not to communicate with the victim or members of it's family, the participants in the crime or other persons determined by court), the judge shall send a copy of the execution part of the decision, if appropriate, also to the persons or institutions referred to in art. 29 para. (1) letters m) and n)[35] of The Law no.

[32] See art. 50 para. (1) and (2) of The Law no. 253/2013, referred to in art. 70 para. (1), and art. 99 para. (2) in relation to art. 94 para. (1) and (4) of The Law no. 252/2013.

[33] See art. 99 para. (2) in relation to art. 94 para. (3) and (5) of The Law no. 252/2013.

[34] See art. 70 para. (2) the second sentence of The Law. 253/2013.

[35] Art. 29 lit. m) for the prohibition of the right to be in certain places or at certain sports events, cultural or other public gatherings, established by the court, the communication is beaing made to the county police inspectorate in whose jurisdiction he resides or to the one from the place of the sentenced person lives, in cases where the ban was ordered for places, events or gatherings outside this constituency, to The General Inspectorate of Romanian Police.

lit. n) for the prohibition of the right to communicate with the victim or with members of it's family, the people who committed the crime or others, determined by the court, or to approach them, the communication is being made

253/2013, competent to supervise the fulfillment of these obligations[36].

According to art. 99 related to art. 97 of The Law no. 252/2013, where the court has imposed the inforcement of the obligation provided by art. 121 para. (1) e) of The Criminal Code, the probation counselor manager of the case determines the dates on which liberated person is required to report to the probation service.

According to art. 99 para. (1) in relation to art. 98 and art. 63 of The Law no. 252/2013, in order to enforce the obligation provided by art. 121 para. (1) letter f) of The Criminal Code, to submit to the examination, treatment or medical care measures, the case manager probation counselor shall proceed as follows:

a) if the court has determined, in the decision, the institution of examination, treatment or medical care, the counselor verifies if the liberated person is taken into the accounts of the established institution, the enforcement of the obligation by the liberated person and monitors the implementation of the examination, treatment or medical care activity[37];

b) if the court has determined, in the decision, the institution of examination, treatment or medical care, the counselor, depending on the particular case, established the institution and will communicated to it the copy of the court decision and his decision, proceeding in accordance with the provisions of letter a). The decision shall be communicated to the supervised person[38].

According to par. (4) art. 70 of Law no. 253/2013, the cost of the examination, treatment or medical care covered by the state budget.

The person released from detention center or education at the age of 18 years may be granted permissions in the execution of the obligation by the probation counselor[39]. Art. 72 para. (1) of The Law no. 253/2013 states that at the request of the liberated person, if justified, the probation councelor may, by decision, grant permissions in the execution of the obligations stipulated in art. 121 para. (1) letters c) and d) of The Criminal Code. In this case, permissions may not be granted for a period longer than 5 days, and its duration is included in the term of supervision.

According to para. (3) art. 72 of The Law no. 253/2013, where the court imposed on the liberated person the execution of the obligation provided by art. 121 para. (1) letter b) of The Criminal Code, at his request, for objective reasons, the probation counselor may grant, by decision, permission to exceed the territorial limit set by the court. If the request concerns leaving the territory of the country, the duration of the permission may not exceed 30 days in an year.

About granting permissions, the probation counselor shall inform, as

to the persons with who the sentenced person does not have the right to connect or is not entitled to approach, to the county police inspectorate in whose jurisdiction he resides and, if applicable, is the place where the convict lives and, for cases where the victim or persons determined by the court do not live in the same district, to county police inspectorates from their homes.

[36] See art. 70 para. (2) sentence I of the The Law no. 253/2013.

[37] See also art. 70 para. (3) sentence I of The Law no. 253/2013, which states that "if the disposition of the obligation referred to in art. 121 para. (1) f) of Law no. 286/2009, as amended and supplemented (The Criminal Code), a copy of the judgment shall be communicated by the probation counselor to the institution in which it will be held the examination, treatment or medical care referred to in the judgment.".

[38] See also art. 70 para. (3) second sentence of The Law. 253/2013, which provides: "If the institution is not mentioned in the judgment, the probation officer shall establish, by decision, the institution in which will be held the examination, treatment or medical care and communicate the copy of the judgment and the decision to it".

[39] See art. 99 related to art. 96 para. (1) of The Law no. 252/2013.

appropriate, the persons or institutions listed in art. 29 lit. m) and n) of The Law no. 253/2013 and judge delegated with enforcement[40].

Although the Criminal Code does not refer to art. 121 para. (4), we believe that this text is applicable, as part of activities related to supervision held by the probation service. The latter is obliged to notify the court if:

a) there have intervened motifs for modifying the obligations imposed by the court or the ending of some of them;

b) the person does not comply with the educational measure's enforcement conditions or does not execute, in the established conditions, its obligations.

Art. 71 para. (2) of Law no. 253/2013 states that the execution of all obligations imposed stops by law at the final date of the period of the interment measure.

According to art. 124 para. (6) and art. 125 para. (6) of The Criminal Code, if the released person does not comply, in bad faith, the obligations imposed, the court reviews the release and orders the enforcement of the remaining of the custodial educational measure duration.

The legislature used the term "reviews the release", not interfering the revocation institution, as for the release on licence.

According to art. 516 para. (2) of The Criminal Procedure Code, the review of the release of the educational center is being made ex officio or after the notification from the probation service, by the court which heard the case at first instance. In the case of the release from the detention center, art. 517 para. (2) of The Criminal Procedure Code also shows that ex officio or after the notification from the Probation Service, it will be competent the court of first instance which judged the minor. In fact, the two texts indicate the same category of courts using different terminology.

The law does not stipulate that commiting a crime until the ending of the internment perioud would determine the revocation of the release, but we note that the provisions of art. 129 para. (2) of The Criminal Code are applicable. Thus, if the sentence established for the new offense committed is imprisonment or life imprisonment, the latter shall apply in accordance with letters b) and c), and if the penalty is a fine, it will countinue to be enforced only the educational measure of which the offender was released, but it's duration shall be increased by up to 6 months without exceeding the statutory maximum for that measure.

The Criminal Code does not provide the cancellation of the release from the educational center or from detention center if it is discovered that the liberated person has commited an offense before being granted release at the age of 18 years.

3. Conclusions

With the coming into force of The New Criminal Code, the enforcement regime applicable to minors became more gentle, because for them the law does not provide punishments anymore, but only educational measures, whose role is to reeducate and reintegrate the minor into the society without suffering the harms of the sanctions served by the adults.

[40] Art. 99 in relation to art. 96 para. (2) of The Law no. 252/2013 provides that "permission is granted by decision of the case manager probation counselor, communicated to the competent territorial police".

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WITHDRAWAL OF PREVIOUS COMPLAINT. A COMPARISON OF THE OLD AND THE NEW CRIMINAL CODE. PROBLEMS OF COMPARATIVE LAW

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Abstract:

In criminal law previous complaint has a double legal valence, material and procedural in nature, constituting a condition for criminal liability, but also a functional condition in cases expressly and limitatively provided by law, a consequence of criminal sanction condition. For certain offenses criminal law determines the initiation of the criminal complaint by the introduction of previous complaint by the injured party, without its absence being a question of removing criminal liability. From the perspective of criminal material law conditioning of the existence of previous complaint,its lack and withdrawal, are regulated by art. 157 and 158 of the New Penal Code, with significant changes in relation to the old regulation of the institution . In terms of procedural aspect, previous complaint is regulated in art. 295-298 of the New Code of Criminal Procedure. Regarding the withdrawal of the previuos complaint, in the case of offenses for which the initiation of criminal proceedings is subject to the existence of such a complaint, we note that in the current Criminal Code this legal institution is regulated separately, representing both a cause for removal of criminal liability and a cause that preclude criminal action. This unilateral act of the will of the injured party - the withdrawal of the previous complaint, may be exercised only under certain conditions, namely: it can only be promoted in the case of the offenses for which the initiation of criminal proceedings is subject to the introduction of a previous complaint; it is made exclusively by the rightholder, by legal representatives or with the consent of the persons required by law for persons lacking legal capacity or having limited legal capacity;it must intervene until giving final judgment and it must represent an express and explicit manifestation. A novelty isrepresented by the possibility of withdrawing previous complaint if the prosecution was driven ex officio, although for that offense the law requires a previous complaint in the sense that the withdrawal takes effect only if it is appropriated by the prosecutor.

Keywords: *crime, previous complaint, criminal action, withdrawal of previous complaint.*

1. Introduction. Previous complaint. General considerations.

Legal order and civic discipline in a state of law are established and maintained by means of rules of law. These rules prescribe rules of conduct, which must be obeyed by the community members as well as sanctions to be applied in case of their violation.

The rules of conduct – most of them - are expressed in a particular form: the law[1] in a wider sense (including any normative act).

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[1] I. Gorgăneanu - Criminal proceedings, Scientific and Encyclopedic Publishing House Bucharest, 1977, p. 13.

The great philosopher, lawyer and orator Cicero (106 BC-43 BC) said more than two millennia before that ”we are slaves to law in order to be free”.

The establishment by law of the facts constituting crime, as well as of the criminal sanctions framework, has a dual role: first to show the members of society which are the deeds prohibited by criminal law and also to warn them about the consequences of committing such deeds, thus fulfilling the function of general prevention and secondly to ensure the correct framing of the facts that infringed the penal law, and a fair sanction for those who committed such acts, with a special preventive function.

In Article 1 of the Criminal Code, the law provides the acts constituting offense, the penalties that are applied to offenders and the measures that can be taken when committing such acts.

Commiting an offense, even when it is discovered and proved by the administration of evidence, adduced against infringers, does not require the automatic application of punishment. In order to reach punishing the offender criminal justice is required, meaning his conviction by the competent court on a trial.

The necessity of restoring the rule of law infringed by committing crimes led to the establishment of the rule that initiation and development of criminal proceedings are made ex officio (principle of officialdom of criminal trial). In the case of minor offenses or those involving relationships between people or their personal life, the Criminal Code and other laws with criminal provisions stipulate that criminal action can be initiated or exercised only if the injured person expressed his/her will of prosecuting the perpetrator by introducing a previous complaint to the courts.

Previous complaint is a criminal institution, its absence representing a cause of removing criminal liability (art. 157 New Criminal Code).

The institution has a procedural aspect which has a direct impact on the possibility of exercising criminal action and implicitly on criminal responsibility.

From the point of view of criminal law, previous complaint is a condition of punishability and in terms of procedural criminal law a condition of procedurability[2].

As outlined, in the case of the offenses for which the law provides the necessity of previous complaint of the injured person, criminal action can not be exercised in the absence of such complaints, art. 295 Code of Criminal Procedure.

Criminal law determines the cases when for the exercise of criminal action, previous complaint is required, starting from the circumstance that these offenses are among those which by their nature concern social relations limited especially to the personal interests of the parties.

In such cases, it is considered that the injured are able to determine whether to start a criminal trial, criminal action being conditioned by the manifestation of an exclusive right of the injured person[3]. Against the will of the injured criminal trial it can not take place.

Justification of the exception consisted either in a lower degree of abstract social danger of these facts or in the circumstance that their bringing to court, with the advertising involved by the trial, could be a source of discomfort or distress to the injured person or would give rise to various conflicts between people belonging

[2] Milea T. Popovici, Prior complaint in regulating the present Code of Criminal Procedure, RRD No.9 / 1969, p.23.

[3] C.Bulai, Criminal Law, General Part, University of Bucharest, 1987, p.469.

to the same family or to the same social environment[4].

Since its legal support - criminal proceedings - in this case is characterized by availability, judicial authorities cannot exercise their duties ex officio.

Conditions of form and substance that must be fulfilled by previous complaint to produce its effect refers, inter alia, to the proprietor of the previous complaint, so, who can introduce previous complaint, the term in which it is introduced, what items previous complaint should include, these being provided by art. 295 para. 3 Code of Criminal Procedure in relation to art. 289 Criminal Procedure Code.

In terms of procedural aspect the institution of previous complaint is to be found in the Special Part of the New Criminal Procedure Code in Title I - Prosecution - Chapter II. art. 295-298, and in terms of substantive law in the general part of the New Criminal Code under Title VII - causes removing criminal liability - art. 157-158.

Therefore, previous complaint can be defined as a manifestation of the will of the injured person embodied in a revocable procedural act requiring criminal liability of the person who committed an offense against him/her for whom the commissioning of criminal action can only be achieved in this way.

Previous complaint, as a notification, is unlike any other ordinary acts referral[5] of the prosecution (denunciation, complaint,ex officio notification) its character necessary and indispensable as a condition for criminal proceedings, as well as through its exclusive character, previous complaint being the only way of valid notification referral[6] for criminal proceedings for certain offenses, which can not take place if there was a common complaint.

The previous complaint must be made by the injured person under the provisions of art. 157 New Criminal Code. It follows therefore that the injured person is the holder of the right to cause the initiation of criminal proceedings by introducing previous complaint.

According to the provisions of art. 158 New Criminal Code, the withdrawal of the previous complaint is, as well as the lack of previous complaint, a cause of the removal of criminal liability. Withdrawal of previous complaint is a unilateral act of will, manifested by the injured person who makes a prior complaint and then returns by withdrawing the complaint he made, and which must be real[7] and indeterminate by fraud or violence[8].

In judicial practice it is questionable which is the procedural remedy where previous complaint was withdrawn due to an error of consent, since the Criminal Procedure Code and the Criminal Code have express provisions on this.

We appreciate that in such a situation the procedural solution must be varied depending on when the withdrawal of prior complaint occurs due to an error of consent.

If viciated withdrawal of previous complaint occurs during the investigation or during the trial in first instance the injured party has the opportunity to inform the appropriate judicial authorities about this issue, promotion or filing a complaint against the solution of classification or,

[4] I.Neagu, Criminal Procedure Law, Special Part, vol. I, Oscar Print Publishing House, 1994, p.152.
[5] Carmen Silvia Paraschiv etc., Criminal Procedure Law, Bucharest, Lumina Lex Publishing House, 2004, p.397.
[6] I.Neagu, work cited., p.431.
[7] I.Neagu, work cited, p.153.
[8] N.Volonciu, Treaty of Criminal Procedure, Special Part, volume II, Paideia Publishing House, Bucharest, 1994, p.116.

respectively against promoting ordinary means of attack .

The problem which finds no firm and explicit solution is when the viciated withdrawal of prior complaint occurs before the final court as a jurisdiction degree pronouncing a final decision without the injured party being aware of the existence of the defect at the time of consent (dol) or was objectively unable to proceed otherwise due to the violence exerted on him.

We believe that by ferenda law this situation should be regulated as to provide procedural remedy in the circumstance when the withdrawal of prior complaint was determined by fraud or violence, and in the meantime a final decision was pronounced.

Withdrawal of previous complaint must be total and unconditional, namely to concern both the criminal and the civil part of the trial.

In other words, the injured person can not renounce criminal proceedings and can not condition the withdrawal of previous complaint by granting civil damages.

As I specified, the withdrawal of the previous complaint must be made within a certain period of time which is situated between its submission and the intervention of the final decision of the court. According to the provisions of the Criminal Code, the withdrawal of the previous complaint has as a legal effect the removing of criminal liability.

Injured person's right to make a prior complaint is a personal right, indivisible and non-transferable in principle.

The exercise of this right may be made, however, by an authorized agent. In this case the mandate should be special and the procuration should be attached to the complaint.

In judicial practice it was established that lack of procedural capacity of the person lodging the prior complaint to the competent body for the injured person is not covered by a mandate given after overcoming these phases of the process, its lack causing the termination of criminal proceedings under Art. 17 Code of Criminal Procedure in relation to art. 396 para. 6 combined with art. 16 para. 1 letter e Code of Criminal Procedure.

Regarding subjects that can introduce previous complaint to the competent bodies we are to see that the legislator has provided the possibility that anyone other than its holder can file a complaint[9], respectively the legal representatives (parents, guardian or curator) when the injured person is a minor or under a disability.

According to art. 157 paragraph 4 of the Criminal Code, if the injured is a person lacking legal capacity or with limited exercise capacity, criminal proceedings are initiated ex officio. Therefore, in the case provided by art. 157 para. 4 Criminal Code functions both the principle of availability on criminal action and the principle of officialdom. In this regard, we consider that initiating criminal action is made ex officio only in the subsidiary, namely only in the event that those entitled by law have not introduced previous complaint to the competent bodies.

According to the New Criminal Code previous complaint can also be introduced or withdrawn by the legal person where he is the victim of a crime for which criminal action implementation is made only in such a way, for example, the crime of destruction provided and punished by art. 253 para. 1 and 2 of the Criminal Code.

[9] I. Neagu, work cited, p.571.

For the legal person previous complaint will be stated and implicitly withdrawn in its name and interest through the legal representative, because as long as there are duties and responsibilities, correlatively there are rights.

A special situation can arise when the legal person, victim of a crime where the criminal proceedings shall be initiated upon previous complaint, is in dissolution or liquidation procedure when we consider that this approach will be achieved by the legal representatives of the company of insolvency . To reason logically and legally otherwise in the sense of a restrictive interpretation of the term " injured person – legal representative " would reach infringement of free access to justice, a right belonging to the legal person too and which is guaranteed by Art. 21 of the Romanian Constitution and art. 6 § 1 Thesis I of the European Convention for defending human rights and fundamental freedoms.

2.1. Comparison between the Old and the New Criminal Code

In the light of new legislation are outlined some new conditions in which withdrawal of the previous complaint removes criminal liability, marking significant differences to the concept promoted by the Criminal Code of 1969, as well as some conditions required under the previous regulation remain valid (some of which being currently established by law, others only reported in the doctrine). Conditions of withdrawal of previous complaint are: intervening in case of offenses for which the initiation of criminal proceedings is subject to the introduction of a previous complaint - art. 158 para. (1) NCP [but, when the prosecution was initiated ex officio, under the law, the withdrawal of the previous complaint must be appropriated by the prosecutor - art. 158 para. (4) NCP]; being made by the rightholder [injured party / other person who has the necessary capacity -art. 158 para. (3) NPC reported to art. 289 para. (2) NCPP]; constituting an express and explicit manifestation of renounciating previous complaint lodged (special mandate, authentic documents); intervening until giving a final judgment [art. 158 para. (1) NCP].

Offences pursued in previous complaint are in the New Criminal Code largely the same from the Old Criminal Code, respectively offenses which generally concern patrimonial or or non-property rights of the person as well as some offenses against the person (193, art. 206, art. 208, Art. 218 para. 1 and 2 Art. 219 para 1 etc ..) crimes against property (Art. 238, Art. 239, Art. 240, Art. 241, etc.), offenses against family (art.378 art. 379, etc.), thereby without being exhausted procedural valences of this institution whose extension is recommended by the Council of Europe, as a way to retributive - restitutive justice

In the introduction to these considerations we defined previous complaint as a unilateral manifestation of the will of the victim embodied in a revocable procedural act requiring criminal liability of the person who committed an offense against it for whom initiating criminal action can only be achieved in this way.

As it is revocable procedural act, the previous complaint formulation does not remove the injured person's right of having in the future the fate of the criminal proceedings. as provided by law,

The main way to revoke the previous complaint is its withdrawal. It can be said that in this area usually the rule of symmetry works, according to which previous complaint may be withdrawn in offenses for which it is required, but only in the case of these crimes. Exceptions are cases where

the law also allows promoting criminal action ex officio, and judicial bodies were self-informed.

We believe that the withdrawal of the complaint can be made by authentic statement (or even certified by lawyer), which is submitted to the case file. If the declaration of withdrawal has reached the court registry on the day of trial, but by an error of officials it did not join the file, because being in the appeal, the only solution is to promote an abatement legal dispute (extraordinary means of attack) .

Therefore, we can define previous complaint withdrawal as a unilateral manifestation of will, express, explicit, total, irrevocable and unconditional of the injured person embodied in a procedural act which in relation to criminal offenses for which initiation of criminal action is made to previous complaint requesting the removal of criminal liability on the person who committed such acts, in any stage of the criminal process, but before the final verdict is pronounced .

Under art. 284 former Code of Criminal Procedure previous complaint had to be lodged within two months from the day the injured party knew the perpetrator, and according to art. 296 New Code of Criminal Procedure previous complaint must be lodged within three months from the day the injured party learned of the offense committed. Legislative amendment aimes at both increasing the term of formulation of previous complaint and the time when the term starts running, the new regulation "on the day injured person learned about committing the crime " being apt to induce removal of the subjective element in assessing the institution. This moment is easily determined on the basis of objective elements, outside the will of the person injured.

The former regulation leaves the possibility of runing a relatively undetermined period in which the injured party is not obliged to resort to the competent authorities to identify the perpetrator, after a long period he could say he learned who the perpetrator was and introduce previous complaint.

Unlike the time he learned who the perpetrator was, as provided by previous legislation; according to par. (3) art. 296 NCPP, if the offender is the legal representative of the injured party, the period runs from the date of appointment of a new legal representative. In long term offenses (continuous, continued, progressive) the term of three months will run from the time of consuming or the date on which the holder of the right knew about it and if the two moments do not coincide, and not from the date of its exhaustion.

Under the old rules and the new rules if the injured person is unable (without legal capacity or with limited legal capacity) previous complaint is made by her legal representatives (parent, guardian, curator), respectively, with the consent of the persons referred by civil law; In these cases, criminal proceedings may be initiated ex officio.

Specifying as a novelty in agreement with the High Court of Cassation and Justice - Criminal Division (for example: Decision no. 464/2009) the provisions of art. 157 para. (5) NCP provide that, if the injured person died (regardless of cause of death) or legal person was liquidated before the expiry of the term provided by law for the introduction of previous complaint, criminal proceedings may be instituted ex officio; the initiation of criminal proceedings ex officio may be made, in this case, both before and after the expiry term of previous complaint formulation; in this case the prosecuting authority is not bound by the term of previous complaint

formulation for disposing beginning of criminal action .

We believe that the criminal proceedings shall be initiated ex officio also if, throughout the period of formulating previous complaint, the injured party was in an objective impossibility of formulating previous complaint, which is directly related to the offense, dying as a result of the offense after the expiration of the previous complaint term (for example, if the offenses are inextricably connected and consistential at a time after the commission of an offense prior to the complaint, the perpetrator tried to kill the victim, leaving her in a coma; if the comatose state extends throughout the term of formulating preliminary complaint, the victim dying after this period, criminal proceedings may be instituted ex officio).

If the death or liquidation occur immediately after the expiration of the previous complaint formulation, and the victim was not in an objective impossibility to file a previous complaint, criminal proceedings can not be initiated ex officio.

In applying the provisions of the Criminal Code of 1968 it was stated that in case of death of the injured person in which previous complaint had to be made and it wasn't, this right is not transmitted to heirs and exercise of criminal proceedings can not be disposed ex officio[10]. Also in applying the provisions of the Criminal Code of 1968 it was stated that if the victim died after the previous complaint was lodged the criminal trial continues to be called into question heirs, but only to be a civil part[11], the criminal proceedings being exercised ex officio[12].

If non-transferability to heirs of the right to make previous complaint is maintained under the new Criminal Code, in the event that the injured person has died or the legal person was liquidated before the expiry of the period prescribed by law for the introduction of the complaint, the New Criminal Code provides that criminal proceedings may be instituted ex officio (157 para 5).

The aforementioned provision is not likely to clarify the exercise of criminal action in case of death of the injured party, on the contrary it can lead to further confusion.

The fact that criminal proceedings may be instituted ex officio means that there is an obligation for the Public Ministry to pursue prosecution. Justification of ex officio exercise of criminal action could be explained only by the existence of a public interest (pas d'interest, pas d'action) and not by the applications of the heirs whose interests would have been better defended by themselves, if the legislator had granted them this right.

Similarly is regulated the institution of active and passive indivisibility of criminal liability for the application of previous complaint.

Rule of active indivisibility applies where by committing the offense there are several people injured, meaning that the right to enter previous complaint belongs to any of these and the criminal liability of the offender will be drawn even if the previous complaint is made by only one injured party (Art. 157 para. 2 new Criminal Code, Art. 131 para. 3 old Criminal Code).

Rule of passive indivisibility applies where the offense was committed by several natural or legal persons (authors, instigators, accomplices), meaning that they will be held criminally liable even if the

[10] E. Ionăseanu, Prosecution procedure, Military Publishing House, p.122-123.
[11] Supreme Court of Justice., criminal judgment. no.3067/1995.
[12] L. C. Lascu, Prior complaint procedure. The death of the victim. Continuing Criminal, Pro Law Publishing House no. 2/1992, p.191.

previous complaint was made only for one of the participants (Art. 157 para. 3 new Criminal Code, Art. 131 para. 4 old Criminal Code).

Under the old Penal Code withdrawal of previous complaint can only be effective if it was withdrawn on all offenders (opera in rem)

The new Criminal Code renounced this rule with reference to the principle of passive indivisibility in case of withdrawal of previous complaint; this solution being justified by the fact that the institution of reconciliation, which takes effect in personam, has been redesigned and is incidental only for crimes that criminal proceedings shall be initiated ex officio in which the law provides such a possibility of extinguishing criminal conflict and not under the assumption of offences for which criminal proceedings are initiated on the injured person's previous complaint.

Thus, according to art. 157 para. (2) The new Criminal Code, withdrawal of previous complaint removes criminal liability of the person on which the complaint was withdrawn. It is therefore possible to withdraw previous complaint only on one or some of the participants to committing the crime (produces effects in personam, not in rem), the criminal trial being to continue on suspects or defendants regarding to whom the complaint has not been withdrawn.

If the withdrawal of previous complaint occurs during prosecution, the prosecutor disposes classification, and if this occurs during the trial, the court orders the suspension of criminal proceedings.

Other changes with reference to the institution of withdrawal of previous complaint can be found in the mediation law (no. 192/2006):

Thus, according to art. 67 para. (2) of this act "in the criminal process, provisions on mediation shall apply only in cases of offenses for which, by law, the withdrawal of previous complaint or reconciliation remove criminal liability."

It is noted that the mediation agreement establishes a reconciliation between the offender and the injured party as a distinct means of mitigating the conflict between them in relation to criminal-law institutions represented by withdrawal of prior complaint, respectively of reconciliation [according to art. 16 para. (1)letter g) NCPP], without representing a new cause of removal of criminal liability.

Another procedural provision is required by art. 69 para. (2) of the same law, namely that the period prescribed by law for the introduction of previous complaint shall be suspended during the course of mediation. If the warring parties have not reached an agreement, the injured party may introduce previous complaint within the same period, which will resume its course since the date of the writing of the minutes closing the mediation procedure, also considering the time elapsed before the suspension.

In case of withdrawal of the previous complaint, the suspect or the accused may request further criminal proceedings under Art. 18 NCPP with a correspondent in the old Criminal Procedure Code Art. 13 Code of Criminal Procedure in order to be able to prove his innocence, for the purposes of acquiting, and if this is not achieved, it is preserved the benefit of withdrawal of previous complaint, respectively ceasing the proceedings.

According to both provisions the withdrawal of previous complaint removes both criminal liability and civil liability, even if it is made by the legal person through his legal or conventional representatives and it is possible as long as there is a pending criminal trial or preliminary acts are performed. After issuing a final solution the withdrawal of

previous complaint can not be done any more because of the lack of prosecution.

Also unchanged are the provisions under which the injured persons lacking capacity, the withdrawal of previous complaint is made only by their legal representatives. In the case of an injured person with limited legal capacity, the withdrawal is made with the approval of persons prescribed by law; in such cases, the withdrawal of previous complaint may be void as criminal proceedings can also be instituted ex officio.

The new Criminal Code has introduced an additional condition for the offenses for which the initiation of criminal proceedings is subject to the introduction of a previous complaint, but prosecution was driven instituted ex officio in accordance with the law (in cases where the injured person is: a natural person lacking capacity, an individual with limited legal capacity or a legal person represented by the perpetrator); in these cases the withdrawal of complaint produces effect only if the complaint is appropriated by the prosecutor, thus limiting the right of disposal of the injured person just to ensure a more effective protection of those persons who are in a vulnerable position; in these situations, if the injured person withdraws his complaint, but prosecutor does not appropriate this manifestation of will (for example, if there is reasonable suspicion to believe that the withdrawal of previous complaint is nullified by an error of consent), criminal proceedings will continue under the principle of officialdom. (Art. 158 para. 4 new Criminal Code).

It is noted that the provision laid down in art. 158 para. 4 new Criminal Code establishes the situation when criminal proceedings was initiated ex officio, under the law [ie, art. 158 para. (3) or art. 199 para. (2) The New Penal Code], an optional attribution of the prosecutor who can refuse to accept the withdrawal of the previous complaint and the criminal trial to continue.

A legislative inconsistency problem is noted on the crime of domestic violence. Thus, according to art. 199 para. (2) The New Criminal Code offenses referred to in art. 193 New Criminal Code (beating or other violence) and art. 196 New Criminal Code (culpable bodily accident) committed against a family member, criminal proceedings may be instituted ex officio and reconciliation removes criminal liability. This text is contrary to the provisions of art. 158 para. (4) that the New Criminal Code according to which offenses for which the initiation of criminal proceedings is subject to the introduction of a previous complaint, but prosecution was instituted ex officio in accordance with the law, the withdrawal of complaint shall take effect only if the complaint is appropriated by prosecutor. Corroborated interpretation of art. 199 para. (2) The New Penal Code and art. 158 para. (4) The New Criminal Code seems to hint that in those cases of domestic violence should be possible both the reconciliation and the withdrawal of previous complaint (if it is appropriated by the prosecutor).

However given the distinct nature of the two institutions, as well as the fact that reconciliation is stipulated by the provisions of the special part of the New Criminal Code, we believe that the only institution that can operate in such a case is that of reconciliation.

If we have detailed above the main differences and similarities between the two regulations we also appreciate that are necessary the following comments in regard to the withdrawal of prior complaint.

These specifications cover issues that are the creation of jurisprudence which shall remain valid and other legislative provisions of the old regulation unchanged by principle.

When the injured person is deaf and dumb, the withdrawal of previous complaint lodged with a statement recorded in conclusion is not valid, if it was not done through an interpreter or a filed document (Supreme Court, Criminal Division, Decision no. 1397/1992, in Problems law ... 1990-1992, p. 436).

Holder of prior complaint is the person - natural or legal - injured by the offense that requires criminal liability.

Previous complaint must meet certain requirements of substance and form, whose not meeting attracts lack or invalid complaint.

Submitting a complaint to an incompetent judicial body does not affect its validity because the incompetent body must send the petition to the organ that has by law, empowerment to address.

Although the law doesn't specifically provide this, previous complaint brought before judicial bodies should be based on fact, namely the one who submits it should rely on facts occurring in the objective world.

We believe that if the previous complaint is made in bad faith, the applicant may be held criminally liable for the offense of misleading the judicial bodies provided and punished by art. 268 new Criminal Code or slanderous denunciation provided and punished by art. 259 Old Criminal Code. With regard to this observation judicial practice and doctrine were not and are not consistent and there is also the substantiated opinion that the crime of slanderous denunciation of the Old Criminal Code with a correspondent in the new Criminal Code offense of misleading the judicial authorities does not concern crimes for which initiation of criminal action is made at prior complaint since the legal text refers only to "the notification made by denunciation or complaint" the prior complaint without being mentioned.

Filing a previous complaint by a general representative does not meet the legal requirement so that the complaint is considered non-existent. For the validity of the complaint, the mandate must be special (ad litem) and the procuration is attached to the complaint. Previous complaint may be drawn up and signed by the attorney if the injured party gave him a special mandate reflected in the content of lawyer's empowerment.

If the injured party is a person without legal capacity or who has limited legal capacity, the previous complaint is not actually necessary because the judiciary organs can notify.

Restoring the term operates if during the criminal proceedings the legal classification is changed for an offense involving the formulation of the previous complaint, when the injured party is called and asked if he wishes to lodge a criminal complaint. From the date when the judicial body announced injured party, it has a period of 3 months.

A special situation exists in the case of flagrant offenses punishable upon previous complaint of the injured party, in which case the criminal investigation body is obliged to establish its commitment even without previous complaint. After establishing flagrant crime, the criminal prosecution body calls the injured party and if he declares that he lodges a prior criminal prosecution continues. Otherwise, the criminal investigation body forwards the concluded documents and the dismissal proposal to the prosecutor.

If within the period of introducing a previous complaint, but before formulating it, there is a law that gives amnesty to the offense provided by the criminal law, the judicial shall order the enforcement of clemency act. The solution will be maintained even if later, within the period prescribed by law, the injured party lodges

complaint, because it was consumed a cause that doesn't leave prosecution without a purpose. The possibility of an equality between amnesty and lack of previous complaint is excluded because, if the complaint was not filed within the prescribed term it is missing, and if submitted within the term the above solution is applied.

Contesting the attack by a parent of the withdrawal of the complaint made by the other can not take place because both parents exercise parental rights.

According to art. 25 para. (5) NCPP with a correspondent in the old regulation in art. 346 para. 4 Code of Criminal Procedure, in the case of the withdrawal of the previous complaint the criminal court leaves civil action unresolved.

2.2. Problems of comparative law

In all legal systems there is the question of knowing if when committing an offense under the criminal law, this act constitutes a crime or not, who is the author and the punishment that is to be applied to the latter in case the person is guilty of committing that crime. To solve these problems it is necessary first to conduct prosecution on that act.

As for the author of the prosecution, some authors of comparative law[13] show that four systems are possible: action emanating from the victim or his heirs (private prosecution); action emanating from all citizens, acting on behalf of the society (popular charge); action that emanates from the very judges (criminal action ex officio); Finally, action emanating from specialized officers such as magistrates from the Public Ministry (public prosecution) or the officials from certain public institutions.

Let's see, then, how these systems are reflected in the different legislations of the countries of the world.

1. Anglo - Saxon (American) Law.

The English system is quite complex, the basic text being Prosecution offences. Act 19852, which refers to the prosecution of offenses.

In principle, all citizens can express their will for criminal investigation in connection with a crime, but in fact, most often, the judiciary police bodies initiate public action .

From this point of view it was brought an attenuation consisting of a specialized service in judicial action: in 1879, was created the Director of Public Prosecution (DPP), ie Department of public and judicial action and in 1985, the CPS, meaning the Crown prosecution service, the first of these two institutions holding the lead. This service has the essential mission to continue or to terminate prosecution initiated by judicial police authorities[14].

Specifically, the Crown Prosecution Service checks the record of the police, if they decided prosecute and decide whether the evidence is sufficient to order continuation of prosecution their insufficiency resulting in the case dismissal. But if the police decided not to pursue, if they just addressed the defendant a warning, they will not send any file to the Crown Prosecution Service and the latter will not be able to exercise prosecution.

The secondary mission of CPS (Crown proecution service) is to decide on prosecutions launched by individuals: in effect, such a criminal action may be contrary to the public interest.

In a word, CPS can only finish prosecution already started by the police or by an individual.

[13] Jean Pradel, taken by Pierre Legrand- Comparative Law, Lumina Lex Publishing House, Bucharest, 2001.
[14] CPS can also give advice to the police.

Finally, in principle, CPS shows which are the exceptions to the rule mentioned above. Thus, there are situations in which the criminal proceedings are not initiated ex officio or on prior complaint of the victim, but require notification or authorization of public institutions. So things are with taxes, customs (for illegal importing of drugs). Health services are competent in terms of fraud benefit offenses in these areas.

Following the investigation, the findings thus made and cumulated in a report made by the criminal investigation bodies, can allow launching of criminal trial.

The American system is very different from the English one and much easier. Originary from the USA, it is separated from the traditional English which is still founded on the idea of ex officio prosecution and previous complaint of the injured person. Also in the USA there is a public service, a veritable Public Ministry possessing monopoly of prosecution: prosecutors of the United States for federal offenses, regional prosecutors and municipal prosecutors for state offenses.

2. German law.

The German law covers, with some differences, the same stages as the Roman criminal proceedings: a preliminary phase of criminal action, followed by the trial phase and ends with the execution of criminal decision.

Prosecution may begin at a notification ex officio, by complaint or by denunciation.

Like the Roman law system for certain offenses such as mild violence, the victim has a specific action: he can act with the same title as the Public Ministry, which is an injury to the monopoly of the latter.

This specific action is the previous complaint, regulated in Book V (art. 374-406h)[15] of German Code of Criminal Procedure, dedicated to the injured person's participation in court.

Previous complaint (Privatklage art. 374-94 Criminal Procedure Code. German) may be exercised for the following offenses: breaking into residence, violating the secrecy of correspondence, personal injury, threat, giving or taking bribes in commercial circuit, destruction and crimes related to intellectual property (Art. 374 para. 1 Criminal Procedure Code. German).

Besides the injured person, holders of previous complaint may be all the people who may lodge a criminal complaint: the family, the legal representative in case of incapacity in civil and superior procedural sense.

If more people were injured by an offense that can lead them to previous complaint, they can act independently of each other. However, if one of the persons injured formulated previous complaint, the others are forced to join the process started, without having to exercise a previous complaint by each. In any case, the effects of a decision favorable for the accused are also opposable to the injured persons who have not participated in the proceedings (art. 375 German Criminal Procedure Code.).

Contents of the previous complaint is the same as the criminal complaint. Preliminary complaint holder is obliged to pay a bail under civil procedural law (art. 379 German Criminal Procedure Code). Making a complaint is not subject to any term.

In relation to the proceedings, previous complaint is not exclusive, so if public interests require, the prosecutor may

[15] Book V - Participation injured person judgment, is divided as follows: Section I. - prior complaint; Section II - Complaint accessory; Section III. - Compensation for the injured person; Section IV. - Other rights of the injured person.

pursue criminal action. Also, the criminal complaint is not a subsidiary of criminal action (Art. 376-377 German Criminal Procedure Code).

Judgment presents some particularities. Before the judgment itself, it is mandatory for some deeds[16] to attempt to reconcile the parties by an appointed mediator (Suhneversuch: art. 380). If the parties are not reconciled, the injured person formulates, in writing or orally before the court a previous complaint, accompanied by evidence showing that preliminary procedure of reconciliation was achieved.

If the complaint meets the legal requirements, the court orders its communication by the accused, who is required to formulate explanations within a given term (art. 382 German Criminal Procedure Code).

The court decides on the opening of the trial, by a conclusion. If the degree of guilt of the perpetrator is low, the court shall order the termination of the trial (art. 383 German Criminal Procedure Code).

Notification act (concluding opening of judgment) is read by the judge (art. 384 German Criminal Procedure Code). The holder of prior complaint can not study the documents in the file other than through a counsel. Otherwise, the law gives the injured person a procedural position equivalent to the prosecutor's (art. 385 German Criminal Procedure Code). Also, this procedure can not be ordered safety or educational measures.

By the time of closing the judicial investigation, the accused in turn may make complaint against the injured person, who will be judged together with the original complaint[17].

Previous complaint may be withdrawn after hearing the accused only with his consent (art. 391 German Criminal Procedure Code). In any case, once withdrawn, previous complaint can not be reformulated. In case of death of the victim, it can be continued (art. 392 German Criminal Procedure Code).

Along with the prosecutor, in the court may participate in some cases the injured person, to protect its interests or for the supervision of the prosecutor's activity. The way the injured person can participate is called Nebenklage (complaint below)[18].

This complaint may be exercised, in addition to cases in which previous complaint may be formulated, and attempted murder victim or the person who had recovery of judjement in the complaint against the solution to end the prosecution (art. 395 par. 2 pt. 2 and 5 German Criminal Procedure Code).

Its procedural position is different from that of the holder of previous complaint by the following features: it can be represented or heard as a witness (art. 397 German Criminal Procedure Code) and may exercise remedies independently from the prosecutor (art. 401) German Criminal Procedure Code), and during the prosecution may file a complaint against the solution of not suing at law (art. 400 German Criminal Procedure Code).

Intention of participation can be expressed at any time[19] during the trial through an application before the court or the prosecutor, in writing or orally. The

[16] Breaking and entering, violating the secrecy of correspondence, personal injury, threat and destruction.

[17] Withdrawal initial complaint by the holder thereof has no effect on the complaint made by the accused (Art. 388 para. 4).

[18] Settlement is to be found in art. 395-402.

[19] The holder of the complaint will state the procedure is (art. 392).

application runs without effect on initiating criminal action. Upon request the court will decide, after hearing the prosecutor and the accused (art. 396 German Criminal Procedure Code).

In case of death of the holder of the complaint, it remains without effect. (Art. 402 German Criminal Procedure Code).

Repair of damage caused to the injured person by offence is in kind or by worth. To this end, the injured person or his heirs make a request before the court by closing of criminal investigation. The application may be withdrawn until the judgment is pronounced(art. 403 and art. 404 German Criminal Procedure Code).

The court will resolve the application for compensation in the following ways: either not to pay compensation if the application is inadmissible or leads to the extension of the trial of the criminal case; this solution can be imposed at any time during the process (art. 405 of the German Criminal Procedure Code Thesis II.); either to grant the application in whole or in part (art. 406 German Criminal Procedure Code) or not to pay damages when the defendant has not committed the act or the application is unfounded (art. 405 Thesis I German Criminal Procedure Code.); These solutions can be pronounced after the debates. In this case, the court may approve the temporary execution, possibly giving a bail.

If the application is not accepted, the injured person can resort to civil action in court.

Against the decision on the application for compensation only the accused can resort to appeal (art. 406A and art. 406c Criminal Procedure Code. German).

Compelled execution follows according to the provisions of civil proceedings (Art. 406h Criminal Procedure Code. German).

Other rights granted to the injured person are provided in art. 406d-h German Criminal Procedure Code).

Thus the injured person is entitled, on request, to be communicated the development of the trial after the decision becomes irrevocable (art. 406d German Criminal Procedure Code).

It also has the right to study, through counsel, the documents in the file, if there are no conflicting interests of the accused with other persons (art. 406e German Criminal Procedure Code.) and the right to be assisted by a defender (art. 406f German German Criminal Procedure Code). The holder of the attached complaint also benefits from this right (art. 406g Criminal Procedure Code).

A right of the heirs is acknowledged by the German Criminal Code Article 77 para. 2 which states that "If the injured person dies, the right to bring a complaint in cases provided by law, passes to the husband / wife and children. If the injured party had no husband / wife, or children, or they die before the deadline for submission of the complaint, the complaint goes right input on parents; and in case they die before the deadline for submission of the complaint, the right of introducing complaint passes to brothers / sisters or grandchildren of son / daughter. If a family member participates in the offense or his relationship with the injured party relationship ceases, he is excluded from taking over the right to lodge a complaint. This right may not be taken by anyone, whether prosecution is contrary to the desire of an injured person".

3. Latin law.

In the Spanish system, criminal action can of course be initiated by the Public Ministry. But what is original, is that all individuals can set initiate it

equally. Under Article 101 LECRIM (Royal Decree for approving the Code of Criminal Procedure) criminal proceedings are public. All Spanish citizens will be able to exercise it in accordance with the provisions of law; Article 102 LECRIM excludes the incapables, those who have already been convicted twice for false allegations and judges. Article 101 is reinforced by Article 270 of the same Code, according to which "all Spanish citizens, who were victims of a crime or not, may lodge a complain exerting public action referred to in Article 101 LECRIM".

Also, foreigners may file a complaint for offenses relating to their person or their loved ones.

This general consecration of public action has besides foreigners, a constitutional basis because, under Article 25 of the Constitution, "citizens will be able to exercise public action".

In some cases however, there is a private prosecution system. Thus, in the case of offenses punishable only upon previous complaint of the victim,only it can act (art. 104 par. 2 LECRIM). But the importance of this system is reduced, because this rule applies only to a limited number of offenses which show a lower degree of social danger (such as insult and libel offenses against individuals); finally, through the obligation of the victim to attempt a reconciliation before submitting the complaint (Art. 278 LECRIM).

The Italian system is relatively distant from that of Spain. For ordinary crimes only Public Ministry may act. For minor offenses which are also called private offenses, prosecution can take place only upon previous complaint of the victim (eg for violence that do not cause distress, inability for more than 20 days).

In the Portuguese system, can act both the Public Ministry and the injured person. In Portuguese law, the concept of victim is original: it includes, on the one hand, the injured person who has suffered damage and who holds civil action (art. 74 Portuguese Criminal Procedure Code), on the other hand, a character who can quote, call offend, insult and who holds the rights protected by law and violated by the offense and that can be an injured party (art. 68 par. 3 Portuguese Criminal Procedure Code). Those harmed may constitute an injured party, but only in the case of crimes traceable at the previous complaint. For these offenses, the victim may initiate prosecution. For other offenses, they are confined for the Public Ministry. Compulsorily, the injured party must be represented by a lawyer and may also require legal assistance.

In the French system, the rule is that the criminal proceedings are initiated ex officio. This can be triggered indirectly by the person injured, but the exercise of this action is essentially entrusted to the Public Ministry, which plays the role of a party in criminal proceedings. He is not an investigating judge (though, in training, he may have a more important role than the defendant or civil part).

But there are a number of offenses that pose a low degree of social danger (eg., In case of insult or defamation art. 48 of Law 29/1881, injury to privacy Art. 226-6 new French Penal Code) in which the criminal proceedings are initiated upon prior complaint of the victim. Lack of this previous complaint constitute a cause for removal of criminal responsibility and also an obstacle in the trial.

Unlike German law, as long as the complaint was not filed, the Public Ministry can not proceed with the investigation. But this preliminary complaint is not a sufficient condition, because even in its presence, the Public Ministry is not required to initiate criminal

action (unless the complaint is accompanied by the application of constituting as civil party)[20].

We also mention that in all cases where prior complaint is a prerequisite of prosecution its withdrawal is a cause of extinction of criminal action.

Apart from these cases that remove criminal liability (lack and withdrawal of prior complaint), criminal action can be also extinguished by the repeal of the criminal law (the new law being far more, indulgent is applied immediately), through the death of the defendant (eg police, criminal action is extinguished only regarding the offender, not in terms of the co-authors and accomplices) by amnesty by res judicata and the prescription of criminal liability.

Like the Romanian legal system, French legislation regulates the special procedure for the settlement of flagrant crimes, in which case it is no longer required a previous complaint of the victim, the criminal investigation bodies only find their perpetration.

As for flagrant offenses in the French legal system, they can have two types of consequences: they cause to rise among people evidence of committing crimes, desire for revenge, and limit the risk of error for justice. These consequences imprint their mark on the procedure for the resolution of cases of flagrant offenses.

Criminal investigation bodies, which have previously notified the prosecutor in charge of the supervision of prosecution, start investigation . Prosecution authorities may prohibit any person to be removed from the scene until the end of operations (to verify their identity). They also can perform certain acts, namely: searching and seizing, especially in the presence of the suspect. For urgent findings, criminal investigation bodies may resort to any qualified person (usually an expert in the field of medicine)., may proceed with the examination of witnesses, may decide on the measure of preventive arrest of the accused.

Apart from detention on suspicion, police can detain the flagrant offender and lead him to the prosecutor. In these cases of flagrant offense, any person can catch the offender and lead him to the nearest headquarters of the criminal prosecution. The prosecutor himself may carry out criminal prosecution and order law enforcement agencies to continue the investigations (as often happens). He has broader responsibilities than criminal investigation bodies.

Thus, in case of a flagrant offense, if the court has not yet been notified, the prosecutor may issue a summons and interrogate the person brought before him. If this person is naturally presented in front of him as a defender, he can be heard only in his presence.

In case of flagrant offense (punishable with imprisonment), if the court was the prosecutor, if he considers that a piece of information is not needed, he may resort to immediate appearance in court.

Also, the court may carry out acts of criminal investigation so that prosecution authorities should require them to continue investigation); if so, the court will extend detention on suspension.

Following the investigation, the findings thus gathered and made into a report by the criminal investigation bodies, can enable initiation of criminal trial.

We note, therefore, that not only in our legal system, but also in the legislations of other states is provided the right of the injured person by an offense

[20] Jean Larguier, taken by Victor Dan Zlatescu - Private Law comparative Oscar Print Publishing House, Bucharest, 1997, p. 104.

that shows a lower degree of social danger, to introduce a previous complaint to the prosecution authorities in order to establish the offense committed, bringing to criminal liability of the perpetrator and repairing the damage. The lack of such complaints is a cause for removal of criminal liability, the victim understanding not to manifest his will towards punishment for the offense committed, under criminal law.

The injured person's right to file the preliminary complaint, in the case of the offenses for which initiation of criminal action is subject to its introduction, and also means a guarantee of protection of fundamental rights and interests of any individual.

Moreover, in the last decade, under the influences deriving from some trends generated by the Council of Europe recommendations and theories which, starting from different bases, predict a repeated dejuridicization of criminal liability on account of promoting solutions that facilitate the reconciliation between the victim - offender, most modern laws are extending cases and situations limiting public action officialdom.

3. Conclusions

In conclusion, the withdrawal of the previous complaint appears as an institution that give legal expression to social-political interests regarding the initiation and the extinction of criminal trial. It is an institution that is considered an exception to the principle of formality and consists in the possibility offered by law to the injured person to decide whether or not further he should impose criminal liability of the perpetrator of a crime that is investigable on prior complaint by the competent authorities.

This exception was allowed by the legislator because, following factual and legal analysis of the situation and also the low level of social danger of certain offenses he can only decide his attitude to criminal liability.

There is an essential difference between the complaint as a way of notification by criminal prosecution bodies, which may be substituted by an ex officio notification or denunciation, and previous complaint, which is the only document required by law for some crimes, without the one who has committed such crimes will not be held responsible and which is, at the same time, a condition of punishability and procedurability.

As a proposal for improvement of the previous complaint procedure, regarding the term of filing previous complaint it should be noted above all the legal nature of this term .

At first glance, as otherwise considered in the specialized literature, it is a decline term.

Thus, if the injured person has not brought the previous complaint within the period provided by law and can not plead interruption of this procedural term, by claiming circumstances beyond his will, which prevented to introduce it, then he can not promote previous complaint and obtain criminal liability of the offender.

If we consider the effects of non-introduction of previous complaint within the period provided by law, we conclude that the time limit for the previous complaint is actually a special term prescription of criminal liability to be subject to the rules of this institution and not only a decline term . Also,we do not see what effect would have the exercise of criminal action ex officio in the case of a liquidated legal person. Who would benefit from such an action?

If all authors of codes were inspired by many European codes (French, German, Italian, Spanish, etc.),they could have chosen a better solution than the one found in the provisions of paragraph 5 157, which refers only to the situation in which the injured party died or the legal person was liquidated before the expiry of the period prescribed by law for the introduction of the complaint, but does not refer to a situation where the injured person has died or the legal person was liquidated during the criminal trial . Does anyone else have the possibility of withdrawing the prior complaint?

As we appreciate in the introduction to this material previous complaint if the legal person is in liquidation proceedings will be formulated and implicitly withdraw from the legal representative of the firm's insolvency, but in this way it does not answer the question above, namely what happens if the legal person was removed from the Trade Register?

Can criminal action ex officio still be exercised automatically in this situation? An affirmative answer would mean an interpretation of the law by analogy, but analogy in mala partem (the solution being obviously against the defendant) is not allowed.

What solution will the prosecutor dispose during prosecution or the court during the trial?

For all these reasons we believe that the text of article 157 paragraph should be reworded in an unequivocal sense either assigning heirs exercise of criminal action in view of their economic interests, or providing that criminal proceedings shall be extinguished upon the death or deletion of the injured person (natural or legal person).

The new Criminal Code differs from the Criminal Code of 1968 and the solution proposed by the 2004 Criminal Code not only by regulating in a separate article of withdrawal of previous complaint but also through the effects that this manifestation of the will of the injured person has.

It was desirable, in the code authors's view, to renounce the parallelism between the causes of removing criminal liability determined today by the existence of the withdrawal of previous complaint, that is the reconciliation of the parties, opting for one of the two, respectively by the institution of withdrawal of the complaint, but the final version was also reintroduced reconciliation, but with different effects from those acknowledged by the old Criminal Code.

We consider that this new regulation managed to upset a legal institution well stabilized in legal practice, with certain restorative values, equally banning the right of the injured party, without any justification of criminal policy, invoking an alleged parallelism, inexisting otherwise, between the withdrawal of previous complaint and reconciliation between the parties, so that finally it should maintain both, distorting their effects.

There is no justification, neither logical, nor of criminal policy, so that the withdrawal of the previous complaint, which is a manifestation of will against the complaint (contrarius actus) should have symmetrical effects, under the symmetry principle of legal documents.

Moreover, we consider that it is inconceivable that the withdrawal of the previous complaint can be carried out prior to a final judgment (Art. 158 para. 1 new Criminal Code), and the reconciliation of the parties can be accomplished only by the reading of notification act(Art. 159 para. 3 new Criminal Code). The law ferenda is necessary, correlating the two institutions and in this respect, or rather the modification of the procedural time of the

possibility of operating reconciliation between the parties so as to provide that this can be achieved until the decision remains final.

Finally, what we have expounded will certainly not clarify controversial issues arising from the withdrawal of the previous complaint being merely an attempt to address this institution, but we believe that it can help the legal practitioners in some way to clarifying novel situations encountered, which will certainly not be few, determined by the new criminal legislation.

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