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CONTROVERSIAL LAW ISSUES IN THE ENFORCEMENT OF THE NEW LEGAL PROVISIONS IN FAMILY LAW

Dan LUPAȘCU*

Abstract

The relatively short period of the new Romainian Civil Code implementation highlights the existence of some controversial law issues regarding the legal provisions contained in Book II, entitled "About family".

Apart from the theoretical disputes, there are also court decisions that contain different solutions in the enforcement of the same legal provisions.

Controversy exists not only in relation to the newly introduced institutions in our legal landscape, but also regarding the ones taken over from the old regulation, institutions that have undergone some changes.

The examples are most varied and they do not bypass almost any matter. Thus, we signal the presence of different interpretations of regulations regarding: engagement, marriage, divorce, parentage, adoption, the legal duty to maintain, the parental authority, etc.

The present study highlights such controversy's by presenting the views expressed and the arguments invoked in their support and also some propositions of Ferenda Law.

Keywords: *Romainian Civil Code, controversial law issues, engagement, divorce, filiation.*

1. Introduction

Conducted during a relatively short time period, the considerable effort of *"modernizing"* romanian legislation and aligning with the international regulatory developments is somewhat *"shadowed"* by the existence of some legislative solutions susceptible of different interpretations or by the absence of provision.

Thus, reffering only to the provisions of the Civil Code regarding family relationships, we find that there are numerous discrepancies in the speciality literature and/or judicial practice. Their existence can be easily noticed from the critical content analysis in terms of legal logic of the various regulations. At the same time, in the process of law enforcement, in many cases, the guardianship courts have ruled differently over the same law issues. In fine, the specialized literature of almost 5 years of implementing the Civil Code revealed different views over the same law issues.

And we could say that this is just the beginning…

The present study highlights only a part of these controversies in matters, such as: engagement, nullity and dissolution of marriage, filiation and legal duty to maintain. Their presentation shows not only theoretical interest, but also significant practical consquences, because from the meaning of a legal provision depends the outcome of a specific case, or in the event of a litigation, or in any other assumptions of enforcing a legal rule.

* PhD, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: prof.danlupascu@gmail.com).

In the contents of the material are criticaly filtered expressed opinions, arguments invoked in their support and also, solutions that we share.

Likewise, regarding certain aspects, there are formulated *law ferenda* proposals designed to lead to the elimination of gaps or, where appropriate, equivocal formulations and the adoption of some clear legislative solutions, that are able to meet the requirements imposed by the specific family relations and the principles that govern this field.

2. Content

2.1 Controversies on the legal nature of engament, engagement effects and legal nature of the liability in the event engagement breakage

Legal institution having a considerable age (being mentioned in the Old Testament – where it was designated through the Hebrew term *"aras"* – present in the Roman law, Byzantine law, etc.), in essence, engagement represents the solemn covenant of two persons of the opposite sex to marry each other in the future.

Also regulated by the old statues, but omitted by the Romanian Civil Code of 1864, engagement was reintroduced in our law through the new Civil Code, a legislative intervention that has sparked conflicting reactions among specialists in family law. The analysis of this institution also generated ample discussions in doctrine. For example, regarding its legal nature, some authors qualify engagement as a legal act[1], a convention[2], others are letting to believe that it would be about such an act[3], while another author believes that engagement is a *"simple legal fact"*[4].

As far as we are concerned, we maintain our opinion[5] of being in the presence of a legal act, more precisely a legal *sui generis* family law act, a qualification that results primarily from the legal definition of engagement, definition contained by art.266 paragraph 1 Civil Code. Secondly, the membership of engagement in the category of legal acts is deducted from the implementation of the sanction of nullity in the case of failure to comply with the basis conditions. Thirdly, the fact that the legislator prohibits the insertion of a Criminal law clause leads to a *a contrario* interpretation according to which any other clauses, that are compatible with this institution, are allowed. Finally, it should be noted that engagement does not fall within the legal category of juridical deeds regulated by the Civil Code.

Another controversy was generated by the fact that the law does not indicate the effects of engagement, but confines only to regulate the patrimonial consequences of breaking the engagement. From here it leads to the conclusion that engagement does not give rise to any statute for the engaged persons, thus the analogy with the institution of marriage is not permitted, only the appearance of some *"pseudo-effects at the breaking of the engagement"*. So, basically engagement is a legal act deprived of legal

[1] E. Florian-Considerații asupra logodnei reglementată de noul Cod civil,Curierul judiciar nr.11/2009, p.632; C.C.Hageanu- Dreptul familiei și actele de stare civilă, Ed. Hamangiu,București, 2012, pag.15).

[2] I.D. Romoșan-Dreptul familiei, Ed. Universul Juridic, București, 2012, p.30.

[3] M. Avram-Drept civil.Familia, Ed. Hamangiu, București, 2013, p.31-32.

[4] A.Gherghe-Noul Cod civil, Studii și comentarii, colectiv coordonat de Marilena Uliescu, vol.I, Ed.Universul Juridic, București, 2012, p.609.

[5] Dan Lupașcu,Cristiana Mihaela Crăciunescu-Dreptul familiei, Ed. Universul Juridic, București, 2012, p.47.

effects[6], the only ones being born at the moment of her tempestuous breakage[7].

We do not share this opinion and we also consider that it is unacceptable that the legislator should be concerned by an institution that lacks any legal effects. If some effects were not expressly provided then it does not mean that they are nonexisting. Also, sanctioning the abusive breaking of engagement or of the culpable determination of the other fiancé to break the engagement presupposes personal relationships conducted in good faith and loyalty between the two fiancés. Even though it does not give rise to a marital action – in order not to affect the matrimonial freedom – engagement generates the juridical condition of engaged persons, thus arising moral as well as legal consequences.

The relations between fiancés fall within the definition of private life, and they are enjoying the legal protection offered, a fact also confirmed by a decision of the former European Commission[8]. From the circumstance that the law penalizes improper conduct of breakage or the determination of the engagement breakage, it is inferred that between the fiancés there are a number of personal rights and duties, similar in principle to those of marriage. Without equalizing the two legal institutions, we can not ignore that both of them are based on the friendship and affection between a man and a woman. That's why we believe that it is not exaggerated to support the existence of some mutual obligations (respect, loyalty, moral support). At the same time, fiancés may agree to live and eventually to take care of the household together, a situation in which engagement can overlap over the state of concubinage.

If children were born from the relationship of the engaged couple, then the couple cohabitation in the legal time period of the conception makes the presumption of filiation against the alleged father applicable. Fiances can choose the matrimonial regime (such an agreement shall take effect from the date of marriage), they can exchange gifts or they can receive them from third parties, they may agree to provide material support for each other, they can aquire assets under common ownership etc.

Reaching a conclusion over these issues, we support that engagement produces both patrimonial and non-property effects, whose legal consequences extent is determined by taking into consideration of the actual content of the agreement between the sides.

In order to remove any doubt about the effects of engagement, we propose the completion of the statutory provisions as specified above.

The legal nature of the liability in the event of a breakage of engagement is not safe from criticism either, under debate being the contractual liability and the tort liability. Under the empire of the current Civil Code, the dominant view is the incidence of liability in tort[9]. In our case, we will remind that in the case of contractual liability, the breached obligation is a concrete one, from those established through contract. So, as we mentioned above, engagement is not a contract, in the common law meaning of the term, but a *suis generis* family law juridical act.

[6] Emese Florian, Considerații..., op.cit., p.633.

[7] S. P. Gavrilă-Instituții de dreptul familiei în reglementarea noului Cod civil, Ed. Hamangiu, 2012, p.12.

[8] C.J.C.E,Cauza Wakefield contra Regatului Unit, 1 octombrie 1990 (Jurnalul Oficial al Uniunii Europene, C189/27).

[9] E. Florian-Dreptul familiei, Ediția 5, Ed. C.H.Beck,2016, p.29.

The promise of marriage can not be executed in kind, through the coercive force of the state. Therefore, the contractual nature of the liability is excluded. In the case of tort liability, the breached obligation is a legal obligation, with a general nature that we all share, consisting in the violation of a conduct rule which the law or the local custom imposes or by an infringement brought to the legitimate rights and interests of others. In the matters of engagement we can not speak of a violation of a general obligation or a rights infringement or also legitimate interests in the sense mentioned above. Moreover, the person has the right to break off her engagement, without being obliged to marry. The pecuniary sanction only intervenes under the assumption of the abusive exercise of this right, which draws incidence in article 15 conjuncted with art.1353 Civil Code.

Therefore, we are reluctant to qualify as pure tort such a liability, thus sustaining the thesis of liability for the abusive exercise of a recognized legal right.

2.2 Controversies concerning nullity and dissolution of marriage

Towards the fact that the provisions of art.13 para.1 in the Civil Code were not taken over from the Family Code it has been sustained that the failing to display the marriage statement is no longer sanctioned with nullity[10]. It is true that breaching the provisions of art.283 Civil Code is not mentioned among the cases of absolute or relative nullity of marriage, however it must not be ignored that these cases relate to the express nullities, and , outside them, there are virtual non entities, the provisions of the art.1253 Civil Code being applied by analogy.

In our opinion the breach of advertising marriage, regardless of whether it takes the form of denying public access at the celebration of the marriage or not displaying the marriage declaration, attracts the absolute nullity sanction of that clandestine marriage. In support of this opinion we invoke, firstly, the provisions of Article 1, paragraph 1 of the Convention relating consent to marriage, minimum age for marriage and registration of marriages, ratified by Romania by Law no. 116 / 1992, according to which: *"No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law."* Secondly, the mandatory wording of the provisions of Civil Code art. 283 maintains the solution of applying the absolute nullity so that the purpose of the violated legal provision to be achieved.

De lege ferenda we propose the completion with this nullity case of the provisions in Article 293, paragraph 1 Civil Code.

Regarding the possibility of granting compensation pursuant to Article 388 Civil Code, in the case of putative marriage, there are two orientations shaped in the specialty literature. Thus, some authors[11] consider that both spouses are subject to the provisions of divorce in regards of patrimonial relations, including the right to damages, regardless of whether both or only one of them was of good faith at the conclusion of marriage. In what concerns us, we share the view that *"both compensatory benefit or the right to damages are specific effects of divorce"*[12], a situation where you can not apply the

[10] M. Avram-Drept civil.Familia, op.cit., p.91-92; C.C.Hageanu-Dreptul familiei..., op.cit., p.39.
[11] T.Bodoaşcă, A.Drăghici, I.Puie-Dreptul familiei, Ed.Universul Juridic, 2012, p.163.
[12] M.Avram - Drept civil.Familia, op.cit., p.105.

provisions of art. 388 Civil Code. The husband of good faith can only claim damages under the common law (of civil liability under tort)[13].

In the matter of culpable divorce for solid grounds, if the claimant spouse dies during the process, art.380 para. 1 Civil Code provides for the possibility of the spouses heirs to continue divorce proceedings. The meaning of the *"heirs"* notion in this law text is the subject of a doctrinal dispute. Specifically, an opinion[14] claims that, in the event of vacant succession, the divorce proceedings can be continued by the village, town or, where appropriate, the municipality on whose territorial area the goods were located at the opening date of the inheritance. We do not share this point of view, believing that the territorial administrative unit is not entitled as the legal heir and can not continue the divorce proceedings[15]. We base our view on a text argument. Thus, art. 963 para. (1) and (2) Civil Code limitingly mentions the categories of legal heirs and the next paragraph provides that, in the absence of legal or testamentary heirs, patrimony of the deceased is transmitted to the administrative-territorial unit.

Given the special practical consequences, we believe that legislative intervention is required in this regard.

2.3. Controversy regarding filiation

The fact that the condition in the contents of Article 53 paragraph 2 of the Family Code has not been taken over in the Civil Code – respectively child birth which took place before the mother remarried, has led to different interpretations concerning the solution of the paternity dispute. Opinions are to the effect that art. 414 para 1 Civil Code is unclear, allowing different interpretations[16], for example that it should enforce *"the priority presumption established by the law or by court"*[17], *"that the problem of double paternity will be settled through legal action in the denying paternity action"*[18], endeavor whereof has been observed, with good reason, that *"it can be foiled by invoking the lack of interest exception*". Case in which, the court or adversary can appreciate that not the attacked presumption is operant, but the other one"[19]. By comparing the provisions of art. 53 para. 1 Family Code (according to: *"A child born during the marriage has as a father the husband of his mother"*) with those of the art. 414 para. 1 Civil Code (according to*:"A child born or conceived during the marriage has as a father the husband of his mother"*), we remark the content difference, namely that the new regulation aims also on conception, not only child birth. Furthermore the conception is placed in the text after birth, which means, in our opinion, on the one hand that it has been desired to also cover the hypothesis of the child's conception before marriage, and on the other hand to enforce an order of preference thus consecrating the solution for the paternity conflict. Therefore, we are not in the presence of a evolutionary legislative change.

An intervention from the legislator would be welcomed to end this dispute in the sense of the full takeover of the old reglementation.

[13] This solution is also sustained in the french doctrine. See, for example: F. Debove, R. Salomon, T. Janville-Droit de la famille, 8 e edition, Ed. Vuibert, Paris, 2012, p.153.

[14] M.Avram-Drept civil. Familia, op.cit., p.133.

[15] In the same meaning: M.Tăbârcă, Drept procesual civil, vol.II, Ed.Universul Juridic, 2012, p.669.

[16] S.Guțan-Reproducerea umană asistată medical și filiația, Ed.Hamangiu,2011, p.69.

[17] C.C.Hageanu-Dreptul familiei..., op.cit., p.193.

[18] M.Avram-Drept civil. Familia, op.cit., p.376.

[19] E.Florian-Dreptul familiei, op. cit., p.394.

2.4 Controversy regarding the legal duty to maintain

The Article 527 para.2 Civil Code, in accordance with the expressed oppinions found in the specialty literature and with the judicial solutions pronounced in the application of the Family Code, foresaw that the determination of the debtors means of maintenance will be taken into account not only by his income and assets, but also by the possibilities of achieving them.

Therefore, the one who has no income or assets, but it is able to work, can be compelled to the legal duty to maintain, the connecting factor being the minimum wage of the national economy. In the hypothesis in which the debtor resides abroad and has no income even though he is fit to work (in practice were different solutions pronounced). Thereby some courts have established the alimony by taking into account the national minimum wage in the country concerned[20], while others have taken into account the minimum wage of the national economy of Romania[21]. At the first glance, it could be argued that the superior interest of the child demands the alimony that would ensure a higher amount of mainteinance, thus implying a comparison of official data set by the laws in those respective states. Only that this higher interest has a complex content, a content that involves the child should have parents who are enjoying a good reputation in terms of criminal law.

That is why we believe that the solution must be determined concretely, on a case by case basis, also taking into consideration all the relevant elements (the nature of the abroad stay, the time period, the concrete possibilities for earning legal incomes in that country, etc.).

A legislative clarification of this law issue or utilising a unification mechanism of judicial practice from the ones stated in the Civil Procedure Code would also be welcomed in this case.

3. Conclusions

The present material captures some of the doctrinal and jurisprudential divergences that are appearing from the application of the new legal provisions in the family law field.

The approach is complex, being made not only from a theoretical perspective, but also from a largely applicative one. As consequence, the purpose pursued and the result obtained are not only about fully and correctly discerning the complete meaning of the analyzed legislation, but also to avoid the wrong solutions in the process of applying them.

The diversity and polyvalence of regulations, the unique character of the legal rules, the problem of adherence to the national realities of legal provisions inspired by other legal systems, but mostly the question of the adequacy of the current law to the rapidly transforming social needs undoubtedly requires broadening and deepening scientific research.

References

- M. Avram-Drept civil.Familia,Ed. Hamangiu, București, 2013.
- T.Bodoașcă, A.Drăghici, I.Puie-Dreptul familiei, Ed.Universul Juridic, 2012.

[20] Tribunalul Dolj, s.civ. ,decizia nr. 4/21.01.2010, www.EuroAvocatura.ro; Tribunalul Hunedoara,s.1 civ.,decizia nr.1258/04.12.2015, citată de F.Radu-Pensie de întreținere stabilită în funcție de venitul minim din țara de reședință a pârâtului-cetățean român și care nu realizează venituri, www.juridice.ro, 15 aprilie 2016.

[21] Curtea de Apel Galați- s.minori și familie, decizia nr. 544/09.11.2011, www.EuroAvocatura.ro

- F.Debove, R.Salomon, T.Janville-Droit de la famille,8 e edition, Ed.Vuibert, Paris, 2012.
- E. Florian-Dreptul familiei, Ediția 5, Ed. C.H.Beck, 2016.
- E. Florian-Considerații asupra logodnei reglementată de noul Cod civil, Curierul judiciar nr.11/2009.
- S. P. Gavrilă-Instituții de dreptul familiei în reglementarea noului Cod civil, Ed. Hamangiu, 2012.
- A.Gherghe-Noul Cod civil, Studii și comentarii, colectiv coordonat de Marilena Uliescu, vol.I, Ed.Universul Juridic, București,2012.
- S.Guțan-Reproducerea umană asistată medical și filiația, Ed.Hamangiu, 2011.
- C.C.Hageanu-Dreptul familiei și actele de stare civilă, Ed. Hamangiu,București, 2012.
- Dan Lupașcu, Cristiana Mihaela Crăciunescu-Dreptul familiei, Ed. Universul Juridic, București, 2012.
- I. D. Romoșan-Dreptul familiei, Ed. Universul Juridic, București, 2012.
- M.Tăbârcă-Drept procesual civil, vol.II, Ed. Universul Juridic, 2012.

CAUSA AND CONSIDERATION – A COMPARATIVE OVERVIEW

Dimitar STOYANOV[*]

Abstract

The article examines the Roman origin and historical development of "causa" as an essential requirement of the contracts, as well as its adoption in the majority of the national legislations belonging to the French legal family. Moreover, the article analyzes what has become to be known as the functional equivalent of causa in the English law – the doctrine of consideration and examines the correlation between them. In the end, the latest tendencies in codifying the European civil law with respect to causa and consideration are being critically discussed.

Keywords: *causa, consideration, mixed legal systems, comparative law, European private law*.

1. Introduction

There is hardly any major national legislation that does not contain any rules on contracts and their formation. Being looked upon as the most important consequence of the autonomy of the will, contracts serve as the founding stone of modern socio-economic life. Yet, the unrestricted application of this philosophical doctrine, as profound as it might be, could lead to results which cannot be considered appropriate, since virtually every promise would be treated as legally binding. Throughout the development of transactions, scholars and legislators have sought to establish numerous legal criteria to determine whether an expression of will is itself capable of producing the designated legal effect. These efforts were intended not only to protect the legal interests of the contracting parties by providing an obstacle to their desire or promise, but also to protect the interests of the whole society by promoting legal security in transactions.

The most notable examples of such criteria can be found in the necessity to observe a specific form or to hand over the goods ('traditio') in order to consider oneself bound by a contract. Thus, by providing additional requirements to the process of expressing one's will a clear distinction between enforceable promises and simple arrangements could easily be established. However, this model of extreme formalism that dominated the rules of almost every ancient society (the most notable example being the law in Ancient Rome) suffered gradual weakening after the collapse of the Roman Empire. The canonist lawyers were seeking to strike a balance between the classical Roman texts and the new socio-economical situation in Europe, putting consensual contracts in a rather favourable position compared to the formal ones. Their interpretation of Roman texts influenced the future development of private law. Several centuries later, with the new era of Enlightenment, the autonomy of the will was established as the founding stone of modern contract law. Still, continental lawyers from that period had to answer the question how to

[*] Assistant at Civil Law in the New Bulgarian University, Sofia, PhD. (e-mail: dimitarstoyanov2011@gmail.com).

distinguish between enforceable promises and accidental agreements when additional requirements were considered to be an exception rather than a rule. The need to establish new abstract criteria to be used as an essential element of the validity of contracts and as indicia of seriousness brought the modern theory of causa to life.

However, Roman law did not play a significant part in moulding modern private law everywhere in Europe. This is the reason why English common law did not adopt the concept of causa, but rather developed its own methods to determine which promises could be enforceable and the ultimate result of this process, lasting for centuries, became known as the doctrine of consideration.

The similarity of the two concepts is beyond doubt. They share some common features, yet there is a considerable difference in terms of notion, scope of application and legal consequences between them, which prevents the statement that the former is a complete functional equivalent of the latter.

Moreover, there is a third group of national legislations where neither causa nor consideration is acknowledged as a vital element of the contracts. It is sufficient for an agreement to be both valid and enforceable when there is mutual consent of the parties upon its primary points.

The main aim of this article is to analyse these three types of legal approach to the question how to distinguish between a simple agreement and a valid contract by presenting the theory of causa and the doctrine of consideration in a comparative perspective, trace its origin, present and future tendencies.

2. Origin of the causa

As far as the origin of causa is concerned, many authors state is that it is a totally un-Roman concept[1], that no general theory of causa could be deduced from the Roman texts[2] and even that having such an abstract principle was impossible for the Romans because of the primitivism of their legal system that excluded any possibility of dealing with abstractions[3]. Although the presence of causa as a concept in Roman private law is admitted by a few scholars, they point out that it was used in various senses, differing immensely from the modern notion of causa[4]. The vast majority of the authors agree upon the fact that the earliest ideas of causa emerged as the result of the canonists' interpretations; a sophisticated medieval attempt to generalise various figures belonging to Roman private law[5]. St. Thomas Aquinas developed the idea that every effect is dependent upon its reason (causa) and causa is something without which a thing cannot exist. If everything is based on a causa, he said, this should apply to contracts as well. Influenced by St. Thomas Acquinas, the glossator Baldus, while interpreting the Roman contract of stipulation, stated that all contracts have a causa – the "nominate" carry it within themselves, while the abstract (such as the stipulation) receive it from outside[6]. Other scholars assume that the origin of causa can be found several centuries later, when the

[1] Zimmermann, R., *The Law of Obligations. Roman Foundations of the Civilian Tradition*, (Cape Town, Wetton, Johannesburg: Juta & Co, Ltd, 1992), 549.

[2] Lorenzen, E., "Causa and Consideration in the Law of Contracts", *Yale Law Journal* 7 (1919): 630.

[3] Peterson, S., "The Evolution of "Causa" in the Contractual Obligations of the Civil Law" *Bulletin of the University of Texas*, 46 (1905): 39.

[4] Daruwala, P., *The Doctrine of Consideration Treated Historically and Comparatively*, (Calcutta: Butterworth & Co., 1914), 367.

[5] Buckland, W., *Roman Law and Common Law. A Comparison in Outline*, (Cambridge University Press, 1965), 227.

[6] See Zimmermann, R., The Law of Obligations, op.cit., p. 551.

famous French scholar Jean Domat[7] put together a blend of Roman law and natural reason, the result of which was the theory of causa. Domat stated that in unilateral contracts, such as loan of money, causa lies in the fact that the creditor performed his obligation at the time of the conclusion of the contract and provided the money. Following that logical pattern, he continued with bilateral onerous contracts[8] where he assumed that the engagement of one of parties is the reason (causa) of the engagement of the other party. As far as gratuitous contracts were concerned, Domat identified the causa with the motive, the intention to make a gift. This theory was incorporated by another prominent French scholar – Robert Pothier (1699-1772) in his famous work „*Traite des obligations selon les regles tant du for de la conscience, que du for extérieur*, Tome 1, Debure l'aîné, 1761, in the chapter "*Defaut de cause dans le contrat*" and ultimately found its place among the other essential elements of the validity of contracts in the process of drafting the French Civil Code from 1804[9].

The merits of this theory are beyond doubt, but to my view one aspect of the origin of causa remains overlooked. Scholars' primary efforts are pointed at analyzing the interpretations of Roman law found in the works of glossators and natural lawyers, whereas traditionally little attention is being paid to the original Roman texts. In my opinion, Roman private law did contain all the vital elements that shaped the concept of causa.

Roman law of contracts has always been dominated by a strong formalism and pre-defined, "closed" types of contract. This meant that no agreement could be enforced unless it belonged to some of these types. An abundantly clear rule was that a nude pact does not constitute an action – *ex nudo pacto non oritur actio*[10]. By the time of Justinian's Corpus Iuris Civilis, contracts could be separated into three large groups – real, formal (verbal and litteral) and consensual[11]. Whenever the requirements for each those types were fulfilled, an action could be brought to enforce the obligation.

In addition to this closed system, another difficulty of tracing the roots of causa in Roman contract law should be considered as well. Causa as a notion was known to Romans, but it had various meanings[12], one of which was 'causa civilis'. Despite being used

[7] Jean Domat (1625-1696), lawyer and philosopher, representative of the Natural law school, author of "Les Loix civiles dans l'eur ordre naturel". It is interesting to point out that Prof. Zimmermann, being a staunch supporter of the canonist origin of the rule himself, does not refer to Domat in any way related to the causa. This peculiarity might be explained with the fact that in his works Domat claimed that his main aim is "to undertake the digesting of the Roman laws into their true and natural order, hoping thereby to render the study of them easier, more useful and more agreeable". What he in fact did was to develop a modern legal system, based on natural reason, upon the Corpus Iuris Civilis. See Peterson, S., The Evolution of "causa" in the Contractual Obligations of the Civil Law, op. Cit., p. 43.

[8] Rather than using the "closed" formalistic system of contracts in the Roman private law, Domat referred to them simply as "do ut des", "do ut facias" and "facio ut facias", thus acknowledging their application in every commercial relationship, both nominate and innominate.

[9] Keyes, W. N., "Causa and Consideration in California – A Re-Appraisal" *California Law Review* 47 (1959): 77.

[10] About the difference between contracts and pacts see for example Birks, P., *The Roman Law of Obligations*, Oxford University Press, 2014, 22 et seq.

[11] See D. 3.89.: *Et prius videamus de his quae ex contractu nascitur. Harum autem quattor genera sunt: aut enim re contrahitur obligatio aut verbis aut litteris aut consensu. „Let us now inquire into those (obligations), that arise from a contract. There are four kinds: contractual obligations, that arise either through re (handing over the good), by words (verbal), by writing (litteral) or through (reaching a) consensus.*"

[12] Some of them have nothing to do with the modern theory of causa and did not influence its origin, for example, pictatis causa in Roman family law or falsa causa in Roman law of testaments.

only once in the Digest (D. 15.1.49.2) its importance was pointed out by scholars since 'causa civilis' meant the reason for the enforcement of contracts[13]. In the case of formal contracts, 'causa civilis' consisted in the observance of the prescribed legal formalities. As far as consensual contracts were concerned it was the consent of the contracting parties, meaning the exchange of mutual promises[14]. The causa civilis of real contracts could be found in the exchange of a thing. Along with them, however, by the time of compiling the Digest Roman private law was no stranger to a special kind of contracts, called innominate[15]. They were stated under the general formulae do ut des, do ut facias, facio ut des and facio ut facias. There is a specific text in the Digest dedicated to them - D. 2.14.7.1-2: "*Those agreements, who do not create an action do not retain their common name; instead they are consumed by the names of the other contracts: sale, hire, society, loan, deposit and other similar ones. But when they cannot be attached to those contracts, if there is a ground (causa), as Aristo decisively responded to Cels's question, an obligation arises, when I give you a thing, so that you would give me one, or so that you would do something: that is a contract and a civil obligation arises from it*"[16].

It is clear that innominate contracts were treated as real, that there had to be a performance by one of the parties. Its significance could be found in two aspects. First, giving the thing was the causa civilis that gave rise to the enforceability of the contract with an action[17]. The second aspect, however, can be derived from the interpretation of the text. If one of the parties gave the thing this was actually a pre-performance, conducted in order to receive a counter-performance – be it a thing or an operation provided by the other party. Since the Digest explicitly acknowledge the emergence of a contract ("synallagma"), the fulfilment of the first performance serves as the basis of the new contract, as a reason ("causa") for its existence and justifies the counter-performance, thus ultimately bringing a new contract into existence. Probably this interpretation has influenced Domat, since his concept of causa in bilateral onerous contracts resembles the provisions of D. 2.14.7.1-2 to a great extent.

[13] See Lorenzen, E., Causa and Consideration in the Law of Contracts, op. cit., p. 625. Yet, there are some scholars who believe that causa civilis and modern causa are one and the same phenomenon, but it is an isolated point of view, such as Daruwala, P., The Doctrine of Consideration, op. cit., p. 364-365. Concerning the text (15.1.49.2) of the Digest, it would seem more precise to speak about obligations than contracts, since the text excluded the possibility of enforcing a stipulation when there is no reason (causa) for it - on the mere statement of debt without actually having borrowed the money.

[14] This type of contracts would ultimately become the founding stone of modern contract theory, but in Roman private law there were only four consensual contracts – sale, hire, society and mandate. See Birks, P., The Roman Law of Obligations, op. cit., p. 53 et seq.

[15] See Zimmermann, R., The Law of Obligations, op. cit., p. 549. Innominate contracts were never called "innominate" in the times of classical Roman law. This notion is believed to have emerged in the works of scholars of the Eastern Roman empire. What is important to stress out, however, is that this legal figure can be found in the Digest, meaning it was already known in the middle of the 6th century AD thus allowing us to use it and make conclusions about causa.

[16] *Quae conventions pariunt actions, in sou nomine non stant, sed transeunt in proprium nomen contractus: ut emptio venditio, locatio conductio, societas, commodatum, depositum et ceteri similes contractus. Sed et si in alium contractum res non transeat, subsit tamen causa, eleganter Aristo Celso respondit esse obligationem, ut puta dedi tibi rem ut mihi aliam dares, dedi ut aliquid facias: hoc synallagma esse et hinc nasci civilem obligationem.*

[17] This is explicitly indicated several lines below – D. 2. 14.7.2 - ... igitur nuda pactio obligationem non parit, sed parit exceptionem – *A nude agreement does not constitute an obligation, it only produces an exception (defense).*

The modern theory of causa can be traced back to Roman law in another aspect as well. Scholars point out that it had special significance as far as formal contracts were concerned[18]. The stipulation in the early stages of its development was an abstract formal contract independent from the various economical circumstances that would lead people to concluding it – a duty to pay was created despite the fact that the underlying reason for it failed. This considerable independence between the declared will and the actual circumstances suffered gradual weakening and two examples are able to attest to this process. First, the parties could impart special importance to the underlying purpose for entering into a stipulation. Thus, the external economic relationship could play the role of a condition of the validity of the stipulation[19]. The second case can be found in the Digest – D. 44.4.2.3 – *If anyone stipulates with another without any causa, and then institutes proceedings by virtue of this agreement, an exception on the ground of fraud can properly be pleaded against him*[20].The party who stipulated could paralyze the effect of the formal stipulation by using an exceptio doli, an exception which enabled him to escape liability by proving that the duty assumed either had no causa or was based upon an illicit causa[21].

As far as the first case is concerned, there are some differences between it and the result of the canonists' interpretation. First of all, the Romans limited this rule only to the case of a stipulation, whereas Baldus applied it to all contracts. Second, the external economic relationship could become the causa of a stipulation only by consent of both contracting parties. The canonists included causa to the essential elements of the contract *ipso iure*. Yet the legal consequences do not differ dramatically. Whenever there was no external relationship to support the stipulation the debtor could simply deny payment, just like in modern times, when causa is absent. To my view, the possibility of making the validity of the stipulation depend upon the existence of an external economic relationship is what probably has lead the glossator Baldus to conclude that abstract contracts receive their causa from the outside while the others carry it within themselves.

Elements of causa may be found in the exceptio doli as well. The exceptio doli was an "abstract" exception, since its application was allowed in every case, regardless of its individual circumstances. Yet, the burden of proof that the duty was assumed without any reason or it was based on an illicit reason was set upon the debtor, according to the common principle in Roman evidence law "*reus in excipiendo fit actor*" – as far as exceptions are concerned, the defendant is in the position of the plaintiff[22]. Only one step is needed to draw the conclusion that a reason is present in every obligation until proved otherwise. This reputable presumption is today one of typical elements of causa and can be found in a number of national legislations.

The last element of the modern theory of causa can be found in the rules about unjustified enrichment in Roman law (D. 12.4-7). Whenever a promise or money has been given to the other party, but there was no reason for this, a *condictio sine causa* could be used to recover what has been promised. In the same text we can find the *condictio ex*

[18] See Buckland, W., *Elementary Principles of the Roman Private Law*, (Cambridge University Press, 1912), 232.
[19] See Girard, P., *Geschichte und System des römischen Rechts*, II Teil, (Berlin, 1908), 495.
[20] *Si quis sine causa ab aliquot fuerit stipulates, deinde ex ea stipulation experiatur, exceptio utique doli mali ei nocebit*.
[21] See Lorenzen, E., Causa and Consideration in the Law of Contracts, op.cit., p. 628; Girard, P, Geschichte und System des römischen Rechts, op.cit., p. 496.
[22] See Lieberwirth, R., *Latein im Recht*, (Berlin: Staatsverlag der DDR, 1988), 263.

turpem causam for recovery of what is promised for an illicit purpose or motive where the promisor was in fact innocent[23]. In modern times, the lack of causa or the presence of an illicit causa leads to the nullity of the contract.

This historical overview proves that the Romans did not develop a comprehensive theory of causa just because the predefined contract system excluded the necessity of introducing another abstract criterion to determine whether an agreement was deemed to be legally enforceable or not. At the same time one can find all the essential elements of causa in Roman contract law – the need for an economic reason to support the legal obligation that can even become an element of its validity (derived from the stipulation); the necessity for every transaction to be supported by some existing and permissible reason and finally a predecessor of the presumption that every obligation has a causa, until proven otherwise. This could lead to the only possible conclusion that as far as the causa is concerned, Romans had a notion of causa and despite the fact that they did not consider it an essential element of the validity of all their contracts, in practise they often applied its principles[24].

3. National legislations that acknowledge the legal function of causa as an essential element of the validity of contracts

The question who is the genuine creator of the concept of causa is naturally very important, but it should be considered that both the canonists and Domat have laid down only some of its most important features. The first time a modern theory of causa in its whole came to existence was in the year 1804. The earliest civil law codification to adopt the principle of causa was the French Civil Code from 1804. Causa is regulated as one of the four essential requisites for the validity of agreements, as shown in art. 1108[25] with some quite familiar ideas that are known to us since Roman time – the prohibition of an obligation that has no causa or has a false or unlawful causa (art. 1131 and 1133) and a reputable presumption of causa (art. 1132).

At the same time Domat's work has influenced the legal doctrine in its attempts to explain the concept of causa. Modern French scholars traditionally define causa as the typical legal purpose, a ground for existence of the undertaking signed by both parties to the contract[26]. There is a distinction between the objective causa and the subjective causa. Objective causa (*cause objective, cause abstraite*) is the logical result of Domat's theory but further developed. In this sense, in bilateral contracts causa consists of the aim of the buyer to acquire title to the thing and of the aim of the seller – to receive the money in exchange for transferring the property. Thus, in synallagmatic contracts the benefit offered by each of the contracting parties serves as the cause for the obligation of the other party. The motives that have guided the parties into concluding the contract are irrelevant. Scholars admit the existence of a second approach to causa – in its subjective form (*cause subjective, cause concrete*).

[23] Buckland, W., McNair, A., Roman Law and Common Law, op. cit., p. 223.

[24] See Lorenzen, E., Causa and Consideration in the Law of Contracts, op.cit., p. 630.

[25] "Four requisites are essential for the validity of an agreement: The consent of the party who binds himself; His capacity to contract, a definite object which forms the subject-matter of the undertaking; a lawful cause in the obligation."

[26] See *Principles, Definitions and Model Rules of European Private Law, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law*, ed. by Christian von Bar, Eric Clive and Hans Schulte-Nölke, (Munich: Sellier European Law Publishers, 2009), 292.

Traditionally, it is being defined as the typical, deciding motive for the parties for entering into this type of contracts, their subjective intentions and the specific reasons for concluding the contract[27].

The significance of causa can be found in a number of cases. First, it establishes that the reciprocal obligations of the contracting parties arising from bilateral contracts are strictly interdependent. Where one of these obligations is not executed, whatever reason might have lead to this, the other obligation has no causa and therefore the party can resist payment. If there was no concept of causa and the obligations of the parties were independent, payment would still be due and the only opportunity to recover it would have been the claim for unjustified enrichment. But the concept of causa ensures that whenever one of the parties fails to perform the other party could simply demand annulment of the contract, thus making contract law more secure and the arisen disputes easier and quicker to resolve[28].

The second feature of causa is that it restricts the courts' unlimited control upon the agreement between the parties[29]. Enacted in 1804, the French Civil Code is a legal embodiment of the major philosophical ideas of that period and was influenced in particular by the idea of individualism. Since autonomy of the will was established as the leading concept in the law of contracts, 19th century French scholars were convinced that the judge should be allowed to intervene in the contractual relationships as little as possible. As a result the control that could be imposed was limited to the objective verification whether a contractual counter-performance actually exists, whether it is one normally expected in the particular type of contract and whether it is not unlawful or false. Inquiries into the motives or other psychological factors that urged the parties into a contract were generally not admitted by the courts.

Although the modern theory of causa was laid down at the beginning of the 19th century, this does not mean it reached a standstill. On the contrary, the concept of causa has developed further, particularly by following some decisions of the French Cassation court and the efforts of legal scholars. Modern French legal doctrine has acknowledged two primary tendencies in the development of the doctrine of causa – its 'concretisation' and 'subjecitivisation'[30].

Throughout the last decades, the concept of causa has become more concrete, in the sense that it does not simply refer to a contractual counter-performance of any nature, but to a "real" contractual counter-performance, which includes taking into consideration the real, genuine interest it represents. A number of judgements of the French Court of cassation reveal a new approach in the assessment of causa – not from a formal point of view (since it might be not apparent at first glance), but from the point of view of the concrete, genuine interest, represented by the performance to the other contracting party, even when the terms of the exchange are apparent[31]. The

[27] Tikniute, A., Damrauskaite, A., "Understanding Contract Under the Law of Lithuania and other European Countries", *Jurisprudence*, 18, (2011): 1397; Principles, Definitions and Model Rules of European Private Law, op.cit., p. 293.

[28] See Julliot de la Morandiere, *Precis de Droit Civil, Tome II*, (Paris: Dalloz), 1957, Russian translation by Fleischitz, E., Moscow, 1960, 270.

[29] Ibidem, p. 271.

[30] *Reforming the French Law of Obligations. Comparative Reflections of the Avant-Projet de reform du droit des obligations et de la prescription*, ed. by John Cartwright, Stefan Vogenauer, Simon Whitaker, (Oxford and Portland, Oregon: Hart Publishing, 2009), 77.

[31] *Cass. Civ. (3) 13. October 2004*, D 2004 AJ 3140.

process of "concretisation" of the causa has lead to a major change in French case law. In the past, where a counter-performance does not exist or is not immediately apparent from the contractual structure both unilateral and bilateral contracts were declared void for lack of causa. Today courts tend to undertake a search for the real interest pursued by the party who appears to impoverish itself. They go beyond the contractual structure and analyse the benefit or some other thing that has been previously received and is capable of sustaining an obligation[32]. If the benefit is still unclear, courts continue their attempt in establishing whether the contracting party nevertheless has an interest in the contract, since it may be provided through another contract or by a third party.

The second current development may be described as a "subjectivisation" of causa. It means that courts analyze the obligation and aim at establishing the causa of each of the contracting parties' obligations, without limiting themselves to the pre-established type of the contractual counter-performance[33]. Traditionally, causa is defined as the typical aim, associated with the certain type of contract and pursued by the parties. In the process of applying the principles of causa, courts proclaim the annulment of a contract that does not contain the interest which is normally expected to be present at this particular type of contracts. Thus courts determine the essential elements of a contract - the minimum inviolable prerequisites for its existence. Since this could lead to a number of contracts being proclaimed void on the ground that an apparent causa is lacking, the notion of causa was enriched by a new aspect. Courts are prepared to refine the control and to hold valid an agreement, provided that a real economic context is present. The search for the 'atypical' cause can be found in a rather recent decision of the French Cassation Court[34]. As a clause in a purchase contract of a hotel room by a family couple, the hotel set up a joint venture whose object was to share the fruits and costs of the hotel restaurant and would be managed by another company. The Court pronounced the purchase contract void, since the hotel assured the couple that they will never have to bear the losses of the hotel, yet on the ground of this clause the family couple would stand surety to the hotel. The absence of causa was proclaimed because of the impossibility of realising a profit, 'a specific goal of viability, expressly coupled with the purchase'[35]. This decision has been subject to eloquent critics. They raised the question about legal certainty in contract law, since every party dissatisfied by the absence of profit could purport to obtain nullity of the contract. Several scholars, however, justified this approach, since the contract should demonstrate by plain terms that the two parties knew of a particular goal pursued and have admitted it from the outset into their relations. Even if the is not the traditional one, associated with this particular type of contracts, the contract will still be held valid. On the contrary, where one cannot derive the goal from the contractual structure, or where it has been included without the express volition of both parties, the contract has no cause and this leads to its nullity[36].

On the face of it, the depth of the French courts' inquiry may seem quite intensive and unprecedented especially when one considers the reason why causa was actually brought to life – to ensure that courts will intervene as

[32] Reforming the French law of obligation, op.cit., p. 79.
[33] Ibid., p. 81.
[34] *Cass civ (3) 29. March 2006*, Bull civ I № 88, JCP G 2006 in: Reforming the French Law of Obligation, op. cit.,p. 88.
[35] Ibid. p. 89.
[36] Ibid. p. 89

little as possible in the contractual relations. French legal doctrine even referred to these undergoing processes as an "exteriorisation" of the causa[37]. To my view, this process is actually a function of the autonomy of the will. Allowing courts to try and determine whether one of the parties has interest despite the lack of a visible counter-performance ultimately leads to decreasing the number of contracts declared void for the lack of causa, which can actually be perceived as a true manifestation of the main principle in the contract law – the autonomy of the will.

The provisions about causa in the French Civil Code have served as a role model for several other national legislations belonging to the Romanistic legal family. Causa is considered an essential element of the validity of contracts according to the provision of art. 1274 of the Spanish Civil Code. What is interesting to point out is that the Spanish legislator has adopted Domat's theory of causa and not its modern notion[38]. The "Spanish approach" of defining causa as a requisite of the validity of contracts is its original meaning, has influenced the Civil Code of the Philippines[39]. The modern French notion of causa can be found in the national legislations of Belgium, Luxembourg[40], Italy[41], Romania[42], Bulgaria[43] and Slovenia[44]. In the same meaning the requirement of causa can be found in some legislations not belonging to the EU: in Quebec[45], the States of Louisiana[46], California[47] and Montana[48] and in the United Arab Emirates[49]. The subjective meaning of causa (as the deciding motive that has lead a party to commit itself) is adopted by the national legislations of Chile[50] and Colombia[51]. This comparative overview clearly shows that the concept of

[37] Ibid., p. 80.

[38] See art. 1274 of the Spanish Civil Code: "In onerous contracts the causa is understood to be, for each contracting party, the prestation or promise of a thing or service by the other; in remuneratory ones, the service or benefit which is remunerated; and in contracts of pure beneficence, the mere liberality of the benefactor".

[39] See art.1350 of the Civil Code of the Philippines that follows closely the provision of the art. 1274 of the Spanish Civil Code.

[40] See art. 1108 and art.1131-1133 of the Belgian Civil Code and the Luxembourg Civil Code. As a whole, both Civil Codes follow very closely the provisions of the French Civil Code.

[41] See art.1325 and art.1343-1345 of the Italian Civil Code. The provisions about causa are the same as in the French Civil Code.

[42] See art. 1235-1239 of the Romanian Civil Code. It is interesting to point out that the definition of causa in the new Romanian Civil Code of 2014 seems to have been influenced by the respective provision of art. 1410 of the Quebec Civil Code.

[43] See art. 26, (2) of the Bulgarian Law of Obligations and Contracts: "Contracts that … have no causa are void. The existence of a causa is presumed until otherwise proven."

[44] See art. 39 of the Slovenian Law of Obligations: "Every contractual obligation must have a permissible causa (ground). The causa shall be deemed impermissible if it contravenes the constitution, compulsory regulations or moral principles. (3) It shall be presumed that an obligation has a causa, even if such is not expressed.(4) If there is no causa or the causa is impermissible the contract shall be void."

[45] See s.1410 of the Civil Code of Quebec: "The cause of a contract is the reason that determines each of the parties to enter into the contract. The cause need not be expressed."

[46] See S. 1967 of the Civil Code of Louisiana: "Cause is the reason why a party obligates himself."

[47] See art. 1550 of the California Civil Code, where the requirement for a "sufficient cause" is explicitly provided.

[48] See S. 28-2-102 of the Montana Code, that resembles the provision of art. 1108 of the French civil Code.

[49] See S. 129 (c) of the UAE Civil Code: "The necessary elements for making of a contract are: agreement, subject matter and a lawful purpose for the obligations". To my view, there is no reason to consider that "a lawful purpose" has any other meaning than a lawful causa.

[50] See art. 1467 of the Civil Code of Chile, where the following definition is present: "By causa it is meant the motive that induces the act or contract".

[51] See art. 1524 of the Civil Code of Colombia, whose provision is the same as in art. 1467 of the Chilean Civil Code.

causa is ever-evolving and it is constantly modified to suit the exercise of control over contractual obligations in the best way possible.

4. National legislations that have adopted the doctrine of consideration

In contrast to the causa as a requisite of contracts that can be discovered in the national legislations of countries belonging to both civil and common law, the doctrine of consideration is a typical feature of common law legislations only. The doctrine of consideration can be found in the legislation of the United Kingdom, the United States of America, Australia and Cyprus as well as in some mixed jurisdictions, such as the Republic of South Africa. The main focus of this article will be placed upon clarifying this doctrine in English law, where consideration emerged and developed.

Differing from the legal systems on the Continent, English law was not based on the blend of Roman law and Canonist law, but rather developed its own institutes[52]. Yet, it faced the same problem about enforceability of promises.

In the early stages of its development (around the middle of the 13th century AD), English law had not developed the doctrine of consideration as a universal requisite, applicable to all contracts. Promises to do or to give something had to be set out in a written form, called deed. Whenever there was a breach of a promise, a special action, called covenant was granted to the plaintiff. A requirement that the covenant must be written and issued under the seal of the covenantor was introduced in the 14th century. In the course of time, the action of covenant gradually limited its legal consequences to the recovery of damages for breach of a sealed promise and was finally supplanted by another action (assumpsit)[53]. In the course of the 16th century, the action of assumpsit became the common legal means for the protection of a party against default by the other party, including the enforceability of promises. The legal effects of the action of assumpsit led the jurisprudence to the conclusion that since creditors enjoy such a convenient way of protecting themselves against a misconduct, carried out by the other party, not every given promise, whatever its nature deserves legal protection[54]. In particular, it was assumed that the action of assumpsit shall not be used to enforce a gratuitous promise and only promises with a bargain, i.e. with a counter-performance will be worthy of protection[55].

The assumed policy of the jurisprudence to limit the cases where one can claim enforceability of a promise was just one of the premises of the doctrine of consideration. The second one could be found in a stunningly familiar issue that tormented the minds of civil law scholars as well – the need to reduce the role of formalism without sacrificing security of transactions. Both premises make it probable that in the 17th

[52] There is a statement that the theories of consideration derived from canon law, since the chancellors who adopted them were former ecclesiastics. This would mean that causa and consideration share the same historical roots. See Willis, H.E., What is Consideration in Anglo-American Law, *University of Pennsylvania Law Review*, 72 (1924): 249. The majority of scholars believe, however, that the doctrine of consideration was developed independent of outer influence, See Beatson, J., Burrows, A., Cartwright, J., *Anson's Law of Contracts*, 29th ed., (Oxford University Press, 2010), 91 et seq.

[53] Willis, H. E., What is Consideration in Anglo-American Law, op.cit., p. 251 et seq.

[54] Simpson, A., A History of the Common Law of Contract: The Rise of the Action of Assumpsit, (Oxford University Press, 1975), 199 et seq.

[55] Cheshire, Fifoot and Furmston's Law of Contract, 12th edition, (London, Dublin, Edinburgh: Butterworths 1991), 71.

century judges inquired into the contractual bond, searching for a reason for the promise being binding[56].

The process of forming the doctrine of consideration did not remain unchallenged. In the 18th century an attempt to redefine the notion of consideration had been carried out by Lord Mansfield, Chief Justice of the King's Bench. He refused to recognize it as a vital criterion of a contract and treated it merely as evidence of the parties' intention to be bound[57]. If this intention could be ascertained in any other way (writing or witnesses) consideration was unnecessary[58]. His second conclusion was considered even more disturbing. Lord Mansfield eventually accepted consideration as essential to English contracts, but defined it as a moral obligation[59]. It took almost another sixty years for English case law to overcome Lord Mansfield's approach. In *Eastwood v Kenyon*, the concept of consideration as a moral obligation was condemned. The judges pointed out that the acceptance of a moral duty as the sole test of an actionable promise collides with English law that requires some factor additional to the defendant's promise so that it would become legally binding and this was the doctrine of consideration[60]. The logical consequence of the *Eastwood v Kenyon* case was that consideration was no longer looked upon as a rule of evidence or a moral obligation. Throughout the 19th century, various attempts to define consideration have been undertaken in case law. It has been established that a plaintiff can prove the presence of consideration in one of two ways. He might either prove that he had given the defendant a benefit in return for his promise or that he himself had incurred a detriment for which the promise was to compensate[61].

This approach had been accepted and further developed in the beginning of the 20th century. English case law attempted to define consideration using the contract of purchase and sale – "An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable"[62]. Despite the fact that defining consideration seems straightforward and simple, scholars do not think of it as a single principle, but rather as a doctrine that has evolved throughout the centuries. That is why

[56] Some scholars regard this perception of consideration as being as close to the theory of causa as possible, since the meaning of "consideration" altered much in the next century, See Cheshire, Fifoot and Furmston's Law of Contract, op.cit., p. 71.

[57] Pillans v Van Mierop (1765) KB 3 Bur. 1663. Lord Mansfield added that "the ancient notion of consideration was for the sake of evidence only; for when it is reduced into writing, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration". See Lorenzen, Causa and Consideration in the Law of Contracts, op.cit., p. 637.

[58] Rann v Hughes (1778), 7 Term Rep. 350. See McCauliff, C., A Historical Approach to the Contractual Ties that Bind Parties Together, 71 Fordham Law Review (2002): 850 et seq.

[59] "Where a man is under a moral obligation, which no Court of law or equity can enforce, and promises, the honesty of the thing is a consideration ... The ties of conscience upon an upright mind are a sufficient consideration" Hawkes v Sanders (1782), 1 Cowp 289.

[60] Eastwood v Kenyon (1840) 11 AD & EL 438.

[61] "A valuable consideration in the sense of the law may consist in either some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other" – *Currie v Misa* (1875) LR 10 Exch 153; "Consideration means something which is of value in the eye of the law, moving from the plaintiff: it may be some detriment to the plaintiff or some benefit to the defendant" – *Thomas v Thomas* (1842) 2 QB 851.

[62] This definition emerged originally in the English case law – see *Dunlop v Selfridge* (1915). This particular case is sometimes being referred to as the most significant case for the consideration doctrine. See Beatson, J., Burrows, A., Cartwright, J., *Anson's Law of Contract*, op.cit., p. 92.

three further sub-principles have been introduced to facilitate its application[63].

According to the first sub-principle, consideration should either be executory or executed, but not past. Consideration may be *executory* when a promise is made in return of a counter-promise by the other party and *executed* when it is made in return for the performance of an act[64]. Whenever the plaintiff purports to enforce a transaction, he must be able to prove that his promise (or act) together with the defendant's promise, constitute one single transaction and there is interdependence between them[65].

However, where the defendant has made a further promise, subsequent to and independent of the underlying transaction between the parties, it should be regarded as a sign of gratitude for past favours or a gift, and no contract can arise[66], since there is a "past consideration". Since it confers no benefit on the promisor and involves no detriment to the promise in return for the promise, the general rule is that past consideration is equal to no consideration[67].

The second sub-principle that has been accepted in the case law and among scholars is that consideration must move from the promisee[68]. This means that a promise can be enforced whenever the promisee has paid for it and there is a bargain. In the cases where the promise was not made by deed and the promisee did not provide consideration, no enforcement is allowed. At the same time this element means that even when the promise is supported by consideration provided by the promisee, consideration must move from the claimant, i.e. the person seeking to enforce the contract must have provided the consideration himself[69]. However, the application this principle should lead to the conclusion that a promisee cannot enforce a promise made to him where the consideration for the promise has been provided by someone else[70].

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[63] Richards, P., *Law of Contract*, 9th ed., (London: Pearson Longman, 2009), 58 et seq.

[64] Cheshire, Fifoot and Furmston's Law of Contract, op.cit., p. 74; Beatson, J., Burrows, A., Cartwright, J., Anson's Law of Contract, op.cit., p. 95.

[65] *Wigan v English and Scottish Law Life Assurance Association* (1909) 1 Ch 291.

[66] Cheshire, Fifoot and Furmston's *Law of Contract*, op.cit., p. 74.

[67] There are, however, some exceptions to this rule. A past consideration would be able to support a promise if the consideration was given at a previous request of the promisor. The Judicial Committee of the Privy Council has summarized the conditions under which this exception applies in *Pau On v Lau Yiu Long* (1980) AC 614 – "An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisor's request, the parties must have understood that the act was to be remunerated either by a payment or the conferment of some other benefit, and payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance." Further exceptions to the rule "past consideration is no consideration" can be found in the existence of an antecedent debt (*Wigan v English and Scottish Law Life Assurance Association* 1909 1 Ch 291) and in the case of negotiable instruments (s. 27 (1) of the Bills of Exchange Act 1882). See Beatson, J., Burrows, A., Cartwright, J., *Anson's Law of Contracts*, op.cit., p. 97. Some scholars assume that a moral obligation is equal to no consideration. The notion of "moral obligation" is used in a different, narrower sense in comparison to Lord Mansfield's definition of the consideration as a moral obligation. Scholars believe that an obligation should be considered moral whenever there is an impossibility to enforce it due to some specific legal defect. English case law has refused to consider binding the promise given by a discharged banker to pay his debts in full incurred before his discharge if this promise is not supported by "fresh consideration" – *Jakeman v Cook* (1878) 4 Ex.D. 26. See Treitel, G., *The Law of Contract*, 11th ed., (London: Sweet & Maxwell 2003), 80.

[68] Cheshire, Fifoot and Furmston's *Law of Contract*, op.cit., p. 77; Richards, P., *Law of Contract*, op.cit., p. 61.; Treitel, G., *The Law of Contract*, op.cit., p. 81.

[69] See Beatson, J., Burrows, A., Cartwright, J., *Anson's Law of Contracts*, op.cit., p. 98.

[70] It should be noted that English courts hesitate about this logical consequence. Australian courts, however, apply this requirement without doubt. See Coulls v Bagot's Executor and Trustee Co Ltd (1967) ALR 385, where

The third sub-principle lies in the requirement that consideration must be real, must be "something which is of some value in the eye of the law"[71]. That's why case law consistently declined to accept as consideration the case where a party refrains "from a course of action which he has never intended to pursue"[72]. Furthermore, whenever there is impossibility, physical or legal, at the time of formation of the contract, consideration is held unreal[73]. Case law requires the impossibility to be obvious, meaning that "according to the state of knowledge of the day, so absurd that the parties could not be supposed to have so contracted"[74]. There is no consideration in the case when a promise is too vague or insubstantial to be enforced as well. Whenever a promise leaves the performance exclusively in the discretion of the promisor the consideration is deemed to be illusory[75].

It has been established that courts will inquire into consideration to prove that it is real, but the question about its adequacy should remain outside their scope[76]. Courts will not seek to measure the comparative value of both promises, since the adequacy of consideration is to be considered by the contracting parties at the time of making the agreement. The parties are presumed to be capable of pursuing their own interests and reaching a desired equilibrium in commercial transactions[77]. That's why courts cannot denounce an agreement just because it seems to be unfair. On the contrary, they have been prepared to find a binding contract in cases where consideration is virtually non-existent. Four centuries ago it has been assumed that "when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action[78] and this rejection of performing a quantitative check is meticulously applied by courts[79]. However, some exceptions where consideration is held to be 'insufficient' have been introduced[80].

5. The correlation between causa and consideration

As it has appeared, both the theory of causa and the doctrine of consideration are brought to life to serve as an "indicia of seriousness"[81] in an attempt to distinguish between a simple arrangement and a contract. This circumstance naturally leads to the

the judges have accepted that "a person not a party to a contract may not himself sue upon it so as directly to enforce its obligations ".

[71] Treitel, G., *The Law of Contract*, op.cit., p. 83; Richards, P., *Law of Contract*, op.cit., p. 62.

[72] *Arrale v Costain Civil Engineering Ltd* (1976)

[73] Beatson, J., Burrows, A., Cartwright, J., Anson's *Law of Contracts*, op.cit., p. 102.

[74] *Lord Clifford v Watts* (1870) LR 5 CP 577.

[75] *Ward v Byham* (1956) 1 WLR 496.

[76] Cheshire, Fifoot and Furmston's *Law of Contract*, op.cit., p. 81.

[77] *McEcoy v Belfast Banking Co Ltd (1935)* AC 24.

[78] Sturlyn v Albany (1587) Cro Eliz 67.

[79] In modern times this principle became known as the "peppercorn theory". In Chappel & Co Ltd v Nestle Co Ltd it was assumed that it is irrelevant whether the consideration is of some value to the other party: "A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn".

[80] Scholars agree that whenever there is a public duty imposed upon the plaintiff by law, any promise to carry it out is a promise without consideration. A further exception lies in the case where the plaintiff is bound by an existing contractual duty to the defendant. See Cheshire, Fifoot and Furmston's Law of Contract, p. 89 et seq.

[81] Zweigert, K., Kötz, H., Introduction to Comparative Law, 2nd Revised Edition, translated from German by Tony Weir, (Oxford: Clarendon Press, 1992), 417 et seq. See also Kötz, H., Europäisches Vertragrecht, Bd.1 Abschluss, Gültigkeit und Inhalt des Vertrages, die Beteiligung Dritter am Vertrag, (Tübingen: Mohr Siebeck, 1996) 77 et seq.

question about the correlation between causa and consideration. At first glance there is a distinctive similarity not only in the function of both figures as "indicia of seriousness". Another common feature between them may be found in the reason why they were developed. Both causa and consideration have emerged as a result of the necessity to facilitate the exclusion of formalism that dominated the contractual relationships in both Roman private law and early English law. In modern times, formalism is considered an exception rather than a rule, since the need to observe a specific form is now usually substituted by the requirement of a causa or consideration in order to consider a contract valid and binding.

These similarities of both concepts did not remain unnoticed by judges and scholars. Case law shows that there was a considerable period of time in English law where consideration and causa were used interchangeably. In the *Calthorpe's case* consideration is defined as a "cause or meritorious occasion, requiring a mutual recompense, in fact or in law"[82]. Despite the fact that in its further development English case law abandoned the approach of defining the doctrine of consideration using causa, this proved to be a very robust idea. The question about the correlation between causa and consideration influenced the development of the enforceability of promises in the mixed legal systems.

The first Civil code of Louisiana, enacted in 1825, as well the next one, enacted in 1890, contained a definition of causa. It was assumed that "Cause is consideration or motive. By the cause of the contract in this section is meant the consideration or motive for making it"[83]. Scholars admit that until the end of the 19th century due to the strong civil law influence the common law doctrine of consideration, although specifically indicated in the provisions of the Civil Code was not applied, because cause meant consideration[84].

To my view, this is only partially true. Scholars' primary aims are pointed at clarifying that under this definition consideration is not equal to motive[85] and omit an important aspect. A historical interpretation of this definition leads us to the conclusion that in 1825, when the first Civil Code of Louisiana was enacted, the notion of causa could have had no other meaning than the one manifested by J. Domat and R. Pothier – in unilateral contracts causa lies in the fact that the creditor performed his obligation at the time of the conclusion of the contract, in bilateral onerous contracts the engagement of one party is the reason for the engagement of the other party and in gratuitous contracts motive serves as causa. If a parallel can be drawn, causa in unilateral contracts and executory consideration seem to be quite alike, since both require something to be done or given. Causa in bilateral contracts and executed consideration are, on the other hand, quite different, but share the same function of establishing the difference between enforceable and unenforceable promises. As far as gratuitous contracts are concerned, they must be made by 'deed' in English law to become enforceable. The Louisianian legislator has included the motive in the definition of causa, since the existence of a motive justifies the existence of a gratuitous promise and substitutes the need for a causa. Following that logical pattern, we might conclude that the scope of causa is

[82] This decision dates back to the year 1574. See Lorenzen, E., Causa and Consideration in the Law of Contracts, op.cit., p. 636. Other scholars also admit that in the 16th and 17th century consideration probably meant the reason for the promise being binding, fulfilling something like the role of causa in continental systems, See Cheshire, Fifoot, Furmston's Law of Contract, op.cit., p. 71.

[83] See art. 1890 of the Louisiana Civil Code 1825 and art. 1896 of the Louisiana Civil Code of the year 1890.

[84] Drake, J., Consideration v. Causa in Roman-American Law, *Michigan Law Review* 4, (Nov. 1905): 39.

[85] Ibid., p. 22.

broader than the doctrine of consideration and that's why causa encompasses both consideration and the liberative motive, as set out in the definition of art. 1890 of 1825 Louisianian Civil Code. As we have seen, it is the causa, not the doctrine of consideration that is used as a universal requisite of the validity of contracts in present-day Louisiana.

In the Republic of South Africa, the question about the correlation between causa and consideration emerged in the beginning of the 20th century. The provision of art. 1371 of the repealed Netherlands Civil Code provided the requirement for a causa in every contract and consequently it was introduced into the legal system of Transvaal by the Dutch settlers as well. Yet, in 1904 a member of the Supreme Court stated that "the causa of Roman-Dutch law has become for all practical purposes equivalent to the valuable consideration of the Common Law"[86]. Despite the fact that this idea was not acknowledged by later South African case law, it was accepted by the majority of the scholars of that time[87].

The idea that causa and consideration are similar, but not the same worked its way into the case law of other mixed legal systems. In the Philippines causa and consideration were originally used as synonyms[88]. Later on, it was established that although somewhat different, both concepts work out equivalent effects in jurisprudence. The common law consideration was held narrower than the civil law causa, since consideration consists of some benefit to the promisor or a detriment to the promisee, whereas causa is the essential reason for the contract[89].

Modern scholars are inclined to accept that causa and executory consideration are similar[90], but others point out that it can be accepted only if causa is being used in its objective sense[91]. To my view, this statement is true, but several other circumstances should not be overlooked.

First, causa is an element necessary for more than just the plain formation of all contracts in civil law. It is used to invalidate unlawful or immoral transactions and justifies the consequences that follow from an excusable failure to perform one of the obligations on a bilateral contract. It can be said that causa accompanies the contract from its formation until its discharge. On the contrary, the doctrine of consideration imposes a standard solely for the formation of an onerous contract, since a gratuitous promise must be performed in the form of a 'deed' to be enforceable. Afterwards, there are several other legal figures, known to English law that are used to perform control over unlawful or immoral transactions or the excusable failure to perform, such as illegality, mistake and frustration. This means that consideration itself cannot carry out the functions of causa[92]. Thus a contract, supported by consideration, could be declared

[86] See Zimmermann, R., The Law of Obligations, op.cit., p. 556.

[87] Drake, J., Consideration v. Causa in Roman-American Law, op.cit., p. 19; Lorenzen, E., Causa and Consideration in the Law of Contracts, op.cit., p. 639; Buckland, W., McNair, A., Roman Law and Common Law, op.cit., p. 233.

[88] See the decision of the Supreme Court Marlene Dauden Hernaez vs Wolfrido delos Angeles, G.R. No. L – 27010; April 30, 1969.

[89] See *Mixed Jurisdictions Worldwide. The Third Legal Family*, 2nd ed., by Palmer, V., (Cambridge University Press, 2012), 471.

[90] See Markesinis, B., Cause and Consideration: A Study in Parallel, *The Cambridge Law Journal* 37 (Apr. 1978): 58.

[91] Tikniute, A., Dambrauskaite, A., Understanding Contract under the Law of Lithuania and Other European Countries, op.cit., p. 1397; Principles, Definitions and Model Rules of European Private Law, op.cit., p. 292.

[92] Markesinis, B., Cause and Consideration: A Study in Parallel, op.cit., p. 74.

void from the outset for lack of causa or unlawful causa. That is why it can be assumed that the notion of causa and its scope of application is considerably wider than the doctrine of consideration.

At the same time in English law nominal consideration is sufficient to sustain a contract, whereas in civil law causa will not be applicable in this case. Civil law legislations usually have adopted the Roman concept of *laesio enormis*, allowing the party to bring up an action and invalidate a contract where the price of the counter-performance is considerably lower than the price of his own performance. English law does not require consideration to be adequate. Although it has developed exceptions to ensure that the lack of adequacy is not due to fraud, mistake or irrational generosity[93], courts will not pronounce the invalidity of contract solely on this behalf. In this sense, as strange as it may seem on face of it, consideration is wider than the notion of causa.

If a conclusion may be drawn, it seems that the 'objective causa' can be considered the functional equivalent of executory consideration, since they stand as close as possible to each other. Apart from that, causa and consideration differ greatly in terms of elements, scope and legal consequences. What they share in common is a similar historical path and the function to establish which promises should be considered binding.

6. The need for coherence. The abandonment of causa in France.

Surprisingly, the concept of causa and the doctrine of consideration share another common feature. Both have been subject to criticism that has doubted their utility and even called for their abandonment[94]. Moreover, many national legislations, such as Germany[95], the Netherlands, Scotland[96] Greece, Portugal[97], Slovakia, the Czech Republic[98], Lithuania[99], Estonia[100] and Hungary do not acknowledge causa or consideration as necessary elements of the formation and validity of a contract. Thus the existence of two parties who have agreed upon concluding a contract is deemed enough. This has been accepted in the civil Codes of various national legislations outside the EU, such as Switzerland[101], Israel[102], Ethiopia, Armenia, Brazil, South Korea[103] and Russia.

Following the rapid development of international civil and commercial

[93] See Treitel, The Law of Contract, op. cit., p. 74.

[94] The most famous French anti-causalist is Marcel Planiol. See Planiol, M., Traite elementaire de droit civil, 7th ed., translated into Bulgarian by T.Naslednikov, (Sofia, 1930) 424 et seq. On the criticism of consideration see Chen-Wishart, M., In Defense of Consideration, Oxford University Commonwealth Law Journal 13 (2013): 209 et seq.

[95] Zweigert, K., Kötz, H., Introduction to Comparative Law, op.cit., p. 426-427;

[96] Mixed Jurisdictions Worldwide. The Third Legal Family, op.cit., p. 256.

[97] See Principles, Definitions and Model Rules of European Private Law, op.cit., p. 294.

[98] Ibid, p. 294.

[99] Tikniute, A., Dambrauskaite, A., Understanding Contract under the Law of Lithuania and Other European Countries, op. cit., p. 1400.

[100] Kull, I., European and Estonian Law of Obligations — Transposition of Law or Mutual Influence?, Juridica International 9 (2004) 33 et seq.

[101] Guhl, T., Das Schweizerische Obligationenrecht, Achte Auflage, (Zürich: Schulthess Verlag, 1991) 94 et seq.

[102] Kellerman, A., Siehr, K., Einhorn, T., Israel Among the Nations, (The Hague/Boston/London: Kluwer Law International, 1998), 299.

[103] Jin, Oh Seung, Overview of Legal Systems in the Asia-Pacific Region: South Korea, paper presented at the Conference Overview of Legal Systems in the Asia-Pacific Region (2004); 04.10.2004; available at http://scholarship.law.cornell.edu/lps_lsapr/6 (last accessed on 04.04.2016).

relationships both inside and outside the EU, the existence of three differing types of legal approach to the question whether an agreement is actually a valid contract could cause a number of complications and undermines the certainty of circulation. That is why several attempts to overcome this challenge have been undertaken on a supranational level. Of course, they differ considerably, but they all share one common feature – the need for a causa or consideration is abandoned and a contact is concluded, modified and terminated by the mere agreement of the parties, without any further requirement.

One of the oldest attempts to unify the requisites of the contract was set out in 1927, by a Draft of a French-Italian Code of Obligations. It never entered into force, due to the outbreak of World War II, but its provisions served as an eloquent proof that causa and consideration may not be included into the issue of formation and validity of contracts[104]. This principle was adopted several decades later with the UN Convention on Contracts for the International Sale of Goods (CISG) coming into force in 1980. Its article 11 provides that "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses".The provision of art. 1.2 of the UNIDROIT Principles (latest revision of 2010) is virtually the same[105].

The approach of simplifying the requirements to consider a contract valid and binding has inevitably influenced EU law as well. The ongoing attempts to create a unified European private law have resulted in introducing several "soft law" codifications, such as the Principles of European Private LAW (PECL) and the Draft Common Frame of Reference (DCFR)[106]. The provision of art. 2:101, (1) PECL sets out a quite liberal and simplified approach. It excludes the formal requirements for the conclusion of a contract in such a way that a contract is concluded if the parties intend to be legally bound and reach a sufficient agreement *without any further requirement.*This implies that the contract can be concluded without the presence of causa or consideration[107].

The Study Group on a European Civil Code closely follows the approach of providing minimal substantive restrictions in the provision of art. 4:101, Book II of the DCFR[108]. The absence of a causa or consideration is considered to promote efficiency by making it easier for parties to achieve the desired legal results in a faster and more convenient way. At the same time the level of legal protection has not lowered since

[104] Smith, J.D., A Refresher Course in Cause, Louisiana Law Review 12 (1951): 2.

[105] See Dennis, Michael J. The Guiding Role of the CISG and the UNIDROIT Principles in Harmonising International Contract Law, Uniform Law Review 19 (2014): 114–151.

[106] About the notion of "soft law" see Terpan, F., Soft Law in the European Union. The Changing Nature of EU Law. European Law Journal 21 (January 2015): p. 68-96.

[107] Storme, M., The binding character of contracts – causa and consideration, Towards a European Civil Code (red. A.S. Hartkamp, M. Hesselink, E. Hondius), 2nd revised and expanded ed., (Kluwer, 1998), 239-254; Maria del Pilar Perales Viscasillas, The Formation of Contracts & the Principles of European Contract Law, 13 Pace International Law Review (2001): 374; Zimmermann, R., Jansen, N., Contract Formation and Mistake in European Contract Law: A Genetic Comparison of Transnational Model Rules, Oxford Journal of Legal Studies 1 (2011): 9.

[108] II. – 4:101 Requirements for the conclusion of a contract.
A contract is concluded, without any further requirement, if the parties:
(a) intend to enter into a binding legal relationship or bring about some other legal effect; and
(b) reach a sufficient agreement.

the contract could be proclaimed invalid of some defect of consent or illegality[109].

It is obvious that the undergoing abandonment of causa and consideration as a requirement of the formation of a contract is not merely a whim, but a consistent supranational policy that has emerged nearly a century ago. That is the reason why one cannot be surprised to see that the French legislator has undertaken a major reform of the law of obligations to harmonize it according to the latest tendencies in European private law. According to the "***Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations"*** **which will enter into force on 01.10.2016, the French Civil Code abandons the concept of causa, so that a contract will be valid if the parties have capacity to contract, have given their consent and there is an object (see the new version of art. 1128, which will enter into force on 01.10.2016).**

The abandonment of the concept of causa, happening in the very national legislation, where it was enacted for the first time, may seem really confusing at first glimpse. However, one should bear in mind that this is merely a reflection of the common European policy of adapting the law of contracts to the new circumstances. It seems that the theory of causa in civil law and the doctrine of consideration have finally performed their main task – to accelerate the fall of formalism and help establishing a new contract law, based on the autonomy of the will and consensualism. This is actually the main aim of every supranational attempt to harmonize contract law. The new concept is that the contract will have its foundations in the objectively expressed will of the parties to be legally bound without the need for a causa, since the presence of the autonomy of the will is itself considered enough to guarantee the validity of a contractual relationship. On the other hand, the regulatory functions of causa upon the post-formation phase of the contract have been overtaken by a set of profound rules that invalidate any contractual relationship whenever there is a defect of consent or illegality[110] and other special rules. In this sense, causa is not useless, it has been made useless by providing an abundant number of provisions that have substituted it and are set to perform quite similar functions.

7. Conclusion

It seems that the theory of causa in civil law and the doctrine of consideration have a last thing in common – that neither of them will probably find its place in a future European codification of private law. Nevertheless, one should consider that causa and consideration have succeeded in establishing the autonomy of the will as the founding principle of contract law. Throughout the centuries they have influenced its development up to the point where they are no longer needed. To my view the concept of causa will suffer a gradual abandonment, just like it happened to formalism, since this is the present tendency in European contract law.

[109] Principles, Definitons and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), ed. by Christian von Bar, Eric Clive and Hans Schulte-Nölke, (Munich: Sellier European Law Publishers, 2009), 95.

[110] See Book II, Chapter 7 DCFR, called "Grounds of invalidity", corresponding to art. 14:101 PECL.

References

- Zimmermann, R., *The Law of Obligations. Roman Foundations of the Civilian Tradition*, (Cape Town, Wetton, Johannesburg: Juta & Co, Ltd, 1992).
- Lorenzen, E., "Causa and Consideration in the Law of Contracts", *Yale Law Journal* 7 (1919).
- Peterson, S., "The Evolution of "Causa" in the Contractual Obligations of the Civil Law" *Bulletin of the University of Texas*, 46 (1905).
- Daruwala, P., The Doctrine of Consideration Treated Historically and Comparatively, (Calcutta: Butterworth & Co., 1914).
- Buckland, W., *Roman Law and Common Law. A Comparison in Outline*, (Cambridge University Press, 1965).
- Keyes, W. N., "Causa and Consideration in California – A Re-Appraisal" *California Law Review* 47 (1959).
- Birks, P., *The Roman Law of Obligations*, Oxford University Press, 2014.
- Buckland, W., *Elementary Principles of the Roman Private Law*, (Cambridge University Press, 1912).
- Girard, P., Geschichte und System des römischen Rechts, II Teil, (Berlin, 1908).
- Lieberwirth, R., *Latein im Recht*, (Berlin: Staatsverlag der DDR, 1988).
- Principles, Definitions and Model Rules of European Private Law, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law, ed. by Christian von Bar, Eric Clive and Hans Schulte-Nölke, (Munich: Sellier European Law Publishers, 2009).
- Tikniute, A., Damrauskaite, A., "Understanding Contract Under the Law of Lithuania and other European Countries", *Jurisprudence*, 18, (2011).
- Julliot de la Morandiere, *Precis de Droit Civil*, *Tome II*, (Paris: Dalloz), 1957, Russian translation by Fleischitz, E., Moscow, 1960.
- Reforming the French Law of Obligations. Comparative Reflections of the Avant-Projet de reform du droit des obligations et de la prescription, ed. by John Cartwright, Stefan Vogenauer, Simon Whitaker, (Oxford and Portland, Oregon: Hart Publishing, 2009).
- Willis, H.E., What is Consideration in Anglo-American Law, *University of Pennsylvania Law Review*, 72 (1924).
- Beatson, J., Burrows, A., Cartwright, J., *Anson's Law of Contracts*, 29th ed., (Oxford University Press, 2010).
- Simpson, A., A History of the Common Law of Contract: The Rise of the Action of Assumpsit, (Oxford University Press, 1975).
- Cheshire, Fifoot and Furmston's *Law of Contract*, 12th edition, (London, Dublin, Edinburgh: Butterworths 1991).
- McCauliff, C., A Historical Approach to the Contractual Ties that Bind Parties Together, 71 *Fordham Law Review* (2002).
- Richards, P., *Law of Contract*, 9th ed., (London: Pearson Longman, 2009).
- Treitel, G., *The Law of Contract*, 11th ed., (London: Sweet & Maxwell 2003).
- Zweigert, K., Kötz, H., *Introduction to Comparative Law*, 2nd Revised Edition, translated from German by Tony Weir, (Oxford: Clarendon Press, 1992).
- Kötz, H., Europäisches Vertragrecht, Bd.1 Abschluss, Gültigkeit und Inhalt des Vertrages, die Beteiligung Dritter am Vertrag, (Tübingen: Mohr Siebeck, 1996).
- Drake, J., Consideration v. Causa in Roman-American Law, *Michigan Law Review* 4, (Nov. 1905).

- *Mixed Jurisdictions Worldwide. The Third Legal Family*, 2nd ed., by Palmer, V., (Cambridge University Press, 2012).
- Markesinis, B., Cause and Consideration: A Study in Parallel, *The Cambridge Law Journal* 37 (Apr. 1978).
- Planiol, M., *Traite elementaire de droit civil*, 7th ed., translated into Bulgarian by T.Naslednikov, (Sofia, 1930).
- Kull, I., European and Estonian Law of Obligations — Transposition of Law or Mutual Influence?, *Juridica International* 9 (2004).
- Guhl, T., *Das Schweizerische Obligationenrecht*, Achte Auflage, (Zürich: Schulthess Verlag, 1991).
- Kellerman, A., Siehr, K., Einhorn, T., *Israel Among the Nations*, (The Hague/Boston/London: Kluwer Law International, 1998).
- Jin, Oh Seung, Overview of Legal Systems in the Asia-Pacific Region: South Korea, paper presented at the Conference *Overview of Legal Systems in the Asia-Pacific Region (2004);* 04.10.2004; available at **http://scholarship.law.cornell.edu/lps_lsapr/6**
- Smith, J.D., A Refresher Course in Cause, *Louisiana Law Review* 12 (1951).
- Dennis, Michael J. The Guiding Role of the CISG and the UNIDROIT Principles in Harmonising International Contract Law, *Uniform Law Review* 19 (2014).
- Terpan, F., Soft Law in the European Union. The Changing Nature of EU Law. *European Law Journal* 21 (January 2015).
- Storme, M., The binding character of contracts – causa and consideration, *Towards a European Civil Code* (red. A.S. Hartkamp, M. Hesselink, E. Hondius), 2nd revised and expanded ed., (Kluwer, 1998).
- Maria del Pilar Perales Viscasillas, *The Formation of Contracts & the Principles of European Contract Law*, 13 Pace International Law Review (2001).
- Zimmermann, R., Jansen, N., Contract Formation and Mistake in European Contract Law: A Genetic Comparison of Transnational Model Rules, *Oxford Journal of Legal Studies* 1 (2011).
- Principles, Definitons and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), ed. by Christian von Bar, Eric Clive and Hans Schulte-Nölke, (Munich: Sellier European Law Publishers, 2009).

ADAPTATION OF CONTRACT IN CASE OF VICE OF CONSENT BY ERROR. APPLICATION BEFORE THE COURT OF ARTICLE 1213 CIV. C.

Emilian-Constantin MEIU[*]

Abstract

We propose further brief analysis of the substantive conditions that should be met in order to be covered by the contract adaptation regulated by the Romanian Civil Code art. 1213 Civ. C. By virtue of the novelty of this institution in the Romanian legislation could be some practical difficulties before the court that we briefly consider in our work and propose possible solutions.

Keywords: *error, nullity, contract adaptation, consent.*

1. Introduction

In regulating the error as vice of consent the Civil Code introduced by art. 1213 a new institution, namely adaptation of contract, as an alternative for voidability.

Usually, violation of a condition provided by law for the validity of the document is sanctioned by nullity. But nullity, although limited the application of the principle of contractual freedom, it must be exceptional, so it shall not work unless the law provides another remedy to cover the deficiencies underlying the regulated condition that is not observed by the parties. Also, in case that the nullity protects a private interest, the protected person may cover it.[1]

Contract adaptation provided by art. 1213 of Civil Code seems to have its origins in the Italian Civil Code[2], but is very similar with the suitable regulation of the UNIDROIT[3] Principles. The new institution is part of the modern orientation expressed by the phrase *favor contractus*, according to which nullity shall not operate to the extent that there is the legitimate interest of one of the parties under the contract as it was understood by the mistaken party[4].

[*] PhD Candidate, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: meiuemilian@yahoo.com).

[1] G.A. Ilie, Considerații asupra posibilității aplicării adaptării contractului în cazul dolului în lucrarea *In honorem Cornliu Bârsan,* Editura Hamangiu, 2013, p. 244-245.

[2] "Art. 1432, Mantenimento del contratto rettificato, La parte in errore non può domandare l'annullamento del contratto se, prima che ad essa possa derivarne pregiudizio, l'altra offre di eseguirlo in modo conforme al contenuto e alle modalità del contratto che quella intendeva concludere."

[3] "Article 3.2.10 (Loss of right to avoid) (1) If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has reasonably acted in reliance on a notice of avoidance. (2) After such a declaration or performance the right to avoidance is lost and any earlier notice of avoidance is ineffective."

[4] M.W. Hesselink, G.J.P, Principles of European Contract Law, Ed. Kluwer, Deventer, 2001, p. 91.

The contract adaptation in case of error occurs by exercising a right of potestative of errans' contractual party to deliver the declaration of performance of the contract or to simply execute the contract as it was understood by the errans. The mechanism of this institution does not involve a process of renegotiation of the contract, but rather, that the contractual party adheres to how the errans has represented the contractual relationship at the time of its conclusion, in order to protect the free consent form.[5]

Given the novelty of the institution of contract adaptation governed by art. 1213 of the Civil Code, we propose below a detailed examination of how the adaptation of the contract may operate, focusing on the procedural means by which the court hearing an action for annulment for error could follow the will of the defendant to adapt the contract as it was understood by the party who is entitled to invoke the nullity.

2. Content

From the regulation provided by art. 1213 Civil Code results that to adapt the contract in case of error vice of consent is required to meet the following conditions:

a) to be fullfiled the conditions of error vice of consent for one of the party. There is no requirement that the error must be common[6]. Regarding the conditions of error as vice of consent, these are the following: the error must be essential; the error must be excusable; the element on which bears the false representation to have been decisive for the conclusion of the legal document, so if it had known the reality the party would not have contracted; for the onerous bilateral or plurilateral legal documents, it is necessary that the contractual party to have known or should have known that the misrepresented item was crucial for the conclusion of the respective civil act[7].

The question is what happens if one of these conditions is not met or is not considered met by the contracting party that even so understand to declare that it agrees to perform the contract as it was understood by the mistaken party. According to grammatical interpretation of the expression of art. 1213 Civil Code. "If a party is entitled to invoke voidability of contract for error" results that in order to follow the request of the defendant contractor of errans, to the adaptation of contract, the court must prior consider whether the requirements consent vice error are met. It would follow that the court shall examine in substance the action for annulment and thus to administer the necessary evidence, and finally to establish the conditions to take note of the adaptation of the contract in the sense that it was understood by the errans[8].

It must also be established which shall be the solution of the court if the evidence applied results that there are not satisfied the rules in order that the error be vice of consent. It shall reject as unfounded the action for annulment and it shall find out that there are not met the requirements to ascertain adaptation of the contract under

[5] C. Zamșa, în Noul Cod Civil.Comentariu pe articole, Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordonatori), Ediția a II-a, Ed. C.H. Beck, 2014, p. 1281;

[6] Idem.

[7] For a detailed analysis of these conditions please see Gabriel Boroi, Carla Alexandra Anghelescu, Curs de drept civil. Partea generală, Editura Hamangiu, București, 2012, p. 147.

[8] But what happens if the adaptation of the contract under Art. 1213 Civil Code occurs without court intervention, if the contracting party of the errans is notified by the latter and not later than 3 months it says it agrees with contract execution or executed without delay, as it was understood by the mistaken party? If the requirements for error as vice of consent are not met it shall not intervene the adaptment of the contract, but possibly it might be concluded a new contract or could be a novation by change of object, of course, subject to the conditions provided by law for signing of a new contract or for novation.

art. 1213 Civil Code? We are inclined to this solution, and if the defendant intends to execute the parties may eventually sign a new contract.

Besides logical and grammatical interpretation, a justification for analyzing the error conditions as vice consent is that by adapting the contract is aimed at maintaining a vitiated consent agreement affected by error and not a contract modification unaffected by this vice consent.

b) The contract has not been executed yet. This condition appears to result from the first paragraph of Article 1213 Civil Code. But it is not explicitly mentioned. Thus, in the event that one party has understood that it has completed a sale of a property with usufruct life contingency, and the other party a maintenance contract, if the Party shall notify the contractor of error in which it is, it may give its consent to adapt contract.

It is essential for this condition that the mistaken party has not accepted its contractual partner's execution. The mere fulfillment of contractual obligations does not prevent the adaptation of the contract. The final moment of this view is that in which the errans accepts the contractual obligations of the contractual party. In the given example above contractual execution time of acceptance of the contractual party would be the payment of the price that is subject to the sale[9]. After that, it would be a new contract accompanied by any resolution or termination of the first.

We also believe that in order to perform the contract adaptation is necessary only that the counterparty of the errans not to have executed its contractual obligations. The errans can execute at any time its own benefit while it is assumed to have vitiated consent and performs the contract as it was understood, so in the form that it could be adapted.

It was stated in the doctrine[10], that failure to execute the contract, involves the necessity of lack of any damage caused by spontaneous errans' error. Does it refer to damage caused to it's contractual partner or to errans or both? If it comes to a damage caused to the errans contractual party, it can declare that it doesn`t want the adaptation. Instead if we discuss about the damage suffered by the errans, the situation is different. Our Code does not provide such a condition, although it appears in similar institutions existing in the Italian and the Dutch[11] Civil Code. We may consider

[9] But even if it receives the price, if it is much lower than the price of the property, it is alleged that the errans accepts it only on the basis that the difference shall be covered by the maintenance provided by the contractor. In such situation, the errans receives the price much lower than the value of the property, just because it is convinced that it signed a mainenance contract and not a sale contract. For a detailed delimitation of the maintenance contract to the sale contract please see Fr. Deak, Tratat de drept civil. Contracte speciale. Ediția a III-a, Ed. Universul Juridic, București, 2001, p. 536.

[10] C. Zamșa, op.cit., p. 1281.

[11] The Dutch Civil Code: "Article 6:228 Fundamental mistake

1. An agreement which has been entered into under the influence of a mistake with regard to the facts or legal rights and which would not have been concluded by the mistaken party if he would have had a correct view of the situation, is voidable:

a. if the mistake is caused by information given by the opposite party, unless this party could assume that the agreement would be concluded even without this information;

b. if the opposite party, in view of what he knew or ought to have known about this mistake, should have informed the mistaken party about his error;

c. if the opposite party, at the moment on which the agreement was entered into, had the same incorrect assumption as the mistaken party, unless he could have believed that the mistaken party, if this party had known the mistake, still would have entered into the agreement.

implicit that requirement? It is also the question of how shall proceed the court within the action for annulment the defendant declares that he is willing to execute the contract as it was understood by the errans instead the latter declares that the execution would not be useful as it is too late to prevent occurrence of the damage or the damage has already occurred.

May the court continue the trial of the action for annulment or it is obliged to take account of the defendant agreement regardless of the existence or imminent damage in errans` patrimony and ascertain adaptation of the contract, and errans would be directed against the other contracting party with an action for damages?

In this respect, in the Italian[12] doctrine it was shown that if the elapsed time or the circumstances caused the mistaken party a damage, not necessarily patrimonial, in the presence of which it can be assumed that the party would not be interested in adapting the contract, it can not be held.

We believe that in the absence of such a provision in the regulation of Romanian Civil Code, the court may not refuse to declare adaptation of the contract fot this reason that the time elapsed between the moment of signing the contract and agreement of the errans co-contractor occurred a damage or the circumstances have changed such that the mistaken party would not be able to gain from the signing of the contract the benefits that it would be gained if the contract had been signed from the beginning as it was understood by the errans.

In this regard, the only condition that the court is obliged to review is that the agreement on adaptation to have occurred within the three months stipulated in art.1213 par. (2) Civil Code, the co-contractor`s agreement of errans having a potestative character.

c) A final condition for adapting the contract is provided by par. (2) art. 1213. The errans is obliged to inform the contractual partner about the way he understood the contract. Depending on how it is carried the notification we may have two situations: informing takes place before bringing an action for annulment or informing by even the notice of the writ of summons.

2. A nullification on the ground of a fundamental mistake cannot be based on a mistake which is exclusively related to a fact that, at the moment on which the agreement was entered into, still had to happen (fact in future) or that should remain for account of the mistaken party in view of the nature of the agreement, the general principles of society (common opinion) or the circumstances of the case.

Article 6:229 Agreement based on a non-existent legal relationship

An agreement which necessarily implicates to elaborate on an already existing legal relationship between parties, is voidable if this legal relationship does not exist, unless the nature of the agreement, the general principles of society (common opinion) or the circumstances of the case imply that the non-existence of that legal relationship should remain for account of the person who appeals to its non-existence.

Article 6:230 Right of nullification ends when the disadvantageous effects of the voidable agreement are removed

- 1. The right to nullify a voidable agreement on the basis of Article 6:228 or 6:229 ceases to exist when the opposite party timely makes a proposal to change the effects of the voidable agreement in such a way that the loss, which otherwise would be suffered by the party with the right of nullification, is sufficiently removed.

- 2. Upon the request of one of the parties, the court may furthermore, instead of nullifying the voidable agreement, change its effects in order to remove the loss which otherwise would be suffered by the party with the right of nullification."

Italian Civil Code: "Art. 1432 Mantenimento del contratto rettificato, La parte in errore non può domandare l'annullamento del contratto se, prima che ad essa possa derivarne pregiudizio, l'altra offre di eseguirlo in modo conforme al contenuto e alle modalità del contratto che quella intendeva concludere."

[12] Cesare Ruperto, La giurisprudenza sul codice civile.Coordinata con la dottrina. Libro IV - (artt. 1754-1822) Delle obbligazioni, Milano, Dott. A. Giuffre Editore, 2012, p. 116.

From this moment the law provides a respite of 3 months in which the contracting party has the option either to declare that he agrees with the execution of the contract actually in the way that it was understood by the mistaken party. Where the notification occurs through notice of the writ of summons it also occurs the additional default condition that within 3 months it won`t be resolved the action for annulment. If the action for annulment was resolved, then the contract adaptation can no longer take place.

If the conditions listed above are accomplished, the contract adaptation shall result in considering the contract as being signed retrospectively as it was understood by the mistaken party. On the other hand, the errans' right to obtain the cancellation of the contract is extinguished by adapting the contract, as required by art. 1213 par. (3) Civil Code.

We shall further analyze how the court shall proceed to adapt the contract and possible practical problems which may arise in implementing judicial mechanism to adapt the contract provided by art. 1213 Civil Code.

If there is already an action for annulment of the contract for error and the agreement comes after communication to contractor within no more than three months, there may be two situations: the opposing party agrees with execution or executes without delay the contract as it was understood by the mistaken party. According to par. (3) art. 1213 Civil Code. in both cases the right to obtain the cancellation is extinguished.

From a procedural standpoint, when we are dealing with the effective execution of the contract in the form understood by the errans, the court shall regard the opposing party to submit evidence of obligation fulfillment (eg payment receipt price, the official report of hand over- take over.).

In case of the mere execution, it could take place even during the hearing, in which case it shall be recorded in the minutes of the hearing or outside the procedural framework, when the defendant from the action for annulment shall have to submit the document evidencing the agreement[13].

In both cases described above, whether when obtaining the consent or when it is proven the effective execution of the contract as it was understood by mistaken party, the court shall have to ascertain the extinguishes right to request cancellation of the contract for error under art. 1213 par. (3) Civil Code.

Another problem is knowing when there are producing the effects of adaptation of the contract under Art. 1213 Civil Code: retroactively from the date of signing or rather from the date on which the contractor performs or states that it agrees to perform the contract as it was understood by the mistaken party? By the wording of the last sentence in par. (1) of the text of the law cited above, results that the effects of adaptation are retroactive, since the text speaks of the contract, which is deemed to have been concluded as it was understood by the mistaken party. So there is no reference to a subsequent legal act, but to the initial contract that is changed by potestative agreement of the contracting party in the form understood by the errans.

Another important aspect is the mentions that the court must make in the recitals and in dispositive fact regarding the adaptation of the contract? Since the adaptation of the contract takes place before the court it is mandatory to examine the institution conditions of art. 1213 as it was

[13] In case that the consent was verbal out of the litigation framework, this consent shall be reiterated before the court and recorded during the minutes of hearing.

listed in the preceding, and then in the dispositive fact to ascertain the adaptation of the contract in the sense that it was understood by the mistaken party.[14]

3. Conclusions

The case of adapting the contract provided by art. 1213 Civil Code. is different from other situations of adapting the contract, in that the court only notes the potestative right of the opposing party to that who fell into error to execute or declare that executes the contract as it was understood by the errans.

For example, in case of lesion, according to art. 1222 par. (1) Civil Code. the adaptation may be undertaken by the party whose consent was vitiated by reducing its obligations to the amount of damages to which it was entitled or according to par. (3) the court may uphold the contract if the other party provides equitably, a reduction of its own claims or, where applicable an increase in its obligations. Also, in case of unpredictability, court may, pursuant to art. 1271 par. (2) Civil Code, dispose the contract adaptation if execution has become excessively onerous because of an exceptional change of circumstances which would obviously unjust the debtor to comply with the duty. According to para. (3) thereof, in order to be adapted the contract it must be cumulatively met a number of conditions.

When during a litigation occurs adaptation of the contract for error it requires that the court must verify certain conditions: to be executed the conditions of error vice of consent for one of the party; the contract not to have been executed yet;

Compliance with the protocol of information/ acceptance provided by par. (2) of art. 1213, manely that within 3 months of receipt of writ of summons the contractual party declare that it agrees to contract execution or execute effectively the contract in the manner in which it was understood by the mistaken party. If these conditions are met, the court shall ascertain the contract adaptation and the right to request cancellation of the contract for error has been extinguished.

References

- Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordonatori), Noul Cod Civil. Comentariu pe articole, , Ediția a II-a, Ed. C.H. Beck, 2014.
- Gabriel Boroi, Carla Alexandra Anghelescu, Curs de drept civil. Partea generală, Editura Hamangiu, Bucharest.
- Fr. Deak, Tratat de drept civil. Contracte speciale. Ediția a III-a, Ed. Universul Juridic, Bucharest, 2001.
- Cesare Ruperto, La giurisprudenza sul codice civile.Coordinata con la dottrina. Libro IV - (artt. 1754-1822) Delle obbligazioni, Milano, Dott. A. Giuffre Editore, 2012, p. 116.
- G.A. Ilie, Considerații asupra posibilității aplicării adaptării contractului în cazul dolului în lucrarea *In honorem Cornliu Bârsan*, Editura Hamangiu, 2013.
- M.W. Hesselink, G.J.P, Principles of European Contract Law, Ed. Kluwer, Deventer, 2001.

[14] For example to ascertain that it operated the adaptment of the contract signed between the parties in the sense that it is a maintenance contract and not a sale contract.

EU COMPETITION LAW AND THE TELECOMS SINGLE MARKET: NETWORK NEUTRALITY IN THE AFTERMATH OF THE TSM REGULATION

Noemí ANGULO GARZARO[*]
Amaya ANGULO GARZARO[**]

Abstract

Since the early 1990s, a sharp increase in the Internet traffic has been experienced. Technology, once again, has proven to be able to develop faster than regulation. In this endlessly evolving scenario, operators in the technology markets, as well as end-users, often find themselves under-protected. Therefore, it comes as a major concern the need to regulate those technological markets and, more specifically, the use –or abuse– of Internet.

All Internet traffic should be treated equally and that is, precisely, what network neutrality aims at. Consequently, network operators may not take advantage of their position in the market to affect competition in related markets. All in all, network neutrality is crucial to achieve the highest degree of competition. In the absence of network neutrality, the Internet would find itself unable to qualify as a market merely driven by innovation, and it would unfailingly turn into one ruled by deal making. Competition law claims that the higher the neutrality is – i.e., the more equal the treatment is, the better it is for the consumer. If network operating companies create an exploitative business model, they might be able to block competitors' websites and services; in other words, it may facilitate adoption of anticompetitive practices – namely, the abuse of their dominant position.

Transcending all the arguments raised against network neutrality –such as the prevention of an overuse of bandwidth–, we will demonstrate that it must be deemed essential from a Competition law perspective. In addition, we will argue, the imperative necessity of leaving the market under the tough scrutiny of competition authorities, which are best placed to assess the anticompetitive character of the practices brought about by market operators.

Keywords: *EU Competition law, network neutrality, Telecommunications Single Market, TSM Regulation, European integration.*

1. Introduction

The use of the Internet has experienced an outstanding growth, due both to its worldwide development as a means of communication and to its validation as an engine of economic progress[1]. Such increasingly important role played by the Internet has raised the awareness of competition authorities over the risk that operators of the network may succumb to the temptation of distorting the competitive dynamics of the market, unduly favoring the

[*] PhD candidate, Faculty of Law, University of Deusto, (e-mail: noemi.angulo@deusto.es).

[**] PhD candidate, Faculty of Law, University of the Basque Country, (e-mail: amaya.angulogarzaro@gmail.com).

[1] Ben Scott, Mark Cooper and Jeannine Kenney, "Why Consumers Demand Internet Freedom Network Neutrality: Fact vs. Fiction", in *Free Press* (2006), accessed 3 February, 2016 http://www. freepress.net/sites/default/files/fp-legacy/nn_fact_v _fictio n_final.pdf, 7.

network traffic of some content providers over the applications or information of others[2]. Ultimately, not only the Internet, but also all the telecommunication networks, have been placed in the spotlight of competition authorities[3]. All in all, it is of major importance guaranteeing that all traffic is treated equally – i.e., network operators may not take advantage of the structure of the market –of their commercial bonds *vis-á-vis* downstream operators– to affect competition either in the market of reference or in related market. Affiliated content providers should not wilfully benefit from a preferential treatment when it comes to traffic management. That is, precisely, what network neutrality aims at: the more neutral the network is, the better for users, as it may enable them to enjoy a wider scope for choice.

With regard to the European Union (EU), the importance of the electronic communication networks is likewise unremitting: they bring along several benefits that range from a potential increase in innovation, through a widening of access to information, to a facilitation of the interaction of content providers and end-users, who utilize the platform to telecommunicate[4]. However, the EU, instead of irrevocably opening up the Telecomms market to competition, has opted for regulating it more intensely[5].

In this study we will challenge the decision of the EU institutions of adopting a Regulation. We intend to identify what is the hurdle that has impede the development of the Telecoms Single Market so far. We will conclude that, albeit the adequacy of a regulation to ensure harmonization, the mere existence of the Telecoms Single Market is dependent on the preservation and ensurance of the network neutrality principle. Further, we will demonstrate that it is high time to de-regulate the market and to open it to the scrutiny of competition authorities, which are best placed to assess, on a case by case basis, whether the practices carried out by network operators do actually harm the competition dynamics.

2. The Telecoms Single Market, a chimera in the EU agenda?

To date, the EU has experienced a low level of network neutrality incidents, but there is a consensus on the fact that network providers do have incentives to anticompetitively discriminate against unaffiliated providers of complementary products with a view of excluding them from their network[6]. Further, the debate over the desirability of protecting the neutrality of

[2] Directorate General for Internal Policies, *Network Neutrality Revisited: Challenges and Responses in the EU and in the US*, Study for the IMCO Commission (2014), 11.

[3] Some authors underline that it is not until 15 years ago that competition authorities have begun to monitor the internet sectors more carefully. *Vide* Rolf H. Weber, "Competition Law Issues in the Online World", in *20th St. Gallen International Competition Law Forum ICF* (2013), accessed 3 February, 2016, http://ssrn.com/abstract=2341978, 1. In this research paper we will make reference to "network" to refer, primarily, to the Internet, but the fast development of electronic networks, such as the ones used for mobile communication, forces us to include all those other networks that may also be captured by their provider.

[4] Directorate General for Internal Policies, *Network Neutrality Revisited… op. cit.,* 39; Rolf H. Weber, "Competition Law Issues in the Online World", *op. cit.,* 2.

[5] European Parliament, *The EU rules on network neutrality: key provisions, remaining concerns* (Briefing, November 2015).

[6] Barbara van Schewick, "Towards an Economic Framework for Network Neutrality Regulation", *op. cit.*, 2 and 35. Also, on the reasons that explain the low level of network neutrality incidents within the EU, *vide* Directorate General for Internal Policies, *Network Neutrality Revisited… op. cit.,* 14.

telecommunication networks was not due to a worry about the Internet; instead, the English *Law of common carriage* did include an obligation for communication and transport network providers to render the service without unduly discriminating among their users[7].

In this scenario, the EU is determined to take the necessary measures to establish a Telecoms Single Market that works under conditions of vigorous competition and enables thus the creation of a legal environment that guarantees access of all European content providers to the network[8]. In short, it aims at achieving a connected continent[9].

2.1. Electronic communication networks: Internet as the paradigm of modern telecommunication networks

When it comes to the telecommunications sphere, EU regulatory philosophy is technologically neutral[10]. This implies that no difference will be made regarding the diverse technology platforms – i.e., the considerations made with regard to a specific platform –e.g., the Internet– may be equally valid for the other electronic communication networks[11]. In this research paper, when clarity requires a greater exemplification, we will consistently resort to the Internet as an example of a network, but the conclusions drawn may be extensively applied to any other type of electronic network.

The Internet is a platform that enables the communication between two distinct groups of actors, who provide each other with benefits: on one side, content providers, who make use of the network to upload information or applications; and, on the other side, end-users, who access the network to download such information or applications[12]. Therefore, network providers are in charge of rendering access to the network through the provision of data transmission services to their customers, who may be either content providers or end-users[13].

[7] Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality… op. cit.*, 4.

[8] This Telecoms Single Market will enable the attainment of other goals set out in the Digital Agenda for Europe; namely, the establishment of a Digital Single Market where content, application and other digital services can freely circulate. *Vide* European Commission, *Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012*, COM(2013) 627 final (Brussels, 11 September 2013), 2. Also, *vide* European Commission, "Net neutrality in the EU", in *Agenda for EU – A Europe 2020 iniciative*, accessed 4 February, 2016, https://ec.europa.eu/digital-agenda/en/eu-actions.

[9] *Vide* the title of the Proposal for a Regulation: "laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent". European Commission, Proposal for a Regulation, COM(2013) 627 final, *cit.*

[10] Framework Directive 2002/21, recital 18.

[11] Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality: Implications for Europe*. (Bad Honnef: WIK Diskussionsbeitrag, n. 314, 2008), 40.

[12] A feature of high-tech markets is, precisely, their multi-sided nature. *Vide* Rolf H. Weber, "Competition Law Issues in the Online World", *op. cit.*, 2.

[13] Peggy Valcke, Liyang Hou, David Stevens and Eleni Kosta, "Guardian Knight or Hands Off: The European Response to Network Neutrality – Legal considerations on the electronic communications reform", in *Communications & Strategies* (no. 72, 4th quarter 2008, pp. 89-112) fn 1. In this paper we will not enter into the analysis of the physical operation of the network; therefore, by network providers we refer to operators that provide Internet Access and transport services over the network. On the differences, *vide* Barbara van Schewick, "Towards an Economic Framework for Network Neutrality Regulation", in *The 33rd Research Conference on Communication, Information and Internet Policy (TPRC 2005)* (September 2005), 3.

The specificity of this type of multi-sided markets is the creation of externalities – that is, network effects[14]. The higher the number of users –participants– of a given network is, the higher the value of the network is, as the number of parties with whom the subscriber could potentially interact has increased[15].

As a consequence of those externalities, first, users of a particular network may be less likely to opt for a network different from the one of the leading provider – manly due to the switching costs; and, second, a provider that offers access to a wide number of users has an significant market power not only in the segment of the provision of the network, but also in the related segment of the provision of content[16]. These barriers to entry hinder the access of new operators to the segment of the network provision and, in addition, are prone to generate distortions in the competitive dynamics of the market[17].

In relation with the switching costs, they may be either inherent or strategic – that is, they may arise from the nature of the product or the market (such as the need to inform other users of new contact information of learning costs) or they may be created by the network provider to keep users from changing providers (such as contract cancellation fees)[18]. Furthermore, the network itself requires a certain size to be efficient, so newly created networks are less likely to grab the attention of users so as to encourage them to change their network provider[19]. While strategic switching cost may be efficiently addressed through regulation –by, for example, simply banning their inclusion in the contracts for the provision of the network–, inherent switching costs, specially those arising from the nature of the market, unfailingly require a case by case analysis. Whereas regulatory responses are intended to apply indistinctly, competition responses are tailored to the factual circumstances of the case. A regulatory *ex ante* intervention is only justified to the extent that its social benefits are larger than the costs, as burdensome rules that diminish network providers' return may reduce network providers' incentives to innovate at the network level and to deploy network infrastructure[20]. Contrariwise, an *ex post* intervention of the competition authorities serves a double purpose: on one hand, it may not constrain the incentives of network providers to innovate, as they will be allowed to look for the most convenient way to expand their profits, with the sole limitation of respecting the competition dynamics of the market; and on the other hand, it may also foster application-level

[14] Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality… op. cit.*, 11.

[15] The mere act of joining a network boosts the value of the network to all network users, even if they were not parties to the transaction, as explained in Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality… op. cit.*, 12. Also *vide* Rolf H. Weber, "Competition Law Issues in the Online World", *op. cit.*, 2.

[16] Rolf H. Weber, "Competition Law Issues in the Online World", *op. cit.*, 5.

[17] The literature refers to vertical conflicts –between players in the same value chain, such as a network provider and a content provider–, horizontal conflicts –between players at the same level of the value chain, such as two network providers– and diagonal conflicts –between players in different, but interconnected, value chains, such as a network provider and the user of a different network provider–. *Vide* Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality… op. cit.*, 18-23.

[18] Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality… op. cit.*, 12-13; Rolf H. Weber, "Competition Law Issues in the Online World", *op. cit.*, 4.

[19] Rolf H. Weber, "Competition Law Issues in the Online World", *op. cit.*, 5.

[20] Barbara van Schewick, "Towards an Economic Framework for Network Neutrality Regulation", *op. cit.*, 35-38. On the seven communication markets that the European Commission considered susceptible to ex ante regulation, *vide* Directorate General for Internal Policies, *Network Neutrality Revisited… op. cit.,* 89.

innovation, as content providers will benefit from a undistorted neutral network[21].

As for the significant market power of network operators, it is certain that in markets where no network provider has a dominant market share operators are more inclined to look for interoperability and interconnection options[22]. However, it is also unquestionable that network providers will seek to enlarge their networks in order to capture the externalities derived from the size of the network, to the detriment of both active and potential operators. Provided that they cannot further expand the size of their network, network providers will proceed to project their market power in the adjacent related segment of the provision of contents.

In such a scenario, it comes as indispensable the preservation of a neutral network, which will hamper an unconstrained expansion of the network providers' market power throughout the segment of the provision of content. Some detractors of network neutrality regulations have claimed their need to discriminate among network users with a view of managing the capacity of the network, which is limited[23]. Nevertheless, network neutrality claims do not hinder such management need since network operators are indeed allowed (and, to the extent that the bandwidth is limited, obliged) to prioritize –not discriminate– the execution of the contents that run through their network[24].

The neutrality of the network may be sought through regulatory measures or its preservation may rather be left in the hands of competition authorities. Whereas in the realm of a monopolistic market, where there is just a single network provider, a regulatory intervention is imperative in order to accomplish the liberalization of the market, in so far as the market gradually opens to competition, regulatory intervention must diminish[25]. In conclusion, regulation is a necessary step in the transition from a monopolistic market to normal competition. Indeed, in the European arena there existed various monopolistic telecoms markets – nearly as many monopolistic markets as Member States[26]. It must be borne in mind that the ultimate goal is the establishment of a Telecoms Single Market, working under conditions of vigorous competition[27]. Consequently, we will proceed to analyze to what extent the

[21] On the conception of the Internet as a general-purpose technology and its implications in relation with innovation, *vide* Barbara van Schewick, "Towards an Economic Framework for Network Neutrality Regulation", *op. cit.*, 38-39.

[22] Directorate General for Internal Policies, *Network Neutrality Revisited… op. cit.,* 40.

[23] The bandwidth is limited. The Internet, as well as other electronic networks, is a good whose use and consumption limits the access of other users –rival good–. On the rival character of the Internet, *vide* Noemí Angulo Garzaro, Amaya Angulo Garzaro and David Férnández Rojo, "Neutralidad en la red y competencia en la UE: la regulación del mercado de las comunicaciones electrónicas tras el Reglamento sobre el Mercado Único de las Telecomunicaciones", in *Revista de Derecho de la Competencia y la Distribución* (La Ley, n. 17, 2015), 3.

[24] Such prioritization is referred to as 'Quality of Service'. *Vide* Noemí Angulo Garzaro, Amaya Angulo Garzaro and David Férnández Rojo, "Neutralidad en la red y competencia en la UE… *op. cit.*, 3-4.

[25] Martin Cave, "Economic aspects of the new regulatory regime for electronic communications services", in P.A. Buigues and P. Rey, *The Economics of Antitrust and Regulation in Telecommunications - Perspectives for the New European Regulatory Framework* (Cheltenham, Edward Elgar, 2004, 27-41), 30.

[26] On the explanation of the reasons that favorized the creation of such monopolies or, in some cases, duopolies, *vide* Ben Scott, Mark Cooper and Jeannine Kenney, "Why Consumers Demand Internet Freedom Network Neutrality: Fact vs. Fiction", *op. cit.*, 7. It is submitted that the number of physical networks to transmit contents is very small and non-competitive.

[27] Martin Cave, "Economic aspects of the new regulatory regime for electronic communications services", *op. cit.*, 30.

initial picture –that is, the several existing monopolistic national telecoms markets– has changed – i.e., whether national telecoms markets have been finally liberalized and, nowadays, are effectively competitive. Only if national telecoms markets are competitive, we may proceed to the next step towards the attainment of the Telecoms Single Market: an EU-wide telecoms market, where no undertaking is favorized, nor wilfully discriminated, due to nationalistic interests.

2.2. The pursuit of the Telecoms Single Market: from several monopolistic national markets to a (non-yet) competitive EU-wide electronic communications market

In the pursuit of a Telecoms Single Market, the EU has adopted different regulatory instruments, whose binding force varies from one instrument to the other, as well as it does the objective of the EU institutions: from liberalizing the monopolistic national markets to trying to accomplish a single competitively working EU-wide telecoms market.

The first legislative package was passed in 1998. It was formed by one general and four specific directives: the Framework Directive 2002/21 and the Authorisation Directive 2002/20, the Access Directive 2002/19, the Universal Service Directive 2002/22 and the Directive 2002/58 on privacy and electronic communications[28]. By passing such a regulatory package, the EU aimed at designing a European Framework for electronic communications, which was ultimately intended to make the first move in the path towards the attainment of the Telecoms Single Market – i.e., the liberalization of the Member States' national telecommunication markets[29]. National telecoms markets were, in the majority of cases, monopolist[30]. However, such legislative package did not specifically address network neutrality[31].

In 2007, the Commission suggested a review of the legislative package. In the context of the review, proponents of network neutrality raised their awareness in respect of the identification of violations of network neutrality, and different alternatives were thus considered: (1) to impose specific network neutrality rules; (2) to maintain the existing regime unchanged, or (3) to maintain the existing regime, but make the appropriate improvements with regard to consumer rights[32]. Finally, a midway option

[28] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), *Official Journal of the European Communities*, L 108/33, 24 April 2002; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), *Official Journal of the European Communities*, L 108/21, 24 April 2002; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), *Official Journal of the European Communities*, L 108/7, 24 April 2002; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), *Official Journal of the European Communities*, L 201/37, 31 July 2002.

[29] Martin Cave, "Economic aspects of the new regulatory regime for electronic communications services", *op. cit.*, 27.

[30] Noemí Angulo Garzaro, Amaya Angulo Garzaro and David Férnández Rojo, "Neutralidad en la red y competencia en la UE… *op. cit.*, 7; Martin Cave, "Economic aspects of the new regulatory regime for electronic communications services", *op. cit.*, 30.

[31] Directorate General for Internal Policies, *Network Neutrality Revisited… op. cit.,* 90.

[32] Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality… op. cit.*, 52-53.

was preferred and, in 2009, a new regulatory framework was passed.

The regulatory framework enacted in 2009 put in place measures intended (a) to ensure that consumers are fully informed of the relevant practices of their network operator; (b) to reduce the strategic switching costs; (c) to empower national regulators to impose minimum Quality of Service standards on network operators; (d) to establish the right of end-users to access content and applications of their choice[33].

In April 2011, the Commission asked the Body of European Regulators for Electronic Communications (BEREC) to undertake a fact-finding exercise with regard to the attainment of an open and neutral Internet[34]. The BEREC, after its traffic management investigation, published in May 2012 a report concluding that there was an undeniable problem regarding open Internet in Europe[35]. Right after that report, in Spring 2013, the European Council requested the Commission to make a proposal for achieving, once and for all, a single market in the telecommunications sector and, in September 2013, the Commission finally adopted a legislative package aimed at building a connected, competitive continent, where all traffic would be treated equally and no unjustified, disproportionate discrimination would be allowed[36].

The form of the legislative instrument was openly debated, as several delegations raised their concerns in relation with the adoption of a regulation[37]. Transcending those reticence's, the Commission, in its Impact Assessment, concluded that the most adequate instrument was a regulation and, accordingly, on 27 October 2015, the Telecoms Single Market Regulation, which contains the first EU-wide net neutrality rules, was finally passed, after undergoing two reading votes in the European Parliament, who introduced, in its first-reading vote, amendments banning zero rating and defining specialized services as physically and logically separate to the Internet[38]. However, the Council of

[33] Directorate General for Internal Policies, *Network Neutrality Revisited… op. cit.,* 14.

[34] European Commission, "Net neutrality in the EU", *op. cit.*

[35] Body of European Regulators for Electronic Communications, *A view of traffic management and other practices resulting in restrictions to the open Internet in Europe*. Findings from BEREC's and the European Commission's joint investigation, BoR (12) 30 (29 May 2012).

[36] European Commission, COM(2013) 627 final, *cit.*; European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Telecommunications Single Market*, COM(2013) 634 final (Brussels, 11 September 2013), 2. Also, *vide* Noemí Angulo Garzaro, Amaya Angulo Garzaro and David Férnández Rojo, "Neutralidad en la red y competencia en la UE… *op. cit.*, 7-8.

[37] Council of the European Union, *Draft Progress Report on Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012*, Hellenic Presidency, 9950/14, 2013/0309 (COD), 8-9. Also, *vide* Noemí Angulo Garzaro, Amaya Angulo Garzaro and David Férnández Rojo, "Neutralidad en la red y competencia en la UE… *op. cit.*, 8.

[38] All in all, "A Regulation, by its directly binding nature without the accompanying need for a transposition at national level, addresses the need for quick implementation. By virtue of its direct applicability, a Regulation also reduces the risk of national divergences and thus fragmentation", *vide* European Commission, *Commission Staff Working Document – Impact Assessment: Accompanying the document Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012*, SWD(2013) 331 final (Brussels, 11 September 2013), 57-58 and 88. Also, *vide* European Parliament, *The EU rules on network neutrality… op. cit.*;

Ministers revised the amended text and, in a trilogue with the Commission and the Parliamentary Committee Chair, made it resemble the original proposal[39]. Likewise, the introduction of potential amendments in the second-reading vote of the Parliament equally failed.

The final text is subject to controversy, as, on one side, its ample ambiguity hinders a direct application by the Member States of key aspects – e.g., the Regulation introduces multiple exceptions, which are to be appreciated by the network provider, to the general principle of equal treatment of the traffic; and, on the other side, it implies the adoption of additional rules, what could impede the ultimate transition from regulation to competition law[40]. Indeed, while harmful divergence among Member States must be combated, if a competitive Telecoms Single Market is to be achieved, flexibility needs to be ensured[41]. From our standpoint, the solution does not rest in the adoption of further pieces of legislation – i.e, in regulating the market more fiercely, instead, as we will address in the following section, the time for a de-regulation, for leaving the market in the hands of competition law (and of competition authorities), has come.

3. The de-regulation of the Telecoms Market: rowing fiercely, but purposefully, against the current

Market regulation takes place in a three-stage process: (1) market definition; (2) market analysis; and (3) imposition, when needed, of remedies[42]. When, after analyzing the market, one concludes that it has proven to be self-correcting – that is, when, thanks to the correcting powers of the market itself, there is low likeliness that the harm to competition is long-lasting, competition laws are preferred –rather than sector regulation– to react to anti-competitive behavior[43].

The core goal of proponents of network neutrality is the observance of the principle of non-discrimination when network providers manage the traffic that flows over their limited network. Competition both in the segment of the provision of contents and in the segment of the provision of the network must be granted – or, to put it in other words, network providers must refrain from either excluding

Christopher T. Marsden, "Comparative Case Studies in Implementing Net Neutrality: A Critical Analysis", in *TPRC 43: The 43rd Research Conference on Communication, Information and Internet Policy Paper* (March 31, 2015), accessed 26 February, 2016, http://ssrn.com/abstract=2587920, 4.

[39] Christopher T. Marsden, "Comparative Case Studies in Implementing Net Neutrality... *op. cit.*, 16.

[40] Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality… op. cit.*, 53.

[41] Directorate General for Internal Policies, *Network Neutrality Revisited… op. cit.,* 15.

[42] Kenneth R. Carter, J. Scott Marcus and Christian Wernick, *Network Neutrality… op. cit.*, 40. For Prof. Hou, the three-stage process is as follows: (1) definition of the relevant market, (2) designation of the undertaking(s) with Significant Market Power (SMP) and (3) imposition of obligations upon undertakings with SMP. *Vide* Liyang Hou, "On Market, Competition and Regulation in the EU Telecom Sector" (February 4, 2015), accessed 1 March 2016, http://ssrn.com/abstract=2560667, 2.

[43] Several legal commenters have supported this view, *vide* Nicolai Van Gorp and Olga Batura, *Challenges for Competition Policy in a Digitalised Economy*, Study for the European Parliament, IP/A/ECON/2014-12 (2015), accessed 1 March, 2016, http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU%282015%29542235_EN.pdf, 62-63. Contra, arguing the lack of expertise with digital technologies of competition authorities, Lapo Filistrucchi, Damien Geradin and Eric Van Damme, "Identifying Two-Sided Markets", in *TILEC Discussion Paper No. 2012-008* (February 21, 2012), accessed 1 March, 2016, http://ssrn.com/abstract=2008661, 9-12; OECD, *The Digital Economy*, OECD Hearings, DAF/COMP(2012)22 (2012), accessed 1 March, 2016, https://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf, 147.

competitors by abusing of their market power or projecting such market power in adjacent markets to unduly discriminate among market operators[44]. It is submitted that, in order to address those distortions of competition, competition authorities are best placed[45].

Competition authorities are empowered to assess, in view of the factual circumstances of the case, whether, in order to be cleared, the prioritization strategies carried out by network operators do meet the transparency standars and, similarly, whether such strategies are proportionate to the aim –deal with traffic congestions– and non-discriminatory. Sometimes, normal business strategies may be confused with anticompetitive practices, mainly due to the fact that market operators adopt future-oriented measures that cry for a balance between the benefits –in terms of incentives to innovate– and the harm to competition[46]. In any case, a foreclosure of the market –impeding or hardening the entry of operators to the market or, if they are already active, the provision of their services– indicates the existence of an anti-competitive behavior[47]. In a market opened to free competition, network providers would not be allowed to hide behind favorable regulatory provisions to shield from the competition authorities' scrutiny.

The adoption of overtly stringent legislation hinders a flexibilized application of the competition principles that ground the attainment of a Telecoms Single Market working under conditions of vigorous competition[48]. Further, it may thwart operators' incentives to innovate, which comes as essential in this endlessly innovation-based competitive high tech markets[49]. Likewise, too traditional an approach on the side of competition authorities may also impair the dynamics of the market; competition authorities must be thus ready to adapt their assessment and enforcement actions to the fast evolving technological progress, not undermining its development[50].

In conclusion, the achievement of a competitive Telecoms Single Market mandates its de-regulation and ultimate opening to competition. First, the once fragmented national markets have already been effectively liberalized. Second, the fast development of the high tech markets prevents the perdurance of long-lasting anti-competitive practices that could justify a regulatory intervention. And, finally, measures taken by national regulatory authorities, which could have been justified on the basis of a pure national public interest, risk to be deemed anti-competitive for the sake of establishing an EU-wide Telecoms Single Market.

[44] Nicolai Van Gorp and Olga Batura, *Challenges for Competition Policy in a Digitalised Economy*, *op. cit.*, 29-33; Nicolai Van Gorp and Stephanie Honnefelder, "Regulation and Competition: Challenges for Competition Policy in the Digitalised Economy", in *Digiworld Economic Journal* (no. 99, 3rd Q. 2015), 155.

[45] Stephen G. Breyer, "Antitrust, Deregulation, and the Newly Liberated Marketplace", in *California Law Review* (Vol. 75, Issue 3, May 1987), 1007; Günter Knieps and Volker Stocker, "Network Neutrality Regulation: The Fallacies of Regulatory Market Splits", in *Intereconomics* (2015), 47.

[46] Nicolai Van Gorp and Stephanie Honnefelder, "Regulation and Competition… *op. cit.*, 155.

[47] Nicolai Van Gorp and Olga Batura, *Challenges for Competition Policy in a Digitalised Economy*, 68.

[48] On the reasons that explain why economis objectives aimed by competition and economic regulation are better achieved indirectly, that is, through competition law, *vide* Stephen G. Breyer, "Antitrust, Deregulation, and the Newly Liberated Marketplace", *op. cit.*, 1006.

[49] Nicolai Van Gorp and Olga Batura, *Challenges for Competition Policy in a Digitalised Economy*, 67-68; Nicolai Van Gorp and Stephanie Honnefelder, "Regulation and Competition... *op. cit.*, 156.

[50] OECD, *The Digital Economy, op. cit.*, 108.

4. Conclusions

The EU has embarked on the task of regulating the Telecoms Single Market more intensely. At the beginning of the telecoms markets liberalization process, the existence of several national markets obliged Member States to resort to regulation in order to open their national markets to competition. Today, focus is placed on the achievement of an EU-wide telecoms market –rather than several national markets–, working under conditions of vigorous competition.

It is submitted that the Telecoms Single Market will only be established if –counter to the latest decision of the EU regarding the adoption of a Regulation– the practices of market operators are supervised by competition authorities. From our standpoint, the adoption of a Regulation does not contribute to the ultimate attainment of the Telecoms Single Market: while regulation is indispensable in the transition from several fragmented monopolist national markets to several liberalized national markets, the achievement of an EU-wide telecoms market implies its opening to the forces of competition.

All in all, competition authorities are best placed to adapt their analysis of a particular prioritization conduct that, albeit necessary, may unduly harm the competition dynamics in the Telecoms Single Market by obviating network operators' obligation of non-discrimination among competitors. That is, competition authorities may balance whether the prioritization strategies carried out by network operators are indeed proportionate to the aim –deal with traffic congestions–.

The EU, as said, has opted for the regulatory instrument that ensures best an integration of the national legal systems. However, not only did it opt for a more stringent normative instrument, but also the Regulation itself is not absent of controversy, and, as pointed out by the literature, its ambiguity is expected to give rise to interpretative problems that may harden its uniform application throughout the Union.

Time (and research conducted hereafter) will tell to what extent this has been a missed opportunity of deregulating the telecoms market and leaving it in the hands of competition authorities.

References

- Angulo Garzaro, Noemí, Amaya Angulo Garzaro and David Férnández Rojo, "Neutralidad en la red y competencia en la UE: la regulación del mercado de las comunicaciones electrónicas tras el Reglamento sobre el Mercado Único de las Telecomunicaciones", in *Revista de Derecho de la Competencia y la Distribución* (La Ley, n. 17, 2015).
- Body of European Regulators for Electronic Communications, *A view of traffic management and other practices resulting in restrictions to the open Internet in Europe*. Findings from BEREC's and the European Commission's joint investigation, BoR (12) 30 (29 May 2012).
- Breyer, Stephen G., "Antitrust, Deregulation, and the Newly Liberated Marketplace", in *California Law Review* (Vol. 75, Issue 3, May 1987).
- Carter, Kenneth R., J. Scott Marcus and Christian Wernick, *Network Neutrality: Implications for Europe*. (Bad Honnef: WIK Diskussionsbeitrag, n. 314, 2008).
- Cave, Martin, "Economic aspects of the new regulatory regime for electronic communications services", in P.A. Buigues and P. Rey, *The Economics of Antitrust*

and Regulation in Telecommunications - Perspectives for the New European Regulatory Framework **(**Cheltenham, Edward Elgar, 2004, 27-41).

- Council of the European Union, Draft Progress Report on Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012, Hellenic Presidency, 9950/14, 2013/0309 (COD).
- Directorate General for Internal Policies, *Network Neutrality Revisited: Challenges and Responses in the EU and in the US*, Study for the IMCO Commission (2014).
- European Commission, Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012, COM(2013) 627 final (Brussels, 11 September 2013).
- European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Telecommunications Single Market, COM(2013) 634 final (Brussels, 11 September 2013).
- European Commission, Commission Staff Working Document – Impact Assessment: Accompanying the document Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012, SWD(2013) 331 final (Brussels, 11 September 2013).
- European Commission, "Net neutrality in the EU", in *Agenda for EU – A Europe 2020 iniciative*, accessed 4 February, 2016, https://ec.europa.eu/digital-agenda/en/eu-actions.
- European Parliament, The EU rules on network neutrality: key provisions, remaining concerns (Briefing, November 2015).
- Filistrucchi, Lapo, Damien Geradin and Eric Van Damme, "Identifying Two-Sided Markets", in *TILEC Discussion Paper No. 2012-008* (February 21, 2012), accessed 1 March, 2016, http://ssrn.com/abstract=2008661
- Hou, Liyang, "On Market, Competition and Regulation in the EU Telecom Sector" (February 4, 2015), accessed 1 March 2016, http://ssrn.com/abstract=2560667
- Knieps, Günter, and Volker Stocker, "Network Neutrality Regulation: The Fallacies of Regulatory Market Splits", in *Intereconomics* (2015).
- Marsden, Christopher T., "Comparative Case Studies in Implementing Net Neutrality: A Critical Analysis", in *TPRC 43: The 43rd Research Conference on Communication, Information and Internet Policy Paper* (March 31, 2015), accessed 26 February, 2016, http://ssrn.com/abstract=2587920
- OECD, *The Digital Economy*, OECD Hearings, DAF/COMP(2012)22 (2012), accessed 1 March, 2016, https://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf
- Schewick, Barbara (van), "Towards an Economic Framework for Network Neutrality Regulation", in *The 33rd Research Conference on Communication, Information and Internet Policy (TPRC 2005)* (September 2005).
- Scott, Ben, Mark Cooper and Jeannine Kenney, "Why Consumers Demand Internet Freedom Network Neutrality: Fact vs. Fiction", in *Free Press* (2006), accessed 3

February, 2016, http://www. freepress.net/sites/default/files/fp-legacy/nn_fact_v _fictio n_final.pdf

- Valcke, Peggy, Liyang Hou, David Stevens and Eleni Kosta, "Guardian Knight or Hands Off: The European Response to Network Neutrality – Legal considerations on the electronic communications reform", in *Communications & Strategies* (no. 72, 4th quarter 2008, pp. 89-112).
- Van Gorp, Nicolai, and Olga Batura, *Challenges for Competition Policy in a Digitalised Economy*, Study for the European Parliament, IP/A/ECON/2014-12 (2015), accessed 1 March, 2016, http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/ IPOL_STU%282 015%29542235_EN.pdf
- Van Gorp, Nicolai, and Stephanie Honnefelder, "Regulation and Competition: Challenges for Competition Policy in the Digitalised Economy", in *Digiworld Economic Journal* (no. 99, 3rd Q. 2015).
- Weber, Rolf H., "Competition Law Issues in the Online World", in *20th St. Gallen International Competition Law Forum ICF* (2013), accessed 3 February, 2016, http://ssrn.com/abstract=2341978

THE DURATION OF RIGHTS CONFERRED BY COPYRIGHT

Cornelia DUMITRU*

Abstract

The duration of copyright protection has been a controversial issue. And yet never completed. It was and is the key issue of copyright, the same as are those concerning the recognition of their nature and content. If the first law to protect a new creation, gave the exclusive right for *the author as long as a year, today its duration is, basically the* whole life *of the author's plus 70 years for the heirs. Some argue that it is unwise. Others that should not be as such at all.*

In reality, the copyright in the widest sense of the term of copyright for the purposes of law complex that regulates the relations between the author with his work and of the relations between the authors and others on his work, this right never ceases. The oldest sculpture (Venus Wilfredo), paintings of Ardeche, Vezere and Altamira, even if you do not know who created them, will belong forever, not just in the consciousness of humanity as a whole, but also according to unwritten rules of law before the law was created by humans, to whose who created them. Even if you do not know who created them and say that they belong to the universal culture. As everyone's works that were created right after the rules of law were created by humans, but before the recognition of copyright by special laws, will belong forever to the universal culture as well.

As for the right created by and after recognizing and codifying copyright notice that he is trying to harmonize the interests of authors and those of the public and to make peace between the author with his audience in a more general interest, and the solution for reconciliation and / or harmonization was limiting the length of some of the attributes of copyright. A solution that makes copyright law without a right to have the benefits after a while, that every owner has of his property. Furthermore, the link between the author and his work remains eternal because none other than the author may not claim ever to be the author of and has a copyright on that work. But neither the author can claim ever to have a real ownership of the work that still belongs to him and him only. Copyright proves to be as different from any other category of rights.

Keywords: *Exclusive right, right limited by time, ownership, monopoly operating.*

1. Time limitation of the rights of the author

Referring to the duration of protection of works under copyright disputes (political, legal, doctrinal and jurisprudential) which were long, even after it was admitted that the economic rights are the first to be recognized whereas the moral ones are due much later for the authors. Moral rights, within the protection system of the Berne Convention, we believe, rightly, honestly, that precede the ownership in their existence conditional on the property. But after the economic rights were afforded to the authors, they were severely limited in time, and the opposition against extending the duration of their protection continues to manifest today. And it is noteworthy that during the nineteenth century, personal property rights were

* PhD candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: cornelia_dumitru1973@yahoo.com).

afforded to the authors, were resumed and disputes were made on the nature of copyright and qualification copyright as ownership was brought to the date of merchantability rights, the growing **interest including creators**, to patrimonial aspect of copyright, moral rights passing from the point of view of immediate interest of authors in the background.

Arguments against the recognition of copyright have always existed since ancient times, the movement **copyleft** was only apparently new, because nowadays it does not make opposition known to history only as to the means and arguments used not in its substance, which it's the same. The Pirate Party today is manifested even in the parliaments of Western countries which cannot be said to be opponents of copyright. The Pirate Party today is manifested even in the parliaments of Western countries which cannot be said to be opponents of **copyright**[1]. More fair to say that the movement copy left is new only in the designation adopted recently by opponents of copyright, i.e. the position of quasi-majority, which recognizes the right of authors in their own works, to be suggestive and impact greater public debate it causes.

In fact, copyright has enemies since ancient times. Recall that both Plato and Confucius believed that people are born with all her ideas, ideas that come to us from the past and not our own, and our knowledge is a gift of the gods, so we cannot claim any rights over them. Francoise Chaudenson tells us that Socrates and Plato „*artists do not deserve any special consideration because beauty that expressed in their work, was outside and dictated by a divine force, they are merely messengers rather than" creators "nor the owners of their work. Socrates, even "hunts" country poets because they were a threat to the future of the city, as later church fathers condemn the seductions of art and will delay and hinder the city enriching divine."*[2]

Aristotle, a disciple of Plato, was also influenced by the design of his master, of creations and creators, and its concepts, which were the basis of education in Europe for hundreds of years, including the most famous university of the Middle Ages, that of Padova, marked course all those who were formed at the school of Aristotle. For the ancient Greeks, Socrates, Plato and Aristotle, artistic creation were nothing more than an imitation of nature, or an imitation of imitation. In ancient Greece, the man could not claim to be the creator, the actual meaning of the term, since the ideas, inspiration and words were transmitted artists gods or nine muses, and art imitates nature only. And during the Dark Ages, no matter how genius, he had, he could claim creator, because it clashed with the Church, which claim to be the creator could only be blasphemy of the author and his work were purified by fire.

Some consider that the rights belong to the author as long as the work has not been made public. With the disclosure of her work, it would become of all. Not true! Because if it is true that after being informed, their work has its own destiny and can survive its own author (it happens to all valuable works), one cannot attribute the authorship of the work to another. And it could not do it even when the copyright was not protected by special laws, but with the risk of becoming the target of public opprobrium.

[1] Pirates Party was founded in Sweden in 2006 by an entrepreneur in IT. European Parliament elections in 2009 won 7.13% of votes and a lawmaker. Conf. Mihăiescu Marius Party Who is it and what do you aim at International Hot News.ro, June 8th

[2] Chaudenson Francoise, „A qui appartient l`oeuvre d`art", Armand Colin, 2007, p. 19.

Others argue that if copyright is a property right and that ownership is flexible enough to cover the rights of creators under its umbrella, so property laws offer solutions to all issues raised by copyright. What is not true or is not entirely true, the argument most solid in support of that view is that in almost all countries copyright is governed by special laws, which derogate from the common law of goods and people.

Between theorists that copyright is proprietary, some argue that if it is his nature, he should be unlimited in time, to be perpetual, to convey a whole to the heirs. Which, again, does not happen in reality. Heirs come into possession of their property the author of all the rights and obligations of an economic nature, but they do not acquire by inheritance and the author of the work of de cujus. Cannot substitute for the moral rights of the cujus, even if they are transmitted and exercise (note, not rights!) Some moral rights, namely, the right of disclosure of the work, the right to demand recognition of authorship and right to inviolability of the work. As you know, do not transmit any exercise of the right to a name, nor the right of withdrawal (art. 11 of Law no. 8/1996).

Qualification copyright as owned, although questionable because it cannot actually explain moral rights as part of a proprietary, limited duration and failure to transmit their doctrine is the conception majority today.

We believe, however, that the Belgian Edmond Picard, proposing in 1874 to recognize a category autonomous "intellectual rights", along with **1) the rights attaching to those (state and capacity), 2) the obligations and 3) real rights w**as right and that the proposal brought better solutions to many problems and which better qualifications proposed in the doctrine through the ages, including that of ownership, do not. But attached so much a division (multimillenary) rights in the three traditional categories, the legal world does not seem willing to accept such a revolution in the law. As a revolution would be for the recognition of this new category of **"intellectual rights".** But if such a revolution was not possible in the nineteenth century, which was a century more open to new and revolutionary in many fields, including law, today, when the theory of magnetic private law seems to have swept the world legal, such a solution seems almost impossible.

We believe, however, that the solution of recognition category to the intellectual property as a distinct category of rights exist ***de facto***, because the theory of monistic the civil law did not involve intellectual property rights, they continue to be governed by special laws and rules that deviate from the rules of common law of persons, goods, obligations, contracts, but refuse to admit them as a distinct category of rights from excessive conservatism.

The issue of the possible temporal limitation of copyright if the copyright is limited in time, it is also questionable. Because, as I said, the right of copyright is, in fact, forever argued. The work bests forever and this happens not only for works that fall into the public domain and may be used freely by anyone, but for works that fall into oblivion and are after a while, resuscitated. If it is well known works of the ancients. But also of many other works, including unpublished works by the author during their life and who they belong, not to publish them

As far as resuscitated scientific works are concerned, things are more complicated, because Directive (EC) no. 116 of 12 December 2006 on the term of protection of copyright and related rights in art. 5 states that "Member States may protect critical and scientific publications of public domain works. The maximum term of protection of

such rights shall be 30 years from the time the edition was published legally for the first time."

Limited in time is **not the right of copyright**, but the possibility that the author and his successor to collect things of property from work. As regards non-material things of its recognition as an author, opera notoriety earned it and that may increase after cessation of life - take the case of artists - they will continue to exist after the termination of life of the author.

A property right without **Fructus** for the whole time the work is used, however, is a property right? Unfortunately, that German Josef Kohler, who is less famous in intellectual property law than Edmond Picard, embraced warmly and supported the proposal Belgian, had the effect of formal recognition of new categories of rights: that of intellectual rights.

We therefore have a copyright qualified majority doctrine as ownership, but it is a limited time into an asset, non-transferable and really unable to explain the moral rights covered by the right of the author and is everywhere regulated by special laws. A complex as special, different from any other category of rights.

Romanian legislator avoided, however, to qualify for copyright, confining itself to recognize only attribute exclusive! Legislator hesitation in affirming unequivocal nature of copyright must have an explanation and I think one of them has its origins in the term of protection just right. Or rights. If it would have qualified as ownership in the common law sense, it would not have limited time and would have to admit that is transmitted as a whole. This never happens in reality.

And temporary exclusive monopoly right to use a recognized work in favor of the author, followed by work fall into the public domain when it can be used freely by anyone, deal in some way with the interests of the public author. But affect the substance of the alleged ownership of the author. How to explain in rational terms that copyright is a property right but after some time you have no fructus nor usus nor abusus?! **On the other hand we must admit that the first regulations of intellectual property rights until today, during right (s) copyright was limited.** Or rather**, apparently restricted or limited in some attributes his,** because nobody has ever said that the work fallen into the public domain, the work for which expired term of protection of rights became *res nullius* and that any work anyone can be appropriated by anyone.

2. The Duration of Rights according to Sybaritic Law

According to the information that we provide Athenaios of Alexandria in his work entitled "**Deipnosophistai"**[3], 600 years before Christ in ancient Greek colony

Sybaris in Italy has adopted a law that "If an innkeeper and chef invent a dish of exceptional quality, it will be his privilege and no one else will be able to adopt to use before one year from the date of achieving it by the first inventor and this in order to encourage others to excel by such inventions"[4]In a translation of BTD Boreschievici the same text and demonstrates once again that translations can be original without " betraying " the translated text reads: " and if any baker or

[3] In Romanian language work has been translated as the "Athenaios - Feast wise" by Nicholas Barbu, Minerva, 1978.

[4] Foyer Jean, Vivant Michel, Le droit des brevets, Presses Universitaires de France, p. 5-11.

chef will invent a dish particular and particularly tasty (excellent ?), no artist (emphasis ours, Ed) will not be entitled to own things resulting from the preparation of this kind, over this period (one year, note) and this to make others to work to excel in such pursuits. "[5]

3. The duration of the rights and privileges granted to publishers

Duration of rights and privileges granted to publisher's privileges royal princely court granted were those that preceded rights afforded to publishers and from which they were born copyright, ie monopoly author's exclusive right to dispose of his work. But as it is, in a sense, also a privilege

Library privileges were granted exclusive rights booksellers and theater companies for the reproduction and dissemination of books, or for their representation and were granted the pleasure of those who have the right to grant. The privileges granted to booksellers fulfill three functions: i) the possibility offered monarchs control prints, censorship already having tradition before drawing up a list of books prohibited by the Catholic Church in 1559 and brought the royal treasury income; ii) provide booksellers agreed exclusive right of reproduction and dissemination of works and obviously a profit; iii) recognizing implicitly in favor of some specific rights of the author, because no book could not be published without authorization and no authorization was given for a card belonging to another.

We must distinguish, however, between privilege Booksellers (include here and theater companies) for reproduction, dissemination and / or representation right or obligation works and authors to give their works manuscripts such privileged. The author was forced to concede only work if he wanted it to be reproduced, distributed and / or edited to obtain benefits from it and the assignment can be made only in favor of those who obtained and enjoyed privileges bookstore. Privilege struck, therefore, indirectly the author, because the privilege does not create a right of ownership over the work, but was effective right into the hands of him who purchase from the author and obtained a privilege reproduction, distribution or editing the work of the king. Transfer of rights to work by booksellers and librarians' royal privilege granted for exploitation of the work was to lose any connection between the author and his work, once the rights were assigned the privilege obtained. The author was not associated in any way in the exploitation of the work and had no control over it, even on later called moral rights, as soon as allowed by its first broadcast.

The privileges were granted, usually booksellers and libraries defended these privileges fighting for them both among themselves and with the authorities and authors of works. Such privileges were granted sometimes and others, as a reward for services to the Crown, and later, and authors. But it is worth noting that when the privileges were granted to persons other than some booksellers (third party or authors), they could not themselves exploit the work, being forced to cede exploitation of the work of librarians, because they were the only ones who can truly exercise the privilege.

The first known library privileges are granted in 1495, in Venice, for an edition of the works of Aristotle, followed in France in 1507 and 1508, the privileges of Louis XII for an edition of the Epistles of St. Paul,

[5] Boreschievici Bogdan D. T., Interferențe, Vol. II, Fragments of the history of the protection of industrial property, OSIM Publishing House, 2009, p. 11

respectively for works of St. Bruno. Privileges for authors are also encountered. Thus, in 1516 a privilege is granted on request, Guillaume Michel Tours for his book "The forest of conscience" (Forest of consciousness)and another privilege granted in 1517 by Jean de Celaya[6] for philosophical work ("insoluble")[7], these first author privileges being granted but exceptionally[8]. Another privilege in favor of an author was granted to reward the author for services to the Crown. Thus, Pierre de Ronsard[9], poet Court's highly praised by King Charles IX and his mother, Catherine de Medici for advice given in delicate problem at the time, the Huguenots enjoys a huge appreciation from King for which he received the right to stand for King and privilege to print work. Privilege that another King (Louis XIII) and refused one of the three great playwrights of France, Pierre Corneille[10] in 1643.

In England, who have a tradition in granting monopoly for inventions by a law (monopolies) adopted in 1623/1624, in 1662 it adopted a law license, under which publishers, organized since 1556 in company stationery, printed enjoyed monopolies, so the authors were compelled to call on them to publish works. And he could not only under the conditions of stationery and a work once transferred to a publisher, it became virtually his property.

Granted at the pleasure of the king's privileges were usually temporary (lettres patentes), and vary the conditions during which they were granted and did not involve a systematic exploitation of the work. One and the same work may be subject to two privileges: one for a bookseller for reproduction and dissemination granted to other theater companies for representation.

Beginning of the end of privileges was to come to England in 1709 with the adoption of state Queen Anna, the first copyright law that will be recognized for authors. But it will still take 80 years until the privileges are abolished in France and the history for almost three centuries of their ends. Period the Parisians and the provincial libraries have faced each other for obtaining privileges and ended defend themselves against each other with arguments in favor of authors.

Louis lawyer d`Hericourt, for instance, appeared in bookstores in the province anul1725 on their dispute with Parisian bookstores because they're not receiving "privileges bookstore" actually advocate in favor of authors, stating that a manuscript is a good own it, because it is the fruit of his labor and therefore he should be free to dispose of his work according to his will to acquire honors and means to cover its needs and even the people that is united by ties family, friendship or gratitude. If an author is considered the owner and therefore sole master of the work, only he and those who are may validly assign another these rights, the king, having no right in the work as long as its author is alive or represented by his heirs and cannot send anyone a favor without the consent of privilege which the work

[6] Jean (Juan) of Celaya (1490-1558), mathematician, physicist, philosopher, cosmologist and Spanish theologian. He studied in Valencia and Paris. He was a professor of theology at the University of Valencia and rector of the university.

[7] L`origine of l`imprimerie of Paris. Disertation historique et critique on https://books.google.ro.

[8] Claude Colombet, Propriété littéraire et Artistique et droits voisins, Dalloz, 1997 Ed. 8, p. 2.

[9] Pierre de Ronsard (1524-1585), created a school in Paris poetic contemporaries called it "Pleiades master Ronsard ".

[10] Pierre Corneille (1606-1684), nicknamed „the founder of French tragedy ", along with Moliere and Racine.

belongs[11]. In turn, the Parisian booksellers' authors have claimed ownership over their work and that libraries could not claim any rights over the works entrusted to the authors than their assignees under quality.

Following this trial, the Council Regal amended policy privileges process will at a fair distribution of work between libraries Parisians and in the provinces, but the authors of works important, however, was the assertion thesis their ownership of the work, even after it had been "sold" to be printed and sold, and that King "did not remain insensitive to the demonstration of force booksellers Parisians and began to consider the interests of authors."[12]

In 1761, after a conflict of interest between community of booksellers and grandchildren of La Fontaine, the rights to his work, he admitted the idea that copyright is a property and therefore is subject to common law, the process heir's writer demanding and obtaining a personal privilege to publish the "fables".

An edict of December 24th, 1762 regulating for the first time how to grant them the privilege of limited duration to 15 years.

The Council Royal family returned in 1777 the Fenelon's the privilege previously granted printers for works belonging to this family, on the ground that granting further privileges for booksellers cannot be made without the consent of the heirs of the author's work.

On 30th August 1777 the same Council adopted the suggestion of King Louis XVI, a total of six resolutions, constituting, according to Pouillet, a genuine code of literary property. In the preamble, it reproduces a letter from King Louis XVI of September 6, 1776 and it enshrines the right booksellers and authors, making a clear distinction between the two categories of rights. In this "Code" states the principle that the author is entitled to claim, for himself and his heirs, perpetuity privilege to edit and sell works, or event that privilege was granted to a publisher, this assignment may not exceed life of the author[13]. As for the booksellers, "Code" states that "given their favor must be proportionate to the costs advanced and the importance of the work done."[14]

In 1788, in an "Essay on Privileges," Abbe Sieyes put the issue of crime authors to distinguish between the responsibility which belongs to the authors, printers and booksellers (publishers). But the author stops and intellectual property that needed to limit the privileges and advocates free flow of books

On August 4th, 1789 French revolutionaries declared freedom of trade and industry in France, which was tantamount to the abolition of privileges. If the abolition of privileges bookstore was a result of the actions creators times due to the political, economic and social that made the French Revolution of 1789 burst, it is hard to say.

4. The duration of copyright in the first adopted regulations

Duration of copyright in the first regulations adopted idea that authors' rights must be limited in time is made in the first draft of copyright made by a French lawyer who in 1586 won the judges in Paris cancel a privilege bookstore for work (annotating the works of Seneca), made by Marc

[11] André Bertrand, „Le droit d'auteur et les droits Voisins ", Ed. Dalloz, 1999, second édition, p. 289, p. 3.
[12] Christel Simler, Droit d`auteur et droit commun des biens, LexisNexis Litec, 2010, p. 30.
[13] Colombet Claude op. cit., p. 3.
[14] Lucas Andre, Lucas Henri-Jacques, Lucas Schloetter Agnes Traité de propriété littéraire et artistique, 4éditions, Litec, 2012, p. 9.

Antoine Muret. At trial, lawyer Simon Marion, Baron Druy a said "people, one another, out of instinct, recognized each of them, the quality of master what they have invented or composed, and after God's example, he belongs heaven and earth, day and night, author of a book is its master and as such may possess and freely dispose of it just as you have a slave, you can emancipate, giving his freedom for a price, or simply just freeing him without reservation, through a kind of patronage under which none but the author cannot reproduce the book only after a certain time"[15]. As you can see, the noble lawyer rule for limited rights since the authors admit that after a certain time, the work may be reproduced by anyone.

In England, in 1662 it adopted a law license, its beneficiaries being publishers organized into "honorable company stationery and newspaper publishers", better known as the "company stationery" effects on but directly and authors of works. England meet privileges licenses role in continental Europe, meaning that publishers were the only ones able to pursue the activity of reproduction and dissemination of works based on licenses granted. Licenses as well as privileges in continental Europe did not enjoy but all publishers, and the authors, they were at the discretion of the editors if they would publish their work because according to the rules of the Company, the authors were denied the publication of books by themselves. Law displeased publishers who had no access to licenses and the authors, so torn by internal disputes and disputes with the authors, the Company ended to address Parliament to demand a new law. In 1695, Parliament abandoned the company, refusing to extend the licensing law, and in 1709 adopted its first modern copyright law, known as the Statute of Queen Anna.[16]

Both the Explanatory Memorandum (preamble to the law) and in the body of law referred to "copy of a book" as a recognizable form of property, equal rights with other tangible property.

As proposed debates, the law did not contain a limitation on the term of protection of the rights of creators, referring to copyright explicitly as a right of authors and provide that printing books without agreement of the authors, who own these books or writings, as a product of lessons and their work, or people whom the authors have transferred these rights is not only a great deterrent to learning in general, learning should receive feedback and encouragement in all civilized nations, but also a violation of the rights of owners the right of these books and writings. As adopted, but the idea was abandoned perpetual, exclusive right of authors on their work and free to print is limited temporal recognized right for authors as having a monopoly nature.

Duration of protection has been set for the books that would be written to 14 years, extendable once for a further period of 14 and for those under 21 years old pattern, the duration of the exclusive right was extended by King George III century, in 1767, at age 28. In 1734 the English painter William Hogarth (painter of the Royal Court) wins a lawsuit against a person who illicitly reproduce his creations, the outcome of the origin of a law judges "l`Engraving Act", also known as the "law of Hogarth ", adopted in 1736, which gave artists a

[15] Lucas Andre and staff, op. cit. p. 6.

[16] The name under which it was adopted is "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times the already mentioned " title later reduced to that of " Law for the encouragement of learned men to compose and write useful books ". The law is known in the literature as the "Queen Anna Statute" .

monopoly of exploitation of their engravings for a period of 14 years.

The law also established the formality of deposit protection law as a condition providing that the author could act against those who violated his rights only if the book title was present in the register Stationery Company prior to publication. Also, the law and limiting import prices allowed books and authors' books "classics" originally published in another country. Those who violated the copyright of the authors had to pay one penny for each page of the book. Half of the fine went to the author, the other half in the coffers of the Crown, and the reproduction was destroyed.

Revolutionary France, the laws devoted to literary property that were taken during the period 1791-1793, from the beginning this was all life duration authors and 5 years post mortem auctoris.

In Germany, a special regulation is passed in Prussia until 1837 by the author of a law that enjoys a protection for 10 years since the opera, prolonged duration in 1845 to 30 years.

In the US, where copyright will evolve differently from European law, a law passed in 1780 recognized the author's right to use in his work during 14 years (extended in 1831 to 20 years) with the possibility of extension for another 14, if the author, wife or children were living at the expiration of the first period.

Media law adopted on April 13, 1862 in Romania, on the 11th articles dedicated to property literary provide that authors will "enjoy throughout their lifetime as a property of their exclusive right to reproduce and sell their works in all Principality, or move them to another this property, making it the right recognized by the laws in being "right and transferable to successors over 10 years. Literary and Artistic Property Law of 1923, art. 38 provided, however, that the term of copyright in a literary and artistic works published as the author's lifelong author and shall expire fifty years after the author's death, and in the case of works published anonymously or pseudonym, duration of rights is 50 years from publication.

5. The duration of protection of rights in regulating the Berne Convention of 1886

The object of protection governed by the Convention is "all work in the literary, scientific and artistic, whatever the mode or form of expression such as books, pamphlets and other writings; conferences, speeches, sermons and other works of the same nature; dramatic or dramatic-musical works; cinematographic works and mimed; musical compositions with or without words; cinematographic works, which they are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving, lithography; photographic works to which they are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps of location; plans, sketches and works relating to geography, topography, architecture or science ", the list is exhaustive, however.

The purpose of the Berne Convention, as set out in the preamble, is to protect in an effective and as evenly as possible the rights of authors to their works (what means and duration of protection of rights) and the means of achieving that objective are the three rules basic Convention:

1) by applying the rule of national treatment or assimilation, on the basis of which a foreigner must enjoy the same rights that are recognized nationality. This does not mean that foreigners will enjoy exactly the same rights as nationals of their

rights depending determine the law applicable to their works. This law is determined by applying the rules of conflict of laws.

2) minimum protection rule, which requires that member countries creators should enjoy at least the rights under the Convention. So Convention affording to authors moral right to authorship and the right to integrity of his work and economic rights of translation, reproduction, broadcasting, recitation, adaptation and distribution of works adapted and sets the minimum duration of moral rights and patrimonial leaving Member States to establish other terms of protection for different categories of works.

3) automatic protection rule, which is supposed to enjoy protection by copyright are required and cannot be imposed formalities.

In duration Rights Convention, art. 7 provides that "the term of protection granted by this Convention contains life of the author and 50 years after his death," which is the general rule for the duration of copyright protection.

In the case of cinematographic works, the term of protection may be established by Member States at 50 years from the date on which it was made accessible to the public or, failing that, 50 years from realization.

For anonymous or pseudonymous works the duration of protection shall expire 50 years after the work was lawfully made available to the public. When the pseudonym adopted by the author leaves no doubt as to his identity, but the duration of protection is applicable for authors identified. If the author of an anonymous or pseudonymous discloses his identity during the period of protection as a work anonymously or under a pseudonym, the patent is jointly applicable. Union countries are not required to protect anonymous or pseudonymous works whose author is presumed dead, in all likelihood, 50 years.

In the cinematographic was booked laws of EU countries the right to regulate the duration of their protection and that of works of applied art, protected as artistic works, establishing however that term may not be less than a period of 25 years, counted from the realization of such works.

The duration of protection subsequent death of the author and other limits begin to run from the author's death or of the event referred to by those paragraphs, but during these periods is calculated only with effect from 1 January of the year following the death or the event had in sight.

6. The duration of related rights protection system of the Rome Convention of 1961 on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations[17] and the Geneva Convention of 1971 on Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms.[18]

The Berne Convention, though it does not limit the scope of protected works in the categories set out therein (illustrative), does not refer to rights related to copyright, i.e. the rights of performers for his own performance, the rights of record producers sound, for its own records, the rights of producers of audiovisual recordings for their own recordings and the rights of the broadcasting organizations of their own broadcasts and service programs. Moreover, the rights of those listed above and their creations are not mentioned in art.

[17] Romania joined the Rome Convention by Law no. 76/1998.
[18] Romania has ratified the Geneva Convention by Law no. 78/1998.

7 and 8 („subject to copyright") of Law no. 8/1996, but only in Title II of the law (Art. 92-1224) but their vocation protection was affirmed19 in our law and under the sway of Decree 321/1956, i.e. before the adoption of the Rome Convention, which lacked any reference thereto.

For the categories of authors and producers envisaged by the Rome Convention (performers, producers of phonograms and broadcasting organizations), duration of protection shall be at least 20 years counted from the end of the year he has been cast for phonograms and Performances attached to them late in the incident execution executions are not fixed in a phonogram and end of the year occurred issuing the broadcasts (art. 14 of the Rome Convention and art. 4 of Geneva Convention).

The duration of protection provided by these Conventions is the minimum length that should be recognized by the Member States of the two conventions, Member having, as in the case of the Berne Convention, the possibility to establish higher limits of protection.

Some EU Member States have introduced a term of fifty years after lawful publication or communication or after legal publication.

7. The term of protection of copyright and certain related rights by Directive (EC) no. 116 of 12th December 2006

The duration of protection provided by the three international conventions is minimal, the states having the possibility of establishing longer periods of time.

The minimum duration of the Berne Convention was intended to protect the author and the first two generations of descendants, but it turned out to be insufficient in terms of extending the average lifespan in the European Union countries.

On the other hand, some EU Member States have given duration's greater time than fifty years after the author's death in order to offset the effects of the world wars on the exploitation of works.

Other countries have introduced, for the minimum period related rights protection was established by the Rome Convention (1961) and Geneva (1971), term of protection of 50 years.

These factual circumstances to which were added goals constantly pursued those not to impede the free movement of goods and freedom to provide services and distort competition in the common market and ensure a high level of protection of copyright and related rights, were the reasons why the European Parliament and Council decided, by Directive (EC) no. 116 of 27 December 2006[20] the term of protection of copyright and related rights.

The law was confined to harmonization and regulation of the term of protection of economic rights, excluding from the scope of its regulatory explicit moral rights (in Recital (20) and Article 9)

In Romania the time of protection of copyright and related rights is in accordance with the rules set out by the Directive, so it does not require their own separate analysis. An observation is yet to be done. In art. 5 provides that "Member States may protect critical and scientific publications of public domain works. Maximum term of

[19] Cărpenaru D. Stanciu, Civil Law. Rights to intellectual creation, Bucharest University, 1971, p. 40: "In the absence of a legal text expressly interpretation, to the extent that it is a work of creation, can be protected as an object of copyright by adding them to the enumeration done art. 9 of Decree no. 321/1956 ".

[20] The Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights is a codified version of Directive 93/98 / EEC of 29 October 1993.

protection of such rights shall be 30 years from the time the edition was published legally for the first time ", or such provision is not in Romanian copyright law. But as it is clear from the quoted text of the Directive, it does not create an obligation to protect critical and scientific publications of works in the public domain, but a college.

8. How to justify the limited duration of protection of economic rights

Limiting the term of protection of rights of the author seems to be the result of a compromise: the author are recognized exclusive rights, but limited duration to ensure reward his work creative and to ensure access public to his work, which becomes part of the cultural heritage. Some have addressed the issue pragmatically thinking things of general interest to the public of its right to knowledge that could become illusory in the absence of a law limiting the duration of protection.

And one can argue that this realm, Napoleon Bonaparte won a war, because he is the one who opposed the recognition of a property right perpetual and imposed its point of view that has not been abandoned, as a principle.

Nowadays arguments of a practical nature Napoleon exposed when discussing Decree 1810 were: "Perpetuity family ownership authors would have some kind of inconvenience. A literary property is intangible property that, finding the flow of time and after succession divided into a multitude of individuals ends, somehow, by not exist for anybody; For such a large number of owners, often distant from one another, and after a few generations barely know might understand and contribute to reprint their joint work of the author? However, if you fail to understand, and only they have the right to publish the best books will disappear slowly from circulation.[21]

"It is interesting to note, however, that although the majority that time was the authors who stand for extending the term of protection of copyright, there were voices who have advocated the limitations of its most interesting arguments. Thus, in an article devoted to France this problem at the end of the eighteenth century, it was held that "once the author has revealed his opera, entrusting it to the trial to the public occurred in favor of the latter, who supplied a response to the author, a kind of transfusion, the result of which is irreversible."

Nowadays, Adolph Dietz makes two arguments in favor of limiting the duration of the economic rights: the first, deducted from the special nature of copyright, the second for reasons of **social interest**: intellectual works having by nature and function of their tendency dissipation conscience of mankind, people, in turn, tend to regard them as public goods, with meaning that are available to all and may be used freely[22]. Likewise, protecting social interest, expressed and Henri Desbois'[23] exclusive rights shall be exercised at the expense of society as a whole when the spirit works have a natural vocation to free propagation. "

The social interest, preventing a monopoly excessive and harmful culture in general and the special nature of copyright are reasons that imposed rule temporary nature of the rights of the author, and this rule has broadened to recognize the rights

[21] Bertrand A., op. cit. p. 289.
[22] Dietz Adolph, by Eminescu în "Copyright", Lumina lex Publishing 1994, p. 46-47p. 82-83.
[23] Desbois Henri, H. Desbois, Le droit d'auteur en France, ed. 3, p. 322.

for authors of all time their life and in favor of the heirs' timeshare.

If at first this term was 5 years post mortem (in France the years 1791 to 1793[24]), over time it extended to 70 years post mortem. The solution is contained in the Berne Convention, noting that it provides lasting less protection for certain categories of works, but is not yet universally accepted, which is why it was reaffirmed by Directive. 93/98 / EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights:

The Explanatory Memorandum to this Directive, which recommends Member States to extend the protection of economic rights, it shows that "Whereas the minimum term of protection laid down in the Berne Convention, namely the life of the author plus fifty years after his death, it was intended to protect the author and the first two generations of his descendants; Whereas the extension of the average life duration in the Community makes the term referred to is no longer sufficient to cover two generations. "

The solutions adopted by our legislature comply with the rules contained in the convention law and the Directive. 93/98 / EEC in 1993.

9. The general rule on the term of protection of economic rights

The duration of economic rights is limited in time, but the time period for which these rights are recognized and protected is, as a rule, variable that consists of two terms: one variable that is given life author (s) and another fixed inside which those rights belong to the heirs of the author (s).

Thus, the work of an author who still lives after its publication 60 years will be protected during its lifetime (60 years) plus 70 years for heirs. If the author lives a year after its publication, the duration of protection of economic rights will be only 71 years.

The main rule is formulated in terms of art. 25 para. 1 of Law no. 8/1996, as amended, which provides that "(1) the economic rights provided for in art. 1:21 p.m. takes the author's lifetime and after death shall be transferred by inheritance, according to civil legislation, for a period of 70 years, whatever the date on which the work was made public legally. If there are no heirs, the exercise of these rights lie with the organization collecting mandated during the life of the author or, in the absence of a mandate, collecting societies with the highest number of members in the respective field of creation. "

This applies to copyright on works published in his lifetime under his name or under a pseudonym that leaves no doubt about the identity of the author and the economic rights in all forms of expression including the right suite. From this rule were imposed exceptions for:

i) unpublished works during the term of protection and made public, legally and for the first time by another person who enjoys the protection of the equivalent rights (Art. 25 al. 2);

ii) works brought to the public under a pseudonym or without mention of the author (art. 26 par. 1);

iii) collaborative works (art. 27 par. 1);

iv) collective works (art. 28 par. 1);
At this, under the rule of Law. 8/1996 to update them by Law no. 285/2004, add two exceptions practical interest for those cases

[24] Bertrand A, op. cit., p. 289.

which raise issues of law enforcement time. These cases are:

v) in case of arts and crafts works the term of protection is 25 years (art. 29 par. 1 of Law no. 8/1996 prior to the amendment);

vi) for computer programs (art. 30 of Law no. 8/1996, prior to the amendment).

10. The duration of protection equivalent rights and issues raised by its regulation in our law

The patrimonial copyrights equivalent rights are afforded to the person who brings legally for the first time, make public a work that has not been disclosed inside term. What are the conditions for recognition rights equivalent? By law these conditions may be formulated as follows:

a) **have expired term of protection work;**
b) **the work has not been made public inside the term of protection;**
c) **the work has to be made known after the expiry of the term of protection, legally.**

According to the new regulation, the right of disclosure of the work rests solely with the author, but this right is transmitted, after the author's death by inheritance indefinitely. In the absence of heirs, the exercise of the right of disclosure, as well as exercise other moral rights which are transmissible by inheritance, it is collecting societies who administered the rights of the author or, where appropriate, the body with the highest number of members in respective creation. These categories are the only ones that can, at any time after the expiry of the term of protection to bring a work made public, are only entitled to exercise this right.

In other words, a work that was not published during the period of protection can be legally made public for the first time, only the heirs of the author or the collective management organization empowered. Bringing opera to public knowledge by others, makes this disclosure is not legitimate and the person who committed the act does not enjoy rights equivalent to copyright.

The law makes no distinction as one who brings to public knowledge such a work is the owner of the original or a copy of the work fallen into the public domain, the right is recognized, if the disclosure was made by several people, in favor of the He took the first initiative. But in this case it means that the expiry of the term of protection does not cause the fall of the work in the public domain, because it is not likely to be made public only by persons designated by law, so it is free to use by anyone.

11. The duration of protection of economic rights on works published under a pseudonym or without mention of the author

According to art. 26 paragraph. 1 of Law no. 8/1996 manner. Duration of the economic rights in works disclosed to the public, legally, under a pseudonym or without indication of the author is 70 years from the date of notification of their public.

In relation to the previous regulation, to apply the regime's longstanding pseudonymous works, provided that disclosure was required work to be held legally. It noted, however, that if the work was published illegally pseudonymous act is an offense under the provisions of art. 141 of Law no. 8/1996 way.

According to paragraph 2 of the same article, where the author's identity is made public before the expiry of 70 years from

the date of work was disclosed to the public, the duration of protection rights shall be calculated according to the rule joint (the author's lifetime and 70 years for heirs). The wording of the law might give the impression that the author's identity may be disclosed to anyone. In fact, the moral right to decide under what name will be brought to public knowledge work belongs to the author, not transmitted by inheritance, and the decision to disclose their identity can only come from the author.

Disclosure author's name after his death, however, is possible if, during life, exercising their right to a name, the author has expressed the wish that his true identity to be disclosed to the public after death (will expressed, for example, through a will).

Also on works published under a pseudonym transparent, ie when the pseudonym adopted by the author leaves no doubt about the identity of the author, the work is applied, the duration of protection, the legal rules (lifetime of the author plus 70 years for heirs).

12. The duration of protection for economic rights in works made in collaboration

The duration of protection of the economic rights extends the life of the author and for 70 years in favor of the heirs of authors, the term running from the death of the last coauthor. This favorable regime, which makes the survival of an author to take another author's heirs established by art. 27 paragraph 1 of Law no. 8/1996 was dictated by the fact that each contribution was needed in developing definitive work, so it would be unfair deadlines to flow separately, depending on the time of disappearance of each author. But when the authors may be individual contributions, limits shall be calculated separately for each of the authors and heirs, the date of death, according to art. 27 2ndparagraph.

13. The term of protection of economic rights in the case of collective works

According to art. 28, during the economic rights in collective works is 70 years from the date they are made public works. If the work is not disclosed for 70 years after its creation, the duration of rights protection expires on the 70th anniversary of its creation.

14. The exceptions to the term of protection established by art. 29 and 30 of Law no. 8/1996 now repealed but still showing interest

Smoothing the duration of protection for all categories of works was imposed 93/98 / EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, which repealed and art. 8 of the Directive. 91/250 on the legal protection of computer programs that institution lasting less protection for this category of creations of the mind. Therefore, following the recommendations Directive, the legislature eliminated Romanian exceptions which stipulate shorter periods of protection for works of applied art and to programs for computers.

The articles no: 29 and 30 of Law no. 8/1996 introducing the derogatory rules for those categories of works have been repealed or amended by Law no. 285/2004, but the issue of the protection of such works under the rule of the previous law remains neutral among cases where the duration of protection was fulfilled before the entry into force of amendments to the law of copyright and related rights.

15. The duration of protection of economic rights on works of applied art

According to art. 29 of Law no. 8/1996 now repealed during economic rights in works of applied art was 25 years after their creation.

According to the current regulation, and in works of applied art, duration of protection is the common law, i.e. life of the author plus 70 years for heirs.

It is noteworthy, on the type of work that protection under copyright is more favorable than that granted by the special law of designs, because, on the one hand, is not subject to any formality (required special law) and, on the other hand, the duration of protection is greater in the right designs the maximum duration of protection is 15 years).

16. The duration of protection of economic rights to programs for computers

According to art. 30 of Law no. 8/1996 (in the version prior to the amendment), the duration of protection of economic rights in computer programs ran the author's lifetime and after his death shall be transferred by inheritance, for a period of 50 years.

Article 30 of Law no. 8/1996 amended by Law no. 285/2004, and in applying computer programs for common rule, the duration of protection that spans the life of the author plus 70 years for heirs. The exception to the rule established by Art. 30, as previous interest (perhaps only theoretically) to conflicts of laws in time. In practice, the problem is probably present little interest, because under market developments informatics term of protection of computer software is already considered too high.

The law, as previous focused on the idea exclusively on the assumption that the computer program is the creation of a single author, but we believe that he current wording of the law problem arises in the same terms since the term of protection of computer software is governed by -a separate text. What will be then, the duration of protection for computer software developed in collaboration? We believe that we should apply common rule set for works produced by several authors in the sense that protection is afforded throughout the lifetime of the author and the person's heirs at 70 years after the death of the last of the authors. In the current term of protection regulatory programs that require the solution of art. 27 rule of law is Common works are collaborative.

The consequences are more important than the omission that is determining the duration of the economic rights in computer programs for the event, according to Art. 74 of the Act, the economic rights belong to the employer, which is not regulated satisfactorily in the current regulation no. He admits, in this case, the duration of protection is unlimited means to violate a principle of law, that the limited duration of the economic rights. The omission might be considered normal if it were accepted that the employing unit does not exercise the economic rights than the period provided in the agreement or, in the absence of a contractual provision, during the 3 years as art. 44 of the Law for works produced under an individual contract of employment.

17. The calculation of time limits protection to the benefit of the heirs

The duration terms of protection of rights of the author the benefit of the heirs shall be calculated from January 1 of the year following the author's death or bringing work to the public (art. 32 of Law

no. 8 / 1996). In the works are collaborative art. 27 provides that: "(1) The duration of the economic rights in works is 70 years from the death of the last surviving author. (2) If the contributions of the co-authors are distinct, lasting economic rights for each of them it is 70 years since the death of the author. "And referring to collective works, art. 28 provides that "The duration of the economic rights in collective works is 70 years from the date they are made public works. If this is not done for 70 years after the creation of works, during the economic rights expire after 70 years from the creation of works. "

Referring to works of fine art, art. 29 (now repealed) provides that "The duration of economic rights in works of applied art shall be 25 years from the date of their creation," and in reference to computer software, art. 30 provides that "economic rights in computer programs lasts for the author's lifetime and after death shall be transferred by inheritance, according to civil legislation, for a period of 70 years."

It follows from the legal provisions cited that the date for calculating the term of protection of rights of the author the benefit of the heirs, as a general rule (including computer programs) is 1 January of the year following the author's death. This rule was applied by law, if in works for which the term starts from the death of the last surviving author (art. 27 al. 1), and where contributions are distinct for each contribution individually will apply general rule (art. 27 al. 2), the logical solution, given that each coauthor has a personal right of its contribution.

It is to be noted, however, that art. 32 refers only to terms that as a starting point the author's death or bringing work to the public; text no longer provides the same calculation also in the works need to the public within 70 years (the works are collaborative and collective works - art. 27 par. 1 and art. 28), which leads to the conclusion that for the latter term protection even after the creation flows and not on 1 January of the year following that in which they were created.

The term of protection does not extend when i work or collection changes are essential, additions, cuts, adjustments or corrections content, necessary for the continuation of the collection, in the way the author intended work.

18. The effects of the expiry term of protection of economic rights

The duration of the rights of the author differ, depending on the nature of the work (individual, collaborative or collective) how the work was made public (in the author's name, pseudonym or anonymously) the fact that the work was made public or not. In relation to these elements, the duration of protection works is different. But in all cases the expiry term of protection, the work falls into the public domain; economic rights are extinguished, intellectual and creative works can be spread in public in more accessible terms, their use not covering the payment of the authors'[25].

The concept of "public domain" may be misleading and in any case should not be confused with the term "public domain" in the sense that it is used in administrative law. The fall of works in the "public domain" means that the monopoly use of the work recognized in favor of rights holders timeshare has ceased and that since then, the work has a different destiny: she has been part of the common heritage of mankind, available all and can be used

[25] Ionaşcu Aurelian, Comşa Nicolae, Mureşan Mircea, „Copyright in R.S.R.", Academic Publishing, Bucharest, 1969, p. 127.

freely. The authors and their successors cannot invoke any unfair competition rules to get their reconstitution of deprivation which has ceased, unless the use of the work is done by a competitor under conditions that could lead to such liability.

Typically, to the public domain it belongs[26]: -the works that do not benefit from copyright protection because they lack originality; -the works which by their nature or purpose in the public domain; -the works "fallen into the public domain"[27], i.e. works whose term of protection has expired. –the works whose authors themselves have publicly available to be freely used. In this regard, it should be noted that increasingly more authors of multimedia works and programs for computers today waive their rights patrimonial putting works freely available to the public. For programs for computers that are subject to freeware, their actual membership in the public domain is questionable, because right holders waive their rights to exercise financial but users require certain conditions, breach of which equals counterfeiting. It is considered that tend to make such works available to the public, freely, to be encouraged, but that these works should be established for proper legal.[28]

In practice, the establishment belonging to the public domain involves research work life of the author and the eventual identification of heirs, the research is even more difficult in collaborative works.

The fall of works in the public domain does not mean that it no longer enjoys any protection; moral rights of disclosure of the work, to respect the integrity of the work and the authorship remain for eternity.

References

- Adolph Dietz, by Eminescu în "Copyright", Lumina lex Publishing 1994.
- André Bertrand, "Le droit d'auteur et les droits voisins", Ed. Dalloz, 1999.
- André Lucas, Henri-Jacques Lucas, Schloetter Agnès Lucas, Traité de propriété littéraire et artistique, 4e éditions, Litec, 2012.
- Aurelian Ionaşcu, Nicolae Comşa, Mircea Mureşan, „Copyright in R.S.R.", Academic Publishing, Bucharest, 1969.
- Bogdan D. T Boreschievici., Interferențe, Vol. II, Fragments of the history of the protection of industrial property, OSIM Publishing House, 2009.
- Cărpenaru D. Stanciu, Civil Law. Rights to intellectual creation, Bucharest University, 1971.
- Claude Colombet, Propriété littéraire et artistique et droits voisins, Dalloz, 1997, Ed. 8.
- Christel Simler, Droit d`auteur droit commun et des Biens, LexisNexis Litec, 2010.
- Francoise Chaudenson, „A qui appartient l`œuvre d`art", Armand Colin, 2007.
- Henri Desbois, H. Desbois, Le droit d'auteur en France, ed. 3.
- Jean Foyer, Vivant Michel, Le droit des brevets, Presses Universitaires de France; https://books.google.ro.

[26] Bertrand André, op. cit., p. 233.
[27] They belong to that special category of official documents, legislative, administrative, legal type of papers etc.
[28] Bertrand A, op. cit. p. 236.

CURRENT CHALLENGES CONCERNING THE LAW OF WATER SERVICES IN HUNGARY

János Ede SZILÁGYI[*]

Abstract

Water-related challenges exist in almost every country all around the world. These challenges encompass problems connected to different scientific fields, including law. The legal background of water issues is quite fragmented and, furthermore, consists of different levels of law – i.e. international, EU and national law – as well. Though, the present paper focuses on the Hungarian water-related legal challenges, it is absolutely clear that these challenges might not be solved without the achievements of other scientific fields (beyond law), and without a multi-level and comprehensive legal approach. This paper presents the most important focal points of the Hungarian water-legislation (i.e. water law concepts) in consideration of which the law-makers adopt the law concerning water management and water protection. By now, these water law concepts have been developed separately from each other. The present paper draws attention to the importance of integrative instruments among water law concepts. These integrative instruments are elementary to solve the challenges of the 21st century. The paper provides some examples of these integrative instruments. Afterwards, one of the water law concepts is analysed in a deeper way; that is the so-called `water as a natural resource and the subject of commercial deals´, and especially its sub-category, water services. In connection with water services, the paper also assesses the so-called Arad-Békés water service agreement according to which the Hungarian and Romanian parties endeavor to transfer drinking water from Romania to Hungary. Such solutions in water utility supplies may be regarded relatively rare.

Keywords: *water management law, water law concepts, water services, water utility supplies, agricultural water services.*

1. Introduction

Water and the connected social issues are regarded as the most significant challenges of the 21st century. These challenges might merely be solved in a transdisciplinary and multi-level (i.e. international and national) way. The decision-makers at both international (including the European Union) and national level are dealing with these challenges[1], nevertheless, it should be noted that their responses so far have not provided a final solution to the raised problems. In the present paper, the author endeavours to focus on the legal aspects of the water-related social issues, and intends to assess

[*] Associate professor, PhD, dr. habil., Faculty of Law, University of Miskolc (e-mail: civdrede@uni-miskolc.hu).

[1] See e.g. Bruce Aylward et al., edit., *Law for water management: a guide to concepts and effective approaches* (Rome: Food and Agriculture Organization, 2009); Laurence Boisson de Chazournes, *Fresh Water in International Law* (Oxford: Oxford University Press, 2015); Daniel D. Bradlow and Salman M. A. Salman, *Regulatory frameworks for water resources management* (Washington D.C.: The World Bank, 2006); David H. Getches, Sandra B. Zellmer and Adell L. Amos, *Water Law in a Nutshell* (St. Paul: West Academic Publishing Co., 1997); Antoinette Hildering, *International law, sustainable development and water management* (Delft: Eburon Publishers, 2004); Stephen Hodgson, *Modern water rights: Theory and practice* (Rome: Food and Agriculture Organization, 2006).

the relevant Hungarian theoretical, legislative and practical reactions to the international, EU and national challenges. Taking the quantity limits into consideration, the paper mainly concentrates on the so-called water service issues, which are especially relevant aspects of the Hungarian vocational policies and law. Though some elements of the Hungarian water management and protection law have already been analysed by other authors[2] as well, the integrative approach of this paper (and author) may be regarded as unique.

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2. Theoretical Background

The paper especially concentrates on the water services and, in connection with this, on the challenges of the Hungarian water management. The topic of the paper is tightly connected to the main research activity of the author,[3] in which the author, *first*, would like to determine the so-called water law concepts of the, otherwise, utterly fragmented legislation concerning water management and water protection, *second*, endeavours to get to know the decisive links among these water law concepts and, *third*, intends to define some proposals for legislative improvements, i.e. the so-called *de lege ferenda* proposals, taking the integrated approach of all water law concepts into consideration. Nevertheless, it is worth stressing that, all along in the research, the author focused his activity on the real water problems deriving from the Hungarian situation.

As regards the first objective, i.e. the determination of water law concepts, first of all, it is worth defining the substance of these water law concepts. Taking the different levels of law (i.e. international, European and national levels) into account, it should be noted that there is a huge amount of provisions which directly regulate the water-related human behaviours, and there are even significantly more provisions which indirectly regulate these human behaviours. The high number of water-related provisions forces lawyers to make an attempt to somehow categorise these provisions. In the main research of the author, water law concepts constitute the basis of the categorisation and they can be regarded as the core of the water legislation. E.g., in 2015, the author determined four main water law concepts around which the water-related provisions can be grouped. Namely: *first*, ruling over waters, *second*, water as an environmental component, *third*, water as a natural resource and the subject of commercial deals (good or service or investment), *fourth*, water as a cause of damage a.k.a. defence against water.[4] Nonetheless, it is worth emphasizing that these water law concepts are not regarded as incontestable axioms; in fact, they and their contents can be altered and modified considering the topical problems waiting for solutions.

Besides the categorisation of the water-related provisions, the complexity of water issues also needs attention. In other words: jurisprudence has a demand for a tool

[2] See e.g. Belényesi Pál, "A vízszolgáltatások hatékonyságának javítása a Vízkeretirányelv egyes rendelkezései és a szennyező fizet elvének tükrében" (PhD Diss., University of Debrecen, 2013); Pump Judit "A jog hatása a fenntartható közszolgáltatásra a hulladékgazdálkodás és a vízgazdálkodás területén" (PhD Diss., Eötvös Loránd University, 2011); Somlyódy László, edit., *Magyarország vízgazdálkodása: helyzetkép és stratégiai feladatok* (Budapest: Magyar Tudományos Akadémia, 2011).

[3] See Szilágyi János Ede, *Vízjog* (Miskolc: Miskolci Egyetem, 2013).

[4] Szilágyi János Ede, "A vízjogi szabályozási csomópontok továbbfejlesztésének lehetőségei," *Pro Futuro* 5 (2015) 2: 39.

in order that it can contribute to the solution of water-related problems affected numerous other sciences beside jurisprudence. Taking this demand into consideration, there is a need for a so-called transdisciplinary instrument with which jurisprudence might assess the problematic aspects of water management and water protection in a multidisciplinary way. In connection with transdisciplinary instruments, it should be noted that the water-related problems of humankind might not be comprehended, assessed and solved without a comprehensive approach provided by the different branches of sciences, e.g. by natural, social and other sciences. There is a significant challenge how to apply the experience of the other sciences in connection with a legal research concerning such complex phenomena as the hydrological cycle and the related social issues. In the opinion of the author, the strategic documents adopted at international, European and national level are able to provide such a multidisciplinary experience. Hence, a research dealing with water-related issues is to also analyse these strategic documents adopted by the UN organisations,[5] the EU institutions[6] and the national[7] decision makers. These strategic documents also draw attention to the importance of the integrating and adaptive approach.

In the following parts, the paper focuses on two issues: *first*, law-related instruments transmitting among the water law concepts; namely, the so-called integrative instruments of water law concepts; *and*, *second*, the water law concept called *water as a natural resource and the subject of commercial deals* to which the water services also belong.

3. Law-related instruments transmitting among the water law concepts

As regards the integrative instruments of water law concepts, both European and Hungarian integrative instruments might be drawn attention to. As to integrative instruments of the EU, the Water Framework Directive (WFD)[8], the supplementing Floods Directive (FD)[9] and the Marine Strategy Framework Directive should be mentioned. As far as Hungary, first of all, the WFD and FD have significance, and Hungary implemented them through numerous acts and decrees.

[5] It is especially worth emphasizing the United Nations (UN) inter-agency mechanism on all freshwater related issues, the so-called *UN Water*. See mainly UN Water's *World Water Development Reports* (1-6). They may be downloaded from http://www.unwater.org/publications/world-water-development-report/en/, Accessed February 2, 2016.

[6] See the EU Commission's *Blueprint to Safeguard Europe's Water Resources*, COM(2012) 673 final; see also the EU Commission's *Implementation reports of Water Framework Directive* (1-4): COM(2007) 128 final, COM(2009) 156 final, COM(2012) 670 final, COM(2015) 120 final.

[7] In connection with Hungary, see *Hungarian River Basin Management Plan 1* as the annex of 1042/2012 government resolution; *Hungarian Water Strategy*, final draft: 20.11.2015, accessed February 2, 2016, http://www.vizugy.hu/index.php?module=vizstrat&programelemid=143; *Hungarian River Basin Management Plan 2*, final draft: 22.12.2015, accessed February 2, 2016, http://www.vizugy.hu/index.php?module=vizstrat&programelemid=144.

[8] Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy. See Stuart Bell and Donald McGillivray, *Environmental law* (New York: Oxford University Press, 2008), 586-595; Ludwig Krämer, edit, *EU Environmental Law* (London: Sweet & Maxwell – Thomson Reuters, 2012), 252-259; Jan H. Jans, and Hans H.B. Vedder, *European Environmental Law: After Lisbon* (Groningen: Europa Law Publishing, 2012), 391-413.

[9] Directive 2007/60/EC of the European Parliament and of the Council on the assessment and management of flood risks.

Concerning the national integrative instruments of Hungary, the following instruments have to be highlighted.

(1) The *Fundamental Law*, i.e. the *Hungarian Constitution*.[10] The Fundamental Law plays an essential role in the integration of different water law concepts. From the several relevant provisions and instruments of the Fundamental Law, it is worth highlighting the following ones: (1a) *Fundamental rights*, especially the right to environment and the right to health;[11] it should be noted that the latter one shall be facilitated, *inter alia*, by providing access to potable water. (1b) Constitutional provisions concerning the protection of *future generations' interests* are also significant.[12] For example, according to Article 36, the Parliament may not pass an act on the central budget in consequence of which the state debt would exceed the half of the gross domestic product. Or, specifically concerning waters, Article P) states that the responsibility to protect and preserve the water resources for future generations lies with the Hungarian State and every individual. (1c) Also Article P) regulates that the Hungarian water resources belong to the so-called *nation's common heritage*. Although, the Hungarian Constitution does not provide an exact definition on nation's common heritage, the nation's common heritage concept could be regarded as the expression of the sovereignty over the waters situated in the territory of Hungary. Taking into consideration that there are numerous cross-border surface and ground waters in Hungary, the Article Q) of the Fundamental Law shall apply as well. By virtue of Article Q), Hungary shall strive for cooperation with every nation and country of the world. (1d) The Fundamental Law established the category of the so-called *national assets*. The category of national assets includes the properties of the Hungarian State and local governments. According to Article 38 of the Fundamental Law, the requirements concerning the national assets shall be defined by a cardinal Act. Cardinal Act means an act the adoption of which requires a two-thirds majority of the votes of the Members of the Hungarian Parliament present. As the significant

[10] See Raisz Anikó, "A Constitution's Environment, Environment in the Constitution," *Est Europa* (2012) special edition 1: 47-51. On the relationship between constitution and water, see Fodor László, "A víz az Alaptörvény környezeti értékrendjében," *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica* (2013) XXXI: 334-345; Szabó Marcel, "A vízbázisok védelmének új koncepciója," *Jogtudományi Közlöny* 69 (2014): 248-253.

[11] In connection with the Hungarian right to environment see: Bándi Gyula, "Gondolatok a környezethez való jogról," in *A nemzetközi környezetjog aktuális kihívásai*, ed. by Raisz Anikó (Miskolc: Miskolci Egyetem, 2012) 6-15; Fodor László, *Környezetvédelem az Alkotmányban* (Budapest: Gondolat Kiadó – Debreceni Egyetem ÁJK, 2006); etc.

[12] As regards the future generations in the Hungarian law, see Bándi Gyula, "A fenntartható fejlődés jogáról," *Pro Futuro* 3 (2013) 1: 11-30; Bányai Orsolya, *Energiajog az ökológiai fenntarthatóság szolgálatában* (Debrecen: DELA, 2014), 16-55; Csák Csilla and Jakab Nóra, "The Hungarian National Report on Agriculture and the requirements of a sustainable development," *Journal of Agricultural and Environmental Law* 7 (2012) 12: 50-55; Fodor László, "A természeti tárgyak helye és szerepe az új alkotmányban," in *Alkotmányozás Magyarországon 2010-2011*, ed. Drinóczi Tímea and Jakab András (Budapest-Pécs: PPKE JÁK – PTE ÁJK, 2012), 89-103; Horváth Zsuzsanna and Pánovics Attila, "Környezetvédelem és fenntarthatóság az új Alaptörvényben," in *Magyarország új alkotmányossága*, ed. Drinóczi Tímea (Pécs: PTE-ÁJK, 2011), 77-95; Nagy Zoltán, *Környezeti adózás szabályozása a környezetpolitika rendszerében* (Miskolc: Miskolci Egyetem, 2013), 8-18; Olajos István, *A vidékfejlesztési jog kialakulása és története* (Miskolc: Novotni Kiadó, 2008), 28-31; Olajos, István. *Támogatási rendszereink és a megújuló energiák*. Miskolc: Miskolci Egyetem, 2013, 15-17; Pánovics Attila, "A fenntartható fejlődés belső és külső dimenziói az Európai Unióban," *Európai Tükör* 12 (2007) 12: 120-127; Szabó Marcel, "A fenntartható fejlődés: nemzetközi jogi elmélet és szerződéses gyakorlat," in *A nemzetközi környezetjog aktuális kihívásai*, ed. Raisz Anikó (Miskolc: Miskolci Egyetem, 2012), 161-174.

categories of waters belong to the Hungarian State and the local governments, the ownership and use of these waters are regulated by a cardinal Act; i.e. by the Act CXCVI of 2011 on the national assets. Taking these points into consideration, the Fundamental Law grants a high level of protection for these waters.

(2) The Hungarian *Environmental Act* (Act LIII of 1995) and the Hungarian *Water Management Act* (Act LVII of 1995). Both the Environmental Act and the Water Management Act have a determining role in the coordination of water legislation.[13] Merely in connection with the water management legislation, the draft of the Hungarian Water Strategy refers to approximately 80 acts and decrees which regulate the water management directly.[14] The number of acts and decrees regulating indirectly this subject is much higher. Therefore, it is utterly significant to somehow orientate this huge amount of water-related legislation. According to the Hungarian Water Strategy, which is underway to be adopted, it is essential to rearrange the relationship between the Environmental Act and the Water Management Act, because the regulated subjects of the current acts are confused. According to the Hungarian Water Strategy, it is also high time to adopt a new Water Management Act, as the current Water Management Act has become fragmented by the countless amendments of the Act since its adoption.[15]

(3) The Hungarian *Critical Infrastructures Act*. By virtue of the EU's European critical infrastructures Directive,[16] the Member States had to adopt their connected national rules concerning critical infrastructures. Hence, Hungary adopted its rules as well. The main aim of the EU directive, and similarly of the Hungarian provisions is to prevent terrorist attacks against the critical infrastructures of Member States. Beside energy, transport, agricultural and other critical infrastructures, Act CLXVI of 2012 on the Hungarian critical infrastructures also regulates a wide range of rules connected to different water law concepts,[17] such as water transport, water utility supplies, protection of water bases, quality control of surface and ground waters, dikes and other ramparts against flood. Taking this comprehensive approach of the act into consideration, it can be regarded as an integrative instrument of water law as well.

(4) Etc.

Beside the Hungarian acts concerning the contents of water law, the organizational aspects of integration are also significant. In connection with this, it is worth noticing that the administrative bodies dealing with water management and protection are rather fragmentary.[18] There are numerous

[13] See Bándi Gyula, *Környezetjog* (Budapest: Szent István Társulat, 2011), 451-464; Csák Csilla, *Környezetjog* (Miskolc: Novotni Kiadó, 2008), 100-115; Fodor László, *Környezetjog* (Debrecen: Debrecen University Press, 2014), 210-233; Kurucz Mihály, *Föld- és vízvédelmi jog* (Budapest: ELTE Jogi Továbbképző Intézet, 2002), 253-381; Miklós László, "A vízvédelem szabályozása," in *A környezetjog alapjai*, ed. Miklós László (Szeged: SZTE ÁJK – JATEPress, 2011), 75-81; Szilágyi, *Vízjog*, 140-167.

[14] *Hungarian Water Strategy*, 96.

[15] *Hungarian Water Strategy*, 96-98. A similar conclusion was previously determined in: Szilágyi, *Vízjog*, 148.

[16] Directive 2008/114/EC of the European Council on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection.

[17] See Szilágyi János Ede, "A vízágazat létfontosságú rendszereinek biztonságpolitikai védelme és a magyar vízjog," *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica* (2015) XXXIII: 354-366.

[18] *Hungarian Water Strategy*, 96-97. Cf. Somlyódy, *Magyarország vízgazdálkodása*, 293-294; Barta Judit et al., *Speciális társaságok*, (Budapest: Közgazdasági és Jogi Könyvkiadó, 2003), 299-320; Fodor, *Környezetvédelem az*

ministries and inferior authorities and administrative bodies, therefore, it is not so simple to handle the water-related problems in this fragmented administrative frame. It would be quite useful if the water authorities and environmental authorities could be again operated under one minister, especially as a joined authority. Nevertheless, it is worth stressing that there were also some quite positive initiatives connected to the organisational aspects of water management. The Hungarian decision-makers set up the supervisory body of water utility supplies,[19] and also established a new administrative system for the agricultural water services (such as irrigation) in which system the state has a more stressful role than previously had.[20]

4. Water as a natural resource and the subject of commercial deals

As far as the water law concept called *water as a natural resource and the subject of commercial deals* is concerned, first, it should be defined what water as a natural resource means. The aspect differing the concept of natural resource from the concept of environmental component is the possibility that an environmental component may be used for satisfying the needs of the society. In a certain sense, according to the definition of the Water Management Act, the management of water *resources* is connected to this concept, and in a wider sense, the direct satisfaction of personal demands as well. The question arises which kind of natural resource the water is according to the law. The different answers derive from the complexity of the hydrologic cycle. For instance, *under the Water Framework Directive*, waters are in principle renewable natural resources,[21] but, *by virtue of the Hungarian Environmental Act*, water is merely a "limited resource".[22]

As regards water as a *subject of commercial deals*, water can become the subject of commercial deals in a *transformed way*. This is the so-called *virtual water trade* and also known as trade in *embodied water*.[23] By the way, this virtual water trade has a strong relationship with another topical question of international issues, namely with the so-called *land-grabbing*.[24] Although, both virtual water trade and land-grabbing are incredibly relevant and interesting topics, in the following parts of my paper I intend to focus on more classic aspects of this water law concept. In the significant literature, water as a subject of commercial deals is analysed in a complex way. Namely, water can be regarded as good, service and/or, in a certain sense, as subject of investments. The distinction between these

Alkotmányban, 117, 178; Pánovics Attila, "A környezetvédelmi, természetvédelmi és vízügyi intézményrendszer egységesítése," *Jogtudományi Közlöny* 62 (2007) 5: 205-215; Szilágyi, *Vízjog*, 217-224. etc.

[19] See Szilágyi János Ede, "A magyar víziközmű-szolgáltatók integrációja jogi nézőpontból," *Pro Futuro* 4 (2014) 1: 144-162.

[20] See Szilágyi János Ede, "A mezőgazdasági öntözéssel összefüggő egyes jogi problémákról," *Miskolci Jogi Szemle* 10 (2015) 1: 33-51.

[21] Preamble (28) of the WFD.

[22] § 19 (1) of the Hungarian Environmental Act.

[23] UN Water's *World Water Development Reports* 4, 33-34.

[24] See Christian Häberli and Fiona Smith, "Food security and agri-foreign direct investment in weak states – Finding the governance gap to avoid `land grab´," *Modern Law Review* 77 (2014) 2: 189-222; Olivier De Schutter, "The green rush: The global race for farmland and the rights of land users," *Harvard International Law Journal* 52 (2011) 2: 503-559; Elizabeth R. Gorman, "When the poor have nothing left to eat: the United States' obligation to regulate American investment in the African land grab," *Ohio State Law Journal* 75 (2014) 1: 199-235.

categories is absolutely a problematic issue of the current international private law,[25] nevertheless, I endeavour to concentrate merely on the service aspects of water.

In the present part of the paper, the nature of *water services* will be analysed in the context of the EU law, especially the Water Framework Directive. Namely, the water service definition of Water Framework Directive became the subject of a dispute between the EU Commission and Germany. The EU Commission stuck to a definition which regarded water services rather as environmental services. Contrarily, Germany interpreted the considered definition of the Water Framework Directive as a commercial category. The 2014 judgement[26] of the Court of Justice of the EU reflects rather the commercial approach of the water service definition. The Court also interpreted the exemptions connected to the water services and to the so-called cost-recovery-principle. In my eye, the judgement proved that these provisions of the Water Framework Directive are hardly enforceable. The draft of the new (i.e. second) Hungarian River Basin Management Plan already reflects this judgement of the CJEU, and the competence provided for the Member States by this judgement. According to the final draft published on 22.12.2015,[27] water services include (a) water utility supplies, (b) agricultural water services (such as irrigation), (c) impoundment and storage for production of hydropower, (d) certain abstraction of groundwater for industry, households and agriculture. The special field of the latter one is the abstraction of thermal waters. In the last part of my paper, taking their significance into consideration, I am about to focus on the first two groups of water services mentioned by the final draft of the second Hungarian River Basin Management Plan.

In connection with water utility supplies, the *right to water and sanitation*[28] should be mentioned. First of all, it is worth emphasizing that the right to water and sanitation do not include merely the water utility supplies, but e.g. the direct human consumption from water resources beyond water utility supplies as well. Nevertheless, it is indisputable that in Hungary, similarly to the other developed countries, water utility supplies present a quite strong relationship with the right to water and sanitation. *At the EU level*, it is worth noticing that the first EU citizens' initiative petition asked the EU Commission, among

[25] Katsumi Matsuoka, "Tradable water in GATT/WTO law: need for new legal frameworks?" (paper presented at AWRA/IWLRI-University of Dundee International Specialty Conference on Globalization and Water Resources Management: the Changing Value of Water, August 6-8, 2001) 2-5; Markus Krajewski and Elisabeth Türk, "The rigth to water and trade in services: Assessing the impact of GATS negotiations on water regulation" (paper presented at CAT+E Conference: Mowing forward from Cancún, Berlin, Germany, October 30-31, 2003) 6-7; David Hall and Stephen Thomas, *GATS and the electricity and water sector*, PSIRU, March 3, 2006, 5-6, accessed July 08, 2011, www.psiru.org/reports/2006-03-WE-GATS.doc.

[26] C-525/12, judgment of the Court of 11 September 2014, European Commission v Federal Republic of Germany.

[27] *Hungarian River Basin Management Plan 2,* 246-247, 248-260.

[28] See Catarina de Albuquerque, *On the right track. Good practices in realising the rights to water and sanitation* (Lisszabon: Human Rights to Water & Sanitation UN Special Rapporteur, 2012); Stephen McCaffrey and Kate J. Neville, "Small Capacity and Big Responsibilities: Financial and Legal Implications of a Human Right to Water for Developing Countries," *The Georgetown International Environmental Law Review* 21 (2009) 4: 679-704; Stephen Tully, "A Human Right to Access Water? A Critique of General Comment No. 15," *Netherlands Quarterly of Human Rights,* 23 (2005) 1: 35-63; Leanne Watrous, "The Right to Water – From Paper to Practice," *Regent Journal of International Law* 8 (2011) 1: 109-136.

others, to guarantee access to water and sanitation as a human right, and in connection with this, the EU Parliament adopted a resolution[29] in 2015, through which the EU Parliament called upon the EU Commission to submit legislative proposals concerning the right to water and sanitation. *At national level*, the Fundamental Law was previously mentioned, according to which, the Hungarian State shall provide access to potable water.[30] Otherwise, in 2015, the Office of the Commissioner for Fundamental Rights assessed its own activity in connection with the right to water and sanitation.[31] Its analyses drew attention to the fact that the Commissioner and its ancestors could act for the proper access to water and sanitation on the basis of the other fundamental rights even before the adoption of the Fundamental Law.

Coming to the point of commercial water services, in connection with the Hungarian *water utility supplies*, the Hungarian Parliament adopted a new act in 2011.[32] According to this new act, Hungary has changed its water utility supplies system. The basis of this new system is the regularization, nationalization and (re)municipalisation of the sector. The first stage of the new system might be regarded successful, but nowadays, the reform seems broken. The problematic question is connected to the financing of the water utility supplies. Namely, who will finance the huge cost of the reconstruction of the run-down water supply system? According to the cost-recovery-principle[33] of the Water Framework Directive, primarily, the consumers are to finance this cost which has accumulated in the last 30 years. But according to the affordability principle, it is almost impossible to impose this cost on the present generations of consumers.

Besides the financial issues, there are other topical questions in connection with the Hungarian water utility supplies. One of these topical questions is connected to the *international aspects* of the water utility supplies. From these international aspects, it is worth emphasizing, among others, at least four: (a) After the change of regime in 1989-1990, foreign investors played an important role in the privatization of numerous Hungarian water companies. (b) After approximately 2005, and especially after the 2010 parliamentary election, when the new Hungarian government have absolutely changed the policy and the legislation concerning water utility supplies, a new tendency has begun with the nationalization and (re)municipalisation of the sector. Some

[29] See European Parliament resolution of 8 September 2015 on the follow-up to the European Citizens' Initiative Right2Water (2014/2239(INI)).

[30] See Szappanyos Melinda, *Víz és jog* (Veszprém: Veszprémi Humán Tudományokért Alapítvány, 2013), 11-130; Greksza Veronika and Szabó Marcel, edit, *Right to Water and the Protection of Fundamental Rights in Hungary* (Pécs, University of Pécs, 2013), 2-15 (*Szabó*), 34-48 (*Bujdos-Fodor*), 49-67 (*Kardos Kaponyi*), 97-114 (*Kéri*), 116-135 (*Baillat-Schmitz*), 136-154 (*Buxhoeveden-Belényesi*), 155-169 (*Pánovics*), 170-179 (*Szemesi*), 180-193 (*Szappanyos*), 194-211 (*Greksza*); Kecskés Gábor, "A vízhez való jog nemzetközi jogi koncepciója," *Állam- és Jogtudomány* 50 (2009) 4: 569-598; Raisz Anikó, "A vízhez való jog egyes aktuális kérdéseiről," in *Jogtudományi tanulmányok a fenntartható természeti erőforrások témakörében*, ed. Csák Csilla (Miskolc: Miskolci Egyetem, 2012), 151-159.

[31] The assessment was presented at the Conference for the Hungarian implementation of the UNECE's 1999 Protocol on Water and Health, Budapest, Hungary, June 2, 2015.

[32] Act CCIX of 2011 on Water Utility Supply; See Hegedűs József and Tönkő Andrea, "A víz- és csatornaszolgáltatás alternatív strukturális modelljei és ezek változási irányai," in *Külön utak*, ed. Horváth M. Tamás (Budapest-Pécs: Dialóg Campus, 2014), 11-31; Szilágyi, *Vízjog*, 180-214.

[33] Szilágyi János Ede, "A magyar víziközmű-szolgáltatások és a Víz-keretirányelv költségmegtérülésének elve," *Miskolci Jogi Szemle* 9 (2014) 1: 77-92.

foreign investors were also affected with this procedure, and parties – on the one hand: the foreign investors, on the other hand: the Hungarian state and/or local governments – could mainly find a proper and peaceful solution, but sometimes these nationalization and municipalisation led to legal debates.[34] (c) Hungarian water companies also have opportunities on the water markets of other countries; e.g. one of the water companies in the Hungarian capital (i.e. *Fővárosi Vízművek*) help providing water services in 35 Indonesian settlements. (d) The domestic water utility supplies from the water resources of another country might be regarded one of the most controversial of international affairs. As regards Hungary, previously, for instance, the 1959 Austrian-Hungarian water management agreement defined the water utility supplies of two Hungarian towns (i.e. *Sopron*, *Kőszeg*) provided from the territory of Austria.[35] However, the topical case of this international relationship is undisputedly the so-called *Arad-Békés* water service agreement. In the background of this agreement, there is an EU directive according to which the arsenic parameter of the drinking water does not meet the requirements of the Directive 98/83/EC in the southern parts of the Hungarian Great Plain (especially in Békés county). In 2011, to fulfil the requirements of the EU directive, the Arad Water Company (AWC) and the Békés County Water Company (today: *Alföldvíz* Water Company) established a Romania-based joint venture (*Aqua Trans Mureş S.A.*; ATM) to transfer water from Romania to Hungary.[36] ATM won a 49-year concession (furthermore an added 24-year option) over 20 fountains in Arad and also an opportunity to set up and manage a water pipe to the Hungarian-Romanian border. The ATM is to exploit the EU-law-conform water from the underground source, and to transfer this water through a 20 km long pipeline to the transfer point at the Hungarian-Romanian border (*Kevermes*). In connection with this cross-border drinking water transfer, numerous concerns might arise. Nevertheless, the Arad-Békés water service agreement includes several guarantees which are able to reassuringly answer to the concerns:[37] (d1) Alföldvíz buys the water not from the AWC but directly from the ATM. (d2) Alföldvíz and AWC are 50%-50% owners of the ATM. (d3) The costs of ATM are also shared in two equal portions by the Alföldvíz and the AWC. (d4) The appointment of the ATM-management is the right of the Alföldvíz. (d5) The fountains providing water for the Hungarian party are separated from the system of the AWC. The ATM is responsible to manage and restore these fountains. (d6) The pipeline built for this project is owned by the ATM. (d7) The concession rights of the 20 fountains are won by the ATM. (d8) The water from these fountains are appropriate for the direct human consumptions without any additional treatment. (d9) The components of the system managed by the ATM are operated in harmony with the Hungarian process control. (d10) In case of a legal dispute, merely the Vienna International Arbitral Centre has the competence to decide. (d11) The Arad-Békés water service agreement also includes a water-resource-protection clause. According to this clause, the ATM as

[34] Szilágyi, *Vízjog*, 192-194.
[35] Szilágyi, *Vízjog*, 105.
[36] Szilágyi, *Vízjog*, 126-128.
[37] Jancsó Edina and Farkas Kristóf, Declaration of Alföldvíz "on the water supply utility consortium for Arad-Békés water-transfer" to author, (Békéscsaba, July 6, 2015), 3-5.

a Romanian legal entity can directly take part in the Romanian water protection procedures. Taking these features of the agreement into consideration, the agreement provides a large-scale guarantee for the Hungarian and Romanian parties.

As regards *agricultural water services*, especially irrigation, the reform was also inevitable.[38] After the change of regime, the irrigation system of agriculture was almost devastated. The reconstruction of this system is unimaginable without a centralised solution. Approximately in 2014, the Hungarian State undertook the task to repair the national system of irrigation and, in connection with this decision, the Hungarian Parliament adopted new rules. In my eye, the decision of the Hungarian Parliament was inevitable as well, but the source of financing is unknown. Similarly to the water utility supplies, the affordability of the service for agricultural producers is questionable in the long run. Namely, at this moment, the service fee for agricultural irrigation is free for agricultural producers, but this could be problematic taking into consideration the cost-recovery principle of the Water Framework Directive.

5. Conclusions

Consequently, (a) numerous regulations of the Water Framework Directive should be re-defined more exactly, (b) the integration of the Hungarian administrative organisations is about to continue, (c) Hungary has to adopt a new and up-to-date water management act, furthermore (d) in connection with water utility supplies and agricultural irrigation service, it is worth emphasizing that the reform of their legal background was inevitable and supportable, but the decision-makers also have to provide the financial source for them taking the cost-recovery principle and the aspect of affordability into consideration. (e) As regards the Arad-Békés water service agreement, it might be regarded as a unique solution concerning the cross-border drinking water service not merely in the relationship between Hungary and Romania, but in other regions as well. The legal guarantees of this agreement can provide a good model for other similar cases.

References

- Albuquerque, Catarina de. *On the right track. Good practices in realising the rights to water and sanitation*. Lisszabon: Human Rights to Water & Sanitation UN Special Rapporteur, 2012.
- Aylward, Bruce, Jamie Bartram, Christie Popp, and Jessica Vapnek, edit. *Law for water management: a guide to concepts and effective approaches*. Rome: Food and Agriculture Organization, 2009.
- Barta, Judit, Fazekas Judit, Harsányi Gyöngyi, Miskolczi Bodnár Péter, and Ujváriné Antal Edit. *Speciális társaságok*. Budapest: Közgazdasági és Jogi Könyvkiadó, 2003.
- Bándi, Gyula. "A fenntartható fejlődés jogáról." *Pro Futuro* 3 (2013) 1: 11-30.
- Bándi, Gyula. "Gondolatok a környezethez való jogról." In *A nemzetközi környezetjog aktuális kihívásai*, edited by Raisz Anikó, 6-15. Miskolc: Miskolci Egyetem, 2012.
- Bándi, Gyula. *Környezetjog*. Budapest: Szent István Társulat, 2011.
- Bányai, Orsolya. Energiajog az ökológiai fenntarthatóság szolgálatában. Debrecen: DELA, 2014.

[38] Szilágyi, "A mezőgazdasági öntözéssel összefüggő egyes jogi problémákról," 35-41.

- Belényesi, Pál. "A vízszolgáltatások hatékonyságának javítása a Vízkeretirányelv egyes rendelkezései és a szennyező fizet elvének tükrében." PhD Diss., University of Debrecen, 2013.
- Bell, Stuart, and Donald McGillivray. *Environmental law*. New York: Oxford University Press, 2008.
- Boisson de Chazournes, Laurence. *Fresh Water in International Law*. Oxford: Oxford University Press, 2015.
- Bradlow, Daniel D., and Salman M. A. Salman. *Regulatory frameworks for water resources management*. Washington D.C.: The World Bank, 2006.
- Csák, Csilla. *Környezetjog*. Miskolc: Novotni Kiadó, 2008.
- Csák, Csilla, and Jakab Nóra. "The Hungarian National Report on Agriculture and the requirements of a sustainable development." *Journal of Agricultural and Environmental Law* 7 (2012) 12: 50-79.
- De Schutter, Olivier. "The green rush: The global race for farmland and the rights of land users." *Harvard International Law Journal* 52 (2011) 2: 503-559.
- Fodor, László. "A természeti tárgyak helye és szerepe az új alkotmányban." In *Alkotmányozás Magyarországon 2010-2011*, edited by Drinóczi Tímea and Jakab András, 89-103. Budapest-Pécs: PPKE JÁK – PTE ÁJK, 2012.
- Fodor, László. "A víz az Alaptörvény környezeti értékrendjében." *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica* (2013) XXXI: 334-345.
- Fodor, László. *Környezetjog*. Debrecen: Debrecen University Press, 2014.
- Fodor, László. *Környezetvédelem az Alkotmányban*. Budapest: Gondolat Kiadó – Debreceni Egyetem ÁJK, 2006.
- Getches, David H., Sandra B. Zellmer, and Adell L. Amos. *Water Law in a Nutshell*. St. Paul: West Academic Publishing Co., 1997.
- Gorman, Elizabeth R. "When the poor have nothing left to eat: the United States' obligation to regulate American investment in the African land grab." *Ohio State Law Journal* 75 (2014) 1: 199-235.
- Greksza, Veronika, and Szabó Marcel, edit. *Right to Water and the Protection of Fundamental Rights in Hungary*. Pécs, University of Pécs, 2013.
- Häberli, Christian, and Fiona Smith. "Food security and agri-foreign direct investment in weak states – Finding the governance gap to avoid `land grab´." *Modern Law Review* 77 (2014) 2: 189-222
- Hall, David, and Stephen Thomas. *GATS and the electricity and water sector*. PSIRU, March 3, 2006. Accessed July 08, 2011, www.psiru.org/reports/2006-03-WE-GATS.doc .
- Hegedűs, József, and Tönkő Andrea. "A víz- és csatornaszolgáltatás alternatív strukturális modelljei és ezek változási irányai." In *Külön utak*, edited by Horváth M. Tamás, 11-31. Budapest-Pécs: Dialóg Campus, 2014.
- Hildering, Antoinette. International law, sustainable development and water management. Delft: Eburon Publishers, 2004.
- Hodgson, Stephen. *Modern water rights: Theory and practice*. Rome: Food and Agriculture Organization, 2006.
- Horváth, Zsuzsanna, and Pánovics Attila. "Környezetvédelem és fenntarthatóság az új Alaptörvényben." In *Magyarország új alkotmányossága*, edited by Drinóczi Tímea, 77-95. Pécs: PTE-ÁJK, 2011.
- Jancsó, Edina, and Farkas Kristóf. Declaration of Alföldvíz "on the water supply utility consortium for Arad-Békés water-transfer" to author. Békéscsaba, July 6, 2015.
- Jans, Jan H., and Hans H.B. Vedder. *European Environmental Law: After Lisbon*. Groningen: Europa Law Publishing, 2012.
- Kecskés, Gábor. "A vízhez való jog nemzetközi jogi koncepciója." *Állam- és Jogtudomány* 50 (2009) 4: 569-598.

- Krajewski, Markus, and Elisabeth Türk. "The rigth to water and trade in services: Assessing the impact of GATS negotiations on water regulation." Paper presented at CAT+E Conference: Mowing forward from Cancún, Berlin, Germany, October 30-31, 2003.
- Krämer, Ludwig, edit. *EU Environmental Law*. London: Sweet & Maxwell – Thomson Reuters, 2012.
- Kurucz, Mihály. *Föld- és vízvédelmi jog*. Budapest: ELTE Jogi Továbbképző Intézet, 2002.
- Matsuoka, Katsumi. "Tradable water in GATT/WTO law: need for new legal frameworks?" Paper presented at AWRA/IWLRI-University of Dundee International Specialty Conference on Globalization and Water Resources Management: the Changing Value of Water, August 6-8, 2001.
- McCaffrey, Stephen, and Kate J. Neville. "Small Capacity and Big Responsibilities: Financial and Legal Implications of a Human Right to Water for Developing Countries." *The Georgetown International Environmental Law Review* 21 (2009) 4: 679-704
- Miklós, László. "A vízvédelem szabályozása." In *A környezetjog alapjai*, edited by Miklós László, 75-81. Szeged: SZTE ÁJK – JATEPress, 2011.
- Nagy, Zoltán. Környezeti adózás szabályozása a környezetpolitika rendszerében. Miskolc: Miskolci Egyetem, 2013.
- Olajos, István. *A vidékfejlesztési jog kialakulása és története*. Miskolc: Novotni Kiadó, 2008.
- Olajos, István. *Támogatási rendszereink és a megújuló energiák*. Miskolc: Miskolci Egyetem, 2013.
- Pánovics, Attila. "A fenntartható fejlődés belső és külső dimenziói az Európai Unióban." *Európai Tükör* 12 (2007) 12: 120-127.
- Pánovics, Attila. "A környezetvédelmi, természetvédelmi és vízügyi intézményrendszer egységesítése: Fejlődéstörténeti áttekintés." *Jogtudományi Közlöny* 62 (2007) 5: 205-215.
- Pump, Judit. "A jog hatása a fenntartható közszolgáltatásra a hulladékgazdálkodás és a vízgazdálkodás területén." PhD Diss., Eötvös Loránd University, 2011.
- Raisz, Anikó. "A Constitution's Environment, Environment in the Constitution." *Est Europa* (2012) special edition 1: 37-70.
- Raisz, Anikó. "A vízhez való jog egyes aktuális kérdéseiről." In *Jogtudományi tanulmányok a fenntartható természeti erőforrások témakörében*, edited by Csák Csilla, 151-159. Miskolc: Miskolci Egyetem, 2012.
- Somlyódy, László, edit. *Magyarország vízgazdálkodása: helyzetkép és stratégiai feladatok*. Budapest: Magyar Tudományos Akadémia, 2011.
- Szabó, Marcel. "A fenntartható fejlődés: nemzetközi jogi elmélet és szerződéses gyakorlat." In *A nemzetközi környezetjog aktuális kihívásai*, edited by Raisz Anikó, 161-174. Miskolc: Miskolci Egyetem, 2012.
- Szabó, Marcel. "A vízbázisok védelmének új koncepciója." *Jogtudományi Közlöny* 69 (2014): 248-253.
- Szappanyos, Melinda. *Víz és jog*. Veszprém: Veszprémi Humán Tudományokért Alapítvány, 2013.
- Szilágyi, János Ede. "A magyar víziközmű-szolgáltatások és a Víz-keretirányelv költségmegtérülésének elve." *Miskolci Jogi Szemle* 9 (2014) 1: 73-94.
- Szilágyi, János Ede. "A magyar víziközmű-szolgáltatók integrációja jogi nézőpontból." *Pro Futuro* 4 (2014) 1: 144-162.
- Szilágyi, János Ede. "A mezőgazdasági öntözéssel összefüggő egyes jogi problémákról." *Miskolci Jogi Szemle* 10 (2015) 1: 33-51.

- Szilágyi, János Ede. "A vízágazat létfontosságú rendszereinek biztonságpolitikai védelme és a magyar vízjog." *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica* (2015) XXXIII: 354-366.
- Szilágyi, János Ede. "A vízjogi szabályozási csomópontok továbbfejlesztésének lehetőségei." *Pro Futuro* 5 (2015) 2: 38-54.
- Szilágyi, János Ede. *Vízjog*. Miskolc: Miskolci Egyetem, 2013.
- Tully, Stephen. "A Human Right to Access Water? A Critique of General Comment No. 15." *Netherlands Quarterly of Human Rights*, 23 (2005) 1: 35-63.
- Watrous, Leanne. "The Right to Water – From Paper to Practice," *Regent Journal of International Law* 8 (2011) 1: 109-136.

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

Augustin FUEREA*

Abstract

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

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

1. The principle of conferral[1]

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

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

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

Regarding the importance of the principle of conferral, it is determined by the types of competences covered in the EU treaties. In this respect, the nature and characteristics of competences will influence the process of their conferral.

* Professor, Ph.D., Faculty of Law, „Nicolae Titulescu" University, Bucharest (e-mail: augustinfuerea@yahoo.com).

[1] Legal basis:

- Statement no. 24: *The Union is not authorized „in any way to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties".*
- Article 5 TEU paragraphs (1) and (2): *„(1) The demarcation of the Union's competences is governed by the principle of conferral. The exercise of these competences is governed by the principles of subsidiarity and proportionality.*

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

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

Thus, we can distinguish two situations. In the first case, EU competences do not replace state competences. They remain, but will be framed by rules of law originating in the EU. In this situation, the Union's institutions have the task to exercise a double action: on the one hand, to prescribe in accordance with Treaties, rules detailing and customizing the limitations set out by them and on the other hand, to ensure compliance with those limitations by Member States. In the second case, the Union's competences were intended to replace state competences. In this situation, the EU institutions have legislative powers greater than those of the Member States due to the Union dimension of actions, accounting in this way, the task to enact common rules in the implementation and enforcement of which, the Member States acquire the quality of Community authorities (such a situation is encountered for example in joint policies).

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

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

2. The principle of subsidiarity[4]

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

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

The principle of subsidiarity involves the following **two** aspects:

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

[4] Legal basis:

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

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

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

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

- the first aspect considers the situation in which the Union is competent to work in the areas and to the extent of objectives assigned to it expressly and obviously, being an exclusive competence. In fact, in this case, the implementation of the principle of subsidiarity (for example, in the areas of agricultural, transport, competition policies or common commercial policies) cannot even be brought into question;

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

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

3. The principle of proportionality[6]

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

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

More precisely, proportionality means that, if in the application of a competence, the Union has to choose between several modes of action, it must retain that mode which leaves states, individuals and businesses, the greatest freedom. To this end, the Union must consider whether legislative intervention is urgently needed or other means could also be used, such as reciprocity, recommendation, financial support, encouraging cooperation between states or accession to an international convention. The principle of proportionality implies that, if it proves that it is more than necessary to adopt a rule in the European

[6] Legal basis:

- Article 5 para. (4) TEU: *„ Under the principle of proportionality, the Union's action, in content and form, shall not exceed what is necessary to attain the objectives of the Treaties. Institutions of the Union shall apply the principle of proportionality in accordance with the Protocol on the application of the principles of subsidiarity and proportionality".*

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

[7] Article 5 para. (3).

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

[9] Idem.

Union, its content should not be an excess of regulation, in the sense that it is preferable to resort to the adoption of a directive rather than to a regulation[10]. In this respect, there are also the provisions of Article 296 TFEU, namely: "if Treaties do not specify the type of act to be adopted, the institutions shall select it, from case to case, in compliance with applicable procedures and with the principle of proportionality".

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

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

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

Under Article 1 of Protocol no. (2) on the application of the principles of subsidiarity and proportionality, each EU institution shall, at all times, provide compliance with the principle of subsidiarity. In this regard, the Protocol establishes a control mechanism for compliance with this principle. Thus, before proposing legislative acts[18], the Commission, under Article 2 of the Protocol, must proceed to extensive consultations involving the regional and local dimension of actions envisaged. From the necessity of consultation, it can be derogated only in case of emergency, but in this case, the Commission must explain its decision in its proposal. Further, the Protocol provides that[19] both the European Parliament and the

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

Commission are required to submit to national parliaments, their draft legislative acts, as well as their amended drafts, at the same time as to the Council. The Council, in turn, is required to submit to national parliaments, the draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, as well as the amended drafts.

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

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

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

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

[20] Article 5 of the Protocol.
[21] Under Article 6 of the Protocol.

order to be taken into consideration in the procedure[22]:

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

(b) if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the Council and Parliament (as legislative institutions) consider that the legislative proposal is not compatible with the principle of subsidiarity, it will not be further examined.

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

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

5. The principle of sincere cooperation

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

Under Article 4 TEU, "according to the principle of sincere cooperation, the Union and the Member States shall respect and assist each other in carrying out missions arising out of the Treaties. Member States shall take any general or particular action to ensure the fulfillment of obligations under the Treaties or resulting from the acts of EU institutions. Member States shall facilitate the achievement of the Union's mission and refrain from any measure detrimental to the achievement of its objectives". In this way, three obligations are established in the task of Member States[27]: two positive (the adoption of measures to implement EU law and facilitate the exercise of the Union's mission) and one

[22] Under Article 7, paragraph (3) of the Protocol.

[23] Article 8, paragraph (2) of the Protocol.

[24] The annual Report of the European Commission for 2012 , regarding subsidiarity and proportionality COM(2013) 566 final, 30.7.2013 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0566:FIN:RO:PDF).

[25] Ibid, p. 11.

[26] François-Xavier Priollaud, David Siritzky, „*Le Traité de Lisbonne. Texte et commentaire article par article des nouveaux traités européens (TUE-TFUE)",* La documentation Française, Paris, 2008, pp. 39-40.

[27] According to *Rapport* de Monsieur Etienne Goethals presented during „Réunion constitutive du comitésur l'environnement del'AHJUCAF. Ecole Régionale Supérieure de la Magistrature de l'OHADA Porto-Novo (Bénin) – Actes", http://www.ahjucaf.org/IMG/pdf/pdf_Actes_Porto-Novo.pdf.

negative - not to take any action that would jeopardize the objectives of the Union.

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

The sincere cooperation is a principle that the Treaty on European Union requires to be complied with by the EU institutions, too. Thus, according to Article 13 paragraph (2), the last sentence is "institutions shall cooperate with each other fairly".

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

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

[28] According to: http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l10125_ro.htm

[29] http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l10125_ro.htm

[30] 10 February 1983, case 230/81 (http://curia.europa.eu/juris/celex.jsf?celex=61981CJ0230&lang1=ro&lang2=FR&type=NOT&ancre=).

[31] Section 37 from the ruling.

[32] 27 September 1988, case 204/86 (http://curia.europa.eu/juris/celex.jsf?celex=61986CJ0204&lang1=ro&lang2=FR&type=NOT&ancre=).

[33] Section 16 from the ruling.

[34] Ordinance from 13 July 1990, C-2/88 (http://curia.europa.eu/juris/showPdf.jsf?text=&docid=95877&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=529108).

[35] Treaty establishing the Economic European Community.

mutual obligations of sincere cooperation with Member States"[36].

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

Conclusions

The principles of the European Union are stemming from specific principles of public international law, on the one hand, and from the principles contained in the legal systems of Member States, on the other hand. To become principles of EU law, these categories of principles are "communitarised"[38], as they are passed through the "filter of EU objectives, so sometimes, they may stand some limitations in order to comply with EU law"[39].

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

References

- **Dumitraşcu, Mihaela-Augustina**, *„Dreptul Uniunii Europene şi specificitatea acestuia"*, „Universul Juridic" Publishing House, Bucharest, 2012.
- **Fuerea, Augustin**, "EU legal personality and areas of competence according to the Treaty of Lisbon", ESIJ no. 1/2010.
- **Isaac, Guy; Blanquet, Marc**, „*Droit général de l'Union Européenne*", 10e édition, Dalloz , 2012.
- **Jacqué, Jean Paul,** „*Droit institutionnel de l'Union européenne"*, 7e édition, Dalloz, 2012.
- **Popescu, Roxana-Mariana**, *„Introducere în dreptul Uniunii Europene",* „Universul Juridic" Publishing House, Bucharest, 2011.
- **Priollaud, François-Xavier**; **Siritzky, David**, „Le Traité de Lisbonne. Texte et commentaire article par article des nouveaux traités européens (TUE-TFUE)", La documentation Française, Paris, 2008.
- **Ştefan, Elena Emilia**, "Răspunderea juridică. Privire specială asupra răspunderii în Dreptul administrativ", "Pro Universitaria" Publishing House, Bucharest, 2013.
- *Rapport* de Monsieur **Etienne Goethals** presented during „Réunion constitutive du comitésur l'environnement del'AHJUCAF. Ecole Régionale Supérieure de la Magistrature de l'OHADA Porto-Novo (Bénin) – Actes", http://www.ahjucaf.org/IMG/pdf/pdf_Actes_Porto-Novo.pdf
- **Statement no. 24**: The Union is not authorized "in any way to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties".
- Protocol (no. 2) on the application of the principles of subsidiarity and proportionality.

[36] Section 17 of the Ordinance.
[37] According to Guy Isaac, Marc Blanquet, *op. cit*., pp. 101-102.
[38] Jean Paul Jacqué, „*Droit institutionnel de l'Union européenne"*, 7e édition, Dalloz, 2012, p. 530 and the next.
[39] Idem.

- European Commission Report on subsidiarity and proportionality (18th report "Better Regulation" for 2010**)**, COM (2011) 344 final, Brussels, 10.06.2011 (http://eur-lex.europa.eu/LexUriServ / LexUriServ.do? uri = COM: 2011:0344: FIN: RO: PDF)
- The annual Report of the European Commission for 2012 , regarding subsidiarity and proportionality COM(2013) 566 final, 30.7.2013 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0566:FIN:RO:PDF)
- http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l10125_ro.htm
- http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l10125_ro.htm
- http://curia.europa.eu/juris/showPdf.jsf?text=&docid=95877&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=529108
- http://curia.europa.eu/juris/celex.jsf?celex=61981CJ0230&lang1=ro&lang2=FR&type=NOT&ancre=

THE JURISDICTION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION TO DELIVER A CANCELLATION JUDGMENT REGARDING THE INTERNATIONAL AGREEMENTS TO WHICH THE EU IS PARTY

Roxana-Mariana POPESCU[*]

Abstract

In the case where international agreements are treated as legal acts of EU institutions, they may be subject to judicial review exercised by the Court in Luxembourg. Given the fact that we assimilate international agreements to legal acts of the European Union, we would be tempted to ask ourselves the following questions: to what extent declaring an agreement, by a judgment of the Court of Justice of the EU delivered in the action for cancellation, as being inapplicable to the EU legal order, affects the security of international relationships? If these relationships are affected, is it possible to exclude the subsequent verification conducted by the Court? In the study below, our purpose is to find answer to these questions.

Keywords: *competence, Court of Justice of the European Union, action for cancellation, international agreements.*

1. Introductory considerations

The action for cancellation lies in the possibility of Member States, European Union institutions and natural and legal persons to challenge before the Court of Justice of the European Union, a legally binding act issued by the EU institutions and to obtain, under certain conditions, its cancellation[1]. It is a means of monitoring the compliance of EU legal acts, a control of legality which seeks the abolition[2] of an unlawful act[3], not its changing.

In the case where international agreements are treated as legal acts[4] of EU institutions, they may be subject to judicial review exercised by the Court in Luxembourg. Given the fact that we assimilate international agreements to legal acts of the European Union, we would be tempted to ask ourselves the following questions: to what extent declaring an agreement, by a judgment of the Court of

[*] Associate professor, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: rmpopescu@yahoo.com).

[1] For details see Augustin Fuerea, *Dreptul Uniunii Europene. Principii, acțiuni, libertăți,* Universul Juridic Publishing House, Bucharest, 2015, pp. 65-74.

[2] The Act will be cancelled with *ex tunc* effect (as if it did not exist) and, exceptionally, with *ex nunc* effects (for the future).

[3] For details see Elena Emilia Ștefan, *Reflecţii privind independenţa justiţiei*, in CKS- eBook, Bucharest, 2013, pp. 671-672.

[4] See: Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia,* second edition, Universul Juridic Publishing House, Bucharest, 2015; Laura Spătaru-Negură, *Some Aspects Regarding Translation Divergences Between the Authentic Texts of the European Union*, in CKS (Challenges of the Knowledge Society) 2014, Bucharest, 2014, pp. 368-387.

Justice of the EU delivered in the action for cancellation, as being inapplicable to the EU legal order, affects the security of international relationships? If these relationships are affected, is it possible to exclude the subsequent verification conducted by the Court? We believe that under no circumstances, as long as the legal control has as effect also the possibility of revising the agreements, and not only that of cancelling them. In support of this answer, we have also the opinion of the Court which considers that "it is its duty to control the deficiencies of institutions on rules of procedure and of fund, despite difficulties that may arise for third contracting States and for the security of international relations"[5]. Moreover, the Court even accepted an action brought by a Member State, although the State had the possibility to notify the Court with an application for advisory opinion under Article 218 par. (11) TFEU. In this regard, we consider the case *Portugal v. / Council* [6], where the Portuguese Republic sought the cancellation of Decision 94/578/EC of the Council of July 18, 1994 on the conclusion of the Cooperation Agreement between the European Community and the Republic of India on partnership and development.

2. ECJ jurisdiction to rule by a judgment in the action for cancellation which has as object, an international agreement to which the Union is party

Pursuant to art. 275 par. (1) TFEU, the Court "has no jurisdiction as regards the provisions on Common Security and Defence Policy or in respect of acts adopted thereunder." However, pursuant to para. (2) there of, "the Court has jurisdiction to monitor compliance with art. 40 TEU". What does this thing mean? The implementation of "common foreign and security policy shall not affect the procedures and scope of the powers of institutions provided for in the appropriate treaties, in order to exercise the Union's competences"[7] in other areas. In this way, the Court of Justice in Luxembourg has the competence to cancel even a legal act on an international agreement based on CFSP; nevertheless, exercising the Union's competence should be based on a different legal ground. Regarding this matter, the Court has ruled, since 2008, in the case *Commission v. / Council*[8] , where the European Commission required the Court, the cancellation of the Commission Decision 2004/833/CFSP of the Council, of December 2nd, 2004 implementing the Joint Action 2002/589/CFSP in view of the European Union's contribution to ECOWAS in the framework of the Moratorium regarding weapons and small arms and the finding of inapplicability for illegality of the joint Action 2002/589/CFSP of the Council of 12 July 2002 on the

[5] Emmanuelle Leray, Aymeric Potteau, *Réflexions sur la cohérence du système de contrôle de la légalité des accords internationaux conclus par la Communauté européenne*, Revue trimestrielle de Droit Européen, Paris, no. 4/1998, pp. 535-571 (quoted by Eleftheria Neframi in *JurisClasseur Europe Traité, Fasc.* 192-2: *Accords internationaux – Statut des accords internationaux dans l'ordre juridique de l'Union européenne*, August 30, 2011, p. 26 - https://orbilu.uni.lu/bitstream/10993/15170/1/Fasc._192-2__ACCORDS_INTERNATIONAUX._-_Stat.PDF)

[6] ECJ ruling, *The Portuguese Republic v. / Council of the European Union*, C-268/94, ECLI:EU:C:1996:461.

[7] Art. 40 TFEU.

[8] ECJ ruling, *European Commission v. / Council of the EU*, C-91/05, ECLI:EU:C:2008:288.

European Union's contribution to combating the destabilizing accumulation and spread of light weapons and small arms and to repealing the joint Action 1999/34/CFSP. The Case brings to the forefront of attention the interference of foreign policy and development cooperation policy, the Court cancelling[9] the decision ruled in the CFSP matter. Although the contested act was a joint action, and not an act on the closing of an international agreement, the Court competence regarding agreements in CFSP matters was founded on the possibility of penalizing the choice of the legal basis. The Court accepted jurisdiction, stating that it has "the task of ensuring that the documents about which the Council claims that fall within the scope of Title V[10] of the EU Treaty and which, by nature, can produce legal effects, do not affect the powers that the EC Treaty confers on the Community"[11]. The Court argued its position in the previous case: "The Court must ensure that the acts about which the Council claims that fall under Art. K.3 para. (2) of the Treaty on European Union do not affect the powers which the EC Treaty attributes to the Community"[12]; "It is the Court's competence to ensure that acts which in the Council's opinion fall within the scope of Title VI do not affect the powers which the EC Treaty attributes to the Community"[13]; "It is the Court's task to ensure that acts about which the Council claim to fall within the scope of Title VI do not affect the powers which the EC Treaty attributes to the Community"[14].

Turning to the Court's jurisdiction to rule in an action for cancellation against international agreements, it is clear, as we have already stated that it could reject such an action, knowing that it can only control those legal acts of EU institutions. The Court jurisprudence, however, seems to contradict us, if we consider the case *France v. / Commission*[15]. In that case, the French Republic sought the cancellation of the Agreement signed on 23 September 1991 by the Commission of the European Communities and the United States of America on the application of national competition laws. The Court accepted the request, considering that "the action of the French Republic must be understood as being directed against the act whereby the Commission sought to conclude the agreement"[16]. In this way, the Court becomes competent to carry out an indirect control on the compliance of international agreements with European Union treaties (primary law). We assimilate the doctrinarian view according to which "the assimilation of the agreement to the act of the EU institution ordering its conclusion is not dictated by a dualistic approach, but only by the need to review the legality of an act which produces legal effects in the EU legal order, in accordance with art. 216 para. (2) TFEU"[17].

[9] According to pt. 1 of the device: "For these reasons, the Court (Grand Chamber) hereby: 1) Annuls Commission Decision 2004/833/CFSP of 2 December 2004 implementing Joint Action 2002/589/CFSP in view of the European Union's contribution to ECOWAS in the framework of the Moratorium on small arms and light weapons".

[10] Currently, Title V has the following name: "General provisions on the Union's external action and specific provisions on Common Security and Defence Policy".

[11] Pt. 33 of the ruling.

[12] Pt. 16 of the ECJ ruling, the *Commission v. / Council*, C-170/96, ECLI:EU:C:1998:219.

[13] Pt. 39 of the ECJ ruling, the *Commission v. / Council*, C-176/03, ECLI:EU:C:2005:542.

[14] Pt. 53 of the ECJ ruling, *Commission v. / Council*, C-440/05, ECLI:EU:C:2007:625.

[15] ECJ ruling, *the French Republic v. / European Commission*, C-327/91, ECLI:EU:C:1994:305.

[16] Pt. 17 of the ruling.

[17] Eleftheria Neframi, *op. cit.*, p. 26.

In 2002, France filed an action for cancellation[18], seeking the abolition of the decision whereby the European Commission had concluded with the United States an agreement entitled "Guidelines for cooperation and transparency in the regulation area." The reason given by France was that the guidelines negotiated by the Commission with the United States in the field of cooperation and transparency, in the regulation area constituted themselves into a genuine international agreement, the conclusion of which fell under the jurisdiction of the Council. Therefore, the problem that had to be solved was to know whether the guidelines developed by the Commission and its partners could be challenged by an action for cancellation. The Court ruled in favour of the Commission, considering that the Guidelines were devoid of legal force and constituted only an administrative arrangement: "The Commission (...) as institution and collegiate body has never expressed its consent to be bound by guidelines which, moreover, are only an administrative arrangement concluded at the level of services"[19]. Therefore, no act of the Commission can be the subject of an action for cancellation.

One aspect to look at is the one which is considering the *a posteriori* control exercised by the Court on a mixed agreement, as more questions arise, such as: is the Court's jurisdiction limited only to those matters falling under the Union's competence? Will the cancellation of a joint agreement affect the entire agreement? In this case, the "conclusion of the agreement would not be a common one, of the Union and the Member States, and the Member States could not continue to be bound by an agreement that does not fall entirely within their jurisdiction, unless the cancellation of provisions falling within the competence of the Union is accompanied by a special enabling of Member States which would entitle them to correct their lack of competences and give them a mandate to act on behalf of the Union. In this way, the validity of a mixed agreement could not consider the division of powers, the Court's review concerning only the unique act which constitutes a mixed agreement "[20]. The law does not seem to give an answer to the questions mentioned, if we refer to the judgment ruled in the case *Spain v. / Council* [21] in which, being notified with an action for cancellation of a Council Decision on the conclusion of the Convention on Cooperation for the Protection and Sustainable Use of the Danube, in its judgment, the Court made no reference to the mixed nature of the agreement in question.

3. The causes of illegality[22]

A. The lack of competence of the Commission

In the case *France v. / Commission*[23], the Court cancelled the act by which the European Commission had decided to conclude the agreement with the United States on the application of competition law, on the ground that the institution had no competence for concluding such an agreement. The Agreement had as object to "promote cooperation, coordination and to reduce the risk of disputes between the

[18] Case *the French Republic v. / European Commission*, C-233/02, ECLI:EU:C:2004:173.
[19] Pt. 24 of the ruling.
[20] Eleftheria Neframi, *op. cit.*, p. 27.
[21] ECJ ruling, *Royaume d'Espagne c. / Conseil de l'Union européenne*, C-36/98, ECLI:EU:C:2001:64.
[22] Eleftheria Neframi, *op. cit.*, pp. 27-28.
[23] C-327/91 *cited above*.

parties in the application of their competition laws or to reduce their effects"[24]. Although the Commission argued that "the agreement is in reality an administrative arrangement for the conclusion of which it has jurisdiction"[25] and that "the failure to comply with the agreement provisions would not determine the liability of the Community, but simply its termination"[26], the Court considered that the agreement, being binding to the Community and generating obligations, could not be qualified as administrative agreement.

B. Violations of treaties

Another cause of illegality is the violation of treaties. Thus in the case *Germany v. / Council*[27], the Court ruled in favour of Germany's request to cancel art. 1 para. (1) first indent of Decision 94/800 / EC of 22 December 1994 concerning the conclusion on behalf of the European Community concerning its fields of competence, of the agreements of multilateral negotiations of the Uruguay Round (1986-1994) to the extent that the Council approved the Framework Agreement on bananas with the Republic of Costa Rica, Republic of Colombia, Republic of Nicaragua and the Republic of Venezuela. Germany argued that "the regime established by the Framework Agreement affected the fundamental rights of operators of A and C categories, namely the right of freely exercising the profession and property rights and discriminated them against the operators of B category "[28].

The Court ruled differently in the case *Portugal v. / Council*[29]. In that case, Portugal requested the Court to cancel the Council Decision 96/386/EC of 26 February 1996 on the conclusion of Memoranda of Agreement between the European Community and the Islamic Republic of Pakistan, and between the European Community and the Republic of India on arrangements in the area of market access for textile products. The reasons invoked by Portugal were taking into account "on the one hand, the infringement of certain fundamental WTO rules and principles and, secondly, the breach of certain rules and fundamental principles of the Community legal order"[30]. This time, the Court held that "the statement of the Portuguese Republic, according to which the contested judgment was delivered by breaching certain rules and fundamental principles of the Community legal order, is unfounded"[31] and dismissed the action in its entirety[32].

C. The wrong choice of the legal ground

As in the case of acts of secondary law, the choice of the legal ground for concluding an international agreement "must be based on objective factors which can be subject to judicial review, of which stand the purpose

[24] Pt. 5 of the ruling.
[25] Pt. 21 of the ruling.
[26] *Idem.*
[27] ECJ ruling, *the Federal Republic of Germany v. / Council of the European Union*, C-122/95, ECLI:EU:C:1998:94.
[28] Pt. 48 of the ruling.
[29] C-149/96 *cited above*.
[30] Pt. 24 of the ruling.
[31] Pt. 94 of the ruling.
[32] For details on the role of the legal principles, see Elena Anghel, *The importance of principles in the present context of law recodifying, în* Proceedings of the Challenges of the Knowledge Society Conference (CKS) no. 2/2012, p. 753.

and content of the envisaged agreement"[33]. If the agreement has a dual purpose, the act regarding its conclusion should have as legal ground, the one required for the predominate purpose. "Only exceptionally, if goals are inextricably linked, the act concluding the agreement must have as legal ground, two legal bases"[34]. The wrong choice of the legal ground is, for the Court, a reason for cancellation of the agreement. In this respect, stands the Court judgment in the case the *Parliament v. / Council*[35], in which the Court cancelled the decision because of the wrong choice of the legal ground. In that case, the Parliament asked the Court to cancel Decision 93/323/EEC of the Council of 10 May 1993 on the conclusion of an agreement in the form of a Memorandum of Agreement between the European Community and the United States concerning the purchases. The reason given was that the decision had as legal grounds, only Article 133 TEC which regulated conditions for the negotiation and conclusion of agreements in the field of common commercial policy, the Parliament being, thus excluded from the procedure to conclude the agreement. In the opinion of the Parliament, in addition to this article, the decision had to have as legal basis, also other articles of the Treaty, specific to the provision of services, articles that provided a cooperation procedure. Therefore, the Parliament believed that delivering a judgement only pursuant to art. 113 TEC constituted an infringement of its prerogatives to participate in the procedure of cooperation.

Likewise, the Court ruled in the case *Commission v. / Council*[36], which cancelled the Council Decision on the conclusion, on behalf of the Union, of an agreement with the United States on the coordination of labeling programs for energy efficiency of office equipment. The reason for cancellation was the wrong choice of the legal grounds, given that the Council considered that the decision to conclude the agreement fell within the scope of the article concerning the common commercial policy[37], without taking into account the article on environmental policy[38].

In 2006, the Court cancelled the judgment in the case *Commission v. / Council*[39] on the conclusion of the Rotterdam Convention on the prior informed consent procedure applicable to certain hazardous chemicals and pesticides from the international trade. The Court considered that the decision concluding the Convention was based not only on environmental policy, but it must have a dual legal ground: the environmental policy and the commercial policy.

Another judgement cancelled by the Court is the one concerning an Agreement between the European Community and the United States of America on the processing and transfer of PNR[40] data by air carriers to Customs, and border protection by the Department of Homeland Security United States. The peculiarity of this judgment[41] is

[33] Eleftheria Neframi, *op. cit*., p. 27
[34] *Idem.*
[35] ECJ ruling, *the European Parliament v. / Council of the European Union*, C-360/93, ECLI:EU:C:1996:84.
[36] ECJ ruling, *European Commission v. / Council of the European Union*, C-281/01, ECLI:EU:C:2002:761.
[37] The current art. 207 TFEU (ex.-art. 133TCE).
[38] The current art. 192 TFEU (ex.-art. 175 TCE).
[39] ECJ ruling, *Commission des Communautés européennes c. / Conseil de l'Union européenne*, C-94/03, ECLI:EU:C:2006:2.
[40] Passenger name records.
[41] ECJ ruling, *the European Parliament v. / EU Council and the European Commission*, C-317/04, ECLI:EU:C:2006:346.

that "the Commission's decision was adopted *ultravires* since provisions[42] of Directive 95/46/EC have not been complied with "and in breach of (...) [provisions] concerning the exclusion of activities which fall outside the scope of the European Union law"[43]. It's hard to say whether a decision concluding the agreement is cancelled for the wrong choice of the legal ground, but it can be concluded from the Court's approach that the former art. 95 TEC[44] did not constitute the appropriate legal basis, and that the decision had to be based on the former art. 308 TCE[45]. However, it can be concluded from the Court's analysis, that the Union had no competence whatsoever to conclude the agreement in question"[46].

4. The consequences of cancelling a decision for concluding an international agreement

Pursuant to art. 364 par. (1) TFEU, if the action is well grounded, the Court declares the act void. Therefore, the act disappears from the *ex tunc* EU legal order, from the date of the entry into force. A cancellation judgment has retroactive effect and *erga omnes* value, resulting in the total or partial nullity of the legal act of the European Union. It should be noted that the partial cancellation operates under the condition of not distorting the act. The Court can cancel a legal act, but it can also declare if some of its effects survive. It can also limit the retroactive effects. Thus, for example, it can limit its retroactivity only to the one who brought the action to court. However, the Court can cancel the act, but it can still keep it in force, until the institution adopts a new act to replace it.

Cancelling a legal act which has as object, the concluding of an international agreement leads to the impossibility of applying the agreement in the EU legal order. It should be noted that the decision to cancel the EU legal act of concluding an international agreement is not enforceable against the third State, party to the agreement. In this situation, naturally, the Union can be internationally held liable, and that while art. 27 para. (2) of the Vienna Convention of 1986 on the Law of Treaties between States and international organizations or between international organizations, provides that an international organization, party to a treaty, cannot rely on its own internal rules to justify an event of default under the Treaty[47]. Article 46 of the same Convention states: "in the situation where the consent of an international organization, to be bound by a treaty, has been expressed by breaching the organization rules regarding the competence to conclude treaties, this cannot be considered a vice of consent, unless that violation was express and aimed at an essential regulation". "The European Union law does not recognize the breach of its regulations as a manifest violation to co-contracting third countries. Consequently, the cancellation of the act concluding an international agreement will lead to international liability of the Union.

[42] Pt. 51 of the ruling.
[43] *Idem.*
[44] Currently, art. 114 TFEU.
[45] Currently, art. 352 TFEU.
[46] Flavien Mariatte, *La sécurité intérieure des États-Unis... ne relève pas des compétences externes de la Communauté: Europe 2006, étude 8* RTDE, 2006, pp. 549-559 (quoted by Eleftheria Neframi, *JurisClasseur Europe Traité, Fasc*. 192-2, *op. cit*., p. 28).
[47] For details regarding forms of legal liability, see Elena Emilia Ştefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Prouniversitaria Publishing House, Bucharest, 2013, pp. 85-95.

However, the Union's international liability is up to the contracting parties"[48].

4. Conclusions

Echoing some previous mentions, it can be noted that the Luxembourg Court can cancel the act, but still keep it in force, until the institution adopts a new act to replace it, under art. 264 par. (2) TFEU, which states: "(...) the Court shall, if it considers it necessary, indicate the effects of the void act which must be considered definitive". Thus, in the case the *Parliament v. / Council*[49], the Council asked the Court to limit the effects of the cancellation of the ruling[50], simply because the abolition of the act concluding the agreement would undermine the rights arising therefrom[51]. For these reasons, related to legal reasons comparable to those which arise when certain regulations are annulled, the Court found it necessary to exercise the power conferred by Art. 264 par. (2) TFEU and to maintain some effects of the cancelled decision[52]. Thus, the Court upholds certain effects until the Council will replace the annulled act by one that will comply with European Union treaties.

In the case the *Parliament v. / Council*[53], the Court maintained the effects of the ruling that it had cancelled, justifying its action in the following manner: "Having regard, on the one hand, that the Community cannot invoke its right as justifying the non-execution of the Agreement which stays applicable within 90 days from its denunciation and, on the other hand, to the close link between the agreement and the decision on adequacy, it would seem justified, for reasons of legal certainty and to protect the persons concerned, to maintain the effects of the adequacy ruling during that period. In addition, it is necessary to take into account the necessary time for adopting the measures posed by the enforcement of this ruling"[54].

References

- Anghel, Elena, *The importance of principles in the present context of law recodifying, în* Proceedings of the Challenges of the Knowledge Society Conference (CKS) no. 2/2012.
- Dumitrașcu, Augustina, *Dreptul Uniunii Europene și specificitatea acestuia***,** second edition, Universul Juridic Publishing House, Bucharest, 2015.
- Fuerea, Augustin, *Dreptul Uniunii Europene. Principii, acțiuni, libertăți,* Universul Juridic Publishing House, Bucharest, 2015.
- Leray, Emmanuelle; Potteau, Aymeric, Réflexions sur la cohérence du système de contrôle de la légalité des accords internationaux conclus par la Communauté européenne, Revue trimestrielle de Droit Européen, Paris, no. 4/1998.
- Mariatte, Flavien, La sécurité intérieure des États-Unis... ne relève pas des compétences externes de la Communauté: Europe 2006, étude 8 RTDE, 2006.
- Neframi, Eleftheria, *Fasc. 192-2: Accords internationaux – Statut des accords internationaux dans l'ordre juridique de l'Union européenne*, August 30, 2011,

[48] Eleftheria Neframi, *op. cit*., p. 29.
[49] C-360/93 *cited above.*
[50] Pt. 32 of the ruling.
[51] Pt. 33 of the ruling.
[52] Pt. 35 of the ruling.
[53] C-317/04, *cited above*.
[54] Pt. 73 of the ruling.

https://orbilu.uni.lu/bitstream/10993/15170/1/Fasc._192-2__ACCORDS_INTERNATIONAUX._-_Stat.PDF

- Spătaru-Negură, Laura, Some Aspects Regarding Translation Divergences Between the Authentic Texts of the European Union, in CKS (Challenges of the Knowledge Society) 2014, Bucharest, 2014.
- Ştefan, Elena Emilia, Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ, Prouniversitaria Publishing House, Bucharest, 2013.
- Ştefan, Elena Emilia, *Reflecţii privind independenţa justiţiei*, in CKS- eBook, Bucharest, 2013.
- ECJ ruling, The Portuguese Republic v. / Council of the European Union, C-268/94, ECLI:EU:C:1996:461.
- ECJ ruling, *European Commission v. / Council of the EU*, C-91/05, ECLI:EU:C:2008:288.
- ECJ ruling, the *Commission v. / Council*, C-170/96, ECLI:EU:C:1998:219.
- ECJ ruling, the *Commission v. / Council*, C-176/03, ECLI:EU:C:2005:542.
- ECJ ruling, *Commission v. / Council*, C-440/05, ECLI:EU:C:2007:625.
- ECJ ruling, *the French Republic v. / European Commission*, C-327/91, ECLI:EU:C:1994:305.
- ECJ ruling, *the French Republic v. / European Commission*, C-233/02, ECLI:EU:C:2004:173.
- ECJ ruling, Royaume d'Espagne c. / Conseil de l'Union européenne, C-36/98, ECLI:EU:C:2001:64.
- ECJ ruling, the Federal Republic of Germany v. / Council of the European Union, C-122/95, ECLI:EU:C:1998:94.
- ECJ ruling, the European Parliament v. / Council of the European Union, C-360/93, ECLI:EU:C:1996:84.
- ECJ ruling, European Commission v. / Council of the European Union, C-281/01, ECLI:EU:C:2002:761.
- ECJ ruling, Commission des Communautés européennes c. / Conseil de l'Union européenne, C-94/03, ECLI:EU:C:2006:2.
- ECJ ruling, the European Parliament v. / EU Council and the European Commission, C-317/04, ECLI:EU:C:2006:346.

THE LIMITS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION'S JURISDICTION TO ANSWER PRELIMINARY REFERENCES

Iuliana-Mădălina LARION*

Abstract

Starting from a concise analysis of the Court of Justice's jurisdiction in the matter of preliminary references ratione materiae, ratione personae, ratione loci and ratione temporis, the study intends to highlight what preliminary questions this international court can and cannot answer and haw far can its rulings reach into the national law of the member states of the European Union.

Keywords: *article 267 of the Treaty on the Functioning of the European Union, preliminary question/reference, preliminary ruling/judgment, court of a member state, jurisdiction limits.*

1. Introductory notes

The jurisdiction of the Court of Justice of the European Union[1] is established, mainly, by article 19 of the Treaty on the European Union (TEU), by articles 256, 258-277 of the Treaty on the Functioning of the European Union (TFEU) and by its Statute[2]. The European Court can only act within the limits of the competence conferred upon it by the member states in the treaties establishing the European Union.

The Treaties provide two main roles for the Court of Justice of the European Union: an advisory one, to render oppinions and a jurisdictional one, to give preliminary rulings and judgments in direct actions. Whereas the preliminary ruling procedure is a noncontencious one[3], direct actions, such as annulment actions, actions regarding EU's institutions failure to act, EU's non-contractual liability or staff cases[4], undergo a contentious procedure.

These competences are divided between the Court of Justice, the General Court and the Civil Service Tribunal[5].

At present, in spite of the fact that article 256 paragraph 3 of Treaty on the Functioning of the European Union renders jurisdiction to the General Court to hear and determine questions referred for a preliminary ruling, in specific areas laid down by the Statute, only the Court of Justice can answer preliminary questions, since its Statute has not yet been modified in this respect. Article 3 of the Regulation (EU, Euratom) of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of

* Judge at the Bucharest County Court and PhD candidate at the Faculty of Law, "Nicolae Titulescu" University, Bucharest (e-mail: madalinalarion@gmail.com).

[1] The Court of Justice of the European Union is a system composed of three courts: the Court of Justice (the former Court of Justice of the European Communities), the General Court and the Civil Service Tribunal.

[2] Protocol no. 3 to the Treaty on the Functioning of the European Union.

[3] See Șandru, Banu and Călin, *Procedura.*, 19-20.

[4] For more information about direct actions, see Fábián 2010, 358-407.

[5] See Craig and de Búrca, 2011, *EU Law …*, 477-478, Chalmers, Davies and Monti, 2010, 143-149.

Justice of the European Union states that the Court of Justice is to draw up a report acoompanied, where appropriate, by legislative requests, by 26 December 2017, for the European Parliament, the Council and the Commission, on possible changes to the distribution of competence for preliminary rulings.[6]

The study intends to analyse in a concise, structured manner the limits of the jurisdiction of the Court of Justice to render preliminary rulings *ratione materiae*, *ratione personae*, *ratione loci* and *ratione temporis* and the consequences of this limited competence.

Since preliminary rulings interpret EU law or decide on its validity and they are an instrument to ensure uniform interpretation and application of that law within the European Union, it is important for national courts to know what they can ask, when they can ask, how they must ask the preliminary questions and what types of answers they can expect to receive. It is meant to be a useful instrument for other legal practitioners as well, such as researchers or lawyers, especially since lawyers have the ability to ask the national courts to refer preliminary questions in pending disputes on behalf of the parties they assist or represent.

The objectives are to have more judgments of the Court on the grounds of the matter reffered to it and less orders of inadmissibility, to achieve an improved dialog and cooperation between the national courts and the Court of Justice. This should also ensure a diminished workload of the European Court with those references that are obviously outside the Court's jurisdiction and/or inadmissible.

In order to achieve these objectives, the study shall include useful examples, relevant case law and references for further reading from prominent doctrinal works. The subject of the study has been covered in a form or another by authors from the member states, but efforts to aknowledge the existing contributions, to present them in a new light, to disseminate information must be made in a society of knowledge.

2. Jurisdiction of the Court of Justice to answer preliminary references

2.1 Ratione materiae

Article 267 of the Treaty on the functioning of the European Union provides the Court's jurisdiction to give preliminary rulings concerning:

a) the interpretation of the Treaties;

b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

The competence of the Court is restricted to the interpretation of the treaties establishing EU. At present, these are TEU[7] and TFEU[8], but it is agreed that this provision includes the founding treaties, the treaties that modified and amended these treaties, as well as the treaties of accession of the new member states, because they also modify the founding treaties.

[6] http://curia.europa.eu/jcms/jcms/Jo2_7031/, last accesed on 10 March 2016.

[7] The Treaty on the European Union was signed at Maastricht on 7 February 1992 and entered into force on 1 November 1993. For the consolidated version see: http://europa.eu/eu-law/decision-making/treaties/index_en.htm, last accesed on 10 March 2016.

[8] The consolidated version of the Treaty establishing the European Economic Community, signed at Rome on 25 March 1957, in force since 14 January 1958, modified several times, last by the Treaty of Lisbon, signed on 13 December 2007, in force since 1 December 2009. For more information, see Fuerea, 2011, 32-83.

The protocols and declarations annexed to the treaties[9] are a part of their content and have the same binding force. Hence, their provisions can be the object of a preliminary reference for interpretation.[10]

After 1 December 2009, the Treaty of Lisbon extended the Court's jurisdiction to the area of freedom, security and justice, integrated fully in TFEU, after the abolition of the three pillar system introduced by the Maastricht Treaty and to the Charter of Fundamental Rights of the EU, annexed to TFEU. However, "the jurisdiction of the Court is largely excluded in the area of the Common Foreign and Security Policy"[11] and with regard to general provisions[12].

These Treaties are primary sources of EU law, they are concluded by states, are instruments of international law and are subject to the will of their creators. Thus, the Court cannot decide on the validity of a provision from the Treaties.

The Court has jurisdiction to answer questions on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union, such as regulations, decisions and directives[13], but also acts that are not mentioned in the Treaties[14]. Any EU act may be the object of a reference on validity or interpretation, regardless of its binding or non-binding effects[15], but its nature, its content and its effects may be of interest in determining whether it is relevant in the national dispute.

The jurisdiction of the Court to rule on the validity of such acts is complementary to its jurisdiction to review the legality of EU acts under article 263 of TFEU. As expressed in the doctrine: "Besides ensuring uiform interpretation, the preliminary ruling does also provide private parties with acces to the Court, when they have no *locus standi* to directly ask the Court to control the validity of Union acts."[16] But, if the party to the main dispute had standing to attack the EU act by way of an annulment action and did no do so in the time-limit established by the aforementioned article, the Court ruled it would be contrary to the principle of legal certainty to analyse the legality of that act by answering a preliminary reference.[17]

"References may also be made on whether a provision of Community law produces direct effect, that is, whether it confers rights on individuals which national courts are bound to protect. This is considered a question of interpretation."[18]

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[9] For example: Protocol no. 2 on the application of the principles of subsidiarity and proportionality and the Declaration concerning the Charter of Fundamental Rights of the European Union.

[10] For a concurring opinion see Kaczorowska, 2009, 253. For the opinion that unilateral declarations of the Member States cannot be the object of a preliminary reference, see Smit, Herzog, Campbell and Zagel, 2011, 267-13, Broberg and Fenger, 2010, 103.

[11] Hartley, 2010, 289. See also Jacobs, 2012, 203-204.

[12] See order of 7 April 1995 in case C-167/94 Grau Gomis and others, paragraphs 5 and 6, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[13] For a presentation of the main sources of EU law, see Dumitrașcu, 2012, 107-184.

[14] See Fuerea, 2016, 98.

[15] See judgment of 13 December 1989 in case 322/88 Grimaldi/Fonds des maladies professionnelles, on the interpretation of recommendations, paragraphs 7-19, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 10 March 2016 and judgment of 27 February 2007 in case C354/04 Gestoras Pro Amnistía and others/Council, on the jurisdiction to review common positions in the field of police and judicial cooperation in criminal matters, paragraphs 52-57, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[16] Mathijsen, 2010, 144.

[17] Judgment of 9 March 1994 in case C-188/92 TWD/Bundesrepublik Deutschland, paragraphs 10-26, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[18] Arnull, 2006, 104.

It seems the Court took the view that its own judgments may be interpreted by way of a preliminary reference[19], but their validity cannot be questioned[20].

General principles of law cannot, in itself, form the object of a preliminary reference, but they can be interpreted and applied in order to determine the correct interpretation or validity of an EU act. However, the Court did answer questions on the infringement of fundamental rights when there was no explicit reference to these in the Treaties.[21]

International law provisions[22] and national acts of the member states cannot be interpreted by the Court, nor be declared invalid[23]. The Court can only interpret the EU act transposed in the national law or on which the national act is based.[24]

The Court cannot apply EU law or national law, nor can it decide if a provision of the national law is contrary to EU law. The Court stated: "When it gives an interpretation of the Treaty in a specific action pending before a national court, the Court limits itself to deducing the meaning of the Community rules from the wording and spirit of the Treaty, it being left to the national court to apply in the particular case the rules which are thus interpreted."[25]

In its case law, many times the Court left little doubt about the compatibility between national law and EU law.[26] "On occasion, the question has been reformulated so as to present the issue in non-fact-specific terms – although the essence of the question answered and its consequential effect as a compatibility decision remain unchanged."[27]

We agree that this may be caused, as some authors observed[28], by the fact that many questions are very detailed and require a specific answer. "The line between matters of Community law and matters of national law, between interpretation and application are more easily drawn in theory than in practice."[29]

In what agreements with non-member states are concerned, these may be regarded as acts of the EU institutions, since they are generally concluded by a decision of the

[19] For example, judgment of 16 March 1978 in case 135/77 Bosch/Hauptzollamt Hildesheim, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016. See also Andreşan-Grigoriu, 2010, 226-227.

[20] Order of 5 March 1986 in case 69/85 Wünsche/Germany, paragraphs 10-16, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016.

[21] Judgment of 17 December 1970 in case 11/70 Internationale Handelsgesellschaft, paragraphs 3 and 4, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016.

[22] See Brînzoiu, 2007, 85.

[23] Horspool and Humphreys, 2008, 114.

[24] For further reading, see Broberg, 2010, 362-389.

[25] Judgment of 27 March 1963 in joint cases 28 to 30/62 Da Costa en Schaake NV and others/Administratie der Belastingen, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016. See also Schütze, 2012, 289-290.

[26] For example, see the judgments in cases C-402/09 Tatu and C-263/10 Nisipeanu, in which the Court stated that article 110 of TFEU must be interpreted as precluding a member state from introducing a pollution tax levied on motor vehicles on their first registration in that member state if that tax is arranged in such a way that it discourages the placing in circulation in that member state of second-hand vehicles purchased in other member states without discouraging the purchase of second-hand vehicles of the same age and condition on the domestic market. http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[27] Craig and de Búrca, 2011, *The Evolution . . .*, 368. For example, see judgment of 29 May 1997 in case C-329/95 VAG Sverige, paragraphs 17-24, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 10 March 2016.

[28] See Craig and de Búrca, 2009, 618.

[29] Steiner and Woode, 2009, 231.

Council. This seems to be the view adopted by the Court and the binding effects of its judgment concern only the agreement as part of EU law, not the non-member state.[30]

However, it has been emphasized that the party to the agreement is the EU itself, not the Council, so the act is not a unilateral act of an institution, but a bilateral or multilateral act of the Union. The Court does not interpret the Council's decision, but the bilateral act of the Union.[31]

If both the Union and the member states are parties to the agreement with the non-member state/states (mixed agreements), the jurisdiction of the Court extends only to those provisions falling within EU competence, not to the provisions falling within the member states'exclusive competence.[32]

It would seem that the Court only has jurisdiction to interpret an international agreement if it is formally a party to that agreement by means of an act of one of its institutions. Agreements between member states are excluded from the Court's jurisdiction[33], even if they are just subsidiary conventions, adopted to attain objectives set out in the Treaties.[34]

That is why the Court's decision to declare it has jurisdiction to interpret the General Agreement on Tariffs and Trade (GATT)[35], to which it did not fomally adhere, was subject to criticism in doctrine and considered to be a policy-based judgment, given only on the ground that it was desirable for the GATT to be covered by article 267 of TFEU (the former article 177 of TEEC)[36]. We agree that there was no legal basis for the Court to accept jurisdiction in the case of GATT, since it was not an act of an EU institution. The Court's arguments that the member states were all parties to this international agreement and that there was a need to prevent potential distortions in the unity of the commom commercial policy and in trade do not constitute formal grounds for jurisdiction.

2.2 Ratione personae and ratione loci

The Court can only answer preliminary references made by "courts or tribunals of a member state".[37]

As the Court stated in numerous occasions, the terms "court" and "tribunal" have an autonomous meaning in EU law, describing any national judicial body, established by national law, independent, permanent, that has the power to apply national law and render a definitive decision on legal rights and obligations, binding, after

[30] Judgment of 30 April 1974 in case 181/83 Haegemann/Belgian State, paragraphs 2-5, in which the Court ruled that it had jurisdiction to answer preliminary questions about the Agreement of association between the European Economic Community and Greece.

[31] Hartley, 2010, 291.

[32] Judgement of 16 June 1998 in case C-53/96 Hermès International/FHT Marketing Choice, paragraphs 22-29. The Court stated it had jurisdiction to interpret provisions from the Agreement on Trade-Related Aspects of Intellectual Property Rights since the Community was a part to this agreement and it applied to the Community trade mark, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 10 March 2016.

[33] See Popescu, 2011, 251.

[34] See judgment of 15 January 1986 in case 44/84 Hurd/Jones, paragraph 20, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 10 March 2016.

[35] Judgment of 16 March 1983 in joint cases 267, 268 and 269/81 Amministrazione delle finanze dello Stato/SPI and SAMI, paragraphs 14-19, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 10 March 2016.

[36] Hartley, 2010, 291-292.

[37] For legal standing to refer preliminary questions, see Andreşan-Girgoriu, 2010, 72-145, Kaczorowska, 2009, 255-260 and Petrescu, 2011, 148-149.

following an adversarial procedure[38] and applying rules of law.[39]

Only the Court can establish if a judicial body meets these criteria. The Court consistently refused to accept references form arbitration tribunals[40] and administrative authorities with no judicial functions.[41]

If the body does not have legal standing to ask a preliminary question or if the judicial body is acting outside its judicial function[42], the Court shall give an order of inadmissibility.[43] If the body receives such an order, it may not ask a new question.

It is for each member state to define its territory geographically[44], but EU law must be applicable in those territories as well[45].

Judicial bodies from non-members states are clearly excluded from the Court's jurisdiction, even if these non-members states are parties to an association agreement with the EU, with the exception of the situation when the right is enshrined in an international agreement concluded between EU and third countries, as it is in the Agreement on the European Economic Area, which authorises courts and tribunals of the European Free Trade Association member states to refer questions to the Court of Justice on the interpretation of an agreement rule[46].

International courts are also excluded, although this rule may be subject to exceptions, as the Court stated that the Benelux Court, a common court to Belgium, the Netherlands and Luxembourg, composed of judges from the supreme courts of these member states, did have standing to refer preliminary questions[47].

In our opinion, the Court's view on jurisdiction might be similar in the case of the European Court of Human Rights, a court that is common to all member states of the EU, parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted within the framework of another international organisation, the Council of Europe.[48] This

[38] See judgment of 16 December 2008 in case C-210/06 Cartesio, paragraphs 54-63, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[39] See judgment of 6 October 1981 in case 246/80 Broekmeulen/Huisarts Registratie Commissie, paragraphs 8-17, available at http://curia.europa.eu/en/content/juris/c1_juris.htm and judgment of 17 September 1997 in case C-54/96 Dorsch Consult, paragraphs 22-38, available at http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[40] For example, judgment of 23 March 1982 in case 102/81 Nordsee/Reederei Mond, paragraphs 7-16 and judgment of 27 January 2005 in case C-125/04 Denuit and Cordenier, paragraphs 11-17. The main argument to reject jurisdiction was that the parties are under no obligation, in law or in fact, to refer their disputes to arbitration. On the other hand, the national court that decides on the annulment of an arbitration award can refer preliminary questions, as it results from judgment of 1 June 1999 in case C-126/97 Eco Swiss.

[41] See judgment of 25 June 2009 in case C-14/08 Roda Golf & Beach Resort, paragraphs 31-42, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[42] See judgment of 15 January 2002 in case C-182/00 Lutz and others, paragraphs 11-17, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016. The Austrian regional court was exercising a non-judicial function, in connection with the maintenance of the register of companies.

[43] For procedural aspects, see Petrescu, 2011 and Fábián, 2014.

[44] Judgment of 10 October 1978 in case 148/77 Hansen/Hauptzollamt Flensburg, with regard to the French overseas departments, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016.

[45] Judgment of 3 July 1991 in case C-355/89 Department of Health and Social Security/Barr and Montrose Holdings, paragraphs 6-10, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016.

[46] Article 107 of the Agreement on the European Economic Area and Protocol 34 annexed to it, available at http://www.efta.int/legal-texts/eea, last accesed on 22 March 2016.

[47] Judgment of 4 November 1997 in case C-337/95 Parfums Christian Dior/Evora, paragraphs 15-31, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 10 March 2016.

[48] For a contrary opinion see Andreşan-Grigoriu, 2010, 88, Lenaerts, Arts and Maselis, 2006, 44.

court is competent to solve disputes between private persons and member states and, though it is not formally a part of the court system of the member states, its decisions are final and must be applied, producing binding effects in their legal system. It applies the Convention, but it is not impossible to imagine a situation in which it might need the interpretation of EU law, applicable in all member states of the EU and also parties to the Convention, especially since this has happened before in ECHR's case law[49]. It remains to be seen how this issue will be addressed in the context of EU's process of accession to this Convention.[50]

2.3 Ratione temporis

The Court does not have jurisdiction to give preliminary rulings if the facts of the national dispute occurred prior to the member state's accession to the EU.[51] In case C-283/10 the Court stated that it has jurisdiction to interpret the provisions of EU law only as regards their application in a new member state with effect from the date of that state's accession to the European Union. The dispute in the main proceedings concerned events which took place between May 2004 and September 2007, whereas Romania did not accede to the European Union until 1 January 2007. As the events occurred in part after the date of Romania's accession to the European Union, the Court decided it had jurisdiction to reply to the questions referred.[52]

Thus, it would seem the Court only denies competence for those past situations or events which have completely exhausted their legal effects prior to the date of accession of the new member state.[53]

The national courts may also ask preliminary questions on the application of EU law in intertemporal situations, since the application of EU law *ratione temporis* is a matter of interpretation.

"It is assumed that the ECJ grants immediate effect to procedural norms, whereas norms of substantive character are not immediately applicabile in every case."[54]

It is also necessary that the national dispute is in course[55] and it is a real one[56]. It does not matter in what stage of the

[49] See cases Cantoni against France, judgment of 11 November 1996, available at http://hudoc.echr.coe.int/eng#{"itemid":["001-58068"]} and Matthews against the United Kigdom, judgment of 18 February 1999, available at http://hudoc.echr.coe.int/eng#{"itemid":["001-58910"]}, last accesed on 22 March 2016.

[50] For details about EU's accession to the Convention for the Protection of Human Rights and Fundamental Freedoms, see Gâlea, 2012 and Jacobs, 2012, 204-206.

[51] Judgment of 10 January 2006 in case C-302/04 Ynos, paragraphs 34-38, judgment of 14 June 2007 in case C-64/06 Telefónica O2 Czech Republic, paragraphs 17-24 and judgment of 15 April 2010 in case C-96/08 CIBA, paragraphs 13-15, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 10 March 2016.

[52] Judgment of 24 November 2011 in case C-283/10 Circul Globus București, paragraphs 27-29, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[53] See judgment of 2 October 1997 in case C-122/96 Saldanha and MTS Securities Corporation/Hiross, paragraph 14, judgment of 29 January 2002 in case C-162/00 Pokrzeptowicz-Meyer, paragraphs 46-57 and order of 6 March 2007 in case C-18/06 Ceramika Paradyż, paragraphs 20-25, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016. See also Broberg and Fenger, 2010, 146-147.

[54] Póltorak, 2008, 1362.

[55] Lenaerts, Arts and Maselis, 2006, 45.

[56] Judgment of 11 March 1980 in case 104/79 Foglia/Novello, paragraphs 10-13, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016. The Court considered that the parties to the main proceedings did not dispute with regard to the EU issue refered, but had the same opinion. They created an artificial dispute and inserted certain provisions in their contract in order to get an Italian court to decide on the compatibility of a French consumption tax with EU law, so the European Court denied jurisdiction to answer the preliminary questions refered by the Italian court.

proceedings[57], but it was recommended that the optimum time would be when the facts of the case have been established and questions of purely national law have been settled[58], in order to receive a helpful answer and not have the question rejected as being purely hypothetical[59] or for the lack of sufficient description of the facts[60].

3. Conclusions

Legal protection in the EU is ensured, largely, by national courts, acting as EU courts competent to apply and interpret EU law.[61] The preliminary reference procedure is an instrument of cooperation between the national courts of the member states and the Court of Justice of the European Union, in a common effort to interpret and apply EU law coherently and uniformly. There is no hierarchy between the first courts and the latter[62], but rather a clear separation of competence, which does not contradict their complementary roles.

The Court of Justice is the only one competent to decide if it has jurisdiction to answer a preliminary reference or not.[63] Some authors observed that, over the years, due to its increasing case load, the Court's generous approach in accepting to answer preliminary questions has shifted to some extent by developing jurisprudence aimed at a better control of the types of cases it will hear.[64]

In this context, it is important to understand how far reaching is the jurisdiction of the European Court, under all its aspects: material, personal, territorial and temporal. These specific issues have been approaches in a synthetical manner, for a better understanding of what preliminary questions can find an answer on the grounds of the legal issue reffered. This can lead to a lighter work load for the European Court, to more confidence for national courts in starting an efficient dialogue and to the development of EU law.

The study did not cover all the reasons for declaring a reference as inadmissible, so further details may be presented on hypothetical problems, on the *acte claire* doctrine, on the precedent issue, on the lack of relevance of the question for the resolution of the national dispute or on the formal aspects of the references, like providing sufficient information about the facts of the case.

References

- Andreşan-Grigoriu, Beatrice, 2010, *Procedura hotărârilor preliminare*, Bucharest: Hamangiu Press.

[57] See Foster, 2009, 193.

[58] Judgment of 10 March 1981 in joint cases 36 and 71/80 Irish Creamery Milk Suppliers Association, paragraphs 5-9, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016.

[59] Judgment of 5 February 2004 in case C-380/01 Schneider, paragraphs 20-32, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[60] Order of 7 December 2010 in case C-441/10 Anghel, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 22 March 2016.

[61] Rusu and Gornig, 2009, 149-150. For Romanian case law on reasons not to refer preliminary questions, see Şandru, Banu and Călin, *Refuzul* . . ., 2013.

[62] Arnull et. al., 2006, 510.

[63] See judgment of 16 December 1981 in case 244/80 Foglia/Novello, paragraphs 18-21, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 22 March 2016.

[64] Steiner and Woode, 2009, 225-226. Douglas-Scott, 2002, 250.

- Arnull, Anthony, 2006, *The European Union and its Court of Justice*, Second Edition, Oxford EC Law Library: Oxford University Press.
- Arnull, Anthony, Dashwood, Alan, Dougan, Michael, Ross, Malcolm, Spaventa, Eleanor, Wyatt, Derrick, 2006, *Wyatt&Dashwood's European Union Law*, Fifth Edition, Sweet&Maxwell.
- Brînzoiu, Laurenţiu, 2007, Examen de jurisprudenţă a Curţii de Justiţie a Comunităţilor Europene în material admisibilităţii trimiterilor preliminare, in Revista română de drept comunitar no. 6/2007, Wolters Kluwer Romania Press.
- Broberg, Morten, 2010, *The Preliminary Reference Procedure and Questions of International and National Law*, in Yearbook of European Law no. 28, Oxford Universit Press.
- Broberg, Morten, Fenger, Niels, 2010, *Procedura trimiterii preliminare la Curtea Europeană de Justiţie*, translated by Constantin Mihai Banu, Bucharest: Wolters Kluwer Romania Press.
- Chalmers, Damian, Davies, Gareth, Monti, Giorgio, 2010, *European Union Law*, Second Edition, Cambridge: Cambridge University Press.
- Craig, Paul, and de Búrca, Gráinne, 2009, *Dreptul Uniunii Europene. Comentarii, jurisprudenţă, doctrină.,* Fourth Edition, Hamangiu Press.
- Craig, Paul, and de Búrca, Gráinne, 2011, *The Evolution of EU Law*, New York: Oxford University Press Inc..
- Craig, Paul, and de Búrca, Gráinne, 2011, *EU Law. Texts, cases and materials.*, Fifth Edition, Oxford University Press.
- Douglas-Scott, Sionaidh, 2002, *Constitutional Law of th European Union*, London: Longman Press.
- Dumitraşcu, Mihaela-Augustina, 2012, *Dreptul Uniunii Europene şi specificitatea acestuia*, Bucharest: Universul Juridic Press.
- Fábián, Gyula, 2010, *Drept institutional comunitar*, Third Edition, Hamangiu Press and Sfera Juridică Press.
- Fábián, Gyula, 2014, Drept procesual al Uniunii Europene. Sedes materiae., Hamangiu Press.
- Foster, Nigel, 2009, *Foster on EU Law*, Second Edition, New York: Oxford University Press.
- Fuerea, Augustin, 2011, *Manualul Uniunii Europene*, Bucharest: Universul Juridic Press.
- Fuerea, Augustin, 2016, Dreptul Uniunii Europene – principia, acţiuni, libertăţi –, Bucharest: Universul Juridic Press.
- Gâlea, Ion, 2012, Aderarea Uniunii Europene la Convenţia europeană a depturilor omului, Bucharest: C.H. Beck Press.
- Hartley, TC, 2010, *The Foundations of European Union Law*, New York: Oxford University Press Inc..
- Horspool, Margot, Humphreys, Matthew, 2008, *European Union Law*, Fifth Edition, Oxford University Press.
- Jacobs, Francis G., 2012, *The Lisbon Treaty and the Court of Justice*, in *EU Law after Lisbon*, edited by Andrea Biondi and Piet Eeckhout with Stefanie Ripley: Oxford University Press.
- Kaczorowska, Alina, 2009, *European Union Law*, London and New York: Routledge-Cavendish Press.
- Lenaerts, Koen, Arts, Dirk and Maselis, Ignace, 2006, *Procedural Law of the European Union*, Second Edition, Sweet and Maxwell.
- Mathijsen, Dr. P.S.R.F., 2010, *A Guide to European Union Law as amended by the Treaty of Lisbon*, 10th Edition, Sweet&Maxwell, Thomson Reuters.

- Petrescu, Oana-Măriuca, 2011, *Dreptul procesual al Uniunii Europene*, Bucharest: C.H. Beck Press.
- Póltorak, Nina, 2008, *Ratione temporis application of the preliminary rulings procedure*, in Common Market Law Review, vol. 45, no. 5, October 2008, Kluwer Law International.
- Popescu, Roxana-Mariana, 2011, *Introducere în dreptul Uniunii Europene*, Bucharest: Universul Juridic Press.
- Rusu, Ioana Eleonora, Gornig, Gilbert, 2009, *Dreptul Uniunii Europene*, Third Edition, C.H. Beck Press.
- Schütze, Robert, 2012, *Dreptul constituţional al Uniunii Europene*, Bucharest: Universitară Press.
- Smit, Hans, Herzog, Peter, Campbell, Christian, Zagel, Gudrun, 2011, *Smith&Herzog on The Law of the European Union*, Center for International Legal Studies, Lexis Nexis.
- Steiner, Josephine, Woods, Lorna, 2009, *EU Law*, 10th Edition; Oxford University Press.
- Şandru, Mihai, Banu, Mihai, and Călin, Dragoş, 2013, Procedura trimiterii preliminare. Principii de drept al Uniunii Europene şi experienţe ale sistemului de roman de drept, Bucharest: C.H. Beck Press.
- Şandru, Mihai, Banu, Mihai, and Călin, Dragoş, 2013, Refuzul instanţelor naţionale de a trimite întrebări preliminare. Jurisprudenţă românească, Bucharest: C.H. Beck Press.

DRONE OPERATORS – LEGAL RESPONSIBILITY

Andrei-Alexandru STOICA*

Abstract

*Drones or unmanned or remote vehicles represent a new generation of devices that were designed to help mankind achieve better results in areas that were proven to hazardous. By developing drones, new areas of economic activities have been unlocked for better exploitation, but at the same time, the lack of a proper legal system to back-up the new technology allowed a new wave of gray-lined uses of drones that must be tackled. As the Director of the 21st Century Defense Initiative at the Brookings Institute[1] explains in an interview in 2012 that "*a revolutionary technology is a game-changing technology on a historic level. It is technology like gunpowder, or the steam engine, or the atomic bomb*". With this in mind, drones mark the revolution to carry out strikes from thousands of kilometers away, while also ensuring a permanent eye in the sky for both military and also law enforcement operations. The aforementioned facts are just small percentages of what a drone is truly capable of and its full potential will only be unlocked once artificial intelligence will become an integral part of robotics.*

Keywords: *drones, operators, International Criminal Court, strike, man-in-the-loop.*

1. Introduction

Until the development of autonomous or intelligent weapons reaches a new milestone, the concept of *man-in-the-loop*[1], that is a human being doing the decision-making authority and not the robot. A typical drone, or for a better illustration a Reaper drone used by the United States of America's Military, requires at least one pilot and a team comprised of flight-coordinators, intelligence gathering teams on the ground, military and civilian analysts and commanders, each, being in most cases, located in different bases around the world and trying to process information in real time. The U.S. Air Force admitted in 2011 that for just one Predator drone to be operational for 24 hours, they required 168 people in different key areas in the continental United States[2]. This may have changed since then do to more technological advancements, but the fact remains, current drone operations require a large amount of manpower and current trends show that this type of work environment is very demanding on the human psyche so drone operators are

* Ph.D. Candidate, Faculty of Law, University Nicolae Titulescu (e-mail: stoica.andrei.alexandru@gmail.com).

[1] Interview with Peter W. Singer, Director of the 21st Century Defense Initiative at the Brookings Institution, Washington, United States of America, International Review of the Red Cross, Vol. 94, Number 886, Summer 2012.

[1] Dan Saxon, International Humanitarian Law and the Changing Technology of War, Martinus Nijhoff Publishers, Leiden, 2013, p. 71.

[2] R. Johnson, US Civilians are now helping decide who to kill with military drones, Bussiness Insider, 30 December 2011.

leaving in scores[3]. Drone operators, such as Brandon Bryant[4], spoke to the media about the difficulties of being a military drone pilot and the psychological impact it had on him when he was doing targeted killings from thousands of kilometers away.

This type of public outcry caused the policy makers to shift from the *man-in-the-loop* to a new policy, the *man-on-the-loop*[5], a situation where the drone uses an algorithm to function independently up to the point of acquiring a target and take a preliminary decision on how to act. The human pilot and the team behind him still have the final decision regarding the action that the drone must take and also, with this type of system, the human team can monitor more than one drone.

The paper will focus on defining and acknowledging that drone operators are viable military targets and can be prosecuted for their actions under international law, while also showcasing how drone operators are more frecvent from private companies rather than be under a governmental agency. The importantance of the paper is marked by the fact it will entertain an explanation on how recent trends in the area of unmanned vehicles have evolved, while also trying to speculate on whether the push for more control over drone missions can be achieved or if still lacks legal guidelines. In doing so, the study will be undergone by analyzing real cases and understanding the milestones that drone technology achieved in the last ten years. Unfortunately, since the area of military drone operations is only recently being made public, the level of information that can be made public or used without backlash for using sensitive information is still restricted to reports by different organizations or public figures

2. Drone operators as subjects of the Rome Statute

2.1. Drone operators and the international crime of genocide

*T*he classic theory of criminal responsibility that the Rome Statute and the International Criminal Court Elements of Crimes, as adopted by the General Assembly of the Member States to the Rome Statute[6], enshrines the necessity to have both an international liability but also a criminal law oriented one. But, while having a clear legal framework for the traditional organized military and armed groups, applying the Rome Statute and other international criminal law tools in the context of drone warfare could prove to be more difficult as technology evolves.

The crime of genocide is defined by the Convention on the Prevention and Punishment of the Crime of Genocide[7] as "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such : a) Killing members of the group; (*b*) Causing serious bodily or mental harm to members of the group; (*c*) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (*d*) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.". While this definition is a general statement that the

[3] Murtaza Hussain, Former Drone Operators say they were "horrified" by cruelty of assassination program, theintercept.com, 19 November 2015.

[4] Helen Pow, Did we just kill a kid?, Dailymail.co.uk, 17 December 2012.

[5] A Shalal-Esa, Future drone pilots may fly four warplanes at once, Reuters, 24 December 2011.

[6] Adopted on 17th of July 1998 and entered into force on 1st of July 2002. As of 2016, 124 states are party to the Rome Statute – according to the untreatycollection website (treaties.un.org).

[7] United Nations, 9th December 1948.

alleged offender could be any person, the question that arises is whether or not a drone operator could be convicted of such a crime or if drones could even prevent genocide.

In the first case, a drone operator acts as a military personnel and as such he is entitled to both the possibility to be liable or to have his commander liable for the decision he imposed in the military chain of command. But in the second thesis, regarding the prevention of genocide by using drones, the situation is more of a hypothetical issue, since no genocide has been conducted in very recent history and drones only started to become relevant in military and police operations only just now.

Ever since 2008, when General Atomics started shifting production from Predator drones to Reaper drones and as such a global fast reaction force to stop genocide could be considered as consisted.

In an interview[8] with a former journalist and genocide investigator for U.N.I.C.E.F., Keith Harmon Snow, information that a global reaction force from the United States of America, Israel and its allies started adopting drones as a means and methods of preventing and intervening in situations that could become genocide or war crime, yet he reporter stated that such a possibility was only to protect assets from AFRICOM, while also contributing to the crime itself. Such a thesis has been promoted more recently in the ongoing conflict between Yemen and Saudi Arabia[9], where anti-war activists said that Saudi Arabia is using its own drones and also U.S. drones to target and kill civilians and military members of the dissident faction, while also doing it in a systematical and with the intent to destroy the group.

Interesting enough, this type of intervention from the United States of America is based on a doctrine that the Pentagon developed in 2012 and it is entitled as the Mass Atrocity Response Operations[10], a doctrine regarding peace operations that require a massive fleet of surveillance gear and information gathering-interception devices, but also gear that could intervene faster than a human group[11]. This doctrine could help protect key elements of the civilian population, while also forming a strong deterrent or imposing psychological pressure on possible perpetrators.

This doctrine did however cause moral damages, as Professor Francis Boyle[12]points out, since the doctrine focuses more on certain religious or ethnical groups, like the Muslim group, and as such the Central Intelligence Agency would be a key violator of human rights and humanitarian law, since it causes more civilian casualties in an operation than it wants to admit. The Professor goes on and notes that in a speech to the Rotary Club in 2013, the U.S. Senator Lindsey Graham outlined no less than 4 700 killed in the drone program, most being comprised of civilians and from this group, a lot of minors.

These statements, while interesting, seem to be countered by the fact that the United Nations mission in the Democratic Republic of Congo used a part of the Satellite Sentinel Project[13] that allowed the U.N. mission to monitor both the rebels and the civilians using drones and to provide early warning and early assessment. This

[8] Ann Garrison, Predator drones to "stop genocide"?, globalresearch.ca, 2th May 2011.
[9] presstv, Saudi Arabia ethnically cleansing Yemenis: Activist, 16th September 2015.
[10] Steven Aftergood, dod Releases doctrine on Mass Atrocity Response Operations, Fas.org, 6th June 2013.
[11] Spencer Ackerman, Pentagon: Drones can stop the next Darfur, Wired, 2st November 2011.
[12] Sherwood Ross, Obama Drone Campaign "verges on genocide", interview with professor Francis Boyle from University of Illinois, Globalresearch.ca, 16th February 2014.
[13] Daniel Sullivan, 5 successes in genocide prevention in 2013, Endgenocide.org, 30th December 2013.

project also had the possibility to gather and develop algorithms in preventing mass atrocities. The Sentinel Project allows a three pronged initiative to predict, prevent and mitigate[14] atrocities, by using a small drone for patrolling areas that had been designated as a risk of mass atrocities. Drones can also create communication networks and help implement and document legal tools in combating and preventing genocide similarly to how satellites helped document the human rights violations in Sudan, Syria and Burma.

As such, drone operators can be both the cause of genocide and also a preventive tool to it. Voices such as that of the journalist Daniel Greenfield[15] issues an outcry on the lack of action against extemist armed groups that cause massive atrocities, such as Daesh, and also that on September 10, 2001, Bill Clinton said that he could have had Bin Laden taken out if not for the collateral damage in Kandahar. As a result of his inaction, 3,000 people in the United States and countless civilians in Afghanistan died.

2.2. Drone operators in crimes against humanity and war crimes

Seeing as how UAVs are more useful in combating genocide than causing it, could the usage of drones be considered a crime against humanity or war crime? The truth is that shady politics and legal frameworks of the United States and its allies could create this impression that it does not follow international law. The American lawyer and Nazi investigator for the Nuremberg Trials, Benjamin B. Ferenzc[16], stated that "*the illegal use of armed force knowing that it will inevitably kill large numbers of civilians is a crime against humanity, and those responsible should be held accountable by national and international courts*," and as such the act to use a weapon that will unavoidably kill a disproportionate number of civilians is considered inhumane and should be held liable. The Rome Statute outlines crimes against humanity as any of the acts enshrined in article 7, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Sadly, the report of the Office of the Prosecutor from 2013 entitled *Report on Preliminary Examination Activities*[17] does not address the usage of drones by coalition forces, however it does address targeted killings as an activity used by Taliban forces and Governmental forces in their search for collaborators. Based on this report, the British Reprieve organization tried to call to justice a series of armed drone using states in almost 156 cases, but most national courts dismissed the cases while the last judiciary line stands with the International Criminal Court[18].

This idea is further strengthened by the report of U.N. special rapporteur[19] from the 21st of June 2012 in Geneva, where it had been brought to the attention of the United

[14] Adrian Gregorich, Drones for Social Good, The Sentinel Project.org, 22th October 2013.

[15] Elizabeth Ruiz, Daniel Greenfield: You can't stop genocide without killing civilians, David Horowitz Freedom Center, 13th October 2014.

[16] Roger Armbrust, Ferencz Condemns Drone Attacks: "A crime against humanity", Clydefitchreport.com, 21th June 2012.

[17] Accessible at this link: https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF.

[18] Candice Bernd, Complaint at World Court Alleges NATO Members Complicit in War Crimes, Truth-out.org, 21th February 2014.

[19] Christof Heyns, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Resolution A/HRC/20/22, 10th April 2012.

Nations that the tactics employed by the United States of America were considered serious crimes under international law since they targeted civilians and first response medical teams. The report was further backed by the Pakistani r and Swiss ambassador, but unfortunately the United States of America dismissed the issue since they already publicly stated that the war on terror is governed by the law of armed conflict and as such these tactics are legitimate[20].

As such, while Central Intelligence Agency and Pentagon agents could technically be trialed for war crimes and crimes against humanity, the fact that the United States of America is not a member state of the Rome Statute and as such would be difficult to seize the Court as per article 13[21] of the Rome Statue since the United States of America is still a permanent member of the Security Council of the United Nations and could block deferrals and other seizures for 12 months, but also shows how the Court lacks a police system to arrest persons outside state cooperation.

Lately, a national judge in the United States of American, Judge Andrew Napolitano, stated that the latest drone operations could be labeled as war crimes if they target American citizens abroad[22], but such statements seem to be unfounded and lack clear guidelines in American legal system, as the case of Anwar al-Awlaki and others proved[23]. The case involved a dual citizenship individual who was killed by a drone strike in the Arabian Peninsula for alleged recruitment and training individuals for specific acts of violence linked with terrorism. The case tried to pull-in the legal responsibility for the U.S. for violations of the U.N. Charter and other human rights conventions. The idea was that the drone strike contradicted article 2 paragraph 4 and article 51 of the U.N. Charter, but the fact that both Yemen and Pakistan consented on the usage of force by a foreign state on their sole removed the liability[24] of the U.S. since 2010 reports showed that C.I.A. convinced the Yemeni President to agree to such strikes, while also proving that Pakistan had tacit consented to strikes even thou strong public protests.

While the *International Review of the Red Cross*[25] issues a warning that not all situations fall under the material field of application of international humanitarian law, the Anwar case proves that the threshold needed to carry out lethal strikes against targets has indeed been lowered. What the case also tried to do is to create a precedent in criminal liability for those that command and operate drones but sadly, the national judges deferred this case to

[20] Jack Serle, UN expert labels CIA tactic exposed by Bureau ”a war crime„ thebureauofinvestigativejournalism.com, 21th of June 2012.

[21] The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

[22] Tina Nguyen, Fox's Judge Napolitano: War Crime for Obama Drone Strikes to have killed Americans, mediaite.com, 24th April 2015.

[23] Robert Chesney, Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force, Yearbook of International and Humanitarian Law Vol. 13, 2010, University of Texas Schoof of Law, published in 2011.

[24] William Banks, Counterinsurgency law: New Directions in Asymetric Warfare, Oxford University Press, 2013, p. 169-174.

[25] Sylvian Vite, International Review of the Red Cross, Geneva, Switzerland, 2009, p. 70.

unsolvable as drone operators are protected by the secrecy of state matters[26]. Other cases have yet to be brought up in the United States, Great Britain or Israel, even though such crimes could be prosecuted in any state due to the universality principle enshrined in customary law. Recently, Professor David Glazier[27] stated that CIA operatives are not actual combatants but rather are civilians taking part in armed conflict and as such do not benefit of privileges, under this view CIA drone pilots are liable to prosecution under the law of any jurisdiction where attacks occur for any injuries, deaths or property damage they cause.

2.3. Drone operators and the crime of aggression

The International Criminal Court defined aggression as the "use of armed force by one State against another State without the justification of self-defense or authorization by the Security Council"[28], a definition that was already largely accepted from the text of the United Nations General Assembly Resolution 3314[29]. This concept has yet to be implemented since it lacks an operative mechanism to use it, while also the resolution provides that the court will have jurisdiction over aggression subject to a decision to be taken after 1 January 2017. This means that while we now have a definition of the crime of aggression, jurisdiction over the crime it is put off for future decision, which means we have a crime without any means of punishment before the ICC. Empowered by the UN Charter, the Security Council determines the existence of any act of aggression[30].

This however can be a troublesome approach as drone operations have been up until now subject of a defensive doctrine based on self-defense as per article 51 of the Charter rather than an active and classic approach to armed conflict. Resolution 3314's drafting history, however, further undermines the suggestion that American drone strikes against al Qaeda fighters in Pakistan constitute acts of aggression. Resolution 3314 identifies acts of aggression depending, inter alia, on their "consequences" and "gravity," along with "other relevant circumstances"[31].

Until 1st of January 2017 one can only speculate if the crime of aggression could be attributed to drone strikes that have been used in Yemen, Pakistan, Somalia, Syria or Libya since drone operations have been used as an excuse to bypass article 2 para. 4 of the Charter, while also being done with the consent of the state that has terrorist cells operating on its territory[32].

Discouraging as it may be, drone strikes and by extent, drone operators have yet to be held criminally liable for their actions since they have a *license to kill*[33] without the fear of going to court due to the secrecy shrouding the program, thus allowing them to be able to target and kill anybody that is a suspect of terrorism and

[26] Mark Mazzetti, How a US Citizen came to be in Americas cross hairs, nytimes.com, 9th March 2013.

[27] Nathan Hodge, Drone pilots could be tried for war crimes, law prof says, Wired.com, 28th April 2010.

[28] International Criminal Court [ICC], Assembly of States Parties, The Crime of Aggression, Annex I, art. 8, ICC Doc. RC/Res.6 (advance version June 28, 2010).

[29] G.A. Res. 3314 (XXIX), Supp. No. 31, U.N. Doc A/9631 (Dec. 14, 1974).

[30] Michael J. Glennon, The Blank-Prose Crime of Aggression, 35 Yale Journal of International law Vol. 71, 2010, p. 108– 109.

[31] Andrew C. Orr, Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan under International Law, Cornell International Law Journal Vol. 729, 2011, p. 741-744.

[32] Coalition for the International Criminal Court, Delivering on the promise of a fair, effective and independent Court > The Crime of Aggression.

[33] Amnesty International, Will I be next? US drone strikes in Pakistan, 22st October 2013, p. 43-50.

any type of activities that can be linked to terror.

3. Drone operators as military objectives

3.1. Defining a military objective

A military objective is limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage[34]. This definition of military objectives is set forth in Article 52(2) of Additional Protocol I, to which no reservations have been made. The definition has been used consistently in subsequent treaties, namely in Protocol II, Amended Protocol II and Protocol III to the Convention on Certain Conventional Weapons, as well as in the Second Protocol to the Hague Convention for the Protection of Cultural Property.

As per article 52 paragraph 2 of the aforementioned Protocol, attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

These situations arising from the interpretation of article 52 and rule 8 enshrine the idea that a key factor is whether the object contributes to the enemy's war fighting or war sustainability capability, and so a military benefit or advantage should derive from the neutralization or capture of the objective[35].

By definition of international humanitarian law, a member of an armed forces is considered a combatant under rule 3 of the ICRC Customary Study and this status only exists in international armed conflicts. A drone operator must comply with the rules that are provided for governmental armed forces, meaning that they could be taken out any time, even if they are thousands of kilometers away from the battlefield. For example, a drone operator sitting in a base in Nevada may control a drone buzzing over Afghanistan. Though the operation may be conducted within a military compound, far removed from civilian populations, the problem arises when a drone operator completes a shift and goes home.

As combatants, drone operators are targetable at any time. On the battlefield, a combatant does not acquire immunity when he or she is eating, sleeping, or picking up children from school. And that is the key, because on traditional battlefields, there are no children, and there are no schools. International law does not allow combatants to kill in the morning and then enjoy immunity later in the evening. It is not a light switch. War has never worked that way[36]. Although the operators of remote-controlled weapons systems such as drones may be far from the battlefield, they still run the weapon system, identify the target and fire the missiles. They generally operate under responsible command; therefore, under

[34] Rule 8 of the ICRC Customary Law Study Vol. I, Jean-Marie Henckaerts and Louise Doswald-Beck, Cambridge, 2009, p. 29-32.

[35] University Centre for International Humanitarian Law Geneva, report expert meeting "Targeting military objectives", 12th May 2005, p. 3-5.

[36] Aroop Mukharji, Drone operators: Soldiers or civilians?, TheAtlantic.com, 28th March 2013.

international humanitarian law, drone operators and their chain of command are accountable for what happens. Drone operators are thus no different than the pilots of manned aircraft such as helicopters or other combat aircraft as far as their obligation to comply with international humanitarian law is concerned, and they are no different as far as being targetable under the rules of international humanitarian law[37].

3.2. Drone operators as military objectives stationed in another state or in their origin state

In an article published by Professor Ryan Goodman[38], it had been stated that that a violation of the maxim does not necessarily entail criminal liability and the maxim could be formulated to include (or exclude) a proportionality analysis. This sparked the possibility of regular army operations or Special Forces operations to either kill or capture a target, based on the instructions or rules given to them by laws of armed conflict and state manuals. The legal right to use armed force is limited to the objective of rendering individuals hors de combat (taken out of battle) or, in the collective sense, to defeating enemy forces. Parties have a right to kill enemy combatants during hostilities, but that right is constrained when killing is manifestly unnecessary to achieve those ends. The author also supports the idea of restraint use of force for any type of combatant, thus for drone operators as well, but this study lacks relevant state practice to uphold the rule.

While current U.S.A. drone bases are known to be only on American soil, the strike on Anwar al-Alwaki was done from a different military installation on Saudi Arabia territory[39] close to the Yemen border. Other bases have been confirmed in Djibouti[40], Ethiopia[41] and other key locations such as the Seychelles or Qatar. Recently, the base in Saudi Arabia has been closed in partial thanks to the recent conflict between the House of Saud and the Yemeni Shiite Rebels[42], a situation that shows how important drone operations and how valuable drone pilots are to the program.

Targeting drone operators in foreign establishments is similar to that of targeting a member of the armed forces of a foreign government inside another state, similarly to how Europe and the United States of America have military bases established in Iraq, Afghanistan or Mali. Consistent with the principle of distinction, attacks may only be conducted against military objectives, including members of the armed forces and other organized armed groups participating in the conflict. By the "use" criterion, civilian objects may become military objectives when the enemy employs them for military ends. Analogously, civilians may be targeted should they "directly participate in hostilities."[43].

This further is outlined in situations such as the peacekeeping operations, where personnel from United Nations peace-keeping forces are not armed forces raised by the Security Council by virtue of Articles 43 and 47 of the United Nations Charter, nor

[37] Interview with the President of the ICRC, Peter Maurer, in 2013, 10th May.

[38] The Power to Kill or Capture Enemy Combatants, The European Journal of International Law Vol. 24 no. 3, 2013, p. 821.

[39] Noah Shachtman, Is this the secret U.S. drone base in Saudi Arabia?, Wired.com, 2nd July 2013.

[40] Telesur, Secret U.S. drone base rapidly expanding in Djibouti, Globalresearch.ca, 21th October 2015.

[41] Nick Turse, America's Secret Empire of Drone Bases, TheWorldCantWait.com, 16th October 2011.

[42] AssociatedPress, U.S. Evacuates key drone base as storm brews in Yemen, 22th March 2015.

[43] Michael N. Schmitt, Targeting and International Humanitarian Law in Afghanistan, International Law Studies – Vol. 85, US Naval War College, Newport, Rhode Island, p. 311-315.

are they organized by the States Members on the basis of an invitation (as in Korea in 1950) or of an authorization by the Security Council (as in the Gulf in 1990, and Somalia in 1992). Both these categories are empowered to use coercive measures to restore international peace and security (or adequate security conditions) in the region concerned[44]. Such a mission would be the MONUSCO[45] mission established through the United Nations Security Council Resolutions 1279 and 1291, which requires a force of over 20 000 to achieve a persistent control over the civil war torn state. The forces stationed there have started, from 2013, to use drones to supervise troop movements, but in 2014 and again in 2015[46], MONUSCO had drones crashes into remote areas or farmlands due to technical issues and never repairing the damages these crashes caused, neither did drone operators or commanders admitted to being at fault for damages caused to civilians in the usage of military drones.

Even the National Guidelines for the Coordination between Humanitarian Actors and MONUSCO adopted in 2006 and revised in 2013 fail to address how drones should be handled in both military and humanitarian areas of activity, while also covering the aspect of surveillance operations with clauses of secrecy to humanitarian actors that work alongside the MONUSCO forces.

Drone operators and commanders that are assigned to such instances, like the one in the Democratic Republic of Congo, will face targeted attacks from the dissident armed forces in a state that has similar issues to the Democratic Republic of Congo. Issues similar to targeted attacks or asymmetric warfare against peacekeeping forces or foreign forces present in a civil war torn state could be resolved by applying the *Kigali Principles*[47], which called for an early assessment of "potential threats to civilians" and the proactive undertaking of steps to mitigate such threats. By applying the Kigali Principles, drone operations could be deployed in advance to counter possible attacks from rebel armed forces against civilian targets or foreign peacekeepers. This of course could count as a law enforcement operation and as such, drone operators would not face the heavy conditions established by international humanitarian law in such an operation. Rule 33 of the ICRC Customary Study also enforces the idea that members of the Peacekeeping Mission are protected by international law and as such attacking them would constitute a war crime[48].

On the other hand, drone operators stationed at home have a similar statute, meaning that they are still protected as members of the armed forces when active and that civilian drone operators (hobbyists and policemen) are protected by municipal laws. For example, in the U.S.A. a woman had a 1 year prison sentence given to her for attacking and beating a civilian drone operator[49] for using it in a public space. Such

[44] Umesh Palwankar, Applicability of international humanitarian law to United Nations peace-keeping forces, Review of the ICRC, 30th June 1993.

[45] United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, established in 1999.

[46] Siobhan O'Grady, How a U.N. drone was promptly forgotten, ForeignPolicy.com, 9th October 2015; AFP, UN surveillance drone crashes in eastern DR Congo, 20th October 2014.

[47] An emerging principle that was conceived in a High-level International Conference on the Protection of Civilians in Kigali, from 28th-29th May 2015, based on the margins of the 69th UN General Assembly in New York.

[48] Article 8(2)(b)(iii) of the Rome Statute, 2003.

[49] Gregory S. McNeal, Woman Faces A Year In Jail For Beating Drone Operator, Assault Caught On Video, Forbes.com, 10th June 2014.

a situation tied with the fact that even uniformed drone operators can be targeted by attacks[50]and be the most efficient way to take out the mechanism, rather than just targeting the drone, which could be captured and re-used. A drone operator in the U.S.A. requires at least 12 months of training along the traditional Air Force Pilot training[51] and gets a very advantageous work benefit package, but as the legal jurisdiction issue is raised, even if they were civilian operators, they could still be punishable for their role by both domestic and international law by their own state or by a third party state, if the attack could constitute an element of crime provided by international criminal law legal documents. In the *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*[52], for a civilian to be considered a direct participation in hostilities, 3 requirements must be fulfilled: 1) the action must be likely to adversely affect military operations or to cause damage to objects protected against direct attack (threshold of harm); 2) there must exist a link between the act to cause harm and the result (one casual step); 3) the act must cause a direct support to a party to the conflict and be in the detriment of another. As such, the CIA or the UK programs use private contractors to operate drones, and thus civilians who take part in direct hostilities.

3.3. Civilian-military partnerships as a risk towards legal strikes

While drones have been traditionally been considered a platform that only the government could deploy and use such platforms, but lately, drones have been outsourced to private civilian contractors or civilian controlled agencies. This is the case of the Central Intelligence Agency who is a civilian controlled governmental agency that coordinates drone strikes with the Pentagon. These types of cooperation, while also attributing different contracts to other private entities, has been more and more evident ever since Iraq or Afghanistan[53]. As of January 12, 2011, the Air Force has used UAS to deliver 906 Hellfire missiles and 201 GBU-12 precision guided 500 lbs. bombs against enemy targets[54], given the heavy manpower requirement, mission number growth, and demand for UAVs delivered armament, the Air Force, has greatly depended on contractors to maintain these medium and large category UAVs, and to perform intelligence data and video analysis.

A new report (*US Special Operations Command Contracting: Data-Mining the Public Record*), that analyses a US procurement database to shed light on the activities of US military special operations contracting has found that private corporations are integrated into some of the most sensitive counter-terrorism activities[55]. This report outlined that nearly 13 billion us dollars, in a 5 year period, got spent on

[50] David Cortright, Drones and the Future of Armed Conflict: Ethical, Legal and Strategic Implications, the University of Chicago Press, 2015, p. 58-60.

[51] Pratap Chatterjee, Why are drone pilots quitting in huge numbers? , Inthesetimes.com, 10th March 2015.

[52] Nils Melzer, ICRC, 31th December 2008, p. 995-996,

[53] Steven L. Schooner, Daniel S. Greenspahn, Too Dependent on Contractors? Minimum Standards for Responsible Governance, Journal of Contract Management 9, Summer 2008.

[54] 1 Lt Col Bruce Black, "The Future of Unmanned Air Power," The International Institute for Strategic Studies Conference, 20th April 2011.

[55] LeakSource.info, 9th September 2014, report accessible at the following link: http://leaksource.info/2014/09/09/ussocom-outsourcing-surveillance-drone-interrogation-psychological-operations-to-private-contractors-remote-control-report/.

projects from companies such as Lockheed Marti, L-3 Communications, Raytheon or Shee Atika, who had to either provide components or provide intelligence, surveillance and reconnaissance services or on-spot translation services.

Such situations show the growing extent of how private military and security and other intelligence, surveillance and reconnaissance companies have become vital in U.S.A. foreign policy decisions. It even went to the extent of hundreds of private sector intelligence analysts are being paid to review surveillance footage from U.S. military drones in Central Asia and the Middle East, according to a new report from the Bureau of Investigative Journalism[56]. By using contractors, the government can rotate military personnel from active duty to leave permissions, but this also means that private companies gets access to private and sensitive information, that may or may not be protected by privacy laws. The latest outsourcing will be done by the USA to India's Genpact LTD[57] and by this outsourcing, the company will get training for targeting and intercepting enemies and to do intelligence gathering operations, all while being under supervision of the US Department of Defense.

If the entire drone program will be outsourced to private companies then the ability to prosecute crimes will be forever diminished, similar to how the US handled private contractors in Iraq with the famous *Order 17*[58] which gave them immunity from Iraqi law, however, ever since 2007, Uniform Code of Military Justice was amended to allow for prosecution of military contractors who are deployed in a "declared war or a contingency operation". Other incidents that went unprosecuted were Abu Ghraib, the 2005 Trophy Video incident[59] and lately, STTEP International involvement in Nigeria[60]. Most of these incidents would fall under international law, which places legal obligations on states in areas under their jurisdiction or control to provide effective legal remedies for persons who have suffered violations of their fundamental rights. This includes state responsibility to investigate and prosecute serious human rights violations and violations of the laws of war by private persons and entities as well as by government officials and military personnel. Unfortunately, the US is the largest supplier of private defense companies in the world and it is also a state that is not a party to the Rome Statute, meaning that only national legislation could prosecute these contractors. While indeed the US Senate has laws pending to give the Federal Bureau of Investigation powers to investigate contractors that are activating abroad, the current legal framework prohibits the prosecution of civilians by military courts[61].

[56] Abigail Fielding-Smith, Crofton Black, Reaping the rewards: How private sector is cashing in on Pentagon's 'insatiable demand' for drone war intelligence, TheBureauofInvestigativeJournalism.com, 30th July 2015.

[57] Adam Carlson, CIA to outsource Drone Operations to India, NationalReport.net, 18th October 2015.

[58] Christopher Kinsey, Private Contractors and the Reconstruction of Iraq, Contemporary Security Studies, Routledge Publishing, 2009, p. 119.

[59] Steve Fainaru, Blackwater Employees Were Involved in Two Shooting Incidents in Past Week, Washington Post Foreign, 27th May 2007, p. A01, available on https://wikileaks.org/gifiles/docs/36/369911_-os-us-iraq-blackwater-s-earlier-scandals-coalition.html.

[60] Colin Freeman, Nigeria hired South African mercenaries to wage secret war on Africa's deadliest jihadist group, Business Insider, 15th May 2015.

[61] Human Rights Watch, information accessible at this link: https://www.hrw.org/legacy/english/docs/2004/05/05/iraq8547.htm#_ftn4.

4. Should the military have a monopoly on drone intelligence and armed strikes?

4.1. Why it should only be a military monopoly

Drone operators that operate under the US and its allies seem to also fall under international humanitarian law obligations, but lately the Russian Federation has been implementing carbon copies of the rules and regulations that the western states had until now, this being evident in the new drone regulation bill that Russia is expected to implement by the end of 2016[62] which states that: "*people or companies who own and use unmanned aircraft systems (also known as drones) must also appoint a crew and a commander responsible for flight safety. In addition, users of registered drones will have to write a flight plan and submit it to the regional body that coordinates air traffic. Just as with conventional piloted aircraft, once the flight plan is agreed the crew must follow it, with the right to conduct an emergency landing only in cases when public safety is under threat*."

Such actions are evidence that the western states have developed an influence in how the legal framework for drones will look under a global initiative, even thou a drone treaty is still to be drafted and adopted. In regards to military operations, armed drones should remain under regular armed forces since these types of weapon platforms wield different load outs that could not be possible for civilian usage. Case and point the new *Kanyon*[63] drone, a submergible drone that can is powered by a nuclear reactor and has the capability of nuclear armament. While the International Court of Justice Advisory Opinion on Nuclear Weapons[64] does not prohibit the owning of nuclear weapons it did however enforce the idea that such weapons must respect the law principles and customary norms of international humanitarian law and by doing so only lawful combatants could use such a platform. This is further nuanced seeing as how starting from 2013[65] and continued in 2015, after the accidental killing of aid workers[66] in April 2015 in Pakistan, the Obama administration reviewed the drone program to ensure that key elements are now governed by the Pentagon.

Back in 2005 the US had a power struggle inside its armed forces when the Navy and Army blocked a provision that was to be added in the national military program[67] regarding the oversight of the Air Force for any drone that could fly higher than 3 500 feet. The provision never made its way in the program, but currently the Air Force has the intention to revisit the decision and develop a centralized operation that would allow 90 drones to be flown in the same time under its direct control, while offering smaller drones to contractors, Special Forces and the Army.

Another reason to have a centralized agency governing drones is to have capable personnel apply the rules of international humanitarian law in a more direct and professional fashion, as opposed to how the CIA and Pentagon collaboration handled it until now[68]. This means that a committee of

[62] Kelsey D. Atherton, Russia's new drone rules look a lot like America's, Popsci.com, 4th January 2016.

[63] Bill Gertz, State official: Russian Nuclear-Armed drone sub threatens US, FreeBeacon.com, 2st December 2015.

[64] ICJ Legality of the threat or use of nuclear weapons Advisory Opinion of 8 July 1996.

[65] RussiaToday, Obama to hand over some CIA drone operations to the Pentagon, 21th May 2013.

[66] Jim Acosta, Obama to make new push to shift control of drones from CIA to Pentagon, CNN, 27th April 2015.

[67] Marcus Weissberger, Should one US service rule the military's drones?, Defenceseone.com, 24th August 2015.

[68] Micah Zenko, Transferring CIA Drone Strikes to the Pentagon Policy Innovation Memorandum No. 31, Council of Foreign Relations, April 2013.

the Parliament, or in the case of the US, the Senate (Select Committee on Intelligence), could handle reports much better and not have different committees handle the same reports in such a way that could cause a bureaucratic slowdown. This means that in the case of the US this can only be accomplished by the Department of Defense operations, because the foreign relations committees cannot hold hearings on covert CIA drone strikes. Such a solution was already drafted in 2004, as the 9/11 Commission recommended that the "*lead responsibility for directing and executing paramilitary operations, whether clandestine or covert, should shift to the Defense Department*" to avoid the "*creation of redundant, overlapping capabilities and authorities in such sensitive work*."

4.2. Conclusions - Drone operators brought before courts

Current drone programs around the world lack any relevant case laws that could make or break the program, but even so, there are lots of cases based on the Freedom of Information Act from the USA that request the Office of Legal Counsel to issue opinions and memos regarding the legal status of targeted killings of people suspected of ties to terrorist groups[69]. Unfortunately, most of these lawsuits ended up with the *Glomar response*, meaning that courts did not confirm nor denied the existing of legal documents that can verify the orders and justification for drone strikes. In the case of the ACLU versus CIA[70], district court Judge Collyer issued ruling that even summaries of the drone program could compromise CIA structure, interests and involvement and as such could lead to disclosure of sensitive information. Later, the D.C. Appeal Court rejected the CIA sensitive information case as President Obama admitted the CIA implications in drone strikes and as such the court forced the CIA to release documents or at least the admittance that they exist.

While the current Presidential Administration requests that the CIA should release more information on how its drone program functions, more and more quasi-judicial activities have started to open up, starting from Philip Alston report in 2005[71] and ending with the *May Revolution*[72], as it has been dubbed, the US started shifting its position from constantly blocking any action against its drone program to a more transparent policy where it can be asked through the Freedom of Information Act some issues regarding the legality of the program, it still failed to capture the sentiment that a court could hold accountable a pilot for his or hers actions, but also failed to point out an executive office or branch that is overseeing these drone strikes. While indeed, the U.N. Special Rapporteur, Ben Emerson[73], did see the US drone program in a new light, he did still outlined a lot of serious issues that the speech did not tackle now that it acknowledged that drone strikes have been undertaken. As a further plea for commitment, the same Judge Collyer who sided with the CIA, requested a memorandum from the Government explaining relevant information on the

[69] Derek Jinks, Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies, Asser Press, 2014, p. 83-86.

[70] Cody M. Poplin, D.C. District judge sides with CIA in Drone FOIA Case, Lawfareblog.org, 19th June 2015. Civil Action No. 10-436 (RMC)

[71] Derek Jinks, see supra note 70, p. 90.

[72] Barrack Obama U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, Speech, May 2013.

[73] OHCHR.org, UN Special Rapporteur urges more clarity on Obama's counter-terrorism policies, 7th June 2013.

targeted strikes it carried in the Anwar al-Awlaki.

These types of lawsuits must not be looked upon as regular litigations, but rather be analyzed from a procedural stand point. A procedure to try and obtain information, even if it's just a denial or dismissal as it shows how the policies are relevant in such covert operations.

However, if one could seize the International Criminal Court to investigate alleged crimes committed by drone operators, then there are safeguards built into the Rome Statute which will protect the United States. The Court may return the issue to U.S. national courts because of the principle of complementarity. Additionally, the "gravity threshold"[74] may prevent the Court's jurisdiction[75]. Also, there is less clarity as to how the CIA's chain of command enforces the laws of war. If the CIA's chain of command does enforce the laws of armed conflict, then the CIA drone operators are combatants, entitled to the combatants' privilege but also liable to be targeted at all times. If the CIA's chain of command does not enforce the laws of war then the CIA drone operators are unprivileged belligerents. They could potentially face domestic criminal prosecution in places like Yemen or Pakistan, and they would remain targetable at all times as continuous combat functionaries rather than as combatants.[76]

While indeed Spain[77] and Italy[78]both tried to prosecute American soldiers for alleged crimes both abroad and inside their boundaries, both of them had to dismiss the cases, despite public outcry, due to the refusal of the US to offer cooperation in these matters.

These are just samples to how prosecution of drone operators could easily be dismantled in future cases against the drone program. This is further outlined in the recent air strike against Kunduz Hospital[79] where the lack of reaction from the US and its allies to the alleged war crime marks a low-point in how credible the judicial system against army personnel truly is.

As another point, even if a state was a member state of the International Criminal Court, they could still defer to prosecute the drone operators as part of the complementarity principle which allows a state to prosecute a person and allow the Court to observe the trial. Only if the Court is not satisfied with the trial or if the state is not able or willing to prosecute the person, only then could it have jurisdiction over said person.

As a conclusion, drone operations and by extent operators have come a long way but the current state of affairs is still unresponsive and not offering sufficient transparent decision making policies, issues that will only further damage the reputation of armed governmental forces once intelligent drones and autonomous weapons take over the battlefield. If these types of weapon platforms would become viable, then operators and commanders could

[74] Gravity Threshold: The Court investigates and prosecutes crimes of concern to the international community-genocide, crimes against humanity, and war crimes. These crimes "shock the conscience of humanity" and are of "worldwide concern."

[75] Lailey Rezai, U.S. Drone Policy and the International Criminal Court, American NGO Coalition for the International Criminal Court, 22nd July 2014.

[76] Michael W. Lewis, Drones and distinction: How IHL encouraged the rise of drones, Georgetown Journal of International Law, 4th May 2013, p. 1161-1162.

[77] Staff and Agencies, Spain forced to drop inquiry into 2003 killing of cameraman by US shell in Iraq, TheGuardian.com, 9th June 2015.

[78] John Tagliabue, 20 die in Italy as U.S. jet cuts ski lift cable, NYTimes.com, 4th February 1998.

[79] Medicine Sans Frontiers, 3rd October 2015, information accessible at: http://www.msf.org/article/afghanistan-msf-staff-killed-and-hospital-partially-destroyed-kunduz.

become even harder to prosecute as they could simply state that it had technical difficulties or that its parameters were designed that way, thus making the manufacturer or even the software programmer liable. As it currently stands, drone operators may have the legal background to play fair as a member of the governmental armed forces of a state, they however will fall more and more under the tempting shield that is the unregulated field of drone warfare and its lack of judiciary mechanisms.

References

- Interview with Peter W. Singer, Director of the 21st Century Defense Initiative at the Brookings Institution, Washington, United States of America, International Review of the Red Cross, Vol. 94, Number 886, Summer 2012.
- Dan Saxon, International Humanitarian Law and the Changing Technology of War, Martinus Nijhoff Publishers, Leiden, 2013.
- R. Johnson, US Civilians are now helping decide who to kill with military drones, Bussiness Insider, 30 December 2011.
- Murtaza Hussain, Former Drone Operators say they were "horrified" by cruelty of assassination program, theintercept.com, 19 November 2015.
- Helen Pow, Did we just kill a kid?, Dailymail.co.uk, 17 December 2012.
- A Shalal-Esa, Future drone pilots may fly four warplanes at once, Reuters, 24 December 2011.
- Ann Garrison, Predator drones to "stop genocide"?, globalresearch.ca, 2th May 2011.
- Presstv, Saudi Arabia ethnically cleansing Yemenis: Activist, 16th September 2015.
- Steven Aftergood, dod Releases doctrine on Mass Atrocity Response Operations, Fas.org, 6th June 2013.
- Spencer Ackerman, Pentagon: Drones can stop the next Darfur, Wired, 2st November 2011.
- Sherwood Ross, Obama Drone Campaign "verges on genocide", interview with professor Francis Boyle from University of Illinois, Globalresearch.ca, 16th February 2014.
- Daniel Sullivan, 5 successes in genocide prevention in 2013, Endgenocide.org, 30th December 2013.
- Adrian Gregorich, Drones for Social Good, The Sentinel Project.org, 22th October 2013.
- Elizabeth Ruiz, Daniel Greenfield: You can't stop genocide without killing civilians, David Horowitz Freedom Center, 13th October 2014.
- Roger Armbrust, Ferencz Condemns Drone Attacks: "A crime against humanity", Clydefitchreport.com, 21th June 2012.
- Candice Bernd, Complaint at World Court Alleges NATO Members Complicit in War Crimes, Truth-out.org, 21th February 2014.
- Report on Preliminary Examination Activities 2013.
- Candice Bernd, Complaint at World Court Alleges NATO Members Complicit in War Crimes, Truth-out.org, 21th February 2014.
- Christof Heyns, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Resolution A/HRC/20/22, 10th April 2012.
- Jack Serle, UN expert labels CIA tactic exposed by Bureau "a war crime,,, thebureauofinvestigativejournalism.com, 21th of June 2012.
- Tina Nguyen, Fox's Judge Napolitano: War Crime for Obama Drone Strikes to have killed Americans, mediaite.com, 24th April 2015.
- Robert Chesney, Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force, Yearbook of International and Humanitarian Law Vol. 13, 2010, University of Texas Schoof of Law, published in 2011.

- William Banks, Counterinsurgency law: New Directions in Asymetric Warfare, Oxford University Press, 2013.
- Sylvian Vite, International Review of the Red Cross, Geneva, Switzerland, 2009;
- Mark Mazzetti, How a US Citizen came to be in Americas cross hairs, nytimes.com, 9th March 2013.
- Nathan Hodge, Drone pilots could be tried for war crimes, law prof says, Wired.com, 28th April 2010.
- G.A. Res. 3314 (XXIX), Supp. No. 31, U.N. Doc A/9631 (Dec. 14, 1974).
- Michael J. Glennon, The Blank-Prose Crime of Aggression, 35 Yale Journal of International law Vol. 71, 2010.
- Andrew C. Orr, Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan under International Law, Cornell International Law Journal Vol. 729, 2011.
- Amnesty International, Will I be next? US drone strikes in Pakistan, 22st October 2013.
- ICRC Customary Law Study Vol. I, Jean-Marie Henckaerts and Louise Doswald-Beck, Cambridge, 2009.
- University Centre for International Humanitarian Law Geneva, report expert meeting "Targeting military objectives", 12th May 2005.
- Aroop Mukharji, Drone operators: Soldiers or civilians?, TheAtlantic.com, 28th March 2013.
- The Power to Kill or Capture Enemy Combatants, The European Journal of International Law Vol. 24 no. 3, 2013.
- Noah Shachtman, Is this the secret U.S. drone base in Saudi Arabia?, Wired.com, 2nd July 2013.
- Telesur, Secret U.S. drone base rapidly expanding in Djibouti, Globalresearch.ca, 21th October 2015.
- Nick Turse, America's Secret Empire of Drone Bases, TheWorldCantWait.com, 16th October 2011.
- AssociatedPress, U.S. Evacuates key drone base as storm brews in Yemen, 22th March 2015.
- Michael N. Schmitt, Targeting and International Humanitarian Law in Afghanistan, International Law Studies – Vol. 85, US Naval War College, Newport, Rhode Island.
- Umesh Palwankar, Applicability of international humanitarian law to United Nations peace-keeping forces, Review of the ICRC, 30th June 1993.
- Siobhan O'Grady, How a U.N. drone was promptly forgotten, ForeignPolicy.com, 9th October 2015.
- AFP, UN surveillance drone crashes in eastern DR Congo, 20th October 2014.
- Gregory S. McNeal, Woman Faces A Year In Jail For Beating Drone Operator, Assault Caught On Video, Forbes.com, 10th June 2014.
- David Cortright, Drones and the Future of Armed Conflict: Ethical, Legal and Strategic Implications, the University of Chicago Press, 2015.
- Pratap Chatterjee, Why are drone pilots quitting in huge numbers? , Inthesetimes.com, 10th March 2015.
- Steven L. Schooner, Daniel S. Greenspahn, Too Dependent on Contractors? Minimum Standards for Responsible Governance, Journal of Contract Management 9, Summer 2008.
- Lt Col Bruce Black, "The Future of Unmanned Air Power," The International Institute for Strategic Studies Conference, 20th April 2011.
- Abigail Fielding-Smith, Crofton Black, Reaping the rewards: How private sector is cashing in on Pentagon's 'insatiable demand' for drone war intelligence, TheBureauofInvestigativeJournalism.com, 30th July 2015.
- Adam Carlson, CIA to outsource Drone Operations to India, NationalReport.net, 18th October 2015.
- Christopher Kinsey, Private Contractors and the Reconstruction of Iraq, Contemporary Security Studies, Routledge Publishing, 2009.

- Steve Fainaru, Blackwater Employees Were Involved in Two Shooting Incidents in Past Week, Washington Post Foreign, 27th May 2007.
- Colin Freeman, Nigeria hired South African mercenaries to wage secret war on Africa's deadliest jihadist group, Business Insider, 15th May 2015.
- Kelsey D. Atherton, Russia's new drone rules look a lot like America's, Popsci.com, 4th January 2016.
- Bill Gertz, State official: Russian Nuclear-Armed drone sub threatens US, FreeBeacon.com, 2st December 2015.
- ICJ Legality of the threat or use of nuclear weapons Advisory Opinion of 8 July 1996.
- RussiaToday, Obama to hand over some CIA drone operations to the Pentagon, 21th May 2013.
- Jim Acosta, Obama to make new push to shift control of drones from CIA to Pentagon, CNN, 27th April 2015.
- Marcus Weissberger, Should one US service rule the military's drones?, Defenceseone.com, 24th August 2015.
- Micah Zenko, Transferring CIA Drone Strikes to the Pentagon Policy Innovation Memorandum No. 31, Council of Foreign Relations, April 2013.
- Derek Jinks, Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies, Asser Press, 2014.
- Cody M. Poplin, D.C. District judge sides with CIA in Drone FOIA Case, Lawfareblog.org, 19th June 2015.
- United States District Court for the District of Columbia, ACLU vs. CIA, Civil Action No. 10-436 (RMC).
- Barrack Obama U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, Speech, May 2013.
- OHCHR.org, UN Special Rapporteur urges more clarity on Obama's counter-terrorism policies, 7th June 2013.
- Lailey Rezai, U.S. Drone Policy and the International Criminal Court, American NGO Coalition for the International Criminal Court, 22nd July 2014.
- Michael W. Lewis, Drones and distinction: How IHL encouraged the rise of drones, Georgetown Journal of International Law, 4th May 2013.
- Staff and Agencies, Spain forced to drop inquiry into 2003 killing of cameraman by US shell in Iraq, TheGuardian.com, 9th June 2015.
- John Tagliabue, 20 die in Italy as U.S. jet cuts ski lift cable, NYTimes.com, 4th February 1998.

TRANSITIONAL JUSTICE IN ROMANIA. REPARATIONS FOR THE VICTIMS OF THE COMMUNIST REGIME AND LEGAL ORDER

Bianca Elena RADU*

Abstract

This study aims to analyse, through a transitional justice approach, the reparations granted by the Romanian state to the victims of the communist regime. The paper will examine the role of reparations in transitional justice programs, the main sources of international law and legal doctrine regarding reparations, as well as the evolution of the Romanian legislation on compensations for the abuses caused by the communist dictatorship. Eventually, we will try to assess the significance of reparations for the legal order of Romania.

Keywords: *transitional justice, reparations, Romania, communist regime, legal order.*

1. Introduction

The study uses a transitional justice approach to analyse the reparations granted by the Romanian state to those individuals who suffered massive human rights violations during the communist regime. Various academic domains such as political science, sociology, history or law have dedicated scholarly research to this issue. However, our endeavor is more consistent with a legal approach at the crossroads between international and private law, being also informed by the basic terms of the general theory of law.

An analysis of the legal steps made by the Romanian state to redress human rights violations carried out by the communist regime is increasingly relevant. In February, 2016, the The High Court of Cassation and Justice of Romania issued a definitive sentence against Alexandru Vișinescu, the first Romanian person convicted after 1989 of crimes against humanity for his abusive acts as a prison commander. During the same year, eight European Ministers of Justice signed a common declaration for the establishment of an international tribunal for the investigation of crimes committed by communist regimes. In March, 2016, the Bucharest Court of Appeal issued an undefinitive sentence against Ion Ficior, convicted for crimes against humanity allegedly committed as a commander of the Periprava labor colony. Even if the aims of this paper are not related to the criminal dimension of transitional justice, one cannot minimize the impact of these decisions for the academic debate regarding the tools used by the Romanian state to manage its past social, political and legal traumas. In this context, we consider that it is highly important to underline the peculiarities surrounding the legal treatment of the communist regime's victims and not only of its' perpetrators.

The first objective of this paper is to examine how the main sources of international law and legal doctrine relate to

* PhD Candidate, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: biancelise@yahoo.com).

the issue of reparations dedicated to victims of the communist regime. Secondly, we will examine the evolution of the legal documents which regulated the Romanian regime of reparations. Such an endeavor also implies an analysis of the Constitutional Court's rulings regarding the compensations allocated to victims. In the end, we will try to highlight the role and significance of such reparations in relation to Romania's post-communist legal order.

2. Theoretical considerations regarding transitional justice and reparations

Most democratic states which experienced recent historical traumas, defined by massive human rights violations, have paid attention to programs, policies and laws intended to compensate the harms endured by some members of the society. Such official efforts usually focus on two types of actions: the prosecution of human rights violators and the reparations awarded to victims. In some cases, the prosecutorial and reparative dimensions of justice are complemented by an officialised narrative of the past, usually produced by "truth committees" whose conclusions are appropriated by state officials through political means.

These types of measures are grouped by researchers under the general concept of transitional justice, a term firstly coined by Neil Kritz in 1995.[1] The concept itself is informed by the idea that transition from conflict to social peace, or from state repression to democracy as in the case of Eastern Europe, requires a peculiar approach to justice.

In 1993, Claus Offe[2] conceived several options available for delivering what came to be called transitional justice. His basic idea was that the collapse of a repressive regime leaves us with the legacy of perpetrators and victims, but also makes possible "the means of civil law (regulating allocation of property rights, income and status) as well as the means of criminal law (dispensing negative sanctions, such as fines and imprisonment".[3] Starting from this distinctions, the options envisaged by Claus Offe were disqualification, retribution and restitution.

Disqualification, which is not of a strictly criminal nature, refers to acts meant to deprive natural or legal persons of possessions and status wrongfully obtained. It may take the form of lustration, income reduction, restriction of access to certain public sector positions. Retribution, however, refers to criminal sanctions dispensed against individual perpetrators for criminal acts, based on court trials and criminal legislation. Restitution implies establishing who may qualify as victim and transfer of material resources to them.

According to Pablo de Greiff[4], criminal justice, usually unsuccessful in terms of results, represents a struggle against perpetrators and not a satisfying effort on behalf of the victims. From his point of view, "for some victims, reparations are the most tangible manifestation of the state to remedy the harms they have suffered"[5].

[1] Neil Kritz, *Transitional Justice, volume I* (Washington: United States Institute of Peace, 1995).

[2] Claus Offe, „Disqualification, Retribution, Restitution: Dilemmas of Justice in Post-Communist Transitions", *Journal of Political Philosophy* 1 (March, 1993): 19-21.

[3] Offe, „Disqualification", 22.

[4] Pablo de Greiff, introduction to *The Handbook of Reparations*, edited by Pablo de Greiff (New York: Oxford University Press, 2006), 2.

[5] Greiff, introduction, 2.

3. Reparations in the international law and legal doctrine

Since the establishment of an international human rights regime after the Second World War, it was considered that massive violations of human rights were no longer just a matter of internal jurisdiction. This view also manifests in relation to the rights of victims to remedy and reparations. Hence, the Universal Declaration of Human Rights stipulates at article 8 that "Everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law".[6] Article 2, align 3 of the International Covenant on Civil and Political Rights further details the obligations of states in this matter:

"Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted."[7]

Article 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment also stipulates significant obligations for the state to offer remedy to those who were victims of torture:

"1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."[8]

Other international instruments with relevant provisions for the issue of reparations offered to victims of massive human rights violations include the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the Hague Convention regarding the Laws and Customs of War on Land, the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, the Rome Statute of the International Criminal Court. The right to an effective remedy is also guaranteed by the European Convention on Human Rights, which stipulates at article 13 that:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the

[6] „Universal Declaration of Human Rights", United Nations General Assembly Resolution A/RES/3/21 A 10/December 1948, accessed March, 2016, http://www.un.org/en/universal-declaration-human-rights/.

[7] "International Covenant on Civil and Political Rights", United Nations General Assembly Resolution A/RES/21/2200/16 December 1966, accessed March 2016, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

[8] "Convention against Torture and other Cruel, Inhuman or Degrading Treatment", United Nations General Assembly Resolution A/RES/39/46/10 December 1984, accessed March, 2016, http://www.un.org/documents/ga/res/39/a39r046.htm

violation has been committed by persons acting in an official capacity."[9]

The Parliamentary Assemble of the Council of Europe issued in 1996 Resolution no. 1096 regarding the means to handle the heritage of former communist totalitarian regimes. With respect to reparations, the Assembly recommends that:

"[…] the prosecution of individual crimes goes hand-in-hand with the rehabilitation of people convicted of "crimes" which in a civilised society do not constitute criminal acts, and of those who were unjustly sentenced. Material compensation should also be awarded to these victims of totalitarian justice, and should not be (much) lower than the compensation accorded to those unjustly sentenced for crimes under the standard penal code in force."[10]

Even if international law was mainly concerned with states as the subjects of wrongs committed against other states, the human rights regime and the obligations of states in this field trigger legal consequences not only in relation to other states, but also in relation with individuals and groups who are under the jurisdiction of a state. The United Nations Human Rights Committee issued in 2004 a comment regarding the legal obligations imposed on states by the International Covenant on Civil and Political Rights which is illustrative for our issue. Thereby, the Committee considers that the obligation to provide effective remedies to individuals whose rights stipulated by the Covenant were violated is not discharged if reparations were not offered to those individuals.[11] Hence, we can infer that the rights of victims who suffered massive human rights violations and the obligation of states that are responsible for these violations became equally important.

Resolution 60/147/2006[12] of the United Nations General Assembly brought forward support to the centrality of victims in relation to the states' obligations in accordance to domestic and international law. According to the resolution, reparations include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Restitution includes measures intended to restore the victims to the original situation before the gross violations of international human rights law occurred, such as restoration of liberty, enjoyment of human rights, restoration of employment, return of property etc. Compensation envisages economic measures provided for physical or mental harm, lost opportunities, material damages and moral damages caused by mass violations of human rights. Rehabilitation refers to medical and psychological care,

[9] "European Convention on Human Rights", Council of Europe, accessed March, 2016, http://www.echr.coe.int/Documents/ Convention_ENG.pdf.

[10] "Measures to dismantle the heritage of former communist totalitarian systems", Parliamentary Assembly of the Council of Europe, Resolution 1096/1996, accessed March, 2016 http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507&lang=en

[11] "General Comment No. 31 (80) - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", United Nations Human Rights Committee, CCPR/C/21/Rev.1/Add. 1326 May 2004, accessed March, 2016
http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3D%3D.

[12] "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", United Nations General Assembly, Resolution A/RES/60/147/21 March 2006, accessed March, 2016, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/ PDF/N0549642.pdf?OpenElement

legal and social services, while satisfaction moves the focus from victims to perpetrators through efforts to prosecute them and to establish the truth at political, legal, scientific and cultural levels. Finally, guarantees of non-repetition include institutional reforms and measures meant to consolidate democracy and rule of law mechanisms which could minimize the chances for other mass violations of human rights to occur again.

According to Office of the United Nations High Commissioner for Human Rights[13], the victims' right to reparation is becoming firmly established as the International Court of Justice continues to issue decisions on reparations. One example invoked refers to the advisory opinion regarding the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", in which the Court found that Israel has the obligation to make reparations for the damage caused to "all natural or legal persons having suffered any form of material damage as a result of the wall's construction".

4. Reparations for victims of communist oppression in Romania

Right after the Romanian Revolution, the Provisional Council of National Union adopted Decree-law 118/1990 on Granting some Rights to Persons Politically Persecuted by the Communist Dictatorship[14]. According to article 1, the law implied that those who could qualify as victims must have been deprived of freedom based on a judicial decision, warrant of preventive arrest, administrative measures, internment in psychiatric facilities or must have been subjected to mandatory residence or resettled to another locality. Ascertainment of these situations fell under the responsibility of a county committee which could decide the allocation of a monthly 200 lei compensation for each year of detention, interment, mandatory residence or resettlement. Besides the pecuniary compensation, victims were also entitled to receive a residence from the state locative fund and free medical services and medication.

Individuals who were convicted for crimes against humanity or who were proven to have conducted fascist activity within an organization or movement could not enjoy the reparations granted through this law. This is an important distinction which was maintained, as we shall see, in other laws and in the judiciary practice as well.

Emergency Ordinance no. 214/1999, repeatedly amended between 2000 and 2006[15], also provided reparations to the victims of the communist regime. Based on this legal document, those persons who were convicted for crimes committed for political reasons or subjected to administrative abusive measure, as well as individuals who participated in activities of armed opposition or forced overthrow of the communist regime between 1945 and 1989 are entitled to be granted the status of "fighter in the anti-communist resistance". According to article 2 of this law, the main acts which could qualify as crimes committed for political

[13] Office of the United Nations High Commissioner for Human Rights, *Rule-of-law tools for post-conflict state*s (New York and Geneva: United Nations, 2008), 8.

[14] "Decret-lege nr. 118 din 30 Martie 1990 privind acordarea unor drepturi persoanelor persecutate din motive politice de dictatura instaurată cu începere de la 6 martie 1945, precum şi celor deportate în străinătate ori constituite în prizonieri", Consiliul Provizoriu de Uniune Naţională, republished in the Official Gazette no. 631/23 September 2009.

[15] "Ordonanţa de urgenţă nr. 214/1999 privind acordarea calităţii de luptător în rezistenţa anticomunistă persoanelor condamnate pentru infracţiuni săvârşite din motive politice, precum şi persoanelor împotriva cărora au fost dispuse, din motive politice, măsuri administrative abusive", published in the Official Gazette, Part I no. 650 on 30/12/1999.

reasons are protests against the communist dictatorship and its abuses, the support for pluralist and democratic principles, propaganda for the overthrow of the communist social order, armed opposition against the communist regime, respect for human rights and fundamental freedoms. The status of "fighter within the anti-communist resistance" is to be granted by a committee formed by representatives of the Ministry of Justice and the Ministry of Administration and Interior, as well as representatives of the Association of Former Political Prisoners in Romania. The holders of the "fighter against the anti-communist resistance" status benefit from the restitution of confiscated goods and the rights provisioned by Decree-law 118/1990. Those persons who were convicted for crimes against humanity or for carrying out fascist activities within organizations or movements cannot benefit from the provisions of this law.

In 2009, the Romanian Parliament adopted Law 221 regarding political convictions and assimilated administrative measure issued between March 6, 1945 and December 22, 1989.[16] According to article 1, political convictions were those issued by courts of law during the mentioned period for actions which aimed at opposing the totalitarian regime instated on March 6, 1945. The law also listed criminal legal provisions based on which political convictions might have been pronounced. These included certain articles of the Criminal Code, laws regarding national security, the regime of fire arms and economic offenses. According to article 4 of this law, the political nature of convictions shall be established by courts of law based on the convicted person's request, or, after its death, on the request of any interested person or of the Prosecutor's Offices attached to the Tribunals. Furthermore, the persons who suffered such political convictions or their first and second grade descendants were entitled to compensation for moral damage or for the goods confiscated based on political convictions.

As in the case of the previously discussed law, article 7 mentions that the provisions of law 221/2009 are not applicable to persons convicted for crimes against humanity or for carrying out racist, xenophobic or anti-Semitic propaganda. This specification is important as it allows us to ascertain that the political nature of a conviction is determined also by the reason of a conviction, and not only by the conviction's legal grounds. Decision no. 1709/2012 issued by the Ist Civil Section of the High Court of Cassation and Justice is relevant for such a case. It relates to a person who, having been convicted by the Bucharest Military Tribunal in 1960 for conspiring against social order based on article 209, pt. 1 of the Criminal Code, requested the application of law 221/2009. Since the military court found that he carried out legionary activities and propaganda, the High Court of Cassation and Justice, considering the fascist and anti-Semitic nature of the Legionary movement, established that the conviction of that person does not fall under the scope of Law 221/2009. As a consequence, the Court ruled that legionary activity cannot justify the right to compensation provisioned by the law and that he is not entitled to any reparations.

[16] "Legea nr. 221/2009 privind condamnările cu caracter politic și măsurile administrative asimilate acestora, pronunțate în perioada 6 martie 1945 - 22 decembrie 1989", published in the Official Gazette, Part I no. 396 on 11/06/1999.

5. The Constitutional Court's position regarding reparations

Among the beneficiaries of law 221/2009 was Ion Diaconescu, politician and former political prisoner, who was awarded 500,000 Euros by the Bucharest Tribunal in June 2010. Following this groundbreaking decision, the Romanian Government issued Emergency Ordinance 62/2010[17] to amend law 221/2009 and established a threshold of 10,000 Euros for the compensation of the convicted persons, 5000 Euros for the husband / wife and first grade descendants and 2500 Euros for second grade descendants.

One month later, the Romanian Ombudsman challenged Ordinance 62/2010 at the Constitutional Court, arguing that it violates the provisions regarding equality of rights stipulated by article 16 of the Constitution. Basically, the Ombudsman pointed out that the ordinance establishes a differential legal treatment between persons who already held a final decision based on Law 221/2009 and persons whose requests had not been settled at that moment. The Constitutional Court acceded to this perspective and ruled that the provisions of Ordinance 62/2010 which established thresholds for compensations are contrary to the Romanian fundamental law.[18] Furthermore, the Court considered that the application of the ordinance to situations in which there is an undefinitive judgement in the first instance also violates the principle of non-retroactivity, stipulated by article 15 (2) of the Constitution.

However, on 21 October 2010 The Constitutional Court settles an objection of nonconstitutionality raised by the Ministry of Public Finances to the Tribunal of Constanța in several files regarding the application of Law 221/2009.[19] The Court finds that here are two legal norms which provision the allocation of money to persons persecuted for political reasons by the communist dictatorship, namely Decree-law 118/1990 and Law 221/2009. As Decree-law 118/1990 established the conditions and the values of the monthly compensation, a second regulation with the same objective infringes on the supreme value of justice proclaimed by article 1 (3) of the Constitution. Furthermore, the parallel regulations regarding these types of compensations also infringe on article 1 (5) of the Constitution regarding the mandatory observance of laws. As a consequence, the Court declared as unconstitutional article 5 (1) (a) thesis one, according to which the state is obliged to allocate compensation for moral damages caused by political convictions.

Furthermore, the ruling of the Constitutional Court is also relevant for the nature that reparations have in Romanian legislation. According to its decision, the objective of compensations for moral damages suffered by the victims of the communist regime is not the restoration to a situation before the gross violations of human rights law occurred. The aim is rather to produce a moral satisfaction through the acknowledgement and condemnation of

[17] "Ordonanța de urgență nr. 62/2010 pentru modificarea și completarea Legii nr. 221/2009 privind condamnările cu caracter politic și măsurile administrative asimilate acestora, pronunțate în perioada 6 martie 1945-22 decembrie 1989, și pentru suspendarea aplicării unor dispoziții din titlul VII al Legii nr. 247/2005 privind reforma în domeniile proprietății și justiției, precum și unele măsuri adiacente", published in the Official Gazette, Part I no. 446 on 01/07/2010.

[18] The Constitutional Court's Decision no.1354/2010, published in the Official Gazette, Part I, no.761 on 15/11/2010.

[19] The Constitutional Court's Decision no.1358/2010, published in the Official Gazette, Part I, no.761 on 15/11/2010.

measures which violated human rights. Furthermore, the Court considered that the obligation to allocate compensation to persons persecuted by the communist regime has only a moral nature. This view is motivated by the Constitutional Court through several rulings of the European Court of Human Rights[20] which found that the provisions of the European Convention on Human Rights do not impose to member states specific obligations to repair injustices or damages caused by previous regimes.

6. Conclusions

Even if Hans Kelsen considers state to be a hermetic conglomerate superposed to the legal system, one cannot omit the fact that the state, constitutions or institutions have in the same time a historical, political, legal and social nature. As Nicolae Popa mentions, "The legal reality is an inalienable dimension of the social reality conditioned, by a historical context. Its existence cannot be separate by other parts of the society, bearing their influence and exerting its' own influence."[21]

One has to take into consideration that institutionalized coercion represents the tool through which legal order, grounded in a system of peculiar and depersonalized instruments that we call norms, is ensured. The process of establishing and applying these norms equates with what is understood through legal order, defined by a system of legal rules which governs society at a certain moment.[22] Furthermore, as Nicolae Popa legitimately highlights, the rules established through norms must find a minimal framework of legitimacy so that they may constitute a condition for the existence of a community. "Law is a principle of social cohesion which gives coherence and definition to society as, before being a normative reality, law is a state of mind"[23].

One can notice a certain relation of determination between the lawful order and the legal order. The lawful order, which implies the activation of mechanisms meant to ensure order and coercion, can be obtained based on legal order. However, one should not forget that individuals are constantly guided by laws in their socialization processes and internalize legal norms as rules of conduct. This is the reason for which individuals participate in the consolidation of a lawful order, as it represents "the persons' awareness, either individually, either collectively, regarding the prescriptive content of rulings issued by the authors of legal norms." [24]

On the other hand, taking into consideration that the Kelsenian legal order does not finds it merits in the political realm, one could deduce that no matter the type of government, any state is grounded in a legal order. However, historical experience shows us that law cannot be examined without resorting to the social and political context. The autonomy of law does not mean its isolation in relation to political and social realms. Reflection on the massive human rights violations which occurred in 20th Century Europe favored criticism against legal positivism, an approach condensed by John Gardner in the following words: "In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits."[25] Critiques of this

[20] "Ernewein and Others v. Germany", ECHR decision on 12 May 2009 regarding application no. 14849/08; "Klaus and Yuri Kiladze v Georgia", ECHR decision on 2 February 2010 regarding application no. 7975/06.

[21] Nicolae Popa, *Teoria generală a dreptului* (Bucharest: C.H. Beck Publishing House, 2014), 42.

[22] Raluca Miga-Beșteliu, *Drept internațional. Introducere în dreptul internațional public*, (Bucharest: All Beck Publishing House, 2002), 2.

[23] Popa, *Teoria generală,* 30, 41.

[24] Emil Gheorghe Moroianu, „Conceptul de ordine juridică", *Studii de Drept Românesc*, 1-2 (2008), 33-42.

[25] John Gardner, "Legal Positivism: 5 ½ Myths", *American Journal of Jurisprudence*, 1 (2001): 199.

approach argue that totalitarian and repressive regimes operated under formal rigor and their crimes enjoyed solid legal justification.

Post-communist Romania implemented various measures to redress the abuses of the previous regime. Even it is not our goal to evaluate the merits and efficiency of these policies, we may observe that at a societal level, the legal reparations provided by the Romanian state correspond to the general aim of transitional justice.

The allocation of reparations to Romanian victims of the communist regime was influenced by several law configuration factors, from which the socio-politic framework distinguishes itself. Hence, the transition to a new governing system, post-dictatorial political evolution, the interests of the ruling elite and the influence of the international community had a major role in redressing massive violations of human rights by the communist regime.

Many scholars observed that a transitional justice approach may result in a „juridicization of the past". This idea points out that reparations, besides bringing comfort to victims, proves a break with the previous legal and lawful order. The allocation of reparations to victims of the communist regime marked the emergence of a new legal order, grounded in democratic values.

References

- De Greiff, Pablo introduction to *The Handbook of Reparations*, edited by Pablo de Greiff (New York: Oxford University Press, 2006).
- Gardner, John, "Legal Positivism: 5 ½ Myths", *American Journal of Jurisprudence*, 1 (2001): 199-227.
- Kritz, Neil, *Transitional Justice, volume I* (Washington: United States Institute of Peace, 1995).
- Miga-Beșteliu, Raluca, *Drept internațional. Introducere în dreptul internațional public*, (Bucharest: All Beck Publishing House, 2002).
- Moroianu, Emil Gheorghe, „Conceptul de ordine juridică", *Studii de Drept Românesc*, 1-2 (2008), 33-42.
- Offe, Claus „Disqualification, Retribution, Restitution: Dilemmas of Justice in Post-Communist Transitions", *Journal of Political Philosophy* 1 (March, 1993): 17-44.
- Popa, Nicolae, *Teoria generală a dreptului* (Bucharest: All Beck Publishing House, 2002).
- „Universal Declaration of Human Rights", United Nations General Assembly Resolution A/RES/3/21 A 10/December 1948, accessed March, 2016, http://www.un.org/en/universal-declaration-human-rights/.
- "International Covenant on Civil and Political Rights", United Nations General Assembly Resolution A/RES/21/2200/16 December 1966, accessed March 2016, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.
- "Convention against Torture and other Cruel, Inhuman or Degrading Treatment", United Nations General Assembly Resolution A/RES/39/46/10 December 1984, accessed March, 2016, http://www.un.org/documents/ga/res/39/a39r046.htm
- "European Convention on Human Rights", Council of Europe, accessed March, 2016, http://www.echr.coe.int/Documents/ Convention_ENG.pdf.
- "Measures to dismantle the heritage of former communist totalitarian systems", Parliamentary Assembly of the Council of Europe, Resolution 1096/1996, accessed March, 2016 http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507&lang=en

- "General Comment No. 31 (80) - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", United Nations Human Rights Committee, CCPR/C/21/Rev.1/Add. 1326 May 2004, accessed March, 2016 http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3D%3D.
- "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", United Nations General Assembly, Resolution A/RES/60/147/21 March 2006, accessed March, 2016, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/ PDF/N0549642.pdf?OpenElement
- Office of the United Nations High Commissioner for Human Rights, *Rule-of-law tools for post-conflict state*s (New York and Geneva: United Nations, 2008), 8.
- "Decret-lege nr. 118 din 30 Martie 1990 privind acordarea unor drepturi persoanelor persecutate din motive politice de dictatura instaurată cu începere de la 6 martie 1945, precum şi celor deportate în străinătate ori constituite în prizonieri", Consiliul Provizoriu de Uniune Națională, republished in the Official Gazette no. 631/23 September 2009.
- "Ordonanţa de urgenţă nr. 214/1999 privind acordarea calităţii de luptător în rezistenţa anticomunistă persoanelor condamnate pentru infracţiuni săvârşite din motive politice, precum şi persoanelor împotriva cărora au fost dispuse, din motive politice, măsuri administrative abusive", published in the Official Gazette, Part I no. 650 on 30/12/1999.
- "Legea nr. 221/2009 privind condamnările cu caracter politic şi măsurile administrative asimilate acestora, pronunţate în perioada 6 martie 1945 - 22 decembrie 1989", published in the Official Gazette, Part I no. 396 on 11/06/1999.
- "Ordonanţa de urgenţă nr. 62/2010 pentru modificarea şi completarea Legii nr. 221/2009 privind condamnările cu caracter politic şi măsurile administrative asimilate acestora, pronunţate în perioada 6 martie 1945-22 decembrie 1989, şi pentru suspendarea aplicării unor dispoziţii din titlul VII al Legii nr. 247/2005 privind reforma în domeniile proprietăţii şi justiţiei, precum şi unele măsuri adiacente", published in the Official Gazette, Part I no. 446 on 01/07/2010.
- Constitutional Court's Decision no.1354/2010, published in the Official Gazette, Part I, no.761 on 15/11/2010.
- Constitutional Court's Decision no.1358/2010, published in the Official Gazette, Part I, no.761 on 15/11/2010.
- "Ernewein and Others v. Germany", ECHR decision on 12 May 2009 regarding application no. 14849/08; "Klaus and Yuri Kiladze v Georgia", ECHR decision on 2 February 2010 regarding application no. 7975/06.

UNDERCOVER PARTNER

Marian ALEXANDRU*

Abstract

The undercover partner takes part in the process of providing the investigating bodies with information. This institution carries out activities similar to undercover investigator. These both represent a proactive investigating instrument used by criminal authorities to obtain better results concerning the fight against criminality. Under the cover another identity, they carefully search for crimes or favorable circumstances for commitment of others new.

Keywords: *partner, investigator, investigation, prosecutor, judge.*

1. Introduction

The institution of undercover partners was introduced in the new Criminal Procedure Code by Law no 281/2003, with the purpose to fight against criminality

Previously, several acts have been adopted with provisions on using undercover investigators (for certain cases, we use "undercover policeman"), such as Law no 143/2000 on fight against drugs trafficking and illegal drug use, which by its art. 21 stipulates that: "Prosecutor can authorize the use of undercover investigators to discover facts, to identify authors and o obtain evidence in cases where there are well grounded reasons to consider that a crime related to drugs trafficking or illegal drugs use has been committed."

Law no 218/2002 on organizing and functioning of Romanian Police sets in its art. 33 that "in order to prevent and fight corruption, trans-border criminality, human trafficking, terrorism, drug trafficking, money laundry, IT crimes and organized crime, on the demand of the Romanian General Police Inspectorate, having the approval of the Prosecutor's Office of the Court of Appeal, the Romanian Police can make use of undercover informers in order to obtain information for a trial. The Prosecutor's authorization shall be issued by a Decree, for a maximum 60 day time which can be extended, provided there are well grounded reasons; each time, the extension cannot overpass 60 days. All these authorizations shall be confidential and not be made public".

Law no 39/2003 on prevention and fight against organized crime stipulates in its art 17, that "in case there are well grounded reasons that a crime has been committed by one or several members of an organized group, that cannot be proved or whose authors cannot be identified by other means, undercover policemen can be used to gather information and identify facts and authors". These policemen are employees of the Ministry of Home Affairs.

According to art 22 of Law n 678/2001 on fight against traffic with human beings, undercover investigator can be use to gather

* Ph.D. Lecturer, Faculty of Law and Administrative Sciences „OVIDIUS" University of Constanţa, Romania, (e-mail: marian.alexandru1961@yahoo.ro).

information necessary for the beginning of the criminal prosecution.

2. Undercover partner

According to art 138 paragraph 10 of the Criminal Procedure Code, undercover investigators are persons using false identity in order to obtain information and data about a committed crime. The provisions on undercover investigators provided both by the Criminal Procedure Code and by special laws, allow us to have different approaches of this institution.

According to art 141 paragraph 1, letter a of Criminal Procedure Code, undercover investigators are used when "there is reasoned suspicion about the preparation and about a committed crime against national security provided by the Criminal code and other special laws, such as crimes involving drug trafficking, arms trafficking, human being trafficking, terrorism or assimilated to them, such as financing terrorism, money laundry, counterfeiting money or other values, electronic payment instruments, blackmail, deprivation of liberty, tax evasion, in case of crimes of corruption, crimes assimilated to those of corruption, crimes against financial interest of European Union, crimes that are committed by means of IT or electronic communication devices or in case of other crimes provided by laws with punishment by prison of 7 years or more or if there is a reasoned suspicion about a person being involved in criminal activities related to the above mentioned crimes".

Using false identity, pursuant to law, undercover investigator can gather information on the crime, on the persons suspected of committing or having committed a crime. Their actions cannot be considered as constraints or encouragement to committing or continuing to commit crimes. Undercover investigators are special policemen assigned to do this with clear purpose of gathering information.

We considered necessary to make mention all these legal acts which regulate the institution of undercover investigator as the undercover partner we analyze in this work does the same actions as the undercover investigator. The law doesn't define the partner but we can adopt the definition of the collaborator of justice, as in the Recommendation no 9/2005 of the Committee of Ministers of the member states of EU on protection of witnesses and collaborators of justice[1] .

Thus, a collaborator of justice is the person who faces criminal charges or has been convicted of taking part in a criminal association or other criminal organization of any kind or in offences of organized crime, but who agree to cooperate with but who agree to cooperate with criminal justice authorities, particularly by testifying about a criminal association or organization, or about any offence related to it or other serious crimes.

The undercover partner is the person assigned to obtain information just like the undercover investigator with the purpose of gathering information about crimes and their authors.

As the specialized literature doesn't offer a definition for undercover partner, many times it was described as an undercover investigator but to use it this "to cover also the activity carried out by a

[1] Recommendation no 9/2005 of the Committee of Ministers on witness protection and collaborators of justice, adopted at the 924th meeting of the Ministers Deputies, published in Romanian on https://wcd.coe.int/ViewDoc.jsp?id=1597817&Site=COE

person who is not employee of the police, is illegal"[2].

Others[3] think that undercover partner is the person who "within the limits of permission given by the Prosecutor carries out certain actions to discover crimes, to identify authors and to obtain useful data to establish the existence of a crime and start the process of holding authors criminally liable".

Law no 143/2000[4] on prevention and fight of illegal drugs trafficking and use, with its article 22, stipulates the employment of partners, meaning specially trained policemen acting as undercover investigators, and their collaborators who can obtain drugs, essential chemical substances, pursuant the previous authorization of Prosecutor, in order to discover criminal activities and identify criminals.

Thus, a collaborator of the undercover investigator can be a police informer or a person investigated in another case, who decided to cooperate with judicial bodies in order to discover crimes and identify their authors.

A more extended definition would say that any person, no matter if he is member of not of a police or informative structure, who helps during the actions of discovery, research, investigation and bring to justice those who committed the crime. Thus, collaborators can be both informers and persons accused for having committed crimes, but also persons who testify about crimes which are not related with them in any way.

Provisions of art 148 paragraph 5 of Law no 143/2000 state that undercover investigators obtain information, based on the Prosecutor's authorization who is the beneficiary of this information. The prosecutor surveillance and carries out the criminal prosecution.

For this, undercover investigators draw up minutes.

The fact that the undercover partner is allowed to get drugs, chemical substances and precursors, is possible due to the Prosecutor's permission, which is also mentioned in a minutes, the only document considered evidence.

The partner can be heard but only as witness with protected identity, as specified by law at art 125-130 of Criminal Procedure Code.

The importance of the activity done by the undercover investigator and partner led to the necessity of United Nations Convention against Transnational Organized Crime: each state shall take appropriate measures in order to encourage persons who participate or who have participated in organized criminal groups to supply information useful to competent authorities for investigative and evidentiary purposes on such matters as: identity, nature, composition, structure, location or activity of these groups ; links including international links, with other organized criminal groups; offences that organized criminal groups have committed or may commit; to provide factual, concrete help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime[5].

Each state shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person

[2] Pușcașu V., Undercover agents*, illegal challenge of the offence. Opinions (I). "Criminal Law Notebooks" no 2/2010*, p. 32.

[3] Dascălu I. et al, *Drugs Criminal Organization*, Publishing House Sitech, Craiova, 2008, p. 337.

[4] *Law no 143/2000 on fight against drug trafficking and illegal use*, published in the Romania Official Gazette" Part I, n 362 of 3rd of August 2000.

[5] Pașca Ioana-Celina, *Aspects on the use of undercover collaborators in Romanian criminal judgment. Their institution in the new criminal law*, Faculty of Law and Administrative Sciences, University of West of Timișoara.

who provides substantial cooperation in investigation or prosecution of an offence or organized crime.

These persons shall be granted protection against possible threats or acts of violence or intimidation. These references concerning the partner institution

Are provided by art 15 and art 16 of Law no 143/2000 on persons who have committed an illegal substances offence and who decided to cooperate with judicial authorities to identify and punish others who committed offences involving drugs trafficking. These collaborators, who committed one of the offences provided by art 2 – 10 of this law, who have cooperated and informed about other offenders, are to have their punishment mitigated by half.

On the other hand, the law stipulates also a case where the punishment is no longer enforced for the person who, before the beginning of the prosecution informs the authorities about his participation in a group or in an agreement to commit one of the offences provided by art 2-10, allowing identifying and bringing to justice of other participants[6].

Such benefits are also mentioned by law no 39/2003 on prevention and fight the organized crime[7].

Art 9 paragraph 2 of this law states half of the legal punishment for the person who committed one of the crimes provided by art 7 paragraph 1 or 3 of the same law and who, during criminal prosecution or judgment, informs and facilitates the identification and the bringing to justice of one or several members of a criminal group.

This category of collaborators is not regulated by Criminal Procedure Code or by any other law; that's why we think that any person can become a collaborator. This does the same things as the undercover investigator, without being a police officer or agent and therefore we can ask about the difference between them.

We also remark that the lawmaker didn't state anything about the conditions or limits of the partnership or its duration

Compared to the informer who is a person who is not involved in the criminal activity and who informs about facts he accidentally found out, the collaborator is a well known in these criminal groups and often collaborates with judicial authorities.

According to provisions of art 148 paragraph 5 of the Criminal Procedure Code, only investigators can carry out investigating actions. Thus, thinking that collaborator enjoys the same authorization as the investigators is an extended interpretation of the law.

Assignment of an investigator and the choice of a collaborator imply necessary measures of recruiting, selection and training.

Both of them must be familiar with the world of criminality, its modus operandi, its slang; they must be members of the action zone, have the same origin or, at least, the same education like other criminals; they must have self esteem, be able to assess correctly reality and have good memory and patience.

Many expressed their opinions[8] about the fact that the papers the collaborators draw up are absolutely null for the criminal investigation process, according to art 102 paragraph 2 of the Criminal Procedure Code related to art 280 Criminal Procedure Code.

Therefore, the only possibility to contribute to unveil the facts and identify the author is the hearing a witness according to art 114 of the Criminal Procedure Code.

[6] Art. 15 of *Law no 143/2000 on fight against drug trafficking and illegal use* .

[7] *Law no 39/2003 on prevention and fight against organized criminality*, published in the Official Gazette. Part I no 50 of 29th of January 2003.

[8] Heghelegiu L., *Undercover investigators*, Magazine of Criminal Law no2/2005, p. 119.

Jurisprudence often encounters situations where a person commits offences and draw up several reports in order to obtain several reductions of the punishments.

The High Court of Cassation and Justice motivated a rejection of the appeal made by a defendant, pursuant to art 19 of Law no 682/2202 and art 16 of Law no 143/2000, stating that: "the person who committed on of the crimes provided by art 2-10 of Law no 143/2000, and who during the criminal prosecuting informs and helps to identify and bring to justice other offenders related to drug crimes, enjoying the mitigation by half of the punishment limits according to art 16 of Law no 143/2000, cannot be granted a new mitigation by half of the punishment as the provisions have the same content"[9].

As using collaborators is a common practice, sometimes their activity exceeds their competences and become similar to the provocateur.

There are opinions[10] according to which "in order to enter under the incidence of art 101 Criminal Procedure Code, the provocative activity of a crime must have clear form of instigation to initiate in a person's mind the idea to commit an offence; it cannot be represented by requests, deception, innuendos, false promises, threats, blackmail, harassment or repeated demand based on mutual sympathy.".

The High Court of Cassation and Justice decided that[11] "there is no violation of art 101 paragraph 3 of Criminal Procedure Code, as it is not a instigation to commit offences, given the fact that the defendant involvement in drug trafficking was known both by the collaborator and the defendant. In other words, the defendant already had a tendency to commit such offences (taking into account that at that time he was already brought to justice for similar actions); the fact that the defendant committed the offence after he had been contacted by co defendant, who had talked with collaborator on buying a drug quantity, doesn't confer the later a provocateur feature as it is provided by art 101 of Criminal Procedure Code and sanctioned by the European Court of Human right in its jurisprudence".

That is the reason for which there should be no confusion between the activities of determining, of inciting, if there is no clear evidence of intention, wand those of creating some opportunities or some favorable conditions to carry out an illegal action, conceived and continued on his own.

Sometime, it the collaborator who incites, determines or pushes, even by material cooperation, to commit a crime so that afterwards he should benefit from a reduction of the punishment, as set by law.

That is why we strongly think some clear regulations to be adopted to state the circumstances where we have instigation and to forbid these practices as the content of art 101 paragraph 3 of Criminal Procedure Code stipulates the elimination of the illegal evidence.

The only documents that regulate the institution of the collaborator are the special laws. The competences of the undercover collaborator were considered similar to those of the undercover investigator.

The tasks of the undercover partner have been set by the extensive interpretation of the definition of the definition of the undercover investigator.

[9] High Court of Cassation and Justice, Criminal Section, *Decision no* 545/2004, published in Magazine of Criminal Law *no 2/2005*, p.155.

[10] Florian C., *Undercover investigators*, Magazine of Criminal Law *no 2/2007, p. 133.*

[11] High Court of Cassation and Justice, Criminal Section, *Decision no 3547/4th of November 2008.*

Thus, the Criminal Procedure Code decided to make use of undercover investigators and therefore of collaborators only when "the measure is necessary and proportionate with limitation of fundamental rights and freedoms, given the characteristics of the cause, the importance of information and of evidence[12]".

Collaborator can be heard as witness as it is set by art 125-130 of Criminal Procedure Code, defining a new category of witness, the threatened one who receives additional protection, according to art 126-129 of Criminal Procedure Code.

3. Conclusions

Using the undercover investigator and partner helps to obtain information concerning crimes. The undercover investigator has to report to the Prosecutor in charge with the case periodical reports on his activity. Such reports are confidential and they are drawn up by investigators based on the data obtained, together with all the details of the activities carried out by them, all focused on serious offences, committed or which are being prepared to be committed, and on their authors.

The partner obtains data and information, sometimes even pieces of evidence, that he gives to the undercover investigator. This one writes the minutes about the actions undertaken by him and by the partner.

Both of them can be heard as witnesses during a trial, according to art 125 of the Criminal Procedure Code, without being asked about their person.

Authorities want to keep their identity confidential, in order to offer protection to them and their families and at the same time to continue their activity inside criminal groups and protect the methods.

When there is a risk concerning the hearing of these persons during the trial, the prosecutor can inform the judge for rights and freedoms on anticipated hearing according art 308 and 352 of the Criminal Procedure Code. If, afterwards, during the trial, this is no longer possible, and if they have already testified before the prosecuting bodies or the judge for rights and freedoms, pursuant to art 308 of the Criminal Procedure Code, the Court shall decide that the statement be read and taken into account while judging the case.

In our opinion, the Romanian law doesn't offer a satisfying explanation on the fact that these undercover investigators or partners, or collaborator in justice can commit offences in order to gain respect and confidence of the members of the criminal groups.

We consider that the crimes committed inside the criminal groups must be thought absolutely necessary and less serious than those for which they obtained permission from the prosecutor and totally proportionate to the envisaged purpose.

Therefore, we think that our legal system should consider offering clear rules concerning this issue.

References

- Recommendation no 9/2005 of the Committee of Ministers on witness protection and collaborators of justice, adopted at the 924th meeting of the Ministers Deputies, published in Romanian on https://wcd.coe.int/ViewDoc.jsp?id=1597817&Site=COE

[12] Art.148 par.1, letter. b of Criminal Procedure Code.

- Puşcaşu V., Undercover agents, illegal challenge of the offence. Opinions (I). "Criminal Law Notebooks" 2(2010), p. 32.
- Dascălu I. et al, *Drugs Criminal Organization*, Publishing House Sitech, Craiova, 2008, p. 337.
- *Law no 143/2000 on fight against drug trafficking and illegal use*, published in the Romania Official Gazette" Part I, n 362 of 3rd of August 2000.
- Paşca Ioana-Celina, Aspects on the use of undercover collaborators in Romanian criminal judgment. Their institution in the new criminal law, Faculty of Law and Administrative Sciences, University of West of Timişoara.
- Art. 15 of Law no 143/2000 on fight against drug trafficking and illegal use
- *Law no 39/2003 on prevention and fight against organized criminality*, published in the Official Gazette. Part I no 50 of 29th of January 2003.
- Heghelegiu L., *Undercover investigators*, Magazine of Criminal Law 2(2005), p. 119.
- High Court of Cassation and Justice, Criminal Section, *Decision no* 545/2004, published in Magazine of Criminal Law *no 2/2005*, p.155.
- Florian C., Undercover investigators, Magazine of Criminal Law no 2/2007, p. 133.
- High Court of Cassation and Justice, Criminal Section, *Decision no 3547/4th of November 2008.*
- Art.148 par.1, letter. b of the Criminal Procedure Code.

THE PRINCIPLE OF SEPARATION OF JUDICIAL FUNCTIONS

Denisa BARBU[*]

Abstract

The fundamental principles of the criminal procedure are general rules applicable throughout the criminal procedure in order to achieve its purpose. The fundamental principles are covered by art. 2-12 C.C.P. and are: the legality of criminal procedure, separating the functions of the judiciary, the presumption of innocence, finding out the truth, ne bis in idem, a requirement for moving and exercising penal action, is fair and reasonable term of the criminal trial, the right to liberty and security, the right to defence, respect for human dignity and privacy, the official language and the right to an interpreter. The European Court of Human Rights is conscious that by protecting the fundamental principles it does not only aim at the protection of super eminence of the inextricably right tied to the state of law. These principles represent a set of obligations imposed on the State that has as the sole purpose the protection of fundamental rights and freedoms.

Keywords: *right to defence, presumption of innocence, guaranteeing the freedom of the person, the legality, the separation of judicial functions.*

1. Introduction

The current criminal procedure code brings important changes to some of the old code of criminal procedure, but devotes a number of new institutions, which have not existed in our criminal procedural legislation. All of these changes are reflected primarily in Title I of the General Part of the Code, which governs the procedural criminal law principles[1].

In connection with the principle of separating the functions of the judicial doctrine, the following conclusion was reached, namely, that there are 3 functions: judicial prosecution, defense and jurisdiction (criminal law conflict substantially in the courts of law), showing that they are resolved, by the authorities of their respective differentiated parties involved in the criminal proceedings.[2]

It may thus be inferred that the legislature did not take into account the doctrine opting for regulating four functions which are incompatible with the exercise of other functions, unless the function available on the rights and freedoms of individuals during criminal investigation and verification of the legality of sending or not sending to court, which are compatible with one another; cf. art. 3 para. 3 C.c.p.

A number of issues concerning the incompatibility of judicial functions in the same case were put into the jurisprudence of the ECHR, laid down a clear situation regarding the impartiality of the Court which adjudicates the case fund and the judge who

[*] Assistant Professor, PhD, The Faculty of Law and Administrative Sciences, Valahia University of Targoviste, (e-mail:denisa.barbu77@yahoo.com).

[1] D. Barbu, *Principiile procesului penal*, Ed. Lumen, Iasi 2015, p. 13.

[2] M. Damaschin, *Dreptul la un proces echitabil în materie penală,* Editura Universul juridic, Bucureşti, 2009, p.108.

ordered the preventive measure of preventive arrest or arranging the sending to court.[3]

So, the jurisprudence of the ECHR is labile, and felt that taking preventive measure by the Court is not sufficient to establish bias judgment, but there must be objective justified grounds with regard to its impartiality.[4]

Thus, such acts are related to the function available on the rights and freedoms of individuals in the phase of the criminal prosecution, as was provided for in the present Code of criminal procedure, providing however an incompatibility between it and the function of the Court, while the two functions are not incompatible in terms of the ECHR's jurisprudence.[5]

2. Content

In the framework of the principles which guarantee respect for the rule of law, we find:

- the legality of the criminal process;
- the separation of the judicial functions
- finding out the truth
- ne bis in idem

As shown in literature, we can define the General principles of law as the fundamental prescriptions containing essential ideas must permeate any rule of law with a legal phenomenon, having a creator role, but also by the fact that they basically contain objective conditions which need to be in any law.[6]

The separation of judicial duties is a fundamental principle that binds rather judicial functions by the separation of the incompatibility.

The resolution of the criminal case involves the exercise of several judicial functions throughout the criminal process[7]:

A. the function of prosecution[8]: the prosecutor and the criminal investigation bodies gather evidence to determine whether or not there are grounds for referring to court.

B. the function available on the fundamental rights and freedoms of the individual in criminal investigation: the judge of rights and freedoms (with the exceptions stipulated by law) has on the acts and the measures under criminal prosecution that restrict the fundamental rights and freedoms of the individual (the right to liberty, to privacy, etc.)[9]

- judicial review through the judge of rights and freedoms guarantees the rights and freedoms of persons involved in criminal proceedings.

Within this function, the judge of the rights and freedoms pronounces with regard to:

a) preventive measures:

- taking the measure of pre-trial detention or arrest;[10]
- the confirmation of the mandate of preventive arrest issued in absentia;
- the extension of the pre-trial detention measure or arrest;

[3] CEDO, Decizia *Garrido c. Spania* din 22 martie 2000.

[4] CEDO, *Hauschildt c. Danemarca*, 24th May 1989; G. Mateuţ, *Tratat de procedură penală. Partea generală*, vol. I, Editura C.H. Beck, Bucureşti, 2007, p. 270.

[5] D. Barbu, *op. cit.*, pp. 17-18.

[6] M. Niemesch, *Teoria Generală a Dreptului,* Editura Hamangiu, Bucureşti, 2014, p.62.

[7] D. Barbu, *op. cit.*, pp. 23-30.

[8] I. Neagu, M. Damaschin,*Tratat de procedură penală.Partea generală,* Ed. Universul juridic, București, 2014,p.61

[9] *Ibidem*, p. 7

[10] In the competence of the rights and judgments there is also the conclusion of the defendant request regarding home arrest, in order to permit leaving the house.

- the replacement of judicial control or measure of judicial control on bail with the measure of arrest at home or arrest;

- the settlement of termination by operation of law, revoking, replacement of the measure of pre-trial detention or arrest;

- the complaint lodged by the defendant against the order of the Prosecutor took the measure of judicial control or judicial review or control on bail, etc.

b) the consent searches or domiciliary or the use of special informatics methods and techniques of monitoring or research, as well as other methods of proof:

- the settlement proposal authorizing the Prosecutor to carry out an informatics or domiciliary search;

- the resolution of the Prosecutor's proposal for approval of technical supervision;

- the confirmation of technical supervision measure authorized under the emergency conditions by the Prosecutor;

- the resolution of the Prosecutor demand extension of mandate of survey;

- the settlement proposal authorizing the Prosecutor to obtain general data or processed by providers of publicly available electronic communications networks, other than the contents of communications and retained by them;

- the settlement proposal authorizing the Prosecutor to obtain data on the financial status of a person.

c) precautionary measures:

- the resolution of the appeal brought against the order of the Prosecutor regarding precautionary measures;

- the resolution of the Prosecutor' s proposal to capitalize the assets, when there is no consent of the owner;

- the resolution of the appeal brought against the conclusion of the recovery of seized assets, when there is no consent of the owner;

- challenging the Prosecutor's solution of things.

d) provisionally safety measures:

- the obliging to the provisional medical treatment/ provisional medical hospitalization of a suspect or accused in the criminal investigation phase;

- the lifting of the provisional measure obliging to the medical treatment/provisional medical hospitalization of the suspect or accused;

e) other procedures under C.c.p.:

- hearing the witness in accordance with anticipated hearing;

- taking, extension, revocation of the measure non-voluntary hospitalization in the clinic to carry out forensic psychiatric expertise;

- physical examination of a person in the absence of the consent of the person concerned;

- the issuance of the mandate of remembrance at the request of the public prosecutor in which to execute the mandate of remembrance is necessary the penetration without consent in a home or establishment, in the framework of criminal prosecution;

- the opposition concerning the reasonableness of overdue the criminal prosecution;

These two functions are exercised within the criminal investigation phase.

C. The function of checking the legality of bringing or non-bringing to trial is exercised by the judge of the preliminary room which verifies the legality of bringing to trial act and the evidence on which it is based and also check the legality of the solutions for bringing to trial.

D. The Court Function[11] shall be carried out by the Court in legality

[11] Gh. Mateuţ, „Necesitatea recunoaşterii separaţiilor funcţiilor procesuale ca principiu director al procedurii penale, în lumina Convenţiei Europene şi a recentelor modificări ale Codului de procedură penal", in *Dreptul* no. 9/2004, pp. 189-209.

established panels (art. 3 para. 7 C.c.p.). It specifies the phase and consists of:

- the management of the probation
- the assessment of the evidence for the purpose of the pronouncement of a judgment
- the verification of the claim made by the solidity of the Prosecutor, to the parties and to the trial subjects being guaranteed the rights in the article 6 of ECHR.

From our point of view, although the legislature has omitted, there is also the function of the enforcement of criminal judgments.

From these judicial functions, there are exceptions:

- under article 3 paragraphs 3, the function of checking the legality of bringing/not-bringing to trial is compatible with the function of the judgment-judge of preliminary chamber will participate in the preliminary judgment of the case (art. 346 para. 7 – the Chamber judge which ordered the start of the preliminary judgment exercised the function of the Court in question).
- by default, it has been waiver form the provision on the rights and freedoms of the individual, these tasks can be fulfilled by other judicial bodies:
- art. 141 para. 1 of C.c.p.- authorization by the Prosecutor of the interception of calls for a maximum of 48 hours;
- art. 209 of C.c.p.- suspect apprehension or accused of the criminal investigation or Prosecutor for not more than 24 hours;
- art. 203 paragraph 2 of the C.c.p. Prosecutor has judicial preventive measure control against the culprit[12].

The effects of the separation of judicial functions[13]:

- It strengthens the protection of the fundamental rights of the persons concerned in the criminal proceedings;
- by separating the function of criminal prosecution of the provision with regard to fundamental rights and freedoms, it protects the right to liberty of the person, the right to privacy;
- by separating the function of criminal prosecution of the verification of the legality of sending trial protections, a fair trial is carried out[14].

3. Conclusions

What should be noted is that this principle takes into account only judicial bodies with competencies in criminal procedure, without the injured individuals or on the defendant. Thus, it refers only to the separation of the activities of judicial bodies, regardless of the phase they are in criminal procedure, regulating a situation in fact and giving an important role of defense by erecting a correlative function at the level of the indictment.[15]

However, the legislature did not expressly enshrine the separation of the judicial functions of the Court, the prosecution and the Defense - for various reasons, primarily because it does not provide a clear principle of prosecution, because the Prosecutor cannot withdraw

[12] I. Neagu, M. Damaschin, op.cit., p. 64.

[13] M. Udroiu, *Procedură penală. Partea generală,Noul Cod de procedură penală,* Ed. CH Beck, Bucureşti, 2014, pp. 9-10.

[14] M. Udroiu,(coordonator), A. Andone-Bontaş, G. Bodoroncea,M. Bulancea,V.Constantinescu,D. Grădinaru,C.Jderu,I. Kuglay, C.Meceanu,L.Postelnicu,I.Tocan,A.R.Trandafir,*Codul de procedură penală, Comentariu pearticole,* Ed. C.H.Beck,Bucureşti,2015, p. 14.

[15] N. Volonciu, A.S. Uzlău şi alţii, *Noul Cod de procedură penală comentat,* Ed. Hamangiu, 2014, Bucureşti, p. 10.

charges after bringing into court by seizing the appeal court, so as not to be possible to continue the trial in the absence of criminal accusation.[16]

Also, it was not expressly regulated the function of defense, although the code enshrines the fundamental principle for the rights of defense.

References

- Barbu, Denisa, Principiile procesului penal, Ed. Lumen, Iaşi, 2015.
- Damaschin, M., Dreptul la un proces echitabil în materie penală, Editura Universul juridic, Bucureşti, 2009.
- Mateuţ, Gh., „Necesitatea recunoaşterii separaţiilor funcţiilor procesuale ca principiu director al procedurii penale, în lumina Convenţiei Europene şi a recentelor modificări ale Codului de procedură penal", în Dreptul nr. 9/2004.
- Neagu, I., Damaschin,M.,Tratat de procedură penală.Partea generală, Ed. Universul juridic, București, 2014.
- Niemesch, M., Teoria Generală a Dreptului, Editura Hamangiu, București, 2014.
- Udroiu, M., Procedură penală. Partea generală,Noul Cod de procedură penală, Ed. CH Beck, Bucureşti, 2014.
- Udroiu,M., (coordinator),And one-Bontaş, A., Bodoroncea, G., Bulancea, M., Constantinescu, V., Grădinaru, D., Jderu,C., Kuglay, I., Meceanu, C., Postelnicu,L., Tocan, I., Trandafir, A.R.,Codul de procedură penală.Comentariu pe articole,Ed. C.H.Beck,București,2015.
- Volonciu, N., Uzlău, A.S. et.a., Noul Cod de procedură penală comentat, Ed. Hamangiu, Bucureşti, 2014.

[16] *Ibidem.*

THE PREVENTIVE ARREST OF A PERSON IN PREVENTIVE DETENTION STATUS

Bogdan MICU*

Abstract

The paper addresses a practical issue of great relevance, namely that of opportunity and utility of preventive arrest of a person who is already in detention in another case. The issue is also extended and other preventative measures and is related to the fulfillment of the requirement of "threat to public order" imposed to be met in this matter.

Keywords: *preventive arrest, house arrest, danger to public order, preventive measures.*

1. Introduction

In judicial proceedings in the field of criminal law, it is often found the need to have and enforce preventive measures aimed mainly to ensure the proper conduct of the criminal trial. Under no circumstances, however, such measures, which have a negative impact on the rights and freedoms of the persons referred to may be taken if the general and special conditions required by the law are not met.

As indicated by art. 202 para. (4) Criminal Procedure Code, the preventive measures are: arrest, judicial review, judicial review on bail, house arrest and preventive arrest. The choice of either of these measures with regard to a concrete situation will be taken based on the fulfillment of the legal conditions, but also in agreement with the principle of proportionality also provided for in art. 202 para. (3): "any preventive measure shall be proportionate to the seriousness of the accusation of the person to whom it is taken and it is needed for the achievement of the aim pursued through its disposition."

In recent jurisprudence, we could notice the trend of taking the measure of preventive arrest, the most severe of the preventive measures, with regard to persons who were already in the custody of the State, either they were in the situation of serving a sentence, or they were the subject of another preventive arrest warrant. With regard to this practice, we appreciate that it is inconsistent with the conditions under which it may order the preventive arrest. To argue this opinion, we will proceed, first of all, to analyze the conditions that must be met for the preventive measure of arrest to be ordered.

2. The conditions under which the preventive arrest of a person may be ordered

Thus, firstly, to take the preventive measure of arrest in the custody of the State, it needs to be found that the measure is necessary to ensure the general goal of

* Associate Professor, PhD, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: bogdanmicu@mnpartners.ro).

preventive measures, as shown in art. 202 paragraph (1) Criminal Procedure Code. According to the quoted text, any preventive measure may be ordered: "if there is evidence or reasonable indications which show reasonable suspicion that a person has committed a criminal offense" and if it is necessary "in order to ensure the proper conduct of the criminal trial, of preventing the circumvention of the suspect or defendant from prosecution or trial or to prevent the committing of another crime."

Given the provisions included in article 202 para. (1) to (3) Criminal Procedure Code, we have to find that for taking the preventive measure of arrest all general conditions of preventive measures should be fulfilled:

a) to have solid evidence or indications showing a reasonable suspicion that a person has committed an offense [art. 202 para. (1) Thesis 1 Criminal Procedure Code]. The condition was assessed in the specialized doctrine as superfluous because preventive measures necessarily imply the existence of a procedural framework which cannot exist without evidence or solid clues that show that a certain offense was committed[1].

However, we also notice in the specialty doctrine that the wording "there are strong clues" which shows a reasonable suspicion that a person has committed an offense is similar to that contained in article 5 paragraph 1 letter c) thesis 1 of the European Convention for the defense of human rights and fundamental liberties "there are credible reasons" to believe that a person has committed an offense[2]. In the case law of the European Court of human rights it is stated that "credible reasons" means the existence of reliable data or information, to convince an objective observer that it is possible that the investigated person committed the offense, the reasoning inferred in the circumstances of each cause[3].

b) the measure involving deprivation of liberty to be necessary in order to ensure the proper conduct of the criminal trial, circumvention of the suspect, or defendant from criminal prosecution or trial or prevention of committing another crime [art. 202 para. (1) thesis 2 Criminal Procedure Code]. Obviously, by these provisions the legislator has set the determinant goal of taking a preventive measure, which is to ensure the proper conduct of the criminal trial[4], the legal nature of the preventive measures being that of the "means of activating the criminal prosecution, the criminal process generally"[5].

About the assumption "to prevent the circumvention of the person committing the offense from prosecution or trial", the doctrine shows that it might be missing because the proper conduct of the criminal trial implies the presence of the suspect or defendant in prosecution or trial activities[6]. At the same time, views have been expressed, according to which the basis relating to the prevention of committing another offense, being a too general

[1] I. Neagu, M. Damaschin, "Tratat de procedură penală, Partea generală", Universul Juridic Publishing House, Bucharest, 2014, p. 587.

[2] A. Țuculeanu, C. Sima, "Condițiile reținerii și ale arestării preventive în reglementarea noului Cod de procedură penal", in "Revista Dreptul" no. 3/2015, p. 61 and the followings.

[3] C.E.D.O, "Cauza Fox, Cambell, Hartley contra Marii Britanii", Decision of 30 August 1990, www.echr.coe.int; C.E.D.O., Cauza Varga contra României, Decision of 11 March 2008 www.echr.coe.int.

[4] I. Neagu, M. Damaschin, op. cit., p. 588.

[5] Constitutional Court, Decision no. 81 of 27 January 2011, published in the Official Gazette of Romania, Part I, no. 133 of 22 February 2011.

[6] G. Radu, "Măsurile preventive în dreptul procesual penal Român", Hamangiu Publishing House, Bucharest 2007, p.6.

formulation, may not be accepted as a distinct basis for deprivation of liberty of a person, but rather a circumstance that can serve, adapted to the conditions of article 223 para. (1), letter d), final thesis of the Criminal Procedure Code, to the arrest of the defendant[7].

c) The preventive measure shall be proportional to the seriousness of the charges of the person against whom it is taken and it is needed for the achievement of the aim pursued through its disposition. [art. 202 para. (3) Criminal Procedure Code] The doctrine notes that among the prevention measures and the system of criminal sanctions, there should be a certain resonance because the status of freedom during criminal trial must correspond to a certain extent to the one existing after the application of criminal sanction, even showing that the criminal repression begins during the prosecution or trial of the case[8].

However, the requirement of proportionality of the measure in relation to the seriousness of the accusation is reflected in articles 53 para. (2) thesis II of the Constitution of Romania, under which the restriction of the right to freedom may only be ordered if the restriction is proportional to the situation that caused it, is non-discriminatory and shall not affect the existence of that right. The deprivation of liberty of a person is optional, being a serious measure, it is justified only if, in the circumstances of the case as a whole, other measures, less severe, are insufficient to achieve the goal shown in art. 202 para. (1) Criminal Procedure Code[9].

Moreover, art. 202 para. (4) Criminal Procedure Code lists in a certain order the preventive measures. The sequence used by the legislator also indicates the severity of the measure within the framework of preventive measures, the order of preference being given to measures which provide a lower level of interference on the rights and freedom of the person.

d) there is a cause that prevents the beginning of the criminal action or the exercise of criminal action [art. 202 para. (2) Criminal Procedure Code]. The condition is characterized as being unnecessary in the context the existence of any of the causes of the art. 16 Criminal Procedure Code[10] stops the whole course of the criminal procedure under which such a measure of prevention could be ordered [11].

e) the suspect or defendant should be heard in the presence of the lawyer chosen or appointed ex officio, insofar as he / she does not evade prosecution and does not exercise his /her right to silence.

These general conditions listed above must be met for the disposition of any

[7] A. Ţuculeanu, c. Sima, URop.cit., p. 61 and following.

[8] I. Neagu, M. Damaschin, op. cit., p. 588.

[9] A. Ţuculeanu, c. Sima, URop.cit., p. 61 and following.

[10] According to article 16 Criminal Procedure Code, the criminal proceedings may not be started, and when it was started it can no longer be exercised if: a) the deed does not exist; b) the deed is not specified by the criminal law or has not been committed with the laid down by law; c) there is no evidence that a person has committed the offense; d) there is a justifying cause (self-defense, state of necessity, exercise of a right or the fulfillment of an obligation, the consent of the injured person) or non-liability (physical coercion, moral coercion, non-attributable excess, minority of the perpetrator, irresponsibility, unintentional poisoning with alcohol or other psychoactive substances, error, unforeseeable situation; e) prior complaint is missing, authorization or referral to the competent body, or some other condition prescribed by law, necessary to start the criminal action; f) amnesty, prescription or death of the suspect or defendant; g) prior complaint was withdrawn, reconciliation, or a mediation agreement was signed; h) there is a cause of impunity; i) there is an authority of judgment; j) there has been a transfer of proceedings to another state, according to the law.

[11] I. Neagu, M. Damaschin, op. cit., p. 589.

preventive measure, regardless of its seriousness. Specific conditions of each of the measures to be ordered are added to all these.

Regarding the preventive arrest of the defendant, the special conditions are indicated by art. 223 Criminal Procedure Code: a) to have solid evidence or clues which show reasonable suspicion that a person has committed an offense; b) preventive arrest measure is necessary in order to ensure the proper conduct of the criminal trial, to prevent the circumvention of the defendant from prosecution or trial, avoid committing a crime; c) to record alternative performance of any of the situations referred to in article 223 Criminal Procedure Code.[12]

The specialty doctrine shows that in the Criminal Procedure Code there are two main categories in which the preventive arrest may be ordered, each having its own conditions[13]. The two categories are: assumptions of preventive arrest separate from the threat condition for public order [provided for in article 223 para. (1) letters a) - d) Criminal Procedure Code], namely, assumptions of preventive arrest ordered in consideration of danger to public order posed by the defendant [provided for in article 223 para. (2) Criminal Procedure Code].

I. Assumptions of preventive arrest separate from the threat condition for public order [provided for in article 223 para. (1) letters a) - d) Criminal Procedure Code] involving the meeting the following requirements:

a) there should be evidence indicating reasonable suspicion regarding the commission of an offense by the defendant. The requirement stresses that for taking the measure of preventive arrest, as the most severe of the preventive measures, it is not enough to have strong indications that an offense has been committed, as evidence is needed[14].

d) to be one of the situations listed in article 223 para. (1) letters a) - d) of the Criminal Procedure Code:

- the defendant fled or hid in order to evade the prosecution or trial, or has made any preparations for such actions;

- the defendant attempts to influence another participant in the offense, a witness or expert or to destroy, alter, conceal or steal material evidence or determine another person have such behavior;

- the defendant pressures the injured person or tries to reach a fraudulent agreement with him / her;

- there is reasonable suspicion that, after the beginning of the criminal action against him, the defendant has committed intentionally a new crime or is about to commit a new crime.

As related to these issues, it is not enough to invoke them in an abstract manner, but factual evidence should be presented[15]. For example, in the case of Griskin against Russia, the arrest was based on the existence of a threat of destruction or forgery of evidence. However, the authorities have made reference to this threat without indicating concrete reasons to justify that the defendant could abuse the freedom to commit acts of destruction or forgery of evidence, and for this reason, the breach of conventional provisions has been found[16].

II. The hypotheses of preventive arrest ordered in consideration of danger to public

[12] Idem, p. 628.

[13] M. Udroiu, Procedură penală, Partea generală, Editura C.H. Beck, Bucureşti, 2014, p. 402.

[14] I. Neagu, M. Damaschin, op. cit., p. 629.

[15] C.E.D.O. Case Tase against Romania, Decision of 10 June 2008, www.echr.coe.int; Case Calmanovici against Romania, Decision of 1 July 2008, www.echr.coe.int.

[16] C.E.D.O. Case Griskin against Russia, Decision of 24 July 2012, www.echr.coe.int.

order which the defendant poses [provided for in article 223 para. (2) Criminal Procedure Code]

In the case of certain serious offenses, paragraph (2) of art. 223 of the Criminal Procedure Code provides for the possibility of taking the measure of preventive arrest of the defendant and in the other case, in compliance with the following conditions:

a) there should be evidence indicating a reasonable suspicion that the defendant has committed a crime that falls within the categories listed in article 223 para. (2) Criminal Procedure Code. As we the specialty doctrine provides, the offenses referred to in paragraph (2) of article 223 of the Criminal Procedure Code are also found in paragraph (1) of article 223 Criminal Procedure Code, being included in the generic formulation used by the legislator in paragraph (1) of article 223 Criminal Procedure Code: "the defendant has committed an offense," without further details. The difference between the two texts - paragraphs (1) and (2) of article 223 Criminal Procedure Code consists in establishing different situations (grounds) that legitimate the preventive arrest of the defendant [17].

Thus, basis of depriving the defendant of his liberty, as follows from paragraph (2) of article 223 Criminal Procedure Code refers to the following offenses: an intentional crime against life, a crime which has caused personal injury or death to a person, an offense against national security laid down in the Criminal Code and other laws, offenses of drug trafficking [18], weapons smuggling, human trafficking, terrorism, money laundering, counterfeiting of money or other values, blackmail, rape, illegal restraint, tax evasion, abuse, legal abuse, corruption, an offense committed by means of electronic communication, or any other offense for which the law provides for punishment by imprisonment of 5 years or more.

b) there is no cause that prevents the beginning or the exercise of criminal action of those provided for in article 16 Criminal Procedure Code;

c) the criminal action should have been started for the crime for which there is a reasonable suspicion that it has been committed;

d) the measure is necessary to ensure the proper conduct of the criminal proceedings, to prevent the circumvention of the defendant from prosecution or trial or to prevent him commit a new crime (the proper conduct of criminal proceedings);

e) the measure is proportional to the seriousness of the accusation against the defendant and it is required for the achievement of the aim pursued in ordering it;

f) defendant was heard by the judge in the presence of the lawyer chosen or appointed ex officio;

g) defendant's deprivation of liberty would be necessary for the removal of a threat to public order.

This requirement is particularly of interest for this study, which is why we will analyze it in a thorough manner.

Thus, the doctrine notes that by this requirement, the legislator has established a legal alternating criterion which it reports for the incidence of situations that legitimate the deprivation of liberty, as appropriate, in the circumstances referred to in article 223 para. (1) letters a)-d) Criminal Procedure Code or, in their absence, the complex character

[17] A. Ţuculeanu, c. Sima, URop.cit., p. 61 and following.

[18] The Constitutional Court admitted the exception of unconstitutionality regarding the phrase "drug trafficking" mentioned in the provisions of art. 223 para. (2) Criminal Procedure Code by Decision 553/2015 .

referred to in article 223 para. (2) Criminal Procedure Code[19].

For the purpose of the threat for public order, the judge of rights and freedoms, the preliminary chamber judge, or the court will have to take into account the following criteria: the seriousness of the offense, the manner and circumstances of committing the offense, the entourage and environment from which the defendant comes, criminal history and any other circumstances relating to the defendant, hypotheses of preventive arrest measures ordered in consideration of danger to public order posed by the defendant [provided for in article 223 para. (2) Criminal Procedure Code].

However, we cannot fail to notice that there is no legal definition for the term "public order". In the Explanatory Dictionary [DEX], the term "public order" means political, economic and social order in a state which is ensured through a set of rules and special measures and translates by the normal functioning of the state apparatus, maintaining the peace of the citizens and compliance with their rights[20].

In the specialty doctrine, it is shown that the public order disturbance, to a certain extent, is related to the things felt by public opinion and not only by the objective data justifying this placement in detention as an exceptional measure. In doing so, the judge need not necessarily be insensitive to the public opinion, but he must provide a balance between the conflicting interests of the victim and the offender, for the purpose of respecting the rights of each party and the public interest[21].

Against this background, according to a separate opinion, the public order is understood as a component of the rule of law and it concerns the proper conduct of life in society, ensuring public safety and security of citizens[22]. In the same way, it has been shown that the assessment of threat to public order should be considered evidence on record showing the exterior elements made or to be made, and that would demonstrate the existence of a present danger for a collectivity of people so that the arrest is necessary to eradicate the hazard in question[23].

As regards the existence of a threat to public order, and in the case law of C.E.D.O., several emphases were made. For example, the Court found the breach of the provisions of art. 5 of the Convention because the authorities did not show any actual circumstance (negative) on the defendant, and the existence of a threat to public order arises only from the seriousness of the offense, the cause not being complex[24].

The domestic case law showed in a concrete situation that leaving at liberty the defendant investigated for illegal restraint and blackmail, poses danger for public order, considering the circumstances of committing the offense and the defendant. For this, the Court pointed out that the defendant exercised violence on the victim, confined him illegally, by transporting him to a basin dam and threatening him to throw him in the lake if he did not pay his debt. The danger to public order also results from the defendant's quality, under-officer with I.S.U. Instead of acting, according to his

[19] A. Ţuculeanu, C. Sima,Rop.cit., p. 61 and following.
[20] Explanatory dictionary of the Romanian language, Bucharest, 1996, p. 726.
[21] M. Udroiu, op.cit., . 416.
[22] A. Ţuculeanu, c. Sima, URop.cit., p. 61 and following.
[23] Gh. Mateuţ, Tratat de procedură penală. Partea generală, vol. II, C.H. Beck Publishing House, Bucharest 2012, p. 369-370.
[24] C.E.D.O. Romanova against Russia, Decision of 20 October 2005, www.echr.coe.int.

professional status, to save his fellows, he acted to the contrary, causing suffering to the victim of the crime. In the absence of a resolute response, such actions would encourage crime climate and would lessen citizens' confidence in the authorities[25].

3. The necessity to find the existence of the current danger to public order

We may find that in terms of the danger requirement for public order, there are principle changes compared with the previous Code of Criminal Procedure, which we do not find in the legal practice reflected properly.

Thus, in art. 223 para. (2) of the Criminal Procedure Code in effect, the term used by the legislator is: "it is found that the deprivation of liberty would be necessary for the removal of a threat to public order." Differently, art. 148 paragraph (1) letter f) of the Criminal Procedure Code 1968 shows that preventive arrest could be ordered if the general conditions of preventive measures were fulfilled: f) the defendant committed a crime for which the law provides for life imprisonment or jail for more than 4 years and there is evidence that his discharge is a real danger for the public order".

Under the previous Criminal Procedure Code, the assessment of danger was made by reference to the further behavior of the person, related to which the question of preventive arrest arose. Based on the appreciation elements made available to the Court it is shown that leaving the defendant free would cause danger to public order. This way, the phrase "danger to public order" designated a state that would endanger in the future the normal conduct of the social cohabitation rules, if the defendant was free, aiming at all social values protected by the criminal law. With regard to the fulfillment of this requirement, two elements had to be taken into consideration: the practical danger of the action and the perpetrator.

Differently, the new Criminal Procedure Code uses the expression: "it is found that the deprivation of liberty would be necessary for the removal of a threat to public order." In this way, on the occasion of analyzing the need of taking the measure of preventive arrest, it is no longer taken into consideration the social behavior of the defendant. Under the new provisions, it must be noted that at that time, the defendant's freedom is a danger for public order, danger in full swing, and that the only way to stop this danger is deprivation of freedom.

4. About the impossibility of ordering the preventive arrest in consideration of danger to public order posed by the defendant for persons already arrested

In these circumstances, it appears as surprising the common practice of preventive arrest of a person who is already in the custody of the State, either under a different preventive arrest warrant, or even under a writ of execution of a punishment applied in another case. We believe that such a practice does not represent anything other than a manifestation of inertia in implementing legal provisions better known from the previous Criminal Procedure Code, whereas the new provisions cannot cover such practice.

Our affirmation considers that it is excluded to find as fulfilled the requirement: "his deprivation of freedom is necessary for the elimination of a threat to public order with regard to a person who is already in the custody of the authorities. In no case, one cannot assert about a person held in a

[25] I.C.C.J., Criminal Section, Conclusion no. 3802/10 November 2009, Case Law Bulletin, p. 845.

detention center and preventive arrest or even in a prison that his freedom since that time presents real danger for public order, for the simple reason that the condition of freedom does not exist at the time of the evaluation. In these circumstances, the new measure of preventive arrest cannot be regarded as necessary for the removal of a state of danger, which is why it appears as unlawful because it does not comply with the requirements for taking such measures.

We are unable to accept any possible motivation which would refer to the need for the new arresting warrant that would ensure the prevention of possible future circumvention of the person in detention but that could be released either because the preventive measure would reach the maximum period, would be revoked, replaced or the person would be released under parole or released as the punishment period would be fulfilled. Even in such cases, we may not talk about a real danger for public order, but about a future and possible danger. In these circumstances, the danger could be ascertained only after the release of the person placed in detention, making it impossible to be proved prior to the release.

An arrest warrant issued if the person to which it refers is already in the custody of the State is meaningless and and lacking real efficiency, because it may not be enforced. Moreover, it shall comply with the general scheme and be extended or checked within the terms specified by law, since it has a limited period in time. We believe that it is a useless legal effort to order a preventive measure which does not have the effectiveness imposed by art. 202 Criminal Procedure Code and it is even more useless to verify a measure that was never enforced.

It would be even more difficult to accept the assumption that following a request of preventive arrest by the Prosecutor's Office, the Court would appreciate that this is not proportional with the seriousness of the situation analyzed and orders house arrest. In this case, the person for whom the measure was taken is already in the custody of the State, and at the same time, he would not be allowed to leave the house.

5. Conclusions

We appreciate that the preventive arrest may not be legally ordered in consideration of danger to public order posed by the defendant in respect of a person who is already arrested preventively or who is imprisoned to serve time, whereas such a measure is unlawful. The element of unlawfulness relates to the failure to comply with the special condition indicated in art. 223 para. (2): Criminal Procedure Code. "it is found that the deprivation of liberty would be necessary for the removal of a threat to public order."

References

- I. Neagu, M. Damaschin, "Tratat de procedură penală, Partea generală", Universul Juridic Publishing House, Bucharest, 2014, p. 587.
- A. Ţuculeanu, C. Sima, "Condițiile reținerii și ale arestării preventive în reglementarea noului Cod de procedură penal", in "Revista Dreptul" no. 3/2015, p. 61 and the followings.
- Constitutional Court, Decision no. 81 of 27 January 2011, published in the Official Gazette of Romania, Part I, no. 133 of 22 February 2011.
- G. Radu, "Măsurile preventive în dreptul procesual penal Român", Hamangiu Publishing House, Bucharest 2007, p.6.

- M. Udroiu, Procedură penală, Partea generală, Editura C.H. Beck, Bucureşti, 2014, p. 402.
- Gh. Mateuț, Tratat de procedură penală. Partea generală, vol. II, C.H. Beck Publishing House, Bucharest 2012, p. 369-370.

THE ARREST PROCEDURE IN ACCORDANCE WITH THE DEMANDS OF THE CONVENTION

George Octavian NICOLAE*

Abstract

In order to arrest an individual certain criminal procedural formal and basic conditions must be met. However, due to our country's ratification of the European Convention on Human Rights, besides this criteria, it is also necessary that our domestic law be in accordance with the demands of article 5, paragraph 1, point "c" of "The Convention" and the jurisprudence regarding it. The focus of this project is on the analysis of the indissoluble link between our national criminal law regulations regarding the arrest procedure and the demands of the European Convention for human rights.

Keywords: *the arrest procedure, European Convention on Human Rights, criminal law, reasonable suspicion, evidence.*

1. Introduction

Pre trial detention constitutes the most intrusive preventive measure in the Romanian penal procedure.

For this reason, the Criminal Procedure Code clearly states the conditions which have to be met and when the authorities can choose it.

In order to conduct a proper analysis of this institution, certain notions have to defined and grasped such as the standard of proof, reasonable suspicion and the threat to the public.

Also, the judge who is asked to grant an arrest warrant, must account for article 5 of the European Convention For Human Rights (ECHR), provisions which offer certain procedural and mandatory guaranties for the accused.

2. Content

According to art. 202 Criminal Procedure Code (C.p.p.), preventive measures, which include the arrest procedure, may be adopted if there is evidence or indications which point to the reasonable suspicion that a person has committed a crime and are necessary to ensure normal criminal proceedings, preventing the accused to skip trial or to prevent new crimes.

In order to arrest an individual during criminal prosecution, reasonable suspicion should emerge from the evidence that the defendant perpetrated an offence and the conditions art. 223 letter. (a), (b), (c) or (d), Criminal Procedure Code, should be met.

However, in order for pre-trial detention, only a reasonable suspicion that the accused person has comitted an offence from the list mentioned in art. 223 paragraph (2) of C.p.p. is necessary, or that an offence

* PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: nicolae.georgeoctavian@yahoo.com).

punished by the law with 5 or more years of imprisonment be comitted.

Other factors which are to be analised include the seriousness of the crime, the manner and circumstances of committing it, his entourage and the social environment of the accused criminal history or other circumstances regarding the person, the necessity of the detention in order to prevent public disorder.

Preventive custody may be ordered exclusively by the judge, depending on the procedural stage when the measure is actually analised.

Thus, functional competence belongs to the judge of rights and freedoms, during criminal investigation, preliminary chamber judge during the preliminary procedure and to the court during the actual trial.

Under Article 339, paragraph 10 of the Criminal Procedure Code, after the judgment in the first instance, until the case is appealed, the judge may order, upon request or ex "officio" the arrest of the convicted individual.

In order to execute the arrest mandate, certain general conditions are required for taking preventive measures mentioned in Article 202 of the Criminal Procedure Code:

- evidence or indications showing reasonable suspicion that a person committed the offense;

- the overwhelming necessity for preventive measures in order to ensure normal criminal proceedings, preventing the accused to skip trial or to prevent new crimes;

- art. 16 of the C.p.p. is inaplicable.

- the preventive measure must be in relation to the gravity of the accusation.

Upon analyzing the legal text, it is clear that the burden of proof belongs the prosecutor, who needs to prove only a reasonable suspicion that the accused has committed a crime, which can stems from both direct and indirect evidence.

It should be noted that the standard of proof is not particularly high, the prosecutor must administer the evidence only to establish reasonable suspicion that the defendant committed the offense and should not prove his thesis beyond any reasonable doubt.

In other words, the evidence supporting the criminal charges made in an arrest request should not be as concrete as the ones needed for a conviction.

In this sense, the High Court of Cassation and Justice has stated that the recognition of *the presumption of innocence* does not exclude preventive measures but in fact ensures that they will only be taken within the framework and under rigorous conditions laid down by the constitutional norms and the provisions of criminal procedure. Reconciliation between the necessity of the pre trial detention and the presumption of innocence throughout the criminal proceedings can be attained by observing the dynamics of the latter, from an abstract notion regarding the guarantee of the fundamental rights of an individual, hereby acquiring substance in the criminal process.[1]

According to Article 97 paragraph. 1, Criminal Procedure Code, evidence is represented by any factual element which serves to determine the existence of a crime, to identify the person who committed it and all the circumstances necessary for a fair settlement of the case and to uncover of the truth.

Evidence is the means provided by the law for stating the facts constituting evidence which can be obtained by the judicial authorities by various methods.[2]

[1] I.C.C.J., criminal Division, decision no. 4284/2009, www.legalis.ro
[2] Gheorghe Theodru, *Tratat de Drept procesual penal*, Bucuresti, editura Hamangiu, 2007, p. 300.

The probation procedures are the legal way of obtaining evidence.

Clues constitute facts which can reveal an event or the guilt of the person who committed the crime.[3]

Domestic legal personalities have stated that conclusive clues can stem from sources outside the normal criminal procedure, such as a complaint, a denunciation, an informative report or during a crime in progress.

The clue is a fact, circumstance, situation which by itself has no evidentiary value, constituting merely the basis for suspicions essential to the judicial activity but which, when part of a sistem of elements in perfect accordance with themselves and with the other existing evidence, can serve to determine the judicial truth.[4]

The court dealing with an arrest request can not validate the legality of the evidence obtained by the prosecution, nor may issue opinions on the accused's defenses related to the merits of the case.

The judicial practice has established that when analysing an arrest request, the evidence administered during the pre-trial stage is indicative of the probable cause that justifies the arrest.

Thus, at this stage the judge is forbidden to analyse if the evidence has been gathered in accordance with our judicial procedures by the investigators or defences which refer to the merits of the case.

Until further notice, the evidence administered by the prosecutor cannot be ruled aut by the judge called upon to decide on the arrest, but merely allowed to examine the existence of probable cause and the other legal conditions, without the possibility of providing an opinion regarding the legality of the evidence, as this is an atribute reserved for the court conducting the actual trial.[5]

Article 53 of the Criminal Procedure Code, also states this: the judge of rights and freedoms is forbidden to analyze the legality of evidence, this activity is to be conducted exclusively by the preliminary chamber judge upon completion of the prosecutorial stage.

Moreover, the rights and freedoms judge can not change the legal classification retained by the prosecutor nor may he consider the application of Article 16 of the Criminal Procedure Code. He can only establish if the legal classification, which derives from the evidence permits the pre trial arrest.

In addition, due to our country's ratification of the European Convention for Human Rights, besides to this criteria, it is also necessary that our domestic law be in accordance with the demands of article 5 paragraph 1, point c) of the Convention and the jurisprudence regarding it.

Article 5 regarding the unlawful deprivation of liberty, can intersect with other fundamental rights protected by the Convention, such as the right to a private and family life, the protection of the individual's home and correpondance –article 8-, the freedom of expression –article 10-, the freedom of assembly and association –article 11- and not lastly the freedom of movement –article 2 protocol no. 4-

Beyond this correlation between the right ot liberty and security guaranteed by article 5 and the other fundamental rights protected by the Convention, there some common points between the warranties provided by this text and those stated in the article 6 which protects the right to a fair trial.[6]

[3] The Court of Appeal Cluj, decission No . 127 of 01.11.2011, unpublished.
[4] G. Antoniu, C. Bulai, *Dictionar deDrept penal si procedura penala*, editura Hamangiu, Bucuresti, 2001, p. 219.
[5] C.A. Cluj, dec. pen. Nr. 681/R din 4 noiembrie 2009, www.curteadeapelcluj.ro.
[6] Corneliu Birsan, Conventia europeana a drepturilor omului, editia 2, editura C.H. Beck, Bucuresti, 2010, p. 227.

Thus paragraph 2 of article 5 states that ,, Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him." and paragraph 3 letter a of article 6 establishes the right ,, to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him".

By comparing the two texts, the warranty instituted by article 5 is applicable in the case of a deprivation of liberty, thus establishing the possiblity of analysing the legality of such a measure and article 6 guarantees the right to receive suficient information in order to comprehend the nature of the charge and to mount an effective for the accused.

Thus, this right must be related to another warranty provided by article 6, namely the right for any accused individual to enjoy enough time and facilities for his defence. Both warranties are established by the general right to a fair trial - article 6 - .[7]

Thus, the two, which one may say intertwine,are aplicable at different stages, namely the one provided by article 5 par. 2 from the point the accused is actually deprived of his freedom, whereas article 6 par. 3 for the wholle criminal process whether or not the individual has been arrested.[8]

The same legal reasoning is applicable regarding to the correspondence between article 5 paragraph 3 -,, shall be entitled to trial within a reasonable time or to release pending trial." And article 6 par. 1 ,, everyone is entitled to a fair and public hearing within a reasonable time".

We concur that in the first case that we have discused, the warranty provided by the Convention refers to a detainee and to the necessity of analysing the legality and the opportunity of a preventive measure that is so intrusive.

In regards to the second case, the duration of the wholle criminal case is to be analysed in relation to certain factors, such as the complexity of the case, the conduct of the parties involved and the diligence of the authorities.

The Court emphasized that any preventive measure must be in accordance with the purpose of art. 5 of the Convention, namely to protect the individual against arbitrary deprivation of liberty.

By analyzing the firm statement at the beginning of art. 5 of the Convention, which defines and postulates the presumption of liberty, followed by an complete list of exceptions to this rule, one can establish the universal principle that the state of freedom is the natural state and the deprivation of an individuals freedom has essentially an exceptional character.[9]

Given this legislative postulate and it's jurisprudence, the arrest of the person appears as an exceptional measure and should be accompanied by strong guarantees against the arbitrary.

For that reason, taking into consideration the impact of deprivation of liberty on the fundamental rights of the person concerned, the proceedings should meet the basic requirements of a fair trial.[10]

Thus, par.1 of art. 5 establishes a positive obligation of the state to protect the freedom of its citizens, and if the state acts in a such a manner which leads to a violation

[7] ECHR, Judegment of 25 March 1999, Case of Pelissier c. France.
[8] Corneliu Birsan, Conventia europeana a drepturilor omului, editia 2, editura C.H. Beck, Bucuresti, 2010, p. 228.
[9] ECHR, Judgment of 6 November 1980, Case of *Guzzardi v. Italy.*
[10] ECHR, Judgment of 13 February 2001, Case of *Schöps v. Germany.*

of the Convention, it will be held accountable.[11]

The purpose of art. 5 lies in protecting against the arbitrary deprivation of any person of liberty.

The Convention is intended to guarantee rights that aren't merely theoretical or illusory but in fact practical and effective.[12]

The Court stated that, in case of deprivation of liberty, it is particularly important that the general principle of legal certainty be satisfied. Domestic law itself must be in accordance with the Convention, including the general principles expressed or implied therein.

It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[13]

We consider that the principle of legal certainty is respected by our national legal framework applicable in this matter, that national provisions are accessible, predictable, precise and contain sufficient safeguards against arbitrary action.

In the matter of deprivation of liberty, the standard of European Court of Human Rights is more mild than in the case of the extension of such measures.

The Court held that in the case of an arrest for the first time, the courts need not rely on strong presumptions, but may place high faith in aspects such as the severity of the criminal charges, the position of the suspect in society, the nature of the offense.

Thus, taking such measures are necessary only plausible reasons, with no additional conditions.

The notion of reasonable suspicion or plausible suspicion is an autonomous concept developed in the jurisprudence of the Court and depends on the particular circumstances of each case.

These plausible reasons must be based on facts and evidence strong enough to satisfy an objective observer that the person concerned may have committed the offence.[14]

According to the conventional standard, authorities are obligated to produce strong evidence to support a criminal charge against the accused, making it impossible to arrest a person based on some simple insights, impressions, rumors and prejudices.

This does not mean that the evidence must justify a criminal conviction, the nature of preventive arrest which doesen't entail a form of early execution of the punishment, but a preventive measure reserved for exceptional situations.

The case law of the European Court of Human Rights has developed four basic acceptable reasons for detaining a person before judgment when that person is suspected of having committed an offence:

- the risk that the accused would fail to appear for trial; [15]
- the risk that the accused, if released, would take action to

[11] ECHR, Judgment of 14 October 1999, Case of *Riera Blume and Others v. Spain.*
[12] ECHR, Judgment of 28 April 2005, Case *of Albina v. Romania.*
[13] ECHR, Judgment of 23 September 1998, Case *Steel and Others v. United Kingdom.*
[14] ECHR, Judgment of 22 October 1997, Case of *Erdagoz v. Turkey.*
[15] ECHR, Judgment of 10 November 1969, Case of *Stögmüller v. Austria.*

prejudice the administration of justice;[16]

- the risk of committing further offences;
- the risk of causing public disorder.[17]

The danger of an accused's absconding cannot be assessed only on the basis of the severity of the sentence risked. It is necessary to take into consideration a serious number of factors related to the person's character, his moral values, his home, his occupation, his assets, family ties and all links with the State in which he is pursued.[18]

The risk of the accused disturbing the proper conduct of the proceedings cannot be calculated *in abstracto*, but in fact must be supported by factual evidence.

We appreciate that the court must procede to a concrete analysis of the good conduct of criminal proceedings.

Thus, if the majority of evidence which substanciates the criminal charge has already been administered, the risk that the accused would prevent the rule of justice and hinder the prosecution from the purpose stipulated by Article 285 of the Criminal Procedure Code greatly diminishes.

Regarding the risk of the defendant of commiting new criminal acts, the court must take into account that a criminal history does not lead, automatically, to the conclusion that there is a *ab initio* prooven risk of a new offense in the future. It is true that the existence of prior criminal weights significantly in terms of shaping the risk of committing new crimes, but this must be combined with the overall elements of the case.

In relation to the risk of disturbing the public order, the Court recognized that the particular gravity and public reaction to certain crimes can cause a social disturbance, justifying the need for preventive measures.

However, the reason of social disturbance, even if it is regulated by our domestic law, can not be regarded as relevant if it is not based on concrete facts able to convince a objective observer of the certainty of disturbances to public order, reasoning that the court must assess on a case by case basis.

Although the threat to public order should not be confused with the social ressonance of the crime, they present some common points. Thus, both legal practice and doctrine outlines that concrete danger for the public order is quantified by taking into consideration both the personal circumstances of the accused and the other factual details, such the nature and gravity of the offenses and the negative social resonance produced in the community.

Also, the court must consider the provisions of art. 202, para. (3) Criminal Procedure Code, which state that any preventive measure must be proportionate to the gravity of the accusation against the accused and be necessary in order to obtain the legal purpose of the the measure.

Moreover, according to the jurisprudence of the ECHR, the national court is obliged to take into cononsideration „ex officio" other preventive, alternative and less restrictive measures, prescribed by law, which could lead to the preventive aim in the same measure.

So, we appreciate that the whole arrest procedure regulated by our Criminal Procedure Code is predictable, accessible and clear. Our recent judicial practice prooves that the provisions of Article 5 of the ECHR are applied, in view of the primary role of Convention.

[16] ECHR, Judgment of 25 April 1968, Case of *Wemhoff v. Germany.*
[17] ECHR, Judgment of 26 June 1991, Case of *Letellier v. France.*
[18] ECHR, Judgment of 4 October 2005, Case of *Becciev v. Moldova.*

3. Conclusions

The arrest procedure in the Criminal Procedure Code represents the result of several decades of refining and reform of the legal text.

So, we appreciate that the whole arrest procedure regulated by our Criminal Procedure Code is predictable, accessible and clear.

However, given the profound intruzive nature of the pre trial detention, with each analysis of an arrest request, the rights and guaranties of article 5 of the ECHR have to be met.

Thus, given the cases in which the European Court for Human Rights has found an article 5 breach of the individuals rights, for the national judge, applying the provisions of the Convention for Human Rights is ever more frequent.

Moreover, our recent judicial practice prooves that the provisions of Article 5, ECHR are applied, in view of the primary role of Convention.

References

- Ion Neagu, Mircea Damaschin, *Tratat de procedura penala. Partea generala. Partea speciala.* Editia a II-a, Bucuresti, EdituraUniversul Juridic, 2015.
- Nicolae Volonciu, Andreea Simona Uzlau (coordonatori), *Noul Cod de procedura penala*. Bucuresti, Editura Hamangiu, 2014.
- Mihail Udroiu (coordonator), *Codul de procedura penala. Comentariu pe articole*, Bucuresti, Editura C.H. Beck, 2015.
- Corneliu Birsan, *Conventia europeana a drepturilor omului*, editia 2, editura C.H. Beck, Bucuresti.
- G. Antoniu, C. Bulai, *Dictionar deDrept penal si procedura penala,* editura Hamangiu, Bucuresti, 2001.

THEORETICAL ASPECTS REGARDING THE NEW OFFENSE COVERED BY ART. 246 OF THE CRIMINAL CODE MISSAPPROPRIATION OF PUBLIC AUCTIONS AND OFFENCES COVERED BY ART. 65 OF LAW NO. 21/1996 REPUBLISHED. COMPETITION LAW

Rodica Aida POPA*

Abstract

The present study aims to bring to the attention of the legal law specialists the theoretical aspects related to a new incrimination as the one covered by art. 246 of the Penal Code, the misappropriation of public auctions, as well as aspects of yet another incrimination, that is the one covered by art. 65 of Law no. 21/1996 republished-competition law, trying thus to prevent certain different interpretations about the typicality of the two incriminations and encourage the possibility of highlighting other arguments that will lead to an application as accurate as possible of the two incriminations.

Presently there is no case law for the two incriminations therefore the theoretical analysis has to present interpretation arguments which will help the judicial bodies to easily classify the factual basis of the content of the two constitutive laws offering the possibility of a more detailed and contextual interpretation in relation to the reality.

The way the public auctions take place is a constant preoccupation not only for the participants who are involved in the procedure and directly interested in abiding the under law and ensuring a fair competitive climate but also for the public opinion which is as equally interested in ensuring fair social-economical relationships based on the market principles.

Simultaneously, the way the legal conditions of the second incriminations-that is the one from art.65 Law no.21/1996 republished - are interpreted in relation with the competition practices will lead to the clarification of the norm and its correct enforcement.

Keywords: *misappropriation of public auctions, anti-competitional practices, constitutive contents of the two incriminations, fair competitive climate.*

1. Introduction

The study of the two incriminations, that is the one referring to the misappropriation of public auctions covered by art. 246 of the Penal Code and the one covered by art.65 of Law no.21/1996 republished-the competition law, presents an interest from a broad perspective for the business environment since it deals with aspects regarding the compliance of some special conditions regarding organizing auctions as well as ensuring the context of preventing illegal, anticompetitive practices.

Presently, in Romania the consolidation and diversification of the business environment is an important part not only of the economy but also of the rule of law; the relationships between partners of the private environment but also the public sector that can interfere under certain circumstances, being based of special laws

* Lecturer PhD, Judge at the High Court of Cassation and Justice, Offences Department (e-mail :aidap@scj.ro).

that can create breaches that will be solved in Court.

Thus, the two incriminations can be found –the first in the Penal Code , respectively the crime of misappropriation of public auctions[1], being regulated by Title II Crimes against property , in Chapter III Crimes against property by disregarding trust, while the offense covered by art. 65 of Law no. 21/1996 republished the competition law is included in the content of the special law mentioned; the common aspect of the two incrimination is the breach of trust of those working in the business environment.

From another perspective knowing how to interpret the content of the two incriminations allows the judicial bodies as well as the criminal prosecution bodies and the Courts to relate to coherent interpretation circumstances in general so that in particular cases to ensure procedural measures and the administration of evidence in order to establish the base for the legal classification of the incriminations

Thus the study will be useful in the jurisprudential area regarding the two incriminations with real consequences for the companies' prevention and emergency plans in creating a climate of trust for all business partners.

We also consider that the study is meaningful for the legislator from the point of view of the evolution of the case law as well as for the need to modify in relationship with the concrete situations that might generate such an approach in the future.

At the same time the study might be the object of further research by Company Law specialists as well as different approaches in international comparative law as well as Union Law with multiple consequences in the case law area as well as in the legislation area to the extent to which the legislator might intent to modify the above mentioned incriminations.

In addressing the theoretical aspects of the two incriminations mentioned we will present the conditions imposed by the legislator about their constitutive content by approaching both their common and different elements. This is the contribution and novelty of this study which we hope to be interesting to many.

The examination of the legal conditions of the two incriminations means to underline from the perspective of our own arguments which was the legislator intent and what are the implications of the application of the presented considerations.

We will thus bring to your attention each incriminated legal condition from the point of view of its way of regulating and we will present arguments for their interpretation also showing the concrete ways for practitioners to apply them in order to effectively establish the contribution of those breaking the legal provisions.

One can easily follow the judgment and the modality in which it effectively find its application through the given explanations as well as the indication of possible adjectival law measures and the administration of certain evidence which will contribute to orienting the investigation and case law in the conditions under which, until this moment, as far as we are aware, there is no cause definitively judged or dealt with.

From this perspective we want to analyze the degree of predictability and the norms' quality aiming to achieve an as correct as possible application of the legal condition of the two incriminations.

So far, in the specialized literature the incrimination covered by art.246 from the Penal Code has been analyzed in many comments on the articles of the new Penal

[1] Adriana Almășan, The anti-competition agreements in public acquisitions: is criminal replacing contraventional or viceversa? in the Romanian Magazine for Public-Private Partnership nr. 13/2015, Presearch Center.

Code, came into force in 2014, under its constituent content, as well as in a study to which we have no judicial references since this new incrimination has been recently introduced in the Code.

As for the second incrimination from the competition law, that is art. 65 , it was the object of some studies published in the specialized literature[2].

2. Theoretical aspects

2.1. Theoretical aspects regarding the misappropriation of public auctions covered by art.246 from Criminal Code – new incrimination added in the Criminal Code

The Romanian legislator structured the content of the special part of the Criminal Code in a different way from the old code, grouping the crimes in titles, reconsidering the protected social values which will lead to the regulation in title I in more chapters on the crime against person, in title II, crimes against property, in title III, crimes against authority and State border, in title IV, crimes against making justice, in title V crimes of corruption and malfeasance while in office, in title VI, crimes of forgery and fraud, in title VII, crimes against public safety, in title VIII, crimes against social relationships, in title IX, crimes related to elections and referendum, in title X, crimes against national security, in title XI, crimes against the fight potential of the armed forces, in title XII, against humanity and of war.

Title II, Chapter III from the Criminal Code regulates crimes against property, by trust infringement among which misappropriation of public auctions, in the content of art.246.

We notice two new things: first, the mentioning of the way the property of a person is affected-through breaching the trust and good faith in relation with the goods that belong to a person an second, the introduction of a new incrimination –the misappropriation of public auctions.

The legislator has purposely incriminated concrete ways of misappropriation of public auctions, considering that it is necessary to regulate them through a special norm, granting thus special attention to the way procedures of public auctions take place, because abiding all legal conditions grants the trust of the participants, encourages the fair competition and strengthens the environments 'safety.

The way it is regulated, the norm also has a preventive character, discouraging those who might want to fraud a public auction.

In other words, the public auction procedure can be breached in the ways mentioned in the content of the norm, as we will further show, affecting the property through breaching trust, since breaching the legally enforced conditions of a procedure will affect the feeling that the law is abided, the good faith being breached in ways that endanger the business relationships.

The before mentioned incrimination is related to a particular condition, that is the existence of a public auction.

The public auction is carried out according with certain procedures regulated by the new Code of Civil Procedure, under legal seizure, be it judicial execution or foreclosure or during the process of granting public supply contracts, concession, according to the conditions expressly provided by two government emergency ordinances, that is Emergency Ordinance no.34/2006 on granting public supply contracts, concession contracts, and Emergency Ordinance no.54/2006 regarding

[2] Adina Vlăsceanu, Alina Barbu, The new Criminal code commented by comparison with the old one, Publishing House Hamangiu, 2014.

the concession agreements regime on public goods or under special regulated conditions.

We want to mention that further on we will specify some aspects we consider important related to the content of the crime, without however to present the elements that clearly define the crime of misappropriation of public auctions since these aspects can be found in the comments on the articles of the new Criminal Code.

It is interesting that this crime is related to the participants at the auction, those people who have a call, under the requirements of the law, in the case of specific auctions, that is when the auction announcement mentions in some ways the existence of certain conditions regarding the participants to the respective procedure.

We assess that the legislator has drawn on incriminating two clear ways, through the meaning of their content, regarding the action of removing a participant from the auction that is coercion and corruption

The two ways are alternatively estimated, so that under the aspect of assessing the evidence that will be administrated by the judicial bodies, there cannot be any doubts regarding the interpretation.

Of course, as far as relevance, the two ways can effectively generate specific differences in the process of establishing the actions of physical or moral coercion or corruption through offering a sum of money big enough to determine a participant to withdraw himself from the auction.

We assess that the judicial bodies that deal with such crimes have to know the way it took place, so that they proceed to specific search of the premises depending on the object of the auction, when the implicated people refuse to present the necessary documentation in order to establish the acquisition or concession conditions; the use of special surveillance methods, formulating the precise requests to the competent judge of rights and liberties.

The means of coercion or corruption through withdrawing a participant from a public auction are practices that we can call anti-competition, regulated by the Criminal Code, in the case of the crime of misappropriation of public auctions that through their nature are supposed to take place underground, which offers the judicial bodies the possibility to use the searches and the special surveillance methods.

We also consider that any evidence can by used, such as documentary evidence when from the modus operandi clearly resulted the existence of documented evidence showing that a certain participant at the auction was targeted through physical or mental threats in order to convince him to withdraw or through money offers between participants to change the wining price.

Also, the administration of testimonial evidence through public hearing of witnesses to the public auction, people who might knew of certain illegal activities or the nature of coercion or corruption or the agreement to change the price, can clarify the context of the crime.

We agree to the opinion expressed in the specialized literature that the way the contents of the crime of misappropriation of public auction has been regulated, as far as the first modality is concerned, there constitutes a special norm of incrimination the deed of blackmail done during the auction procedure and as far as the second incrimination modality, there constitutes a special norm of incrimination the deed of bribe done during the procedure of public auction[3].

Thus we consider that under the conditions in which the evidence, that might lead to clearly establish the way the crime of

[3] Adina Vlăsceanu, Alina Barbu, The new Criminal code commented by comparison with the old one, Publishing House Hamangiu, 2014.

misappropriation of public auction took place, was appraised, the legal description of the deed is ensured.

As far as the second normative modality of incrimination regarding the agreement between participants, the judicial bodies are in charge with establishing objectively and subjectively the way the agreement has been initiated, which were the means of changing the price, how did the action took place effectively.

It is interesting to notice that the second modality of creating the constitutive content of the incrimination, the agreement between participants can affect just one concrete element of the auction and not the whole process-that is the final price, which leads to the conclusion that if the agreement is done for a different element of the public auction, such as the object or the nature of the object of the auction, the constitutive content of the misappropriation of the auction does not take place, in this second modality.

2.2. Theoretical aspects regarding the incrimination regulated by art.65 of Law no. 21/1996 republished, competitive law[4].

The incrimination regulated by art. 65 from the before mentioned law constitutes a more complex special norm, in which content besides the ways of committing a crime in paragraphs 2 and 3, there are

[4] Art.65. *(1) The deed of any person that has a position of administrator or legal representative or any other leading position in a company to design and organize with intent either of the banned practices according to the provisions of art.5, paragraph (1) and that are not excepted according to the provisions of art.5 paragraph (2) constitutes crime and imposes a prison term from6 months to 5 years or a fine and the disqualification from certain rights.*

(2) Will not be punished the person that before the begining of the prosecution makes a criminal complaint about his taking part in the crime mentioned in paragraph (1) allowing thus to identify and hold liable the other participants. (3) the person that commited the crime mentioned in paragraph (1) and that during the prosecution makes the complaint and thus helps to identify and hold liable the other persons can benefit from reduction in half of the penalty.(4) the Court orders the display or publication of the final criminal conviction.

Art. 5 of Law no. 21/1996 republished *(1) There are banned any agreements between companies, decisions taken by companies'associates, concertated practices, that have as object or effect to prevent,restrict, or distortion of competition on the Romanian market, or on a part of it especially in those parts that: a) establish directly or indirectly buying or selling prices or other transaction conditions; b) limit or control the production,selling, tehnical development or investments; c) divide markets or supply sources; d) condition the closing of contracts on the acceptance from the partners of suplimentary conditions in no way related the object of the contract 2) the prohibition regulated by paragraph (1) does not apply to the agreements between companies, or to the decisions taken by associations of companieswhen they cumulatively met the following conditions: a) contribute to the enhancement of production or distribution of goods or to the promotion of ethnic or economic progress ensuring at the same time for the consumer an advantage comparable to the one got by the agreement parties b) impose to the companies only those restrictions that are essential for attaining the goals set ; c)do not offer the companies the possibility of eliminating the competition (3) The categories of agreements, decisions and practices exempted from the provisions of paragraph (2) as well as the conditions and classification criteria are those established by the rules and regulations of European Union Council or European Comission regarding the application of the provisions of art.101 paragraph (3) from the Treat regarding the functioning of the European Union to certain categories of agreements decisions of associations or common practices, called regulations exemptions on categories which apply accordingly.*

(4) Agreements, decisions and common practices regulated by paragraph (1) that meet the conditions covered by paragraph (2) or are part of the categories covered by paragraph (3) are considered legal, without the necessity of being notified by the parties and the decision of the Constitutional Court. (5) the responsibility of gathering evidence about a breach of the provisions of paragraph (1) lies with the Competition Council. The company or association that invoke the benefit of the provisions of paragraph (2) or (3) has the responsibility to prove that the conditions regulated by these paragraphs are met.

(6) every time the Competition Council applies the provisions of paragraph (1) to the agreements, decisions or practices to the extent that these can affect the commerce between the member states, these also apply the provisions of art.101 from the Treat regarding the functioning of the European Union.

regulated also a clause of non-punishment as well as one of reducing the punishment under certain conditions.

Further on we will examine a couple of particularities of this incrimination without aiming to do an analysis of the constitutive content of this incrimination.

We have to underline the fact that from the perspective of the used legislative technique in paragraph 1, the legislator also used the cross referred rule, referring to the banned practices covered by art.5 paragraph (1) conditioned by their exemption under the conditions of paragraph (2), art.5.

The active subject of this incrimination is a qualified one, the administrator, legal representative or someone who has a leading position in the company, under this aspect the sphere or leading positions being much broader, leading us to the conclusion that supposing that the deed is committed by somebody else than the above mentioned people, the deed is only done by the actively indicated subject.

In other words, if the deed is committed by an employee with no leading position, he/she cannot be held liable for the deed since he/she does not have the quality regulated by the law.

We consider interested for the analysis of the constitutive content the concrete way of organizing with intent, the practices before mentioned, without being necessary to detail the two actions since their semantic meaning also covers the juridical one.

Of course then we have to establish the factual basis which will describe the legal incrimination model of art. 65 of Law no.21/1996. It is necessary to analyze which were the ways of organizing intently used of the banned practices.

Based on the evidence presented the judicial bodies have to establish the conditions in which such a crime has been committed.

We consider that the documentary evidence referring to the company formation can be run to the way the company's activities, which are the concrete activities, how they compare to the other companies with the same type of activities from the point of view of competition rules and regulations, how can it be proved that illegal practices were intently used.

Thus, the documentary evidence, the expertise related to the nature of the used practice, the testimonial evidence are meant to explain if a banned practice has been designed and organized, how was it put into practice, what consequences had on the private sector, did it affect or not the competition through imitating or controlling the production, selling, technical development, investments.

We consider that the incrimination from art. 65, competition law sanctions the illicit behavior of those doing it, its gravity being enhanced by the quality of the actively qualified subjects, their intent being clearly underlined by the creation of alternative contents and especially by the usage of banned practices.

In the specialized literature there have been performed analyses of the contravention and crime reaching interesting conclusions related to the nature and content of penalties and consequences under the aspect of its way of application as well as solving the civil action[5].

[5] Adriana Almășan, Doru Trăilă, *Does Criminal Law ensure effective detterent measures against the deeds of malign competititon ? In* AUB Law 2014 Supplement. Legal Law. Special Part; Adriana Almășan, *The anticompetitive agreements in the public acquisition procedures: criminal replacing contraventional and vice versa?* in Romanian Magazine of Public-Private Partnership no. 13/2015, Presearch Center.

2.3. The common and distinct aspects of the two incriminations covered by art. 246 of the Criminal Code and art. 65 of Law 21/1996 republished, competition law.

From presenting aspect of both incriminations, we reached the conclusion that they are both meant to ensure a prevention context aiming to prevent the committing of such deeds that breach the trust of the public and private sector.

Both incriminations sanction the breach of the rules regarding either public auctions or illicit activity.

Also, they both ban the anti competition practices that might affect the activity of the companies.

Both incriminations have alternate content in which they are made.

From the point of view of differences, the subject of the two incriminations are different; while when misappropriating the public auction the subjects are mere participants, in the incrimination from art.65, the active subject is qualified.

The alternating content in which the two incriminations take place has a specific character.

Also, while for the incrimination of misappropriation of public auctions there is no punishment or possibility for a punishment reduction, for the incrimination in art. 65 from competition law paragraph 2.3 there is such a clause.

Under the evidence aspect, both incriminations can be proved through different ways that help establish the detailed context of the deed, the methods used, offering the possibility to a fair legal classification by the judicial bodies.

Conclusions

The study aimed to examine a series of theoretical aspects of the crime of misappropriation of public auctions, as covered by art. 246 of Criminal Code and the crime covered by art.65 of Law no.21/1996 republished, competition law, without examining the constitutive contents.

The presentation was centered on underlining theoretical aspects of the two incriminations, in the conditions in which there is no case law, and also on common elements that lay down the prevention character in combating the anticompetitive practices in the business area.

The study reached its purpose through examining some particularities of the two incriminations which favor the coherent application through ensuring a fair judicial classification of the factual basis.

We also have presented procedural aspects related to the administration of evidence in proving the two incriminations, which offer a note of pragmatism orienting the specialists in their activity of analyzing, interpreting and application of the two crimes.

Of course, other studies of the same incriminations will be able to base themselves on the case law that will be published and analyzed offering the possibility of finding particular aspects depending on the alternative contents of the two incriminations, ensuring the variety in their application.

References

- Adriana Almășan, Doru Trăilă, Does Criminal Law ensure effective detterent measures against the deeds of malign competititon ? In AUB Law 2014 Supplement. Legal Law. Special Part.

- Adriana Almăşan, The anti-competition agreements in public acquisitions: is criminal replacing contraventional or viceversa ? in the Romanian Magazine for Public-Private Partnership nr. 13/2015, Presearch Center.
- Adina Vlăsceanu, Alina Barbu, The new Criminal code commented by comparison with the old one, Publishing House Hamangiu, 2014.