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THE DIRECTIVE 85/374/EEC ON DEFECTIVE PRODUCTS: ITS INTERPRETATION BY THE EUROPEAN COURT OF JUSTICE

Inmaculada HERBOSA MARTÍNEZ*

Abstract

This paper focuses on the interpretation of the European Court of Justice concerning substantive aspects of the Directive 85/374/ECC of July25, 1985, on liability for defective products. Therefore, this work will deal with the interpretation of some aspects regarding the essence of products liability: The concept of defect and the extent of damage covered by this liability. In addition, a number of issues needing of interpretation are analyzed, such as: The meaning of putting a product into circulation, the right to information of the consumer in order to prove the causation of damage, and finally the problems that arise in cases where the producer is exempt from liability.

Keywords: *Liability, product liability, strict liability, producer liability, defective products.*

1. Introduction. Principle of complete harmonization

As it is known, products liability is governed by the Directive 85/374/EEC of July 25, 1985, on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products. In essence, this Directive concerns liability of the producer for the damage caused by defective products. It imposes "strict liability"[1], without fault, on the liable subject, the producer, where a defective product causes injuries to a person or damage to property.

It is settled case-law that Directive 85/374 seeks to achieve, in the matters regulated by it, completed harmonization of the laws, regulations and administrative provisions of the Member States[2]. To this respect, the European Court of Justice (ECJ) has held that reference in Article 13 to the rights which an injured person may rely on under the rules of the law of contractual or non-contractual liability cannot be interpreted as giving the Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive[3]. Differently, it must be interpreted as meaning that the system of producer liability put in place by

* Professor PhD, Deusto University, (e-mail: inmaculada.herbosa@deusto.es).

[1] As it noted by the ECJ, that is expressly stated in the second recital in the preamble to the Directive. It is also apparent from the enumeration of the matters to be proved by the injured person in article 4 and from the cases in which the producer's liability is excluded in article 7 (see Case C 402/03 *Skov Æg v Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v Jette Mikkelsen and Michael Due Nielsen* [2006], paragraph 19).

[2] See Case C 52/00 *Commission v France* [2002], paragraph 24; Case C 154/00 *Commission v Greece* [2002], paragraph 20; Case C 183/00 María *Victoria González Sánchez v Medicina Asturiana SA* [2002], paragraphs 24-29 and *Skov and Bilka*, paragraph 23. Concerning the intention to harmonize completely at Community level article 11 of the Directive, see Case 358/08, *Aventis Pasteur SA v OB* [2009], paragraph 37.

[3] *Commission v France*, paragraph 21, *Commission v Gree*ce, paragraph 17, *González Sánchez*, paragraph 30 and *Skov and Bilka*, paragraph 39.

the Directive does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects[4]. Likewise the reference in Article 13 to the rights conferred to an injured person under a "special liability system" existing at the time when the Directive was notified, must be construed as referring to a specific scheme limited to a given sector of production[5].

Nevertheless, as is apparent from the 18th recital in the preamble, it is also settled case-law that it does not seek exhaustively to harmonize the field of liability for defective products beyond those matters[6]. In accordance with this statement, the ECJ has ruled that Directive 85/37 brings about complete harmonization only so far as the producer's liability and damages covered by the Directive, among other aspects, are concerned[7].

2. Interpretation concerning the elements that determine liability product

After the promulgation of the Directive 85/374, the ECJ has ruled on several issues concerning its interpretation. Some of them, in recent days, regarding the scope of the Directive, such as the class of liable person, concept of defect and the damage covered by it.

2.1. Concept of liable person

Article 1 of this Directive imposes the defective product liability on the producer of the product in question, as it has been defined in Article 3. The reasons why it appeared appropriate to hold the producer liable have been summarized by the ECJ. So, it is recalled that the choice of allocating liability to producers in the legal system established by the Directive was made after weighing up the parts played by the various economic operators involved in the production and distribution process. To this respect, it was considered that the fact of imposing liability on the supplier, although would make it simpler for an injured person to bring proceedings, first, there would oblige those subjects to insure such liability, resulting in products significantly more expensive. Second, it would lead to a multiplicity of actions brought by the suppliers, back up the chain as far as the producer. All, while in the great majority of cases, the supplier does not influence the quality of the products it sells[8].

Since this Directive, as it has been said before, seeks a complete harmonization in the matters covered by it, the determination in Article 1 and 3 of the class of persons which can be considered liable must be considered as exhaustive[9]. Therefore, in *Skov and Milka* the ECJ holds that the Directive precludes a national rule which transfer to the supplier the liability imposed

[4] See *Commission v France*, paragraph 22, *Commission v Greece*, paragraph 18, González *Sánchez*, paragraph 31, and *Skov and Bilka*, paragraph 47.

[5] See *González Sánchez*, paragraph 32, and Case C-310/13 *Novo Nordisk Pharma GmbH v. S.* [2014], paragraphs 20 and 21.

[6] See Case C 285/08 *Moteurs Leroy Somer v Société Dalkia France, Société Ace Europe* [2009], paragraphs 24 and 25; Case C 495/10 *Centre hospitalier universitaire de Besançon v Thomas Dutrueux, Caisse primaire d'assurance maladie du Jura* [2011], paragraph 21.

[7] See *Centre hospitalier universitaire de Besançon*, paragraphs 26-30 and *Moteurs Leroy Somer*, paragraphs *30-32*, respectively. In addition, regarding the consumer's right to obtain information on the adverse effects of the defective product, see *Novo Nordisk Pharma GmbH*, paragraphs 24 and 25.

[8] See *Skov and Bilka*, paragraphs 27-29.

[9] See *Skov and Bilka*, paragraph 33 and Case C 127/04, *Declan O'Byrne v Sanofi Pasteur MSD Ltd and Sanofi Pasteur SA* [2006], paragraph 35.

by its regulation on the producer, beyond the cases listed exhaustively in Article 3(3) [10]. Reversely, in the same judgment it is recalled that the Directive allows a national rule under which the supplier is answerable for the fault-based liability of the producer for a defective product, since Article 13 does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault[11].

Likewise, since the Directive brings about complete harmonization only so far as the producer's liability for defective product is concern, Member States are allowed to establish a system of strict liability for suppliers different from that laid down under the Directive, only on condition that it does not adversely affect the system established by the latest [12].

It follows that the liability regulated by the Directive only may be imposed on the producer, as defined in Article 3 (1): The manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part. And it is only in the cases exhaustively listed in this Article 3 that other persons can be considered as a producer: Any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer (Article 3(1), any person who imports into the Community (Article 3 (2) and, where the producer or the importer cannot be identified, the supplier who does not inform the injured person of the identity of the producer or of the person who supplied him with the product (Article (3)[13].

In the context of determining the liable person under the Directive, the question of the substitution of the defendant when this is not the producer becomes significant. This question involved two separate references to ECJ as to the same case in the main proceedings. To this respect, in *O'Byrne,* the ECJ rules that it is for national law to determine the conditions in accordance with which one party may be substituted for another when an action is brought against a company mistakenly considered to be the producer. However, in light of considerations made above, the national court which examines the conditions governing such a substitution "must ensure that due regards is had to the personal scope of the directive, as established by Article 1 and 3 thereof"[14]. It follows that the subject who substitutes the defendant must be a producer as defined by this Article.

In *Aventis Pasteur,* as to the same case where the victim mistakenly brought an action against a defendant who was not the producer, the ECJ, having regard to the fact that the defendant was the supplier of the defective product, recalls that where the producer cannot be identified, the supplier of the product is treated as the producer, unless he informs the injured person, within a reasonable time, of the identity of the producer or of his own supplier according to Article 3 (3)[15].

As was pointed out by the ECJ, this latest provision should be understood as referring to the situation in which, taking into account the specific circumstances of the case, the victim "could not reasonably have identified the producer of that product before exercising his rights against its supplier". To this respect, it was stated that the mere fact that the supplier of a product

[10] See *Skov and Bilka*, paragraph 37 and 45.
[11] See *Skov and Bilka*, paragraphs 47 and 48.
[12] See *Centre hospitalier universitaire de Besançon,* paragraphs 26-30
[13] See *O'Byrne*, paragraphs 36 and 37.
[14] See *O'Byrne, paragraphs* 34, 38 and 39.
[15] *See Aventis Pasteur*, paragraph 54.

denies being its producer does not suffice for that supplier to be treated as having informed the injured person of the identity of the producer or its own supplier. On the other hand, the condition relating to the supply of such information within "a reasonable time" involves that the supplier informs the injured person, "on its own initiative and promptly, of the facts referred to above. In any case, it is for national court to determine if the supplier fulfills these requirements[16].

2.2. Concept of defect

The definition of defect is given by Article 6 of the Directive, according to which a product is defective "when it does not provide the safety which a person is entitled to expect". With this purpose, all circumstances must be taken into account, including: (a) The presentation of the product (b) its reasonably expected use; and (c) the time when the product was put into circulation.

Recently, the ECJ has ruled on the circumstances under which a product can be considered as defective in Joined Cases *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt and others*[17]. The question referred to the court was, in essence, whether Article 6(1) allows to classify as defective certain products, belonging to the same group or forming part of the same production series and having all of them a potential defect, without any need to establish that the product in question has such a defect. In this judgment, the Court rules on two related cases concerning implanted medical devices, such as a pacemaker and a cardioverter defibrillator. As we will see, the specific nature of the defective products, medical devices implanted in the human body, was relevant for its ruling.

In deciding this question, the ECJ considered the concept of defect by reference to the Directive itself and, therefore, gave guidance on the parameters to consider a product as defective. The Court, making reference to the definition of defective product (Article 6 of the Directive) and to the sixth recital of the preamble, states that the effect of that recital was that the "assessment must be carried out having regard to the reasonable expectations of the public at large". This expectations, according the Court, must be assed taking into account a number of factors, *inter alia*, "the intended purpose, the objective characteristics and properties of the product in question and the specific requirements of the group of users for whom the product is intended".

For products such as those at issue in the main proceedings, implanted medical devices, the ECJ noted that, given its function and the particularly vulnerable situations of patients using them, the safety requirements which those patients were entitled to expect were "particularly high". Moreover, taking into account these factors, the Court understood that in the cases at issue, where it is found that such products belonging to the same group or forming part of the same production series have a potential defect, it is possible to classify all products in that group or production series as defective, without the need to show that any specific product was defective.

As it has been said above, in adopting this decision the Court seems to have taken into account the specific nature of these products, implantable medical devices, and the specific risks arising from them. However, the Court does not limit its

[16] *See Aventis Pasteur*, paragraphs 55-59.

[17] See Joined Cases C-503/13 and C-504/13, *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt and others* [2015].

decision to these particular products. Therefore, the same solution can be applied, under the same circumstances, to products, other than implanted medical devices.

2.3. Recoverable damages

As it is noted by the ECJ, unlike the terms "product", "producer" and "defective product", for which the Directive provides express definitions (Article 2, 3 and 6 respectively), the term "'damage'" is not defined in the Directive. Neither Article 9 nor Article 1 of the Directive, to which Article 9 refers, contains any explicit definition of the term "damage"[18].

Therefore, Article 9 only indicates the various heads of damage covered by the Directive. Under this Article, those damages are limited to:

Damage caused by death or by personal injuries;

Damage to, or destruction of, any property other than the defective product itself, with a lower threshold of €500[19], provided that the property is ordinarily intended for private use or consumption, and was used by the injured person mainly for his or her private use or consumption.

In *Henning Veedfald v Århus Amtskommune*, given the difficulty in specifying the nature of the damage in the case at issue, the national court referred the question whether the Community Law imposes any requirement as to define the expressions '"damage caused by death or by personal injurie" and "'damage to, or destruction of, any item of property other than the defective product itself" provided for in Article 9 of the Directive[20].

The Court held that **it is for Member States to determine the precise** content of those two heads of damage. Nevertheless, full and proper compensation for persons injured by a defective product must be available for both kind of damages referred in the preceding paragraph, since it is settled case law that application of national rules may not impair the effectiveness of the Directive[21]. In essence, that means that it is for Member States to define these two heads of damages, in order to determine if in a particular case a damage is resulting from death or personal injury or damage to property. But a Member State may not restrict the material damages which are recoverable under these two heads of damages in accordance with Article 9 of the Directive[22].

In recent days, the ECJ has provided guidance on the damages which constitutes "damage caused by death of by personal injuries" according to Article 9 of the Directive. The particular question referred to the Court was whether the costs of an operation to remove and replace the defective medical device constitute damage caused by personal injuries covered by this provision, in the specific circumstances of the joined cases *Boston Scientific* above mentioned. The ECJ has adopted a broad interpretation of the concept of this head of damage, stating that it relates "all that is necessary to eliminate harmful consequences and to restore the level of safety which a person is entitled to expect". This interpretation is based both on the objective of protecting consumer health and safety pursued by this Directive in

[18] See Case 203/99, *Henning Veedfald v Århus Amtskommune* [2001], paragraph 25.

[19] According to the principle of full harmonization imposed by the Directive 85/374, Member States cannot decide against the minimum threshold of €500 (see Commission *v France* [2002] and *Commission v Greece* [2002].

[20] See *Henning Veedfald*, paragraph 11. In this case, the damage consisted of the loss of a kidney that had been removed from a donor for transplantation. The kidney was prepared by the hospital through flushing with a perfusion fluid designed for that purpose. This fluid proved to be defective, making the kidney unusable for any transplant.

[21] See *Henning Veedfald*, paragraph 27.

[22] See Henning *Veedfald*, paragraps 28-29.

accordance with the first and sixth recitals of the Preamble, and the causal relationship between the defect and the damage suffered.

It means that costs for replacing defective medical devices only constitute damage caused by personal injuries covered by the Directive as long as the replacement is necessary to restore the safety the injured person is entitled to expect. In other case, the compensation for this head of damage will cover only those costs which are necessary to overcome the defect. In any case, it is for national courts to determine what measure is necessary in a particular case, "bearing in mind the abnormal risk of damage to which it subjects the patients concerned".

Therefore, in the concrete cases at issue, as to the defective pacemaker, the Court finds that the costs for the replacement of such device, including the costs of the surgical operations, constitute damage caused by personal injuries covered by the Directive. But the Court holds that this finding may be different in the case of the defective cardioverter defibrillators, since it was apparent that the magnetic switch of those medical devices should simply be deactivated. In any case, as it was said above, it is for national court to decide this.

Finally, as it has been said above, since the Directive 85/374 does not seek to harmonize products liability beyond the matters regulated by it, the harmonization does not cover compensation for damage excluded from its scope. That is the case, *inter alia*, of compensation for damage to an item of property intended for professional use and employed for that purpose. In *Société Moteurs Leroy Somer v Société Dalkia France and Others*, the national court asks, in essence, if this Directive precludes the interpretation of domestic law according to which the injured person can seek compensation for this type of damage under a system of strict liability corresponding to that established by its regulation[23]. After stating that compensation for this type of damage is not one of the matters regulated by this Directive, and therefore is not covered by its scope, the Court held that nothing in its wording leads to the conclusion that Community Law deprive Member States of the power to provide a system of liability which corresponds to that established by that Directive[24].

3. Other issues needed of interpretation

Beyond those elements which determine the scope of the Directive 85/374, there are other provisions interpreted by the ECJ which complete a general approach in respect of product liability across the EU.

3.1. Limitation in time of the right of compensation

Article 11 of the Directive states that Member States must provide in their legislation that the rights conferred under its regulation shall be extinguished after a period of 10 years from the date on which the producer put into the circulation the defective product. This 10 years period only can be interrupted when the injured person has instituted proceedings against the producer. To this respect, the 10th recital in the preamble to the Directive states that "a uniform period of limitation for the bringing of action for compensation is in the interests

[23] See *Société Moteurs Leroy Somer*, paragraph 14. In the case at issue, a generator installed in a hospital in Lyon caught fire due to the fact that the alternator manufactured and put into circulation by "Moteurs Leroy Somer" overheated. Dalkia France, which was responsible for the maintenance of this installation, and its insurer, paid compensation for the material damage caused to hospital by that accident and then brought an action against Moteurs Leroy Somer, to obtain reimbursement of the payment made by them.

[24] See *Société Moteurs Leroy Somer*, paragraphs 27-31.

both of the injured person and of the producer".

As it is noted by the ECJ, the purpose of this Article is to place a time-limit on the rights conferred by the Directive on the victim and, it is apparent from its Preamble, to satisfy the requirements of legal certainty in the interests of the parties involved. Therefore, as we will see later when examining the putting into the circulation of the product as the starting date of that period, the establishment of the time-limits within which the action for compensation must be brought must satisfy objective criteria[25].

According to the ECJ, this harmonization contributes, first, to the general aim expressed in the preamble of the Directive, consisting of putting an end to the divergences between Member States which entail differences in the degree of protection of consumers. Second, seeks to limit the liability of the producer to a reasonable length of time, taking into account a number of factors, such as, the gradual aging of products, the increasing strictness of safety standards and the constant progressions in the state of science and technology. In addition, bringing up the opinion of the Advocate General, the Court invokes the need not to restrict technical progress and to maintain the possibility of insuring against risks connected with this specific liability, given the burden this liability represents for the producer[26].

In a context in which the action laid down by the Directive must be brought within the 10-year period, the issue related to the substitution of one defendant for another after the expiration of that period becomes relevant. In *Aventis Pasteur* the question referred by the national court was whether the Directive allowed this substitution although the person named as a defendant in the first place did not fall within the scope of the Directive. Bearing in mind the *rationale* for limiting in time the right of compensation, the ECJ hold that Article 11 precludes the application of a rule of national law which allows the substitution of one defendant for another during proceedings in a way which "a producer", as defined by the Directive, is sued after the expiry of the period prescribed by that Article[27].

According to the court, an outcome to the contrary would involve, first, to accept that this period could be interrupted for a reason other than the institution of proceedings against the producer as prescribed by Article 11. And, second, a lengthening of the limitation period with regard to such a producer. The latter would be inconsistent with the harmonization intended by the Directive and with the legal certainty this provision seeks to grant this subject in the context of the liability established by that Directive. To this respect, the Court recalls the importance of the principle of legal certainty in rules that entail financial *consequences*, in order that those concerned may know precisely the extent of their obligations[28].

In addition, the ECJ gave clarifications to guide the referring court in giving judgment in the main proceedings of reference, where the person named as a defendant before the expiration of the 10 years period was a wholly-owned subsidiary of the producer. To this respect, this Court appoints that it is for the national court to assess whether the product was put into circulation by the producer. So, where the national court notes that fact, first, Article 11 does not preclude national court from

[25] See *O'Byrne,* paragraph 26.
[26] See *Aventis Pasteur,* paragraphs 40-43.
[27] See Aventis Pasteur, paragraphs 43-44
[28] See Aventis Pasteur, paragraphs 45-47.

holding that the parent company, "producer" as defined by the Directive, can be substituted for that subsidiary. Second, the supplier of the product can be treated as the producer, in particular for the purposes of Article 11, where the latest cannot be identified, unless he informs the injured person, within a reasonable time, of the identity of the producer of his own supplier in accordance with Article 3(3)[29]. Where the conditions provided for in this provision are met, the supplier should be treated as a "producer" and, therefore, the proceedings instituted against him will interrupted the limitation period laid down in Article 11[30].

3. 2. Meaning of "putting the product into circulation"

The Directive does not define the concept of 'put into circulation', which is referred to in several provisions of the Directive 85/374. Primarily, in Article 7(a) dealing with the circumstances where the producer will be exempt from liability and Article 11, which places a time-limit on the exercise of the rights conferred by this Directive on the injured person. Secondarily, this term is also used in other provisions: In Article 6.1 (c), dealing with the circumstances to assess the safety expectations of the products to be considered defective, and in Article 17, as the reference date for determining the temporal scope of application of the Directive.

As to the concept of "putting into circulation" referred to in Article 7 of the Directive, in *Henning Veedfald* the ECJ hold that the producer may himself exempt from liability because the product has not been put into circulation, primarily, in cases "in which a person other than the producer has caused the product to leave the process of manufacture". In accordance with this approach, the Court considered that this exception also covers the use of a product contrary to the producer's intention (where the manufacturing process is not yet complete) and use for private purposes. In this context, regarding the concept referred in the Article 7, the Court considered that the cases exhaustively listed by this Article, by which the producer may exempt himself from liability, "are to be interpreted strictly" in order to protect the interests of the victims[31].

In the case at issue, the producer of the defective product , a hospital, produces and uses the product in the course of provinding a medical service. Bearing in mind this situation, the Court held that a defective product is put into circulation when "it is used during the provision of a specific medical service" , although the product did not leave the sphere of control of the service provider [32]. This case is different from that on which a service provider, in the course of providing a service, uses defective equipment or product of which it is not the producer. [33] In the latter case, as it is

[29] See Aventis Pasteur, paragraphs 50-54.

[30] See. Aventis Pasteur, paragraph 60. As to the conditions for the application of article 3 (3), see 1.1. Concept of liable persons.

[31] Cf. *Henning Veedfald*, paragraphs 24 and 25.

[32] In this case, as it was mentioned before, a kidney, previously removed from the donor from transplantation was, rendered unsable for any transplant due to that kidney was prepared through "flushing" with a fluid designed by the hospital for this purpose with proved defective. The defendant hospital denied liability on the grounds that the product had not been put into circulation.

[33] See *Centre hospitalier universitaire de Besançon*. In the case at issue in the main proceedings, a patient suffered burns during surgery carried out in public hospital. The burns were caused by a defect in the temperature-control mechanism of a heated mattress on which he had been laid. The defendant claimed that the Directive 85/374 prevented application of the principle deriving from the case-law, whereby a public hospital is liable even without

apparent from ECJ case law, damage to the recipient of the services does not fall within the scope of the Directive 85/374. Therefore this Directive does not prevent a Member State from applying rules which impose strict liability on a service provider, provided that it does not adversely affect the system established by Directive 85/374[34].

The concept of "putting into circulation" referred to in Article 11 was interpreted in *O'Byrne v. Sanofi Pasteur.* In this context, taking into account the purpose and the aim of this Article explained above, the Court held that a product is put into circulation "when it leaves the production process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed". The ECJ considered that, generally, it is not important in that regard that the product is sold directly by the producer to the user or to the consumer or that the sale is carried out as part of a distribution process involving one or more operators, as Article 3 (3) of the Directive makes apparent[35].

It must be noticed that in the case of reference in the main proceeding, one of the links in the distribution chain was closely connected to the producer, since the distributor of the defective product was a wholly-owned subsidiary of the latter[36]. To this respect, the Could considered that it is necessary to determine whether the subsidiary entity was in reality involved in the manufacturing process of the product or it acts simply as a distributor of depository for the product manufactured by the parent company. In any case, it is for the national courts to establish this aspect, having regard to the circumstances of each case and the factual situation of the matter before them[37].

3.3. Exemption of liability

Since the Directive imposes a system of "strict liability" on the producer, this subject cannot avoid that liability by the mere fact of proving he has acted without fault. Nevertheless, in accordance with the principle of a fair apportionment of risk between the injured person and the producer laid down in the seventh recital in the preamble, Article 7 sets out a number of facts exonerating him from liability[38].

The case law of the ECJ has interpreted some of these circumstances, in addition to that which allows the producer to be exempt from liability when he did not put the product into circulation, analyzed before. In particular, this Court has ruled on the exonerating circumstances laid down in Article 7, paragraphs (c) and (e).

Article 7 (c) of the Directive exempts the producer from liability when the producer proves that "the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business". As to the exemption from liability where an activity has no economic or business purpose, the ECJ has ruled that it does not extend to the

fault for damage caused to users as a result of the failure of products or equipment used in connection with their treatment.

[34] See *Centre hospitalier universitaire de Besançon,* paragraphs 27, 30 and 39.

[35] See *O'Byrne v. Sanofi Pasteur,* paragraphs 26 and 27. See also paragraph 32.

[36] In the case of reference, the producer of the defective product, an antihaemophilus vaccine, had sent it to a distributor, which was a wholly-owned subsidiary of the producer. Then, the vaccine was sold by this distributor to the Department of Health of United Kingdom and delivered directly to a hospital nominated by the Department of Health.

[37] See *O'Byrne v. Sanofi Pasteur,* paragraphs 29 and 30.

[38] See Case C 300/95, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1997], paragraph 24.

case of a defective product which has been manufactured and used in the course of a providing a service (in the case of reference, a medical service) which is entirely financed from public funds and for which the user is not required to pay any consideration. To this respect, this Court appoints that this activity "is not a charitable one" which could therefore be covered by the exemption from liability provided for in this provision[39].

On the other hand, Article 7 (e), in connection with Article 15.1 (b), allows Member States to decide whether in its legislation the producer can be exempt from liability when "the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered" (the so called, "development risks"). The ECJ makes several observations as to the wording of this provision. The Court states, first, that this provision does not refer to the practices and safety standards in use in the industrial sector in which the producer is operating, but "at the state of scientific and technical knowledge, including the most advanced level of such knowledge at the time when the product in question was put into circulation". Second, that it does not contemplate the subjective knowledge of a producer but "the objective state of knowledge of which the producer is presumed to have been informed". Finally, it is considered implicit that the relevant knowledge must have been accessible at the time when the product in question was put into circulation[40].

3.4. Proof concerning the causation of damage

As it is known, Article 4 of the Directive places the burden of proof on the victim or injured party as to the damage, the defect, and the causal relationship between these two elements.

Although the Directive does not define the standard of proof and how evidence is gathered, some Member States have imposed on the producer the obligation to provide useful documentation and information related to the defective product to the victim. The question is if the principle of complete harmonization brought by the Directive would prevent Member States from adopting this provision.

According to the ECJ, it should be noted that, as a matter of principle, the consumer's right to obtain information on the adverse effects of a product provided for by national legislation is excluded from the scope of the Directive 85/374 and, therefore, it would not be affected by the principle of complete harmonization of the matters covered by it. But, as it is noted by this Court, in reaching a decision, it would be necessary to ascertain if this provision would be capable of undermining the allocation of the burden of proof as delimited in Article 4. To this regard, the Court holds that it does not bring about a reversal of the proof as delimited by the Directive and does not introduce any change in the circumstances listed in Article 7 under which the producer can be exempt from liability. It follows that the Directive does not preclude national legislation under which the consumer has a right to require the producer to provide him with such an information[41].

In the case at issue, the Court avoids the question referred by the national court for preliminary ruling concerning the interpretation of Article 13 of the Directive, since that question becomes irrelevant once found that the right to information is outside the scope of it.

[39] See *Veedfald*, paragrpahs 21 and 22.
[40] See *Commission v United Kingdom*, paragraphs 25-29.
[41] See *Novo Nordisk Pharma GmbH*, paragraphs 25 -31.

3. Conclusions

Ever since the Directive 85/374 concerning liability for defective products was adopted, the ECJ has been called on to deliver a number of judgments on its interpretation. ECJ case law provides a catalogue of cases on product liability, a number of them in recent days in the field of medicine (pharmaceutical products and medical devices). Certainly, the case law of this Court does not put an end to all the questions arising from the application of the Directive but it decisively contributes to clarifying and elaborating the basic principles of product liability across the European Union.

LEGAL CONSEQUENCES OF MERGERS AND ACQUISITIONS

Amelia-Raluca ONIȘOR*

Abstract

The research analyses the legal effects of mergers and acquisitions from the Romanian Company Law perspective, underlining certain general principles, the procedure of annulment of such a legal transformation of companies and the protection of the employees of companies participating in the merger according to the Law no. 67/2006.

These consequences of mergers and acquisions are to be seen in the broader light of the most important purpose of this legal instrument, maximizing financial and organizational efficiencies, thus legal certainty is a desirable goal to be assumed by any merger regulation.

Keywords: *mergers, acquisitions, legal consequences of mergers, nullity.*

1. Effects of merger and acquisitions for the participating companies

1.1. General principles

Mergers and acquisitions is a legal transaction involving the change of society pact, a way of external reorganizing of the companies, to bring together assets and activities1.

With the completion of this operation, certain legal effects which accompany these types of statutory changes are produced.

The main legal consequence of such operations is determined by dissolution without liquidation of the company which ceases to exist. The other legal effects of mergers, expressly provided by article 250 paragraph (1) letter a)-c) of Law no. 31/1990, are ensuing and concern:

i) universal transmission or with universal title of the society's assets dissolved by the company or beneficiary companies;

Referring to the universal transmission of assets, it must be emphasized that the rights and obligations belonging to companies which dissolve, are transmitted in the conditions and safeguards accompanying them at the time of the operation. Although the transmission is done on a contractual basis, pursuant to the judgment adopting the merger, it has also a legal nature, by its express consecration in the provisions of article 238 paragraph (1) of Law no. 31/1990.

The fact that the assets transmission is universal and operates de jure, it determines that the transfer of rights and contractual obligations of the company dissolved in favor of the acquiring or new company formed, to be imposed automatically to contractors, without any formality. Enforceability of the principle of merger to the latter, third parties of the legal operation of reorganization is due to the publicity formalities required by law for the merger procedure.

* PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: amelia.busca@gmail.com).

[1] See Ioan Schiau, Titus Prescure, *Legea Societăților comerciale nr. 31/1990. Analize și comentarii pe articole*, Ed. Hamangiu, 2007, p. 687. [*The Law of Companies no. 31/1990. Analyzes and comments on articles*], Hamangiu, 2007, p. 687.

Of course, if any trademarks, patent or other intellectual property rights, it is also necessary to fulfill the formalities laid down by the special legislation, such as those inserted in the provisions of Law no. 84/1998 on trademarks and geographical indications. In the case of immovable property, it must be followed the procedure for registration in the land register on the basis of the reorganization document concluded in authentic form, in accordance with the provisions of article 242 paragraph (3) of the Civil Code.

At the same time, the universal transfer of assets will be carried out in accordance with the distribution rules set out in the merger and acquisition project, according to article 250 paragraph (1) letter a) of Law no. 31/1990.

Universal character and universal title of transmission of assets requires, on the one hand, that all the rights belonged to the company being acquired or merging companies to be transmitted through merger, and, on the other hand, to be transmitted also the obligations of the company or companies who cease to exist.

Thus, standing to bring proceedings – locus standi – or standing to be sued in a dispute started by or against the company which ceases to exist after the merger will be made by the beneficiary company or companies. According to article 38 of the Civil Procedure Code, it is operating a transmission of the standing to pursue the proceedings.

Similarly, for disputes triggered after the date on which the merger takes effect, active or passive procedural legitimacy belongs to the beneficiary company. In this regard, the beneficiary company may sue the managers of the acquired company for damages, may initiate enforcement relying on an enforcement order to the company absorbed.

The merger can not be a reason per se for cancellation or rescission of contracts, they being imposed between the parties laid down by law, an interpretation contrary eluding itself the main purpose of the regulation of such legal-technical operations, simplification of the operation of universal transmission of assets. The rescission or termination has the nature of a penalty for non-fulfillment of a contractual obligation, or, patrimonial devolution is not a such non-execution.

Târgu Mureș Court of Appeal stated in a decision of this case[2], that the effect of the merger by absorption is the one of universal transmission of assets, the legal beneficiary acquiring both the patrimonial rights and obligations belonging to the absorbed company in the case judged. It thus concluded that the existence of an enforcement which could be successfully opposed to the absorbed company makes that the procedure about getting a new title to the absorbed company for the same claim to be uninteresting[3].

From the date from which the merger produces effects on third parties, i.e. from the date of advertising procedures, the company acquires the quality of universal cause, benefiting, inter alia, of the rights in favor of the company that is reorganizing the judgment[4].

As decided by the High Cassation and Justice - Civil Division I, in the decision no. 5141 / November 08th 2013[5], the effects of

[2] Decision no. 363/R/11.05.2006, on website: http://portal.just.ro/43/Lists/Jurisprudenta/DispForm.aspx?ID=90.

[3] The court noted that "by the universal transmission effect, the plaintiff must use the procedural means provided by law to enforce the judgment given and not to take steps to order a new enforceable title".

[4] In this regard, the Supreme Court ruled in France by commercial decision of October 21st 2008, published in *Bulletin d'information de la Cour de Cassation* (hereinafter "BICC") no. 697 of March 01st 2009. The conclusions are valid in the Romanian commercial law, due to the similarity regulations.

[5] Pronounced in case no. 13923/95/2011, published on the website www.scj.ro

the judgments in cases where the dissolved company had a party concept, are extended from the date of the merger - date of establishment of the new company, the latter acting as universal successor of the company being divided, just as it would have participated in the proceedings, the successor being obliged to comply with the judgment entered in res judicata.

In the absence of a stipulation in the contract, an absorbent company is entitled to a clause of guaranteeing a debt referred for a company being absorbed[6].

As regarding the rights of the third parties, the new company or the absorbing company is required to comply the company's obligations that are reorganizing, regardless of the agreed decision to adopt the merger[7].

Following universal transmission of the assets that accompanies the merger operation, creditors may be harmed only economically, not legally, the value of the assets that were the object of their universal pledge being able to be reduced, possibly by attaching them to a new patrimony. However, creditors have the right to object, in the conditions provided by article 243 of Law no. 31/1990.

Regarding the effect of dissolution without liquidation of the absorbed companies or companies that merge, which reach at least one of the participating entities in the merger, it causes loss of legal personality at the time the merger takes legal consequences.

Regarding contracts of companies which are abolished, as was pointed out earlier, these change in the subjective aspect, due to the intervention of legal subrogation of the absorbing company or new company, in the rights of the company/companies abolished as a result of the merger.

By Decision no. 77 / A of October 10th 2013, Târgu Mureș Court of Appeal Civil section II, of administrative and fiscal departament, cited by the High Court of Cassation and Justice, Civil Division II, in Decision no. 2327 / 19.6.2014, in case no. 3/1371/2011, it was considered that the conditions under which the merger interfered with the defendant company, the latter took only the outstanding contract with written clauses thereof, not bound to comply or continue various commercial habits established by the terminated company after the merger[8].

It should be noted that the aforementioned subrogation occurs without further formalities than those provided for the validity and enforceability of the merger.

However, the concession contracts, that are intuitu personae, can not be transferred without the consent of the grantor, given the prohibition in article 28 paragraph (6) of Law no. 219/1998.

Furthermore, employment contracts concluded by the absorbed company or the abolished one, as a result of the merger shall be forwarded by law to the beneficiary company.

Following the universal transmission, augmentation of capital occurs regarding the absorbent company with the regime of a contribution in kind.

ii) award of shares or of shares in the company or the beneficiary companies to the associates of the company which is dissolved;

The legislator regulates the situation of mutual holdings of securities between the participating companies in the merger.

[6] *Cour de Cassation*, Chambre Commerciale, commercial decision of July 10th 2007, BICC no. 671 of November 15th 2007.

[7] See the decision of the French Supreme Court, Chambre Commerciale, April 7th 2010, application no. 09-65899, published on the website Légifrance at http://www.legifrance.gouv.fr/initRechJuriJudi.do.

[8] Published on the internet at: http://lege5.ro/en/Gratuit/gqydmobtgm/decizia-nr-2327-2014-privind-obliga-ia-de-a-face.

According to article 250 paragraph (2) of the Law, the shares in the absorbent company can be exchanged for shares issued by the company being absorbed and are held either by the absorbent company itself or through a person acting in its own behalf but on behalf of the company or by the company being absorbed itself or through a person acting in its own behalf but on the company behalf.

iii) the absorbed company ceases to exist since its removal from the commercial register.

This extinctive effect is, in fact, an essential feature of the merger, with repercussions on the validity of the operation. Thus, there are not part of the reorganization of merger type the disposals and exchanges of securities, shares, in which case their issuing company continues to protect its autonomy and its legal status.

Dissolution caused by merger is not followed by liquidation, it becomes useless by the transmission with universal assets character of the company or companies being absorbed / that merge. Therefore, the principle of survival of legal personality for liquidation is not applicable to this method of reorganization.

1.2. Date on which the merger is effective

Law number 31/1990 establishes different dates to produce merger effects, depending on the specifics of each operation.

According to article 249 letter a) of the Act, the effects of the merger are occurring after the date of registration in the trade register of the new company or the last of them.

In case of merger by absorption, the general rule provided for by article 249 letter b) of the Act shows that the effects are produced from the registration decision of the last general meeting which approved the operation.

The legislator established, as an exception to the general principle previously pointed out, the situation in which the parties agree that the operation takes effect on a specific date, stating that it can not be after the conclusion of the current financial year of the absorbent company or beneficiary companies or earlier conclusion of the last financial year of the company or companies that transfer their assets.

1.3. Effects of the merger towards third parties

As a general rule, contractual rights and obligations belonging to the company which will be forwarded to dissolve are transmitted to the absorbent company or the newly created company. The latter is part of a contract, without other contractors to object, as a result of the universal transmission of the assets.

However, some contracts do not follow this regime. It is about the conventions intuitu personae, at the conclusion of which the consideration of the contractor is determined. Because these contracts are submitted to new company or absorbent company, it is required the prior consent of the contracting party[9].

1.4. Protection of employees of companies participating in the merger

According to article 243 paragraph (9) of Law no. 31/1990, the opposition institution to the merger recognized to social creditors and governed by the provisions of

[9] See in this respect, on the character *intuit personae* of an exclusive concession contract or of a commercial agency contract, Cour d'appel de Paris, November 2nd 1982, *Bulletin repide de droit des affaires (Éditions Francis Lefebvre*) February 15th 1983, p. 12; and the Cour de cassation, chambre commerciale, October 29th 2002, Bulletin Joly Societies, 2003, p. 192.

article 243 paragraph (1) - (8) of the same law does not apply to wage claims arising from the individual employment contracts or applicable collective agreements, which satisfy the conditions of paragraph (1), whose protection is made according to the Law no. 67/2006 on the protection of employees' rights in case of transfer of the enterprise, unit or parts thereof, and according to other applicable laws.

For the purposes of the constitutionality of the above provisions was ruled the Constitutional Court Decision no. 404/2012 relating to dismiss the objection of unconstitutionality of article I point 4 of Government Emergency Ordinance no. 90/2010 amending and supplementing Law no. 31/1990[10].

The court was notified of the objection of unconstitutionality of article I point 4 of Government Emergency Ordinance no. 90/2010 amending and supplementing Law no. 31/1990, exception made by a union in a case covering the outcome of the opposition against a merger ruling thereon.

In motivating the exception of unconstitutionality, its author argued that the legal provisions criticized affect free access to justice for employees who see themselves deprived of the appeal of the opposition to the merger / division given that they are holders of firm, liquid debts, but not due. According to the author of the objection, removal of employees from among those persons who can raise objections was made on the basis of discriminatory criteria.

The Court held that protection of employees is carried out according to the provisions of Law no. 67/2006 on the protection of employees' rights in case of transfer of the enterprise, unit or parts thereof. The provisions of article 5 of Law no. 67/2006 provide imperatively that the rights and obligations of the assignor arising from individual labor contracts and applicable collective labor contract existing at the time of the transfer; will be transferred entirely to the transferee, it having also the obligation to comply with the applicable collective labor contract. Thus, the new legal entity is obliged to provide all rights to salary and other that employees had prior to the time of the merger.

Thus, the Law 67/2006 on the protection of employees' rights in case of transfer of the enterprise, unit or parts thereof has transposed into national law Directive 2001/23 / EC[11].

Prior to adoption of this particular normative framework, were introduced Articles 173 and 174 of the Labor Code - Law no. 53/2003, norms that are the common law on the matter. These provide that employees enjoy protection of their rights where a transfer of enterprise, unit or parts thereof, to another employer, by law, that the rights and obligations of the transferor arising from a contract or relationship employment existing on the transfer date will be entirely transferred to the transferee and the transfer of the enterprise, unit or parts thereof can not constitute grounds for collective or individual dismissal of employees by the transferor or the transferee. At the same time, it is recognized a right to earlier information and consultation of the transfer, of the trade union or, where applicable, of the employees representatives on the implications of legal, economic and social consequences for employees resulting from the transfer of ownership and the related

[10] Published on the internet at https://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx

[11] Directive 2001/23 / EC of March 12th 2001 on the approximation of laws of the Member States relating to the safeguarding of employees in the event of transfers of enterprises, units or parts of enterprises or units, published in Official Journal L 082/16, 05 /volume 06, p. 20.

obligation borne by the transferor and transferee.

Law no. 67/2006 transposing the Council Directive 2001/23 / EC on the approximation of the laws of the Member States relating to the safeguarding of employees in the event of transfers of enterprises, units or parts of enterprises or units[12].

Regulating a detailed procedure, special rules - Law no. 67 / 2006 – define at article 4 letter d) the notion of transfer, as the passage of property owned by the transferor to the transferee of an enterprise, unit or parts thereof, aimed at continuing the principal or secondary activity, whether intended or not making a profit.

Thus, article 5 of Law no. 67/2006 provides that the transferor's rights and obligations arising from individual labor contracts and the applicable collective contract, existing on the transfer date, will be fully transferred to the transferee.

Prior to the transfer, the transferor has to notify the assignee of all rights and obligations to be transferred to it.

Failure to notify will not affect the transfer of these rights and obligations to the transferee and the rights of employees. [Article 6 of the Act]

The most important provision of the law is related to the fact that transfer of the business, unit or parts thereof can not constitute grounds for collective or individual employees' dismissal by the transferor or the transferee, provided by article 7 of Law no. 67/2006.

In addition, if the transfer involves a substantial change in working conditions to the detriment of the employee, the employer is responsible for termination of the individual employment contract. [Article 8]

The transferee has the obligation to observe the collective agreement applicable to the transfer date until the date of termination or expiry. By agreement between the transferor and representatives of employees, collective agreement clauses valid at the time of transfer can be renegotiated, but not earlier than one year from the date of transfer.

Where, following the transfer, the enterprise, unit or parts thereof do not preserve its autonomy and the collective agreement applicable to the transferee is more favorable to employees transferred will apply more favorable collective agreement. [Article 9]

Where, following the transfer, the enterprise, unit or part thereof retains its autonomy, the representatives of the employees affected by the transfer maintain their status, powers and function of whether the conditions for representation are complied under the law. If legal representation conditions are not met, the transferred employees choose their representatives by law.

If the transfer of the enterprise, unit or parts thereof does not preserve its autonomy, the transferred employees will be represented by their express agreement by representatives of the employees of the transferee's company, until the establishment or inauguration of new representatives, under the law. [Article 10]

According to article 11 if the transferor or transferee envisages measures on its own employees, will consult with the employees' representatives in order to reach agreement with at least 30 days before the date of transfer.

Article 12 paragraph (1) of the Act provides that the transferor and the transferee shall inform in writing the employees' representatives themselves or, if they are not constituted or appointed on their employees, with at least 30 days before the date of transfer, on the date of transfer or proposed date of transfer, the reasons for the

[12] Published in the Official Journal L 82 of March 22nd 2001

transfer, the legal, economic and social implications of the transfer for employees, the measures envisaged in relation to the employees and the conditions of work and employment.

Paragraph (2) of the same legal text, states that the information obligation under paragraph (1), shall apply regardless of whether the decisions resulted from the transfer are taken by the transferee or by an enterprise exercising control over it.

2. Nullity of the merger of companies on the commercial activity

2.1. Legal nature of the merger nullity

Merger nullity is both a cause of inefficiency and a sanction lacking the transaction of the contrary effects of legal rules enacted to achieve the reorganization process to companies / company involved. Thus, it intervenes only when it conflicts legal rules governing the conditions of validity, of background or shape of the operation.

From the legal regulation of the merger nullity, namely the provisions of article 251 paragraph (1) of Law no. 31/1991, it is deduced the legal nature of the nullity of the operation said. Thus, the legal text expressly provides that the nullity of a merger to be declared only by court order, expressly excluding the possibility of amicable nullity in this matter.

Reported to the nature of the interest protected by the legal provisions violated in pursuit of completing the merger, its nullity can be absolute or relative. The law itself refers to the provisions of article 251 paragraph (3), to the absolute or relative grounds for nullity, namely the nullification proceedings and of declaration of the merger nullity.

The same text establishes the prescriptive nature of the nullity, so it can not be relied upon expiry of 6 months from the date on which the merger or division became effective.

It is noted, however, that the premises for nullity or annulment of operation are strictly provided by the law and the sanction cannot be extended to other legal situations.

2.2. The grounds of the merger nullity

According to article 251, paragraph (2) of the Act, the two grounds of nullity, strictly established, are: the lack of judicial control in accordance with legal regulations and absolute or relative nullity of one of the general meeting which voted the merger project.

In this regard, the commercial sentence no. 7702 of June 24th 2010 in case no. 50861/3/2009 of Bucharest Tribunal, irrevocable by decision no. 3601/2011 of the High Court of Cassation and Justice, Civil Division II[13], the court held that there can be retained grounds for nullity of the merger decision of general meeting on the conduct of the merger in two stages, "because on the date of preparation and publication of the merger project Law no. 31/1990 was no longer compulsory to conduct two-step merger, article 239 of the Act does not contain no penalty for the lack of judgment in principle on the merger or division, and the merger nullity can be declared only in accordance with article 251 of the same law.

Thus, the reason for nullity of the judgment of the general meeting alleging infringement of the provisions of article 134 of Law no. 31/1990 was rejected by the court, given that it is not found in the

[13] *In extenso,* on the Internet at: http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=78160.

grounds for nullity mentioned in article 251 of mentioned regulation.

A) Lack of judicial / administrative control

Regarding the first question of nullity, the text provides that the legal nullity may intervene in the merger which was not subject to judicial control in accordance with article 37 of the same law.

Thus, according to article 37, paragraph (1) of the Act, the control of the legality of acts or facts which, by law, are registered in the trade register, is exercised by justice by a delegated judge.

It should be noted that through article 1 of Government Emergency Ordinance no. 116/2009 for establishing measures on trade registration activity[14], notwithstanding the Law no. 31/1990, it was provided that has jurisdiction to hear applications for registration in the trade register and, where appropriate, other applications under the jurisdiction of the judge delegated to the regulation of trade registration conducted by commercial registrars, for the director of the trade register office attached to the court and / or the person or persons designated by the Director General of the National Office of the Trade Register.

This legislative amendment was based on the desire to remedy with celerity the blockage existing at the trade registry offices.

Consequently, the control of legality performed to record changes of the articles of association with the trade register, just like any other registration, is carried out by the Director of the Trade Register attached to the tribunal and / or the person or persons designated by the Director General of the National Office of the Trade Register and not by the delegated judge.

Specifically, after drafting the merger project and signing it by representatives of participating companies, it is submitted to the Trade Register Office where is registered each company, together with a statement of the company which ceases to exist after the merger or division on how was decided to extinguish its liabilities, and a statement regarding the manner of publication of the merger project or division (article 242, paragraph (1) of Law no. 31/1990)

The law provides that the merger or division, will be targeted by the delegated judge, for publication in the Official Gazette of Romania, Part IV, at the expense of parties, in whole or in excerpt, according to the judge's delegation or demand of the parties, with at least 30 days prior to the dates of extraordinary general meetings in which are to decide, pursuant to article 113 letter h) on the merger. (Article 242 paragraph (2) of Law no. 31/1990)

To simplify the procedures and to reduce the administrative costs, the legislator has given companies the possibility, if they have their own web page, to be able to replace the publication in the Official Gazette of Romania, Part IV, provided in the paragraph (2) with the publication made through its own website, for a continuous period of at least one month before the extraordinary general meeting which is to decide on the merger / division, period ending not earlier than the end of that general final meeting. (Article 242 paragraph (2^1) of Law no. 31/1990)

Therefore, the lack of performance of a judicial / administrative control targeting the merger project for publication in the Official Gazette or on its own web page, is ground of nullity of the merger operation as a whole.

Clearly, because is the question itself is the nullity operation, it is necessary to invoke such irregularity to be achieved the completion of the merger process, of course,

[14] Approved by Law no. 84/2010.

within the period prescribed in Article 251 paragraph (3) of Law no. 31/1990.

B) The situation in which the judgment of one of the general meeting which voted the merger project is void or voidable

Without distinction on grounds of public policy or private character of the rule disregarded the adoption of the ruling of the General Assembly which voted the merger project, such an irregularity per se justifies a declaration of nullity in the merger process.

It should be noted that if earlier completion of the process fusion, absolute nullity or, where applicable, relative to this legal act drew the imprescriptible character or prescriptible of the action in finding the nullity or annulment of the judgment, from the date on which the merger becomes effective regardless of the nature of the interest protected by the infringed rule, the invocation of the merger nullity for this reason is prescriptible within 6 months provided for in article 251 paragraph (3) of Law no. 31/1990[15].

2.3. The procedure of nullity declaration

As noted above, the nullity of the merger has a judicial character and the right of action is prescribed under article 251, paragraph (3) of Law no. 31/1990, within 6 months from the date on which the merger or division has become effective pursuant to article 249, or if the situation has been rectified.

The date on which commences the prescription term - dies a quo - is, in case of the formation of one or more new companies, specifically in the case of the merger, from the date of registration in the trade register of the new company or the last of them, and in case of merger by absorption, from the recording date of the last judgment of the general meeting which approved the operation, except that, by agreement, it is stipulated that the operation will take effect on another date. In the latter situation, the conventional chosen date may not be later to the end of the current financial year of the absorbent company or beneficiary companies, nor the later to the end of the last financial year of the company or companies that transfer their assets.

During this time is essentially legal, and the calculation of this period is done according to the general rules contained in the provisions of article 2552 of the Civil Code. Thus, it shall expire on the corresponding day of the last month, and if the last month has no corresponding day to the one in which the term began to flow, the term shall expire on the last day of this month.

Thus, by Decision no. 178 of April 10th 2009 pronounced in case no. 2718/87/2008, Bucharest Court of Appeals - Commercial Section VI[16], it was noted that under article 251, paragraph 3 of Law no. 31/1990, the cancellation procedures and declaration of merger nullity or division may not be initiated after the expiration of six months from the date on which the merger or division became effective under article 249, or if the situation has been rectified. Also, according to article 249, letter b of the Law no. 31/1990, republished, the merger takes effect from the date of registration of the last general ruling that approved the operation.

[15] For details, see Cristian Gheorghe, *Drept comercial român*, Ed. C.H. Beck, București, 2013, p. 518-520. [*Romanian Commercial Law*], Ed. C.H. Beck, Bucharest, 2013, p. 518 – 520. The author argues that the action for annulment of the general meeting judgment which approved the merger project, brought after the consolidation operation, "is absorbed by the action in the operation nullity, existing only inside and with its justification" (*opus citatum, p. 520*).

[16] Available on the Internet, at the address: http://portal.just.ro/2/Lists/Jurisprudenta/DispForm.aspx?ID=427

The Court found that the date specified in article 249 letter b) of the Act was to September 26th 2007, when it held general meetings of both companies, so the company that is being absorbed and the absorbent company, meetings that approved the merger, noting that there were no oppositions to the merger project.

Given that from this date passed more than six months, the request of declaration of nullity of the merger by D.G.F.P.J.T. was recorded before Teleorman Court on October 20th 2008, the Court accepted this lateness exception formulation request and rejected the request as being out of time.

Being a period of extinctive prescription, it is subject to the institution of suspension[17], interruption[18] and restoring the prescription period[19], given that the law provides otherwise. Of course, common law causes of suspension, interruption and restoration in term provided for by article 2532, article 2537, respectively article 2522 of the Civil Code have not fully implemented the mergers situation, given the specific of this operation and the topics that may invoke the nullity of this operation.

An action for annulment / nullity may be exercised by the associates of the companies participating in the merger, stating that, on the invocation of the relative nullity of decisions of the general meetings, must take into account the provisions of article 132, paragraph (2) of Law no. 31/1990. More specifically, they exclusively act as shareholders who have not taken part in the general meeting or voted against and asked to insert it in the minutes of the meeting.

It should also be noted that, from the regime of absolute nullity, any person may request the its declaration judicially, but must be proven he essential condition for setting in motion the civil action, namely the interest, practically benefit pursued by the plaintiff, who must be legitimate, vested and present, personal and determined according to article 32, paragraph (1) d) of the New Code of Civil Procedure.

In this regard, it was ruled also the High Court of Cassation and Justice, Civil Division II, by decision no. 2580 / June 27th 2013, in case no. 1508/1259/2011*[20]. Thus, in line with those adopted by the appeal court, it was noted that "the plaintiff has locus standi because it relied on a ground of absolute nullity, which can be invoked by third parties to the merger agreement," but it did not justified "a practical interest in invoking this absolute nullity".

The court vested with such action shall grant the companies involved in the merger process a deadline for rectification, in cases where the nullity is likely to be remedied. [Article 251, paragraph (4)]

Of course, the assessment on the possibility of rectification belongs to the court.

The provisions of article 251, paragraph (3) from the last thesis of the law

[17] Suspension of the prescription term is "that change of the course of the prescription that lies in stopping rightfully the flow of the prescription term during limiting situations provided by law that put it in the impossibility to act on the holder of the right to act". See, în acest sens, Gabriel Boroi, Liviu Stănciulescu, *Instituții de drept civil în reglementarea noului Cod Civil*, editura Hamangiu, București, 2012, p. 310 și următoarele. [*Institution of civil law in the regulation of the new Civil Code*], editura Hamangiu, Bucharest, 2012, p.310 și următoarele.

[18] Interruption of prescription term is to change its course consisting of removal of the prescription period elapsed prior occurrence of an interruption and the start of another prescription. *Ibidem*, p. 314 et seq.

[19] Restoring the term is a benefit granted by law to the right holder to action which, for good reasons, could not trigger the action within the prescription period, so that the body of jurisdiction is entitled to deal in substance the complaint in court, although it was brought after the expiry of the prescription period. *Ibidem*, p. 319-322.

[20] Published on the Internet, at the address, http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=113441.

take into account the possibility that the companies involved to rectify the irregularity prior to referral to the court. According to the law, cancellation procedures and merger or division nullity declaration may not be initiated if the situation has been rectified.

In the legal doctrine[21], it was stated that legal provisions do not refer to a real inadmissibility of the action, the court being forced to determine whether the grounds for nullity and fixing them until the notification date of the court.

We agree with this view, arguing that, indeed, the law does not stipulate a plea of inadmissibility, the analysis of existence at the time of the action, a plea of nullity of the operation is done either in terms of the merits of the action, either the existence of the interest demanded by law to promote the action based on concrete facts before it.

Regarding the mandatory procedure prescribed by law, must be evoked the conclusions of the High Court of Cassation and Justice, in the Commercial Decision no. 153 of January 18th 2011[22], which showed that in the procedural framework governed by the provisions of article 364 of the Civil Procedure Code, criticisms must concern the arbitration decision and the judgment of the court in an action for annulment and not for reasons which may be invoked in accordance with the rules established by another law.

Thus, continued High Court's reasoning, the exception of nullity judgment of the extraordinary general meeting of shareholders and of the merger company can be analyzed only after the procedural rules laid down by the mandatory provisions contained in article 132, article 250 and article 251 of Law no. 31/1990 and can not be valued on incidental way.

As required by article 251, paragraph (5) of the law, "[the final declaration of nullity decision of a merger or division will be forwarded ex officio by the court to the registry offices at the headquarters of trade companies involved in the merger or division concerned"].

2.4. Effects of merger nullity

The legal consequences of the sanction of nullity of a civil legal act are governed, traditionally, by the three principles of the common law of such sanctions: retroactive effects of nullity, reinstatement in the previous situation – restitutio in integrum, the cancellation of both the operation and subsequent legal acts - resolute iure dantis, resolvitur ius accipientis.

In the matter of merger nullity, these principles known, however, justified limitations on the specific operation, the need to protect the interests of third parties in good faith, and for ensuring legal certainty.

Thus, first, article 251, paragraph (6) of Law no. 31/1990 provides that "[the final decision of declaration of nullity of a merger [...] shall not affect the validity of obligations incurred by itself in the benefit of the absorbent or beneficiary company engaged after the merger or division became effective under article 249, and before the ruling of nullity to be published."

As a result of the principle of restoring the previous situation, the company or companies that have ceased to exist by merger, regain legal status, are canceled the legal effects of removal from the trade register and are excluded amendments of articles of association of the benefiting companies.

However, according to article 251, paragraph (7) of the Act, if the nullity

[21] Cristian Gheorge, *opus citatum*, p. 522.

[22] Available on the Internet, at the address: http://www.scj.ro/1093/Detalii-jurisprudenta?CustomQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=82969.

declaration of a merger, the companies involved in the merger shall be jointly liable for the obligations of the absorbent company after the merger or division became effective, pursuant to article 249, and before the ruling of nullity to be published.

Conclusions

This paper aims to examine the effects of the merger on the companies' business, and the nullity of such an operation from a dual perspective, theoretical and practical.

Although Romanian law covers a broad regulatory issue mentioned, the regulations are imperfect.

Thus, as a *de lege ferenda* proposal, we believe that it would be necessary to clarify and define the causes of suspension, interruption and restoration of the time limit on the period of extinctive prescription provided in article 251, paragraph (3) of Law no. 31/1990. Common law cases are not adapted to the operation, nor reported to topics that can engage in a procedure of annulment or declaration of nullity of the merger. However, keeping in view the wishes of legal certainty, predictability and creating an attractive tool for companies that want to reorganize, those cases that determine, ultimately, the timing of the procedure referring to the merger should be restrictively provided by law.

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THE EFFICACY OF THE ARBITRATION CLAUSE IN A SIMULATED ACT

Tudor Vlad RĂDULESCU*

Abstract

The article focuses on the effects that an arbitration clause can still produce when it is contained in a simulated operation, whether it is in the apparent act or in the secret one, depending on the forms of simulation.

Keywords: *simulation, arbitration clause, relativity of contracts, overt act, ccovert agreement.*

1. Introduction (Times New Roman, Bold, 10, justify)

The material aims to address the issue of compatibility between the arbitration clause and the operation of simulation. More specifically, to answer two problems that could arise if the parties, chosing to hide the true legal relationship between them, have concluded a secret act, known only by them, and a public act, ostensible, enforceable against third parties, where they chose to introduce an arbitration clause.

Thus, the two problems can be summarized as follows: 1. the action for declaration of the simulation will be the jurisdiction of the courts or of an arbitral tribunal? and 2. if disputes are in relation to the performance of the obligations arising from the covert contract, the one taking effect between the parties, the competence will belong to the courts or to the arbitral tribunal?

The above problems may arise, as we have shown, where the parties have included the arbitration clause only in the content of the public act, and not in the secret one, and shall be established to what extent this clause will be more effective, or, in in other words, what is the relation between the arbitration clause and the avert contract between the parties: of independence or dependence?

To provide an answer to these problems, we will do a review of the two institutions meeting at issue: **the simulation**, exception to the enforceability of documents to third parties, but especially viewed from the perspective of relativity and enforceability if the effects of contracts between the parties, and the arbitration agreement, disguised under the mantle of **arbitration clause**, first seen individually, and then we will review to what extent the second one can somehow influence the action for declaration of the simulation or general or material jurisdiction where there occur issues in the execution of rights and obligations arising between the parties.

2. Some consideration regarding the legal operation of simulation

Without trying, in these lines, to formulate a new theory on simulation, or to fully resume the existing one, we only intend to draw some determining elements of this

* PhD Student, Faculty of Law, "Nicolae Titulescu" University of Bucharest (email: tradulescu@yahoo.com).

operation in order to create an overview of the issue, which is the subject of the article.

Thus, the simulation could be defined[1] as the legal operation whithin which, through a public legal act, but apparent, is created a new legal situation than the one established by a hidden legal act, secret, but real, called inappropriate and secret[2].

To understand the definition given above, we consider necessary to explain certain terms used in explaining the concept.

The secret act is the one expressing the real intention of the parties and establishes the true legal relationship between them; to be valid, the secret act shall meet only the substantive and validity requirements of the civil legal act, and not the formal ones, as evidenced by the interpretation *per a contrario* of the dispositions of art. 1289 para.2 Civil Code.[3]

The public act is the one creating the appearance and that is concluded for this purpose, i.e. to hide reality under its lying mantle; its existence is essential to the existence of the simulation[4]. As concerns this act, it is necessary to be fulfilled both the substantive conditions (capacity, consent, object and cause) and the formal ones, required by law. Moreover, when the secret act is a document for the validity of which the law requires compliance with a specific formal requirement (eg, donation), although this act will not take the form of the authentic document, however, for the validity of simulation, as a legal operation, the public act shall be concluded in that form, even if the law does not require, for its valid conclusion, the compliance of a certain formal condition[5] so that the secret act "borrows" the form from the public act.

2.1 The conditions of validity of the simulation

To be valid as legal operation, the simulation must meet, in an opinion, a series of conditions, that we recall hereunder: **(1)** there is a secret act; **(2)** there is a public act; **(3)** the secret act must is completed concurrently, or possibly before the conclusion of the apparent one and **(4)** both legal acts are entered into by the same parties[6].

According to another opinion[7], embraced also at the level of the latest jurisprudence of the High Court of Cassation and Justice[8], in addition to the two acts, is also necessary **(5)** the existence of the overt act, namely the intention of the parties that

[1] For further definitions of this legal transaction, proposed by doctrine and jurisprudence, particularly the ones previous to the current Romanian civil code, see F.A.Baias, *Simulaţia. Studiu de doctrină şi de jurisprudenţă*, Editura Rosetti, Bucureşti, 2003, p. 46-49.

[2] G. Boroi, L. Stănciulescu, *Instituţii de drept civil în reglementarea noului Cod civil*, Editura Hamangiu, Bucureşti, 2012, p. 172.

[3] Was also expressed the opinion as meaning that the secret act, however, should also fulfill the formal conditions required by law if the simulation is achieved by interposing persons or mandate without representation, cases in which the parties of the public act are not the same with the ones of the secret act; see F.A. Baias în F.A.Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul cod civil. Comentariu pe articole*, ediţia a II-a, Editura CH BECK, Bucureşti, 2014, p. 1438.

[4] F.Baias, *op.cit.*, p. 55.

[5] Similarly, see G. Boroi, L. Stănciulescu, *op. cit.*, p. 176; contrarily, see P.Vasilescu, *Drept civil. Obligaţii*, Editura Hamangiu, 2012, p. 493.

[6] C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligaţiilor*, Editura Hamangiu, Bucureşti, 2008, p. 78; we consider that this condition must be fulfilled only if the simulation takes the form of the fictitious act and disguise, not in the case of simulation by interposing persons.

[7] L. Pop, I.F.Popa, S.I.Vidu, *Tratat elementar de drept civil. Obligaţiile*, Editura Universul Juridic, Bucureşti, 2012, p. 223; F.A.Baias, *Simulaţia*, p. 67 şi urm.

[8] ICCJ, secţia I civilă, dec. nr.5782 din 12.12.2013, pe www.scj.ro.

the legal operation produces all the legal effects specific to the simulation, *animus simulandi*, which differs from the discrepancy that may spontaneously occur between the declared will and the real intention, which will be settled through the interpretation of the contract[9].

2.2 Forms of simulation

From the point of view of the form in which can appear simulation, this legal operation can be done fictitiously, by disguise (total or partial) and by interposition of persons; legal literature[10] has made a distinction between *absolute* simulation and *relative* simulation, the latter classiffying itself in *objective simulation* (when are hidden objective elements of the act, such as the nature of the contract, its object or cause) and *subjective simulation* (in case of simulation by interposition of persons).

In its first form, of the fictitious act, the simulation means the existence of only two of its three elements, respectively the public act and the covert agreement. Thus, the parties conclude an apparent act that is nevertheless devoid of any effects through the covert agreement, the participants in the simulation remaining in the state preceding the conclusion of the public act; between the parties are not born any new rights and obligations, except those strictly determined by the will to simulate (e.g. the obligation to consent to the dissolution of the apparent act within a certain period, the right of the one who consented to simulation to receive a certain remuneration, etc.)[11]. In short, through the fictitious act, the parties „dissimulate" to conclude a legal act (aiming, most of the times, at defrauding the interests of certain categories of participants in the legal relations - creditors), in reality the act being non-existent.

The disguise, the second way to hide the reality can be total or partial, depending on the element on which the parties conclude the covert agreement. Hiding the nature of the contract representing the real intention of the parties makes the disguise to be complete, while concealing only certain elements of the secret contract will be just a partial disguise l (i.e., hiding the real price, hiding the actual date on which was concluded the secret act, hiding the way the obligation is to be executed, etc.).

Finally, simulation through the interposition of persons implies the conclusion of the public act between certain parties, while in the secret act (but also in the covert agreement) takes part a third person, who will be the real beneficiary ofthe public act, so in the patrimony of whom will be produced the legal effects of the concluded act.

2.3 Effects of simulation

In terms of the effects produced, Romanian legislature of 2009 remained faithful to the principle of neutrality of simulation, art. 1289 paragraph 1 Civil Code providing that the secret act shall take effect only between the parties and, if the nature of the contract or the stipulation of the parties does not show to the contrary, towards the universal successors and with universal title. So, simulation, as a rule, is not sanctioned, than when is pursued an unlawful cause, the secret producing effects between its parties but also to persons treated as parties, to third parties in good faith, being enfroceable onlu the public apparent act.

[9] L.Pop, I.F.Popa, S.I.Vidu, *op.cit.*, p. 223.

[10] F.A.Baias, *Simulația,* p. 97 ș.u.; L. Pop, *Tratat de drept civil. Obligațiile. Volumul II: Contractul*, Editura Universul Juridic, București, 2009, p.619; P. Vasilescu, *op.cit.* , p. 490.

[11] F.A.Baias, *Simulația,* p. 99.

If one party refuses to perform its obligations arising from the secret contract, the other party may ask the court to find the simulation, and then to enforce the performance or to resort to any other remedy provided by law for non-performance (exception of non-performance, enforcement in nature, rescission or termination, etc.)[12]

It is not the object of this study to treat in detail the effects produced by this legal operation, since the issue to be reached concerns only the parties of the simulation, not the third parties, either successors with particular title, or unsecured creditors, which is why regarding the effects produced, we limit ourselves to the observation made in the previous paragraph.

3. Arbitration – alternative means of dispute settlement. The arbitration clause

The code of Civil Procedure entered into force on 15.02.2013 defines, for the first time, the institution of arbitration, stating that it is an alternative jurisdiction having private nature (art. 541 para. 1 Civil Procedure Code). So arbitration is a means of settling disputes by decisions rendered by a third party that are binding on the parties[13].

Arbitration is a legal institution with a dual legal nature, both contractual and judicial. The legal basis of arbitration is the arbitration agreement, under its two forms– compromise and arbitration clause[14]. So, as has been stated in the literature[15], the term of arbitration agreement was created only to simplify the legal language, as long as an arbitration agreement stricto senso never exists. This is in fact the meaning of art. 549 para. 1 Civil Procedure Code, according to which the arbitration agreement may be concluded either as an arbitration clause in the main contract or established in a separate agreement, to which refers the main contract, either in the form of compromise.

Compromise and arbitration clause have different forms, but their purpose is the same: represent the common will of the parties to resort to arbitration proceedings for the settlement of the dispute between them. Both shall be concluded in writing, under the penalty of absolute nullity, thus being formal acts, without importance, as the document is an authentic one or under private signature. The solemnity of the arbitration agreement consists in its contents, in addition to the written form, as will be explained below.

By compromise, the parties agree that a dispute arising between them shall be settled by arbitration, the provisions of art. 551 para. 1 Civil Procedure Code concluding that, under the penalty of nullity, the parties shall show the object of the dispute and the names of the arbitrators or the manner of appointing them in case of ad-hoc arbitration.

The arbitration clause is the clause inserted in the main contract or in another contract to which the main contract refers whereby the parties establish that disputes arising from the contract where it is stipulated or in connection with it, are settled by arbitration (art. 550 para. 1 Civil Procedure Code). So, the arbitration clause concerns, unlike the compromise, *future disputes*, yet unborn, but which may arise in connection with the contract containing that clause.

According to art. 550 para. 2 Civil Procedure Code, the validity of the

[12] L.Pop, I.F.Popa, I.S. Vidu, *Curs de drept civil. Oligaţiile*, editura Universul Juridic, Bucureşti, 2015, p. 175.
[13] F.G.Păncescu în G.Boroi (coord.), *Noul cod de procedură civilă. Comentariu pe articole,* vol. II, editura Hamangiu, Bucureşti, 2013, p. 23.
[14] G. Dănăilă, *Procedura arbitrală în litigiile comerciale interne*, editura Universul Juridic, Bucureşti, 2006, p. 42.
[15] M. Badea, *Procesul comercial cu element de extraneitate*, editura Hamangiu, Bucureşti, 2009, p. 211.

arbitration clause is independent of the validity of the contract where it was entered, text giving expression to the principle of autonomy of will of the arbitration clause related to the contract in which it is inserted. Thus, we can say that we are dealing with a "contract into a contract", the main agreement seeming to aliase, as if we were in the presence of two separate contracts, one etsablishing the mutual material rights and obligations of the parties, and another one agreeing on the method of settling the disputes relating to those rights and obligations[16].

Thus, it was observed in practice that the validity of the arbitration clause is not affected by the invalidity of the contract in which it has been entered, the less it will be affected if the parties, through their will, have terminated the contract in which it was provided[17].

A provision similar to the one in the Civil Procedure Code, however general, we also find in the Civil Code, which, in the section on termination, states that it has no effect on the clauses related to dispute settlement or on those intended to take effect even in case of termination. Or, among clauses peratining to dispute settlement there are, most often, the arbitration clauses.

Finally, again with reference to the arbitration clause, the Civil Procedure Code, under art. 550 para. 3 sets out a special rule for the interpretation of this clause, stating that, in case of doubt, it should be interpreted as meaning that it applies to all disagreements arising from the contract or legal relationship to which it refers. This rule of interpretation is an application of the interpretation provided by art. 1268, para. 5 Civil Code, according to which the clauses intended to exemplify or to remove any doubt on the application of the contract to a particular case, do not restrict its application in other cases that have not been expressly provided.

4. The effect of the arbitration clause on the legal operation of simulation

Typically, the arbitration clause contained in contracts has a standard content, which tends to cover all disputes that may arise between the parties regarding the concluded contract.

In this regard, The Romanian Chamber of Commerce and Industry made a recommendation on the content of the arbitration clause in commercial contracts, meaning that *Any dispute arising from or in relation to this contract, including the conclusion, performance or termination thereof shall be settled through the arbitration of the Court of Internaţional Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, according to the Rules of Arbitration of the International Commercial Arbitration Court, in force, published in the Official Gazette of Romani, part I."* [18]

After reviewing some general issues regarding simulation and arbitration clause, we will try to provide answers to the questions which were the starting point of this article and that we resume hereunder:

the action for declaration of the simulation shall be the jurisdiction of the courts or of an arbitral tribunal?

and

if disputes arise in relation to the performance of the obligations arising from the secret contract, the one taking effect between the parties, their settlement competence will belong to courts or to the

[16] G. Dănăilă, *op. cit.*, p. 53;
[17] Sentința nr.69 din 8.05.1998 a Curții de Arbitraj Comercial Internațional, în G. Dănăilă, *op.cit.*, p. 55, footnote 68.
[18] www.arbitration.ccir.ro/clauzarb.htm, consulted on 19.03.2016 .

arbitral tribunal where the arbitration clause exists solely in the public act?

The answer to the first question can be given starting from the provisions of art. 550 para. 3 Civil Procedure Code, to which we referred above, which we consider closely related to the purpose of the action for declaration of the simulation.

Most of the time, the action for declaration of the simulation is an action-means, which is only the necessary step to reach the true contractual reality, then aiming at demanding its abolition or the performance of the obligations it has generated[19]. The action for declaration of the simulation does not aim so much at denouncing the simulation but something concrete in relation to the acts forming the simulation mechanism (simulators may pursue the enforcement or annulment of the hidden and third parties may claim being defrauded of their interests through the suspect hidden act)[20].

In these circumstances, the action for declaration of the simulation, from the point of view of the parties, may pursue, as its purpose, either to terminate the hidden contract (its cancellation, rescission or terminatio) or performance of the contractual obligations, as they have already been drawn up in the act representing the real intention of the parties. We cannot agree with the view according to which the action for declaration of the simulation is a fullu-fledged action, even if the arguments in support of this theory, from a theoretical point of view, are at least attractive, from a very simple reason, procedurally speaking: the interest.

According to art. 32 para. 1 Civil Procedure Code, the conditions governing the civil action are as follows: capacity to stand trial, standing, formulating a claim and the interest.

This latter requirement, on the interest, was defined as being the practical use pursued by the one who initiated the civil action[21], and, in order to be valid, must meet the following requirements: be determined legitimate, personal, **vested and present** (art. 33 Civil Procedure Code).

Thus, we wonder, what could be the vested and present interest of the parties to bring an action for declaration of the simulation, without a real reason, which would expose them to a prejudice if they did not resort, that time, to action (and which can relate either on the abolition of the secret act or on the obligations arising herefrom). We believe that an action for declaration of the simulation, made by one party, with a single head of claim, without invoking other claims, shall be dismissed by the court as devoid of interest. We consider that the real issue of autonomy of action for declaration of the simulation could arise if the claimant in such a request were a third party and not one of the parties, that knows very well what was the real intention and in what consisted the covert agreement, situation that yet is not covered by this study.

For these reasons, we consider that the action for declaration of the simulation, made by one party is an action that serves either as the abolition or the performance of the secret contract, in which case it would fall under an eventual arbitration clause made either in the manner recommended by the Chamber of Commerce of Romania, or in the more general way "any disputes arising in connection with this agreement shall be settled by arbitration".

As to the second issue raised, it can be summarized as follows: if the parties had agreed on an arbitration clause only in the

[19] P. Vasilescu, *op.cit*, p. 500; for contrary opinion, see F.A.Baias, *Simulația,* p. 208-209, L. Pop, *Contractul*, p. 638.
[20] P. Vasilescu, *idem*.
[21] G. Boroi, M.Stancu, *Drept procesual civil*, editura Hamangiu, București, 2015, p. 36.

apparent (overt) act, the legal operation of the simulation will also extend on the competence on settling any dispute concerning either enforcement or abolition of secret act, as meaning that the arbitration clause will no longer be effective?

We believe that the response relates to the legal nature of the arbitration clause, namely to its principle of autonomy to the main contract, but also to the content of the covert agreement, as a key element of the simulation.

Thus, as long as the covert agreement relates only to the elements of substantive law (i.e. the true rights and obligations of the parties that arise from the secret act), we believe that the provisions of the secret act will be completed with the ones of the public act, apparently, concerning to the jurisdiction for settling any disputes that will arise in the contract. This reasoning is all the more evident when simulation by disguise and interposition of persons, by which the parties seek, in reality, to hide certain elements of the secret act from third parties (nature of the contract, the true beneficiary of the rights, etc.), and in no way what will be the competent institution to settle its disputes.

A problem could arise in case of absolute simulation, through fictitious act, when the public act is devoid of content, is only a form without substance, the covert agreement of the parties ruling as meaning the lack of will expressed in the apparent act. In this situation, the court or the arbitral tribunal hearing the request for the performance of provisions of the secret act, should, in principle, ascertain the extent of the covert agreement, namely whether it took into account the public act in its entirety, including the clause conferring general jurisdiction or only the specific effects of the public contract signed. If such a research is not carried out, or if the court cannot conclude one way or another, we consider that the arbitration clause is integral with the other terms of the apparent (overt) act, notwithstanding the rule established by Art. 550 para. 2 Civil Procedure Code, the parties aiming by its introduction in the contract, at creating conditions to remove any doubt on the authenticity, veracity and efficiency of that agreement.

5. Conclusions

As a conclusion, we can say that in what concerns simulation, the effectiveness of the arbitration clause will always depend on the research of the covert agreement, the key element of this legal operation, which represents the real intention of the parties. We should not lose sight of the autonomy enjoyed by the arbitration clause within a contract, but this rule must be adapted to the special conditions of simulation and to the aims pursued by the parties.

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ISSUERS OF FINANCIAL INSTRUMENTS

Cristian GHEORGHE[*]

Abstract

The rules laid down by Romanian Capital Market Law and the regulations put in force for its implementation apply to issuers of financial instruments admitted to trading on the regulated market established in Romania. But the issuers remain companies incorporated under Company Law of 1990. Such dual regulations need increased attention in order to observe the legal status of the issuers/companies and financial instruments/shares.

Romanian legislator has chosen to implement in Capital Market Law special rules regarding the administration of the issuers of financial instruments, not only rules regarding admitting and maintaining to a regulated market. Thus issuers are, in Romanian Law perspective, special company that should comply special rule regarding board of administration and general shareholders meeting.

Keywords: *capital market, investments, issuers, regulated market, shareholders protection*

Introduction

Romanian legislator has chosen to implement in Capital Market Law (no 297/2004) special rules regarding the administration of the issuers of financial instruments, not only rules regarding admitting and maintaining to a regulated market. Therefore Chapter VI of the Romanian Capital Market Law contains special provisions regarding the companies admitted to trading.

Thus issuers are, in Romanian Law perspective, special company that should comply special rule regarding administration and decisions in general shareholders meeting.

From the beginning, the Romanian Capital Market Law was designed as a comprehensive code for its field. Therefore this law encompasses not only everything about capital market but companies rules too.

As it happens in banking or assurance field, overregulation of the special purposes companies (i.e. banks or assurance companies) is expected and detailed. Adequate capital, exclusive activity object, elaborate prudential requirements and administrative supervision, all these are in place in order to protect such companies. Capital Market Law uses all these mechanisms when it comes to investments firms. In European Union these companies are the intermediaries, legal persons whose regular occupation or business is the provision of one or more investment services to third parties, the performance of such investment activities on a professional basis[1]. All these regulations find their place in Capital Market Law but the situation is different for the issuers.

[*] Associate Professor, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest, (e-mail: profesordrept@gmail.com).

[1] Directive no 2014/65/EU of the European Parliament and of the Council on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II), Art. 4 para (1).

The originality of the Romanian Capital Market Law stands in its option to put a genuine layer of regulation on the general rules of joint stock companies, for all listed companies. Such layer of regulation addresses sensible issues for companies traded on regulated market: shareholders' rights and equitable treatment of shareholders, clear rules for shareholders meetings and advanced framework for directors' appointment. All these regulations ensure the basis for an effective corporate governance background. In this way the Romanian Capital Market Law adheres to OECD Principles of Corporate Governance in an applied manner. Inspired of these principles the Romanian legislator enhanced the regulation of the issuers with special rules, unknown for the rest of the companies[2].

Special provisions. General Meetings.

In order for the General Meeting of Shareholders to be legally convened the directors should communicate the reference date which is an important issue for exercising the shareholders' rights: only the persons who are registered as shareholders at the reference date shall participate and vote in the General Meeting of Shareholders. The reference date may not be more than thirty days prior to the date of the general meeting to which it applies[3].

The general meeting shall be convened by the board of administration or executive board according to the provisions of the incorporating instrument, but the time allowed until the meeting may not be shorter than 30 days from the publication of the calling. Nevertheless this time limit shall not apply for the second or any further call of the general meeting caused by the fact that the quorum necessary for the meeting called for the first time was not formed, provided that no new item was added to the agenda and at least ten days lapsed between the final call and the date of the general meeting[4].

Attendance right and proxy voting. The access of the shareholders entitled to participate in the general meeting of the shareholders is allowed by proving their identity (valid ID is requested only) in the case of natural person shareholders. In the case of legal persons (or natural person representing shareholders) the access is allowed by the power of attorney granted to the natural person representing them. Such provisions prevent the company to obstruct in any way the general meeting attendance under specific consequences: if a shareholder who meets the legal requirements is prevented from participating in the general meeting of shareholders, any person concerned has the right to request the court to annul the resolution of the general meeting of shareholders[5].

The Capital Market Law assents that shareholders may be represented in the general meeting of shareholders also by persons other than the shareholders, based on a limited or general proxy.

There are special regulations depending on the type of power of attorney. The limited proxy may be granted to any

[2] OECD Principles of Corporate Governance, http://www.oecd.org/daf/ca/corporategovernanceprinciples/31557724.pdf.

[3] Law no. 297/2004, Art. 243 para (4). Company Law (Art. 123 para 2), prescribes that the reference date will be no more than 60 days before the date the general meeting is called for the first time.

[4] Law no. 297/2004, Art. 243 para (1). Company Law (Art. 117 para 2, Art. 118 para 2), prescribes that the second meeting may be indicated from the beginning in the call but, if the day for the second meeting is not indicated in the calling published for the first meeting, the period for the meeting may be reduced to 8 days

[5] Law no. 297/2004, Art. 243 para (5). Such right is not expressly recognized under Company Law.

person for representation purposes in one general meeting and shall contain specific voting instructions from the issuing shareholder. Such limited proxy may be granted to the company's directors and clerks too[6].

General proxy are accepted by law in shareholders' general meetings but with specific provisions regarding the conflict of interest. Thus the shareholder may grant a valid proxy for a period which shall not exceed three years, allowing its proxy holder to vote in all aspects (even regarding acts of transfer of ownership) debated in the general meetings of shareholders (even of more companies, identified in the proxy) provided that the proxy is given by the shareholder, as client, to an investment firm or to a lawyer. Conflict of interest rule prevents the shareholders to be represented in the general meeting of shareholders, based on a general proxy, by a person who is in a situation described in any of the following cases: a) such person is a majority shareholder of the company, or another entity, controlled by that shareholder; b) such person is a director or a member of a management or supervisory body of the company, of a significant shareholder or controlled entity; c) such person is an employee or auditor of the company or of a significant shareholder or of a controlled entity; d) such person is the spouse or relative of any of the natural persons abovementioned[7].

The powers of attorney may not be transmitted. Thus the proxy holder may not be substituted. If the proxy holder is a legal person, then its powers may be exercised through any person belonging to its board of directors or executive board, or its employees.

Remote attendance (by means of electronic communication) and vote by correspondence. Romanian Capital Market Law is favorable to remote participation in general meetings and voting by mail.

Listed companies may allow their shareholders to participate in the general meeting in any form through electronic communication. Of course, such means should be implemented by companies first.

Even proxy holders may be appointed and revoked through electronic communications. If such advantages depend on company's willingness to implement them voting by mail will be compulsory for listed company. Consequently companies shall prepare procedures which shall give the shareholders the possibility to vote by mail, prior to the general meeting. If resolutions requiring a secret ballot are on the agenda, the vote by mail shall be cast in a manner that prevent disclosure to anyone but to the persons in charge with counting the secret ballots, at the moment when the other secret ballots (from the attending shareholders or by the representatives of the shareholders participating in the meeting) are also cast[8].

The vote cast personally or by proxy prevails to vote by mail. If the shareholder casting its vote by correspondence happens to participate (personally or by proxy) in the general meeting, the vote cast by correspondence shall be cancelled[9].

[6] Company Law forbids such operations (Art. 125 para 5). The directors of the company and its clerks may not represent the shareholders if, without their votes, the required majority would not have been met.

[7] Law no. 297/2004, Art. 243 para (6).

[8] Ibidem.

[9] Law no. 297/2004, art. 243 para (9).

Special provisions. The increase of the share capital.

Company Law provides general rules regarding capital increase: rules regarding shareholders' resolution in the framework of the extraordinary general meeting, conditions regarding quorum and bailout for approval of the motion, preemptive rights and rules for the share capital increases by in kind contribution[10].

Issuers of financial instruments traded on regulated market face a new layer of regulation represented by special provisions included in the Capital Market Law which derogate from the Company Law.

Any increase in the share capital shall be decided by the extraordinary general meeting of shareholders. Nevertheless, the administrators may decide, following the delegation of duties, the increase in the share capital[11]. Such delegation of duties shall be granted by the instruments of incorporation or the extraordinary general meeting which may authorize the increase in the share capital up to a maximum level. Such competence shall be granted to administrators up to a limit of capital level and for maximum one year (the delegation may be renewed by the general meeting for a period which may not exceed one year for each renewal).

Following the principle of symmetry, the resolutions adopted by the administrators in the exercise of the duties delegated by the extraordinary general meeting of shareholders shall have the same regime as the resolutions of the general meeting of shareholders (as regards their publicity and the possibility to be challenged in court)[12].

Capital Market Law establishes special and restrictive conditions for the share capital increases by in kind contribution and the annulment of the shareholders' preemptive right to subscribe new shares if the share capital is increased.

Capital increase by in kind contribution. In the view of the Capital Market Law the share capital increase by in kind contribution is an unusual operation for a company traded on a regulated market. Therefore the law put in force almost impossible demands: the share capital increases by in kind contribution shall be approved by the extraordinary general meeting of shareholders attended by shareholders representing at least 85% of the registered share capital and with the vote of the shareholders representing at least ¾ of the voting rights.

The contribution in kind shall be evaluated by independent experts and the number of shares allotted as a result of the in kind contribution shall be determined as a ratio between the value of the contribution, established by experts and the highest value established between: i) the market price of a share, ii) the value per share calculated based on the net asset book value and iii) the face value of the share[13]. And in the end, the in kind contributions may consist only of new and efficient assets required to conduct the company's activity.

Annulment of the shareholders' preemptive right. The annulment of the shareholders' preemptive right to subscribe new shares, if the share capital is increased, shall be decided in the extraordinary general meeting of shareholders attended by shareholders representing at least 85% of the

[10] Law no 31/1990, Art. 210-221.

[11] Law no. 297/2004, Art. 236 para (1)-(2). Company Law provides that such delegation shall be granted by the instruments of incorporation for a period of time up to five years and for an increase value up to a half of the registered value of the share capital (Law no 31/1990, Art. 221[1]).

[12] Ibidem, Art. 236 para (3).

[13] Law no. 297/2004, Art. 240 para (2)-(4). Company Law states no special condition for the adoption of resolutions concerning the capital increase by in kind contribution (Law no 31/1990, Art. 215).

share capital subscribed, and with the vote of the shareholders holding at least ¾ of the voting rights. Those shares disallowed to shareholders shall be offered for subscription by the public, in compliance with the provisions on public offers. The number of shares shall be determined using the same algorithm put in force for in kind contribution, respectively a ratio between the value of capital increase and the highest value established between: i) the market price of a share, ii) the value per share calculated based on the net asset book value and iii) the face value of the share[14]. The law seems unclear in this point but it should be construed as referring to the price of the shares publicly offered. That means the offer price shall not be less than either of the prices above mentioned.

Registration/Record date.

The shareholders which shall benefit from dividends or other rights granted by the resolutions of the general meeting of shareholders shall be established by such resolution by setting a registration date (record date). Such date shall be at least ten working days subsequent to the date of the general meeting of shareholders.

After the declaring of dividend, the general meeting of shareholders shall also establish the time limit within which it shall be paid to the shareholders. Such time limit shall not exceed six months from the date of the general meeting of shareholders declaring the dividends[15]. The Company Law has a different approach. In its view the shareholders entitled to exercise their rights in a general meeting of shareholders (access, vote) are the same with the shareholders who shall benefit from dividends or other rights which are affected by the resolutions of the general meeting of shareholders[16].

Directors' election.

Election of directors follows an electoral voting system. The voting system put in force by the Company Law adheres to majority rule: all the directors from the board of directors are elected in the ordinary shareholders meeting with the vote of the shareholders holding at least a half plus one vote of the voting rights exercised in the meeting. Such majority rule assigns all seats of the board to a shareholder or shareholders who have obtained the majority[17].

As an alternate to majoritarian method the Capital Market Law accepts a proportional representation system by which divisions in shareholders' structure are reflected proportionately in the elected body (board of directors)[18]. The system used by the Romanian Capital Market Law is cumulative voting[19].

The members of the board of directors of the companies admitted to trading on a regulated market may be elected by cumulative vote. This method shall be mandatory at the request of any significant shareholder (which holds over 10% stake).

[14] Law no. 297/2004, Art. 240 para (1), (5). Company Law states regarding the annulment of the shareholders' preemptive right that such operation shall be decided in an assembly attended by shareholders representing at least 75% of the share capital subscribed, and with the vote of the shareholders holding at least 1/2 of the voting rights present or represented in the assembly. (Law no 31/1990, Art. 217).

[15] Law no. 297/2004, Art. 238.

[16] Law no 31/1990, Art. 123.

[17] Majoritarian method is the only method accepted by Company Law (Law no 31/1990, Art. 112).

[18] Cristian Gheorghe, *Capital Market Law*, Bucharest: C.H. Beck, 2009, p. 291-312.

[19] Cumulative voting is implemented in US. (*See e.g., Minnesota Statutes, Section 302A.111 subd. 2(d). https://www.revisor.mn.gov/statutes/?id=302a.111).*

A cumulative voting system permits voters in an election for more than one seat council to put more than one vote on a preferred candidate (usually the cumulated votes are the shareholders' votes, attached to the shares, multiplied by the number of seats of the board). In order to work out such a system, any company where the cumulative vote method is applied shall be managed by a board of administration consisting of at least five members[20]. It is expected that voters in the minority concentrate their votes to a preferred candidate and increase their chances of obtaining representation in board of directors.

The application of the cumulative vote method is established by Financial Supervisory Authority (FSA – the Romanian supervisory body for capital market) regulation[21]. This regulation solves the weak points of the procedure: the number of elected seats and the dismissal procedure.

A shareholder or shareholders holding individually or together at least 5% of the share capital or a smaller share, if the instruments of incorporation so provide, may request at most once a year the call of a general shareholders meeting having on its agenda the election of the board of directors through the cumulative vote method[22].

The cumulated votes to which each shareholder is entitled are the votes obtained by multiplying the votes held by any shareholder, according to participation in the share capital, with the number of directors that will form the board of directors. The directors in function at the date of the general shareholders meeting shall be included in the list of candidates for the new board of directors and those one which are not reelected in the board of directors through cumulative vote are considered revoked. The application of the cumulative vote method requires the election of the entire board of directors, comprising of at least five members, in the same general shareholders meeting[23].

In exercising their cumulative votes, the shareholders may grant all the cumulated votes to a single candidate or to several candidates. The candidates who have been assigned most cumulated votes during the general shareholders meeting shall be declared elected members of the board.

Conclusions

The Romanian Capital Market Law (no 297/2004) was designed as a broad code for capital market. Therefore this law encompasses about everything about capital market, even special rules designed for issuers, companies traded on regulated market. The current trend in Romanian capital market rules reversed and now we observe a process of fragmentation of the Capital Market Law. Undertakings for collective investment in transferable securities (UCITS) and investment management companies are now subject of the Law No. 10/2015 approving Government Emergency Ordinance No. 32/2012 and the correspondent rules from the Capital Market Law have been repelled.

The issuers of the financial instruments are undertakings from very different fields, joint stock companies incorporated under Company Law. Strictly speaking the issuers are not subject of the Capital Market Law, but their titles are.

In this light the regulation of the listed company within the framework of the

[20] Law no. 297/2004, Art. 235.

[21] Regulation no. 1/2006 on issuers of and operations with securities (issued by former Romanian National Securities Commission).

[22] Regulation no 1/2006, Art. 124 para (2).

[23] Regulation no 1/2006, Art. 124 para (3) – (8).

Capital Market Law is not necessary. These companies, the issuers, remain undertakings functioning following the rules laid down by the Company Law. Rules on administration of the issuers and financial instruments will have the same fate as UCITS: they will be put outside the Capital Market Law.

The project of a unique Capital Market Code seems to be an illusion as FSA (Romanian Financial Supervisory Authority) prepared a draft[24] for a new law in order to segregate issuers and market operation from the Capital Market Law.

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[24] See *Draft Law on Issuers of financial instruments and market operations.* http://www.asfromania.ro/legislatie/consultari-publice?start=40.

NEGOTIATION OF REMUNERATION PAYABLE TO PERFORMERS AND PHONOGRAMS PRODUCERS FOR PUBLIC COMMUNICATION OF PHONOGRAMS AND AUDIOVISUAL ARTISTIC PERFORMANCES

Mariana SAVU[*]

Abstract

Given that certain categories of authors' rights or neighboring rights holders do not exercise them individually, but is mandatory collective management by collecting societies, as CREDIDAM - art. 123[1] of the Romanian Copyright Law no.8/1996 provides for the categories of rights that requires mandatory collective management, including, in letter f) recognized the right to equitable remuneration of performers for communication to the public and broadcasting of commercial phonograms or reproductions thereof, stipulating the art. 123[1] par.2 that collecting societies, for these two categories of rights, are representing also the rights holders who have not given the mandates to them.

The mandate given by right holders, members of CREDIDAM, is thus extended to non-members, Romanian and foreign performers, that can benefit from equitable remuneration as required by art.146 d) of Romanian Copyright Law and art.12 of the Rome Convention – the latter article providing that "if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both."

Keywords: *public communication; performers; phonograms producers; negotiation; mandate.*

1. Introduction

According to **art. 15 paragraph 1** of Law no. 8/1996 on copyright and related rights, as amended and supplemented (hereinater referred to as Law/the Law): *„It iscontemplated* ***as public communicationany communication of a work, made directly or through any technical means, made in a place open to the public or in any place where a number of people exceeding the normal circle of family members or their acquaintances is gathered,*** *including the representation on stage,reciting or any other form of direct performance or presentation of a work, the public display of work of fine art, applied art, photography and architecture, the public projection of cinematographic and other audiovisual works, including works of digital art, presentation in a public place, through sound or audiovisual recordings, as well as the presentation by any means of a broadcasted work in a public place. It is also considered public any communication of a work,either by wire or wireless means, achieved by making available to the public, including via the Internet or other computer networks, so that any member of the public may access it from any place or at any time individually chosen".*

According to paragraph 2 „The right to authorize or prohibit the communication or

[*] Attorney-at-Law, PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: liliana.savu@credidam.ro).

making available to the public of works shall not be deemed exhausted by any act of communication to the public or making available to the public".

In order to determine the final form of the Methodology regarding the remuneration payable to the performers and producers of phonograms for public communication of trade phonograms/ phonograms published for commercial purposes or reproductions thereof and/or of audiovisual artistic performances, for ambient and profit purposes, and the tables including performers' and phonogram producers' royalties for the phonograms and audiovisual, through compulsory collective management, the collective management organizations and the users in the field must negotiate.

The negotiation procedure is prescribed by Law[1], meaning that collecting societies should proprose a Draft Methodology to be submitted to ORDA. Within five (5) days ORDA should issue a decision establishing a negotiating committee, a decision to be published in the O.G. (Official Gazette)

The parties negotiate within 30 days. At the end of the negotiation period, if the parties have agreed, they conclude a protocol to be submitted to ORDA in order to be published in the O.G. If the parties do not reach an agreement they switch to the second stage, that of arbitration. After arbitration, the party which is not satisfied by the arbitration award pronounced by the Arbitration Panel may address the Court, by submitting an appeal in this regard.

2. Content

Such a negotiation took place between the collecting society which represents the rights of performers – CREDIDAM, the collecting society which represents the rights of phonogram producers – UPFR, on the one hand, and the representatives of users in the field on the other hand, meaning the carriers which were represented by COTAR[2], the hoteliers which were represented by FIHR[3] and FPTR[4], the large stores (supermakets) which were represented by FPRC[5] and three major users, i.e. Altex Romania, OMV Petrom Marketing and Dedeman.

The above mentioned parties were members of the Methodology Negotiation Committee, established by the Decision of ORDA General Manager no. 65/19.06.2015 amended by the Decision of ORDA General Manager no. 76/14.07.2015 (publihed in the Official Gazette of Romania no. 542/21.07.2015), conducted negotiations on the determination of the final form of the Methodology, in accordance with the provision of art. 131[1] of Law no. 8/1996, within the meetings dated 20.07.2015, 24.07.2015, 29.07.2015, 30.07.2015 (two of the meetings on different branches of activity), 05.08.2015, 12.08.2015; 14.08.2015, 18.08.2015, 27.08.2015 and 02.09.2015. The meetings were held according to the schedule agreed by the parties at their first meeting.

During the above mentioned meetings, the representatives of collective management organizations, CREDIDAM and UPFR, have proposed the Methodology form to be negotiated as it was determined

[1] Art.131, art. 131[1] and art. 131[2] of Law no. 8/1996 on copyright and related rights define the negotiation and arbitration procedures.

[2] Confederația Operatorilor și Transportatorilor Autorizați din România (Confederation of Licensed Transport Operators and Hauliers from Romania).

[3] Federația industriei hoteliere din România (Federation of Hoteling Industry from Romania).

[4] Federația Patronatelor din Turismul Românesc (Romanian Tourism Employers Federation).

[5] Federația Patronală a Rețelelor de Comerț (Employers' Federation of Trade Network).

by the Court through the Civil Judgment no. 192A/27.12.2012 of the Bucharest Court of Appeal - IX Civil Section and for intellectual property, labor disputes and social security cases, published in the Official Gazette no. 120/04.03.2013, by ORDA Decision no. 14/2013.

The new regulations proposed in the draft Methodology as well as the increased remunerations (compared to the current ones), as they are stipulated in the draft methodology, are justified against:

a) the circumstances that current remunerations (provided by ORDA Decision no. 399/2006, amended by ORDA Decision no. 189/2013) have not been negotiated since 2006, being maintained at the same value for 9 years;

b) the circumstances that, within the period 2006 – 2014, the remunerations were not indexed to inflation rate, so their value was devalued by the inflation accumulated within the period 2006 – 2014;

c) the circumstances that, within the period 2006 – 2015, the turnover of the users in the incidental industries (tourism, public catering/restaurants, bars, accommodation premises, etc., public passenger transport, retail chains/commercial spaces) significantly increased, bing necessary to correlate the remunerations in relation to the evolution of users' revenues over time;

d) the need to ensure an equitable remuneration and likely to support the creative activity of rightholders (performers and phonogram producers), especially in a context where public communication for ambient/profit purposes is one of the main sources of income for these rihthlders;

e) the need to correlate these remuneration with the European practice and also with remunerations determined for other categories of rightholders, especially those of the authors of musical works, which registered an important increase during 2011 - 2012 (compared to the remunerations envisaged in 2006), especially in the context in which it was declared as unconstitutional by the provisions of art. 134 paragraph 2, letter g) of Law no. 8/1996 (which limited the related rights to one third of the copyrights), by the Decision no. 571/2010 o the Constitutional Court, under the reasoning that in many circumstances the artistic performance of an atist can be more valuable than the work he/she plays;

f) the incorporation of some legislative changes in certain industries incidental to ambient public communication (mainly in the tourism and public passenger transportation) that require regulation of certain aspects (such as the requirement of submission by users of supporting documents during their licensing) which the old methodology has not taken into account;

g) the need to determine a predictable methodology, easy to be applied in practice, enabling a better collection of remunerations and corresponding decrease of collecting costs;

In turn, the representatives of users have submitted for debate proposals for amending or supplementing the Methodology, in order to reasonably increase the remunerations provided by ORDA Decision no. 399/2006, but with some nuances which I shall present below.

The issues on which the parties have agreed in the sense of determining the final form of the methodology have resulted in concluding of protocols, as required by law.

Thus, UPFR, CREDIDAM, FPRC, ALTEX and OMV signed a protocol on 22.09.2015 regarding the final form of the methodology as well as of the remunerations contained in the table at letter B, representing the remunerations due by the supermarkets.

On 28.09.2015, UPFR-CREDIDAM-FIHR-OMV also signed another protocol by which they agreed on the final form of the

methodology, as well as on the remuneratins due by hotels, restaurants, bars, swimming pools, elevators etc.

Those agreed under the Protocol of 22.09.2015 (between UPFR, CREDIDAM, FPRC, ALTEX, OMV) are similar to those provided by the Protocol of 28.09.2015 (between UPFR, CREDIDAM, FIHR and OMV), noting that in the latter Protocol was further agreed:

a) „inside the hotels, for the reception/public catering area", justified removal of the reception/public catring areas from the remuneration set per accomodation premises;

b) exemption from indexing to inflation rate of the remuneration provided for accommodation premises, in the frame of interest of determining a differentiated remuneration per each year, for the years from 2016 to 2020, with a gradual increase;

c) if inside an accomodation premises there are accomodation places (rooms) having different classifications (stars/daisies), the remuneration for all accommodation rooms shall be paid based on the higher classification, as according to the classification certificate of the accommodation premises"**.**

The changes stipulated in the Protocol of 28.09.2015 are relevant only for the the users in the hotel and public catering industry represented by OMV and FIHR.

During the negotiations for the remunerations proposed by the collecting societies for fairs, exhibitions, advertising events, bus/railway stations, railway passanger transportation, train stations, subway stations and waiting areas, passangers plane transportation, airports and passangers waiting areas, ships/boats for recreational transportation, cable transportation, parking areas, sports and recreation, offices/production areas, telecommunications, the users' representatives in the negotiation committee have not express any criticism, proposals or changes in remunerations.

Also during the negotiations, the methodology text has been determined with the following exceptions:

a) COTAR formulated criticism, in that it disagrees with bringing up the supporting documents required for their licensing, and willing to agree only with the *Agreement Certificates* related to the passengers' public transportation vehicles.

We find as ungrounded such criticism because the collective management organization has the legal right to request, according to art. 130 paragraph 1, letter h) of Law no. 8/1996, both the information and the submission of the documents required in order to determine the remunerations, so that the proposed regulation appears completely justified in assuming obvious that the documents which the methodology text refers to are necessary in order to determine the obligation to pay remuneration. Relating only to *Agreement Certificates*, which are specific only to Taxi transportation activity (not to other means of transportation - bus, motor coach, minibus), is not sufficient and does not allow a clear representation of the payment obligations of the remunerations due by users in the passengers' transportation category.

b) COTAR criticized the amount of penalties stipulated by this article (of 0.1% per day of delay), requiring, as an alternative, the applying of legal interest. COTAR criticism is inconsistent with the position initially expressed during negotiations, when it was willing to sustain the regulation of severe monetary penalties for those who delay the payment of remuneration. However, applying the legal interest would represent only a general remedy that would not take into account the specifics of the collection activity and that would neither improve the collection system nor discourage late payments. On the other

hand, this late payment fee is also used in other collection areas, being also agreed in the license agreements by the users in the field of public communication.

For the remuneration due by the public catering establishments, restaurants, bars, coffe shops, etc., users' representatives have agreed to increase remunerations, but in a reasonable way, especially given that for the public catering establishments (dining room, restaurant, etc.) inside the accommodation premises the remuneration corresponding to these areas is to be included in the remuneration per accommodation premises, as proposed by the representatives of FIHR and FPTR.

By the Protocol dated 22.09.2015, concluded between CREDIDAM-UPFR-OM-FIHR, they determined an appropriate remuneration for public catering areas being reduced by 10% compared to the ones proposed by the collective management organizations during negotiations (in relation to those determined by the Decision of the Bucharest Court of Appeal) and set differently depending on the area (on area levels - up to 100 square meters, between 101 to 200 sqm, and over 200 sqm) and location (A1 for those in the cities and resorts and A2 for those in the communes and villages).

FPTR did not suggest for negotiation certain values of remuneration corresponding to such areas, but asked that they should be differentiated depending on area and location, which requirements we believe that the said Protocol meets.

In relation to the remuneration payable for commercial premises, the associative structures and designated users in the negotiation committee, which had been interested in negotiating and determining the final methodology form, were FPRC, ALTEX, DEDEMAN and OMV.

As we mentioned above, UPFR, CREDIDAM, FPRC, ALTEX and OMV have signed the Protocol dated 22.9.2015, having as object both the methodology text and the amount of remuneration.

The only interested party that has not signed this protocol was DEDEMAN, but given that DEDEMAN did not raise any objection either on the text of the methodology or on the remunerations determined by the parties at the negotiating table, we believe that it also concured with those agreed.

In relation with the remuneration due by the hotel, tourism and public catering industry (hotels, villas, pensions, etc.), users' representatives in this branch of activity, FPTR and FIHR, have proposed several versions for calculating the remunerations for the public communication inside the accomodation and public catering units. The positions of the two representative associations have been convergent regarding some aspects, and different (and somewhat divergent) regarding others, so that negotiating and finding a common ground with the representative collecting societies was difficult, without being able to materialize in an understanding of the parties.

In order to better understand the reasons for which UPFR, CREDIDAM, FIHR and OMV have signed a protocol on 28.09.2015 regarding the methodology form and the due remunerations, in a different form than the initial one (which was subject to negotiations), I will display the position of each party in relation to which the elements contained in the Protocol have been adapted.

FIHR originally referred to the parties two negotiation proposals about how to determine the remunerations for the tourism accomodation premises:

a) the first being related to maintaining the current fees structure (the one in the ORDA Decision no. 399/2006, also

maintained in the Decision no. 189/2013, but with updated fees), exclusively for hotel rooms, however, with the remark to determine differentiated remunerations for hotels of 4 * and 5 * stars and to maintain or, at most, to reasonably raise the remuneration for all accommodation premises, regardless of the occupancy of accommodations premises;

b) the second is about *setting a flat rate fee per room* (proposals similarly submitted by CREDIDAM and UPFR during negotiations), differentiated according to the classification of the accommodation premises by stars/daisies, but which should be weighted with the occupancy degree of the rooms and expected that such occupancy to be estimated, either by reference to the statistics of the Institutul National de Statistica INS (National Statistics Institute (NSI)) regaring the occupancy in the previous year, or by judgment of the parties during the negotiations, and taken into account for determining a remuneration flat rate per room.

FPTR supported the second option proposed by FIHR, for the purpose of determining a remuneration flat rate per room, but which takes into account the occupancy degree of the accommodation premises.

The representatives of CREDIDAM and UPFR have showed that the occupancy degree of rooms in the accommodation premises represent a criterion which in practice is difficult to assess and verify, because one can not ignore the lack of reporting in this area, and the alternative **assessment of the occupancy degree based solely** on statistical data applied consistently to all the hotels, it is not fair neither towards users, ignoring here the principles of competition (being inequitable to apply the same values of occupancy degree of rooms to all the users), nor towards the rightholders, while reducing remuneration after an arbitrary criterion that would greatly complicate the collecting of remuneration.

On the other hand, the introduction of such criterion as a way of weighting the value of the flat rate remuneration is contrary to the notion of "public communication" that the ECJ has construed in Case C-162/10, meaning that the act of public communication is conducted by hotels operator, by placing TVs for its customers in the hotel rooms, not being relevant if they (the customers) actually use them, so that the degree of use of the works is not given by the occupancy degree of the rooms, but by the number of rooms equipped with such devices for playback and reception of works.

We consider that CREDIDAM and UPFR position was clearly understood by the representatives of the users, the proof being also the circumstance that FIHR proposed a new calculation version to be negotiated, by which they requested ***to determine a single remuneration rate for the entire accommodation premises*** that includes, besides the remuneration corresponding to the hotel rooms, also the remuneration corresponding to the reception, the bar and restaurant inside the accommodation premises.

In light of this latest proposal, FIHR presented two value alternatives of the remuneration proposed, namely:

a) either the increase by 65% of current remunerations (stipulated by the Decision 189/2013) for hotels, rise justified in order to also include the appropriate remuneration for the restaurant, bar and reception and, at the same time, a 5% increase of such increased remuneration per each year, from 2015 through 2018 inclusive, as follows: 10% (in 2015), 15% (in 2016), 20% (in 2017) and 25% (in 2018);

b) or the increase by 70% of the current remunerations for hotels, rise justified in order to also include the

appropriate remuneration for the restaurant, bar and reception, and, at the same time, a 5% increase of such increased remuneration per each year, from 2015 through 2018 inclusive, as follows: 5% (in 2015), 10% (in 2016), 15% (in 2017), 20% (in 2018).

The increases targeted by FIHR proposal were based on the current reference value of remunerations provided by ORDA Decision no. 399/2006, amended by ORDA Decision no. 189/2013, as well as on the fees structure and differentiation of remuneration in the ORDA Decision no. 399/2006.

Although FPTR stated that they disagree with the values submitted by FIHR, however they agreed with this option to determine a single remuneration for the whole accommodation premises, showing that remuneration should include all the areas which are prescribed mandatory for the classification of the accommodation premises, according to the ANT Order no. 65/2013, and for the areas that exceed the classification compulsory criteria and that are found inside the accommodation premises, to determine a distinct remuneration for each area, according to their size and destination. In reply, FIHR showed that the said Order is considering a number of criteria against which the accommodation premises are classified, without necessarily binding certain areas inside the accommodation premises, which, however, still have relevance in terms of the score which the accommodation premises can get, points relevant, in turn, as of the classification by stars/daisies. Precisely for this reason, FIHR considered that there should be clearly determined and right from the start for which areas inside the accommodation premises the remuneration is to be included in the one set per unit of accommodation, otherwise, questionable analyzes would be generated in terms of determining the areas for which the remuneration is included in the one set per unit of accommodation.

In relation to the things shown by FIHR, FPTR did not present counterarguments but they required for that remuneration per accommodation premises to be represented by a remuneration per room (accommodation area), as they are provided in the Annex to the Classification Certificate of the accommodation premises, irrespective of their level of occupancy, in this manner not sustaining the theory of remuneration weighting with the occupancy degree of the accommodation premises. This remuneration per room/accommodation area[6] would also include the appropriate remuneration for the reception area, the bar and the restaurant inside the accommodation premises. This remuneration per room would also be differentiated depending on the location of the unit and on the classification level by stars / daisies. In this regard, FPTR proposed the determination of some remunerations differentiated per room for the villages/communes, for cities, municipalities, for touristic areas of national and local interest, which in turn, to be differentiated by each section depending on the number of stars of the accommodation premises, or depending on where they are located in the city, town, etc. As a reference, they refered to a draft law on determining a flat rate tax in the hospitality (hotels) industry, a draft containing such a complex scheme of taxation based on many criteria (related to the location, the rating on stars/daisies, the number of rooms, etc.), the flat tax being set, in turn, per room.

[6] FPTR criticizes the notion of room in comparison with the circumstance that an accommodation area may be composed of several rooms, as is the case of the apartments inside the accommodation units; such a distinction between "room" and "accomodation area" we believe it's irrelevant given that the fee relates to the room/apartment booked and not to the number of rooms from an apartment.

FIHR showed that even the current methodology (which I agree with in principle) contains such criteria of differentiation in remunerations per villages / communes and towns, namely depending on the levels as per the number of rooms and depending on the classification by the stars and by the categories of accommodation premises, but, in their opinion, the introduction of other additional criteria to differentiate remuneration is not justified because such an approach would greatly complicate the pricing structure of the accommodation premises and thus would generate significant costs for both sides when collecting the remuneration.

The same arguments were also presented by CREDIDAM and UPFR, showing that the application of the fee structure requested by FPTR would entail significantly higher costs in the collection of remunerations and, implicitly, the determining of much higher remunerations than those originally proposed. CREDIDAM and UPFR have shown that in order to collect remunerations they can only carry costs within the legal limit of 15% from the collected remunerations and therefore they prefer a more predictable form of methodology and easy to apply in practice. As the financial resources and also the logistics of the two collective management organizations are limited by law, they cannot be required to apply the " taxation scheme" of a draft law in differentiating the remuneration, because the collecting societies cannot compare with ANAF in terms of the number of inspectors in the field or in terms of pecuniary sanctions provided by the law for ANAF.

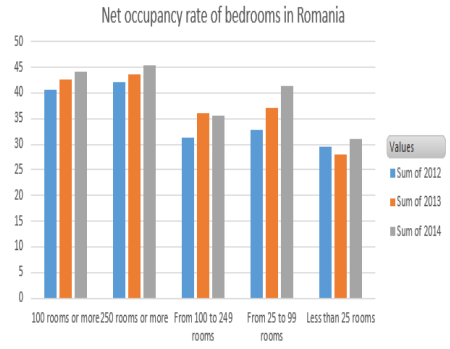
FPTR returned on its proposal, simplifying the scheme originally proposed, meaning that differentiation of remunerations should be made depending on the number of stars/daisies and depending on area in villages/ communes, the area in city/municipality/resort, and on this occasion they sent by e-mail to the representatives of the collective management organizations the values of required remunerations, which is lower by 40% compared to those in force (provided by ORDA Decision no. 189/2013). This latest proposal was considered by all other parties involved in the negotiation (including by FIHR) as absurd, especially given that the FPTR position was not consistent during the negotiations, alternating between opposing to the right to an equitable remuneration in comparison with construing the concept of "public space", and submitting proposals for remuneration differentiation by too many criteria, perhaps only in order to aggravate the collection system and the application of methodology in practice. This is the reason why we could not negotiate reasonable terms and sign a possible protocol with FPTR.

FPTR allegations regarding the "user" definition in the draft methodology according to which it is contrary both to the "grammatical" definition and to the "Romanian jurisprudence in the field" as well as to the "European precedents and acquis communautaire", is completely ungrounded. By the definition of the term "user" in the new methodology draft no extension was made for the payment obligation of the persons communicating publicly trade phonograms/phonograms published for commercial purposes or reproductions thereof and/or audiovisual artistic performances, for ambient or lucrative purposes. The definition of this term in the current methodology is "*By user of the audiovisual artistic performances we understand any natural or legal person authorized to use under any title (ownership, management, rental/lease, sublease, etc.) the spaces in which audiovisual works are used for ambient purposes"*, so it is easy to see that the new definition does not extend

this concept, but simply outlines it in order to be more understandable. Moreover, the obligation to pay the remuneration due to performers and to producers of phonograms turns only to users that communicate publicly trade phonograms/phonograms published for commercial purposes or reproductions thereof, and/or audiovisual artistic performances.

We also believe that it is very important to note, in comparison with FPTR allegation regarding the average occupancy of tourist accomodation structures functioning as accomodation premises for the period 2010-2015, that the occupancy of the bedrooms in Romania, in principle, is in an uptrend, or at least it is steady (fig. 1).

Fig. 1



Moreover, we specify that in Europe, the occupancy is not used as main criterion, for instance in: France, Spain, Slovenia, Moldova, etc. One of the problems we predict where the payable remuneration would be calculated based on occupancy, is the need for transmission by users of monthly financial reports in which they declare on their own responsibility the occupancy degree. This is to the disadvantage of users, given that for establishing a flat rate per room there must be also determined a minimum remuneration (in order not to negate the legal provisions and to protect the holders of neighboring rights). Moreover, in case CREDIDAM and UPFR will receive from the users these financial reports on monthly basis, we see ourselves in the situation where the fiscal inspection bodies request information about these users, or taking into account the increased number of tourist accomodation structures with functions of tourist accommodation, this will result in the obstruction of CREDIDAM and UPFR activity.

Given that rightholders cannot exercise individually certain categories of copyright or related rights, and a collective management by collecting societies, as CREDIDAM and UPFR, is mandatory – the art. 123^1 of the Law provides for the categories of rights for which collective management is mandatory, among which, at letter f), the right to equitable remuneration acknowledged to performers for the public communication and broadcasting of trade phonograms or of reproductions thereof, stipulating at art. 123^1 paragraph 2 that for these two categories of rights the collecting societies also represent the rights holders who have not granted a mandate. The mandate given by rightholders, i.e. members of CREDIDAM and UPFR, is thus extended to non-members, both Romanian and foreign artists and producers of phonograms, as provided by art. 146 letter d) of the Romanian law and art. 12 of the Rome Convention - the latter article providing that "when a phonogram published for commercial purposes or a reproduction is used directly for any type of broadcasting or for any type of public communication to the public, the one who uses it shall pay an equitable remuneration to performers or to producers of phonograms or to both of them".

If the collected amounts of money are due to foreign performers and to phonogram producers, such amounts shall be transmitted to the collecting societies in that country, with which CREDIDAM or UPFR have

concluded a reciprocal representation agreement.

Whereas, in accordance with Article 123[1] the collective management of copyright or neighboring rights, in certain cases provided by law, is mandatory, in the same manner according to the provisions of Article 129[1] of the Law no. 8/1996 "*in case of compulsory collective management, if a holder is not a member in any organization, jurisdiction lies with the organization in the field with the largest number of members. Claiming by the unrepresented rightholders of the amounts due can be made within 3 years from the date of notification. After this period, undistributed or unclaimed amounts are used according to the decision of the general meeting, excluding the management costs."*

As concerning the supplementation of the documentation for the authorization-exclusive license with the documents indicated by FPTR, we do not see an opportunity in such an endeavor, and we believe that the draft methodology requested documents are sufficient in order to issue the authorization-exclusive license. It is completely irrelevant the allegation that all permits and regulations refer to seats and not to areas, as long as we require "any justifying document that shows the area where the phonograms /audiovisual artistic performances are broadcasted", and not the total surface area.

We believe that removing the article on requesting the authorization from the Draft Methodology is completely inappropriate and meaningless as long as not all users publicly communicating trade phonograms/phonograms published for commercial purposes or reproductions thereof are willing to obtain an authorization - license from CREDIDAM and from UPFR, and/or to be in compliance with the law. Thus, this point in the Methodology is required in order to establish a guarantee regarding the payment of the remuneration due to the performers and to the phonogram producers.

Complying with the defined process and the basic principle of negotiation, one should bear in mind that CREDIDAM and UPFR are two collecting societies representing holders of rights related to copyright, performers or producers of phonograms, and they are bound by a special law applicable in the field to defend their rights and to not create any damage to them.

In the article 124 of the Law no. 8/1996 is stated that "*the collective management organizations of copyright and related rights, referred to in the Law as collecting societis, are, in the present law, legal entities established by free association and* ***having as main activity, the collection and distribution of royalties which maangement has been entrusted to them by the holders***."

We did not agree with the change proposed by FPTR on reducing by 20% the amount due, in the circumstance in which the payable remuneration is paid in advance for 12 months until February 28th. Such a reduction will result in ridiculously low remunerations due to performers and producers of phonograms. It is necessary that FPTR understands that these earnings are not "fees" but rights of the author (copyrights), private rights accruing by composers and performing artists/performers as remuneration for their creation work from those using the outcome of their creative activity (music). We believe that the amounts collected by CREDIDAM and UPFR are at a reasonable level, and such a major reduction is inappropriate.

However, summarizing the proposals of both representative associations (FIHR and FPTR), we find that **both prefer to establish a *remuneration per accommodation premise***, which should

include the remuneration corresponding to the reception area, the bar, the restaurant and the dining room, the difference between the proposals of FIHR and those of FPTR being that FIHR wants to determine a *monthly flat remuneration for the entire accommodation premise*, differentiated both by stars/daisies rating of the accommodation premise, and by the levels of rooms for those which are classified; and FPTR wants to determine a *monthly flat remuneration per room*, which should also include the remuneration corresponding to the areas inside the accommodation premise which are mandatory under the classification, differentiated both by stars/daisies rating of the accommodation premise and also depending on the area where the accommodation premise is located, because there is a different remuneration for the ones in villages/communes and the ones in cities/towns and resorts.

The position of the two representative associations converges in terms of determining ***a remuneration per accommodation premises***, a situation towards which the representatives of the collective management organizations have reconsidered their original proposal (the one set by the Bucharest Court of Appeal) and expressed their willingness to determine a flat rate remuneration that includes besides the rooms/accommodation areas alsothe reception area, the restaurant, the bar, provided that they are managed by the same hotel operator, as well as the determination of different remunerations for other areas (than those mentioned above) inside the accommodation premises, such as the swimming pool, the gym, the elevator, the lobby (inside which music is played), which will be paid where appropriate and separately from the remuneration per accommodation premises.

In this respect, negotiations continued even after the expiry of the initially agreed timetable and even after the arbitration was initiated by the two collecting societies, carrying a rich correspondence by e-mail for determining the final form of the tables and the corresponding fees for the accommodations premises

Thus, depending on the proposals of FPTR and FIHR during negotiations, UPFR and CREDIDAM proposed to OMV, FIHR and FPTR a new form of fees for the accommodation premises, claiming for the determination of a monthly flat remuneration (for the entire accommodation premises, of which excluding the elevators, the fitness, massage and spa facilities, the event halls, bars with nightclub programs, night clubs and other clubs, etc.), differentiated by the type of accommodation premises, by the stars/daisies classification, by the levels on the number of accommodation spaces (rooms), estimating that such proposal is pretty close to the things proposed by FPTR and FIHR.

Following the proposal formulated on 28.09.2015, UPFR, CREDIDAM, FIHR and OMV signed a protocol in which they agreed the fee structure and the value of differentiated remunerations, so that the negotiations and the fees agreed by the representatives of OMV and FIHR users, provide an absolute position to the parties in determining a remuneration per accommodation premises, as this term was appropriated by the parties.

Related to the remuneration payable by the users of the public road transport of passengers, the representatives of this branch of activity, namely COTAR, made a counterproposal saying that the current fees (provided by ORDA Decision no. 189/2013) should decrease, but the collection rate of remuneration by the collective management organizations should increase, and for this purpose they have offered their support in

order to identify solutions in this regard. Thus, they discussed the solutions for charging the remuneration either at the moment of authorizing the public passenger transport (per each vehicle in part) by the state authorities (namely by the ARR[7]) or at the moment of homologation or classification on stars and/or on categories of motor vehicles by the RAR[8], and the remuneration would subsequently be allocated to the vehicles based on the number of permits/authorizations issued in this manner and notwithstanding such vehicles authorized for public passenger transport were or were not actually used in passenger transport.

The right to an equitable single remuneration of these categories of rightholders represented by CREDIDAM and UPFR is statutory, and users' obligations established by the special law are mandatory and not left to the discretion of each individual.

Thus, article 106^5 paragraph 1) of the Law no. 8/1996 on copyright and related rights, as amended and supplemented, explicitly provides: "(1) *For direct or indirect use of the phonograms published for commercial purposes or of reproductions thereof by broadcasting or by any means of communication to the public, the performers and producers of phonograms are entitled to a single equitable remuneration. "*

COTAR showed that they categorically disagrees with differentiation of remuneration depending on the number of seats of the vehicle, showing instead that they wish to establish a remuneration depending on the type of vehicle, namely taxi, bus, coach (as means of transport for which, according to the regulations in the field, the number of places available for public passenger transport is determined), and to this purpose they have submitted alternative proposals: either to establish a single remuneration throughout the lifetime of the vehicle, payable at the moment of its agreeing or authorization by the RAR (but without indicating a remuneration value for this type of calculation) or to determine a monthly remuneration of RON 1/taxi, RON 3/bus, RON 5/domestic coach and RON 10/international transport, but which will be comparable to the number of permits/authorizations for the public passenger transport issued by the public authorities for user's fleet of vehicles and notwithstanding they were actually used in public passenger transport.

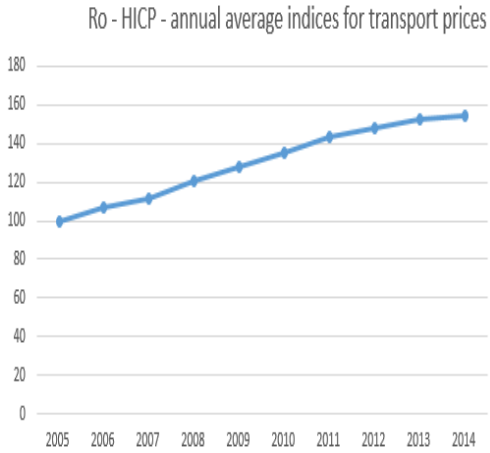
The proposal of certain fees with a sole remuneration value payable on the first registration of vehicles depending on the manufacturing year or on the type of vehicle, without specifying the appropriate amount of remuneration for each category of rightholders in part or without presenting the essential elements in determining the representation value of the proposals made, namely stating the number of CECAR members, who are they and which is the fleet of vehicles owned by each member, proves the lack of seriousness of the negotiations with this organization.

We also believe that it is very important to note, relative to CECAR allegation regarding the economic situation in the "*years of crisis*" as well as the current situation, and coming to meet the difficulties faced by the users, that starting with the beginning of 2015 the prices for the urban transport increased by 2%. Moreover, in 2010 (in full "*economic crisis*") Romania was in first place in the European Union with regard to price developments in the field of transport, with an increase of 42.66% in five years. In 2014, the annual average index of

[7] Autoritatea Rutieră Română (Romanian Road Authority).
[8] Registrul Auto Român (Romanian Motor Vehicles Registry).

prices charged by carriers was with 54%[9] higher than the reference year 2005. It had a steady upward trend between 2005 and 2014 (Fig. 2).

Fig. 2



Thus, we note that neither COTAR has met the difficulties faced by consumers of their services, and thy chose to consistently raise prices.

Also as evidence of COTAR concern for increasing the collection of remuneration by the collective management organizations, they showed that they agree with regulating by this methodology the very high pecuniary sanctions for the users who are late in payment or for those who play ambient music without previously getting a non-exclusive license from CREDIDAM and UPFR.

There were also ongoing negotiations on finding solutions to regulate the situation of collaborating taxi drivers (mostly natural persons/individuals) who drive a taxi in collaboration with major taxi companies by using their personal vehicles branded by the company and for the services provided on behalf of the Taxi Company, but without any result.

In order to have a representation of value of the proposals made by COTAR certain information were requested regarding the COTAR members (which is the number of members, who are they and what is the fleet of vehicles owned by them), information that COTAR was bound to make available for collecting societies during the negotiations, but did not meet this obligation until the end.

On the other hand, UPFR and CREDIDAM discussed a number of issues which, in fact, hinder the collection of remunerations, most problems appearing while identifying the fleet of vehicles (the number of motor vehicles for public passenger transport), the type of transport (domestic and/or international) or about the distinction between bus and coach (relevant distinction in terms of related remuneration).

Regarding the issues discussed, UPFR and CREDIDAM considered that the methodology itself must provide sufficient tools in order to clearly determine users' payment obligations in this branch, such as regulating the distinction between bus and coach in terms of the remuneration due to the performers and to the producers of phonograms, in relation to the type of transportation (urban, interurban/inter-county, international) or regulating the obligation of the user to present documentary evidence, as it clearly results from the form of the proposed methodology.

COTAR considered that a regulation is not required in the methodology in order to make the distinction between notions of bus and coach, because such a distinction is made by GO no. 27/2011 and the letter will be taken into account in determining the remuneration for the bus and the coach respectively.

Summarizing the position of COTAR during negotiations, we noted that their proposals focused on:

[9]http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tsdtr310.

a) the reduction of remunerations proposed by CREDIDAM and UPFR (the fees proposed by COTAR being ridiculous and, consequently, unacceptable);

b) the increase in the collection rate of CREDIDAM and UPFR;

c) the non-differentiation of remunerations depending on the number of seats of the vehicle, especially for the bus and coach;

The negotiation is a process that takes place between two or more parties (in which each side has needs, objectives and points of view) which attempt to reach a mutual agreement on a problem or dispute regarding the parties involved. Exchange principle states that each participant in the negotiation must win something and give up something. However, the principle of exchange does not necessarily imply equality between what we give and what we receive.

Thus, both during the negotiation and arbitration stages, one can find that the collecting societies have taken into account the counterproposals of CECAR representatives and changed the fees structure.

However, the representatives of carriers have only submitted requests for the decrease of the payable remuneration proposed by CREDIDAM and UPFR, promoting only ridiculous fees and proposing to increase the collection of remuneration by CREDIDAM and UPFR, but without presenting viable solutions and requesting for an undifferentiated remuneration depending on vehicle's number of seats, especially for buses and coaches.

It can thus be concluded that, on the one hand CREDIDAM and UPFR have both complied with the negotiation process and with its basic principle, aiming to protect the rights of the represented holders (and not to harm users), but on the other hand, the users have the only aim *to win something, WITHOUT willing to give up something*. Furthermore, COTAR appreciates, in an entirely misrepresented manner, that a clear delimitation (regarding the remuneration increase) should be made between carriers and other categories of operators, namely those operating in public catering, hotels, retail, motivated by the fact that only in the latter's activity the use of *„devices for the communication of musical artistic creations"* is appropriate, because the essence of their activity has the *"purpose of entertainment"*. Such an assessment only reinforces the total lack of understanding of COTAR with regard to the creative industries.

CREDIDAM and UPFR took into account the user's position expressed during the negotiations and have reconsidered the proposal by changing the fees structure and also by reducing the remuneration proposed during negotiation, so that the **new structure proposed in Table E1** to differentiate remunerations depending on the type of vehicle and on the type of transport, following that the distinction between bus and coach to be done according to GO 27/2011[10]. The fees so proposed (as listed in the table below) are differentiated by type of transportation; the remuneration is higher for the passenger's touristic transportation by coach, both domestically and internationally, and much lower in the case of regular people transportation by bus

[10] GO no. 27/2011- regarding the road transport, with subsequent amendments and supplements, defines the coach as "a bus with more than 22 seats, designed and equipped only for the carriage of seated passengers, having special spaces for carying the luggage on long distances, arranged and equipped to ensure comfort of transported persons, with the interdiction to carry people standing up (article 3, point 4). GO no. 27/2011 makes the distinction between bus and coach, the bus being "designed and constructed for the carriage of passengers seated and standing, which has more than 9 seats including driver's seat".

at urban/suburban level or domestic-interurban/inter-county level. A differentiation of remuneration as well as of the amount thereof has been proposed considering several economic aspects, such as the price difference of the ticket depending on the type of transport carried out or on the type of vehicle used (for eg. in scheduled domestic - urban/suburban and inter-county transportation by bus the ticket price being lower than in the touristic and/or international transportation by coach).

There have also been proposed separate remunerations for both the cars used for taxi and for the minibuses. For the taxis (specific for urban or suburban transportation), the remuneration is higher than in urban transport buses, given that the price of the ticket per person is much higher than the corresponding "public" transport. For minibuses, the remuneration is determined as the average between the remuneration corresponding to urban transport and the one for the scheduled intercity transport, taking into consideration that minibuses are used both in the urban transport and in the in scheduled intercity transport.

Therefore, the user must submit a monthly report (a statement on its own responsibility - affidavit) by which it communicates the number of cars that have been used / introduced into traffic. Moreover, in the current methodology in force, and in the new structure proposed for Table E1 by CREDIDAM and UPFR, there is clearly and unequivocally stated that we talk about the means of transport equipped with sound systems, radio, TV, and headphones for individual listening. In this regard, we believe that all COTAR allegations on the exemption from payment of the remuneration for the vehicles either in terms of construction or for the ones that had the music devices removed or sealed or that belong to the "Cold Park", based on the self-statements on their own responsability submitted by the carriers to the collective management organizations, are deeply ungrounded.

E	**Transports*****)**			
E 1	**Passenger Road Transport - means of transportation equipped with sound system, radio, TV, individual headphones for listening, whether they are in a rent-a-car system, or in a collaboration, or lease, etc.**			
	Framing type	**Monthly remuneration (excluding VAT)**		
		Producers of phonograms (UPFR)	**Performers for the phonograms (CREDIDAM)**	**Audio visual Performers (CREDIDAM)**
1	Recreational vehicle (tractor, small train, semitrailer, platform)	RON 10	RON 10	RON 5
2	Bus, trolley bus, tram and minibus used in regular urban / suburban transportation of persons	RON 10	RON 10	RON 5
3	Car up to 6 passengers seats used for taxi service ******)	RON 15	RON 15	RON 7
4	Car up to 6 seats used in the rent service (rent a car)	RON 15	RON 15	RON 7
5	Minivan / minibus regardless of the number of seats	RON 20	RON 20	RON 10

6	Bus used in domestic (national) transport,both interurban / Intercounty	RON 30	RON 30	RON 15
7	Coach used in domestic transport, both interurban / Intercounty	RON 60	RON 60	RON 30
8	Coach used in international transport	RON 80	RON 80	RON 40

We believe that the reconsidered form of the table in letter E1 is a fair proposal in relation to the users of this activity segment, which takes into account their position on the criteria of differentiation of remunerations but also on the reduction of the remuneration originally proposed for negotiation.

On the other hand, an increase in remunerations is justified in comparison with the current ones (in the ORDA Decision no. 399/2006, amended by ORDA Decision no. 189/2013), for the above outlined reasons.

Taking into account the preponderant position of the parties involved in the negotiation regarding the increase of the remunerations relative to the current ones, regarding their differentiation structure and regarding the methodology form, as such position was recalled by the concluded protocols, we consider the position of the two associations, i.e. PFTR and COTAR, as being an unconstructive one in the negotiations and arbitration that took place.

3. Conclusions

As a result of the arbitration, the Arbitral Award was rendered under no. 1/2016, published in the Official Gazette no. 146 / 25.02.2016, setting the remuneration due by the users for this collection field – i.e. the public communication, starting with March 2016.

The collecting societies CREDIDAM and UPFR believe that the remunerations determined by the Arbitration Panel are very small relative to the economic situation of the users, which is why they shall submit an appeal to the competent Court.

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LEGAL IMPLICATIONS OF OPEN LICENSES

Monica Adriana LUPAȘCU*

Abstract

This paper studies the Creative Commons and GPL open licenses from the perspective of some of their legal implications. The social interest that has lead to the creation of these types of licenses is being studied, as well as their relationship with the public domain. The scope of the paper is to find out to what extent appertaining to the Creative Commons or GPL licensing system can assure the protection necessary for the social interest of accessibility.

Keywords: *Creative Commons, General Public License, copyright, open licenses, public interest, public domain*

Introduction

The field covered by this study is intellectual property, respectively, the field of copyright. The study is focused on the analysis of accessibility as an extremely important form of social interest in the current society, which justifies the reconfirmation of the right of access to works belonging to rights holders. From this perspective, the model of the open licenses whose analysis allows the identification of the forms of protection meant to support the public interest corresponding to accessibility is relevant. Also mentioned, are some of the legal implications of belonging to open licenses, including from the perspective of the common points that these contracts with the public domain present. The relationship with the public domain is important because, in the case of this sphere of works, the existence of the right of access is the most obvious, but the arguments retained in this paper are valid in regards to any other context in which the right of access may be found, therefore including in the case of copyright limitations and exceptions conferred by the current legislation.

The public interest that justified the appearance of open licenses

James Boyle[1], one of the members if the Creative Commons council, identifies what could be a short history of CC licenses and of what justified the development of this open licensing system.

"*Once copyrighted, the work is protected by the full might of the legal system. And the legal system's default setting is that all rights are reserved to the author, which means effectively that anyone but the author is forbidden to copy, adapt or publicly perform the work. This might have been a fine rule for a world in which there were high barriers to publication. The material that was not published was theoretically under an all rights reserved, but who cared? It was practically inaccessible anyway. After the development*

* PhD Student, Faculty of Law, "Nicolae Titulescu" University of Bucharest, (e-mail: monica.lupascu@cyberlaw.ro).

[1] James Boyle, "The Public Domain – Enclosing the Commons of the Mind", 2008, p.182.

of the World Wide Web, all that had changed. Suddenly people and institutions, millions of them, were putting content online – blogs, photo series, videologs, podcasts, course materials. But what could you do with it? You could read it or look at it, but could you copy it? Put it on your own site? Of course, if you really wanted the work, you could try to contact the author. And one by one, we could all contact each other and ask for particular types of permissions for use. All of this would be fine if the author wished to retain all the rights that copyright gives and grant them only individually. But, what about the authors, the millions upon millions of writers, and photographers and musicians, and bloggers and scholars, who very much want to share their work? Creative Commons was conceived as a private "hack" to produce more fine-tuned copyright structure, to replace "all rights reserved" with "some rights" reserved for those who wished to do so."

In James Boyle's vision, CC licenses tried to support an obvious necessity in a society with a great online exposure. Practically, there was a need for freedom, sharing and copying in order for the entire content to be capitalized. Without access to the huge informational mass, the interconnectivity required by the network could not even be ensured. And this new public interest could not be satisfied under the old system of copyright law enforcement. Indeed, the law is not just a set of rules but has to be a reflection of society's need in a certain stage of its evolution; in other words, the law and its interpretation has to completely follow the public interest affirmed by society at a given moment. The right of access, copying, sharing were to be reconfirmed and especially guaranteed by the public interest itself, as revealed by the new social reality.

"Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights **should be adapted and supplemented to respond adequately to economic realities […] in order to respond to the technological challenges.** (EUCD[2] European Union Copyright Directive)."

The concepts are not really new. The (law) institutions can remain unchanged so long as the applicability of the copyright law is performed by balanced coordinates that value accessibility as a social interest of paramount importance.

To not recognise the existence of the public's rights, practically of the right of access (in certain limits and conditions) in this domain is equivalent to denying the process preceding any regulation and the fact that any provision, regardless of field, has as primary purpose social order, which is achieved by trying to create balance between the holders of conflicting interests (tension relationship). In the field of copyright, the norm is the expression of an attempt to maintain in order the interests of the rights holders/authors, on one hand, with the general public's interest of accessing culture, on the other.

The tension relationship preceding regulation is transposed into the legal relationship regulated by the current norm, the subjects remaining the same, regardless of whether or not they are expressly highlighted. There is, without question, a relationship between holders and the object being protected, namely, 'protectable' or protected works, but the regulation itself is the expression, with priority, of the relationship between authors and the rest of the population, categorized as being the

[2]Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

general public (the community, and every single individual), whose interest to access information/culture is contrary (in a certain measure and to a certain degree) to the author's interest of protecting that work and of restricting/limiting access to his work without his consent.

Guaranteeing certain rights to a category of subjects, such as owners, will always correspond to the existence of certain obligations borne by the other subject category, the obligation to not reproduce protected works for commercial purposes, without the consent of their owners, actually being the expression of the owners right to authorize or forbid the reproduction of said work. Exceptions and limitations that exist in the field of copyright are practically the expression of the existence of the public's right of access to works belonging to other creators. The right of access is, therefore, intrinsic to the current norm and can fluctuate only in regards to its extent and level of protection, as it is conferred by the state, but its existence cannot be denied because denying it would be equal to the negation of the very legal relationship that keeps together all subjects, and not just some of them.

It's what the doctrine considers to be an indissoluble bond[3] between the subjects of the legal relationship, manifested throughout the entire development of the legal relationship. That is why the owner and his rights cannot be seen as (and implicitly protected) on their own, taken out of the legal relationship in which they are developed. It has been considered that *"this indissoluble, organic bond, that keeps together subjects throughout the legal relationship's development (bond owed to the existence of reciprocal rights and obligations), constitutes one of the objective legalities essential in the field of legal reality, and the absence in a social phenomenon of a judicial form means the impossibility to use law-specific tools to achieve and protect the interests of the participants."*[4]

The new technological era, a title that has been confirmed for the current century, has imposed new values, new needs, other interests of the citizen have been affirmed. The ease of access to any information has lead man to a new step, the computer and the network slowly becoming a way of life. It's especially in this context that one should interpret every citizen and everyone's interest, as well as those of the entire community, with greater needs, stimulated by a growing need for knowledge, specific to an era in which a scientific study doesn't need to be researched in specialized libraries for days on end, but is available online, in each and everyone's house, through a simple "search".

Needs and interests of people contemporary with the first copyright law in France 1957, for example, are different from the ones of today's individuals from the current society, whom are hard to identify as not pertaining to the internet users' category. The user of works protected by copyright is, in fact, an internet user, the right of the user, of the consumer, being in fact the right of the internet user, with the specifics related to him, the interest that's at the base of this right being coordinated directly by knowledge requirements specific to the age of information, of the internet, of the network. The society that has developed has created the possibility of some new personal needs, the internet bringing with it a multitude of information (most of which protected) at everyone's disposal, the interest for each one of them, increasing more and more, has also had an impact on

[3] Saleilles, "Le personnalite juridique", p.487.
[4] N. Popa, "Le rapport juridique (Notion et traits)", p.24-34.

every individual's need, and subsequently on society as a whole.

A society accustomed to a certain level of knowledge, of culture, will refuse a limitation of this level of access to information, limitation that could not be felt as anything but an involution, a regression.

A new and emergent public interest has therefore justified the creation of this open licensing system, in which the leading place is occupied by the right of access, respectively, free use and not the restrictions specific to copyright. Without abandoning the coordinates and principles of the copyright law, the "all rights reserved" system has been substituted with "some right reserved".

Open licenses, whether they pertain to computer programs (GPL) or any other literary-artistic expression (Creative Commons), are practically contractual formulas made available to authors or owners, in different versions, so as to cover the most frequent licensing cases.

Exactly as with the Creative Commons licenses, the fundamental idea behind General Public Licences is that of protecting the free use of computer programs. *"The GPL specifies that anyone may copy the software, provided the license remain attached and the source code for the software always remains available. Users may add to or modify the code, may build on it or incorporate it into their own work, but if they do so, then the new program created is also covered by the GPL. Some people refer to this as the viral nature of the license. The point is that the open quality of the creative enterprise spreads. It is not simply a donation of a program or a work to the public domain, but a continual accretion in which all gain the benefits of the program on pain of agreeing their additions and innovations back to the communal project."*[5]

The most common types of Creative Commons licensing (the ShareAlike ones) function on the same system as the GPL ones, through which the user is required to preserve the same contractual terms for future licenses. Using the work exclusively within the CC licensing system and maintaining the cycle of usage and retransmissions, represents practical methods of protection of the right of subsequent access to the work, avoiding forms of abusive/exclusive appropriation.

The "ShareAlike" mention compels that any derived work, created on the basis of a material licensed in this manner, be distributed solely within the "ShareAlike" terms applicable to the original/initial work. "*If you remix, transform, or build upon the material, you must distribute your contributions under the same license as the original.*" A similar method of protecting the right of accces is also used in the more recent forms of Creative Commons International licensing, which requires any user to not apply any other contractual terms or technological means of protection that would limit others' access to the work. "*You may not apply legal terms or technological measures that legally restrict others from doing anything the license permits.*" Practically, in the exchange of receiving unrestricted right of access to a certain work, the user conforms to a behaviour identical to that of the original author, undertaking to not change the open nature of the work. One might consider that we are dealing with an implicit guarantee of the right of access, that each user assumes towards future users, at the moment of accepting the contractual terms, a moment considered to be that of the use of said work.

As can be observed, the freedom of use needed by the current society to exploit the existing online content has justified the development of the open licensing system,

[5] http://www.gnu.org/licenses/gpl-3.0.en.html.

through which the protection of the right of access itself is attempted, exploiting, more precisely, the accessibility on the owner's desired coordinates, since any work will enter this system of licensing only through the expressly manifested intention of contracting of its owner. This manifestation will be considered express at the moment in which the owner has opted for one of the open licensing forms for a work that belongs to him and is available to the public.

In continuation of the discussion related to the legal relationship that exists in the copyright field, and relevant for this study, although implied in the relationship between owner and public (considered to be the community and each individual), the relationship between the primary user of a work, on one hand, and the subsequent user, on the other, must also be mentioned. An affirmation of this relationship is also made through the GPL and CC ShareAlike licenses, as the obligation of maintaining (keeping) the work in the open licensing system ensures exactly the continuation (transmission/retransmission chain) through which the interest of accessibility is protected, because any blocking, such as an exclusive use, would practically break the work out of the transmission and retransmission chain, by making it no longer available to the entire community, and practically, there being no way of exploiting any right of non-exclusive use. These are principles of protection of an informational mass that must be available to everyone (to the public, as I've mentioned, exactly as in the case of the public domain), the guarantee of accessibility actually meaning the guarantee of the right of access of each individual to the work in question.

The existence of these types of licenses opens new perspectives of defining the notion of "freedom of use", since from the perspective of these new contractual approaches, freedom no longer means non-protection because it doesn't contravene this notion, but it supports it through other methods. In the same way, it becomes easier to understand that freedom can manifest itself not only outside of the remuneration system, but being perfectly compatible with it and, last but not least, that freedom does not contravene the notion of ownership/belonging. Maintaining a work within the CC or GPL system would ensure every person non-exclusive rights over some works. This is, truly, the principle on which the public domain functions, as the works pertaining to this sector can be used by each person on the basis of owning a right of access that must be guaranteed to remain non-exclusive, so as to adequately exploit the public domain and to avoid abusive acquisition.

Relationship with the public domain. The confusion between CC-licensed works, on one hand, and unprotected/unprotectable works or works that belong to the public domain, on the other.

As far as the public domain is concerned, we recall the common characteristic of all works in this sphere as being, mainly, the freedom of use, this being, in turn, an effect of the impossibility of exercising copyright. The work can be used, basically, without restriction, without the need for payment of a fee or soliciting permission from its owner. Another common characteristic is accessibility, which places value on the freedom of use, because a work that is free, but cannot be accessed, is, in fact, a restricted work. Concretely, freedom of use and accessibility are not just characteristics taken from the definition of the public domain, but mark the existence of certain rights automatically born in each individual's patrimony,

namely, the right of free use and the right of access.

Exactly as with the works pertaining to the public domain, CC or GPL-licensed works have, specific to them, the freedom of use and the right of access, but their existence is not the effect of the impossibility of exercising the rights of the owners, but the exercising of these rights in certain conditions, through which, practically, two apparently contradictory interests are balanced, that of the owner and that of the user, respectively. We will also consider relevant for this paper, taking the arguments presented in "Public Domain Protection. Uses and Reuses of Public Domain Work"[6], according to which, it is important to not consider freedom of use as just an expression of the right of access, these concepts having to be separated as they correspond to different exercising possibilities. The right of access is not just an expression of the freedom of use, but a separate right.

In the same measure we will also take and accept the arguments according to which works from the public domain are not considered unprotected, but on the contrary, needing special, particular, protection, one that, as it will be shown, tries to also be ensured by belonging to open licenses.

As far as the public domain protection is concerned, it's specified that the protection that I am talking about is in fact a form of safeguarding the rights that every person holds over public domain materials, which belong to everyone and over which we all have rights. It doesn't mean that this protection is different from the one granted to authors and owners and, in fact, is necessary to emphasize the fact that there is no legal ground for which a work that belongs to everyone shouldn't be protected as one belonging to one or some of us.

In this context, it is very important to notice that free use must not be confused with the right of appropriation. Private appropriation of public domain materials threatens individual creative expression because it limits the possibility of further acts of access. No form of use of public domain works should lead to a way of appropriation, damaging other users or in the detriment of other types of uses. In this sense, protection of the works that belong to the public domain practically mean the right to impose the moral non-alteration of the public domain work and the right to forbid any form of exclusive appropriation.

Considering all these arguments, works that are unprotected/unprotectable can be considered those which, in explicit terms, are made available to the public to be used in any way, including for exclusive appropriation, as well as works that contain information and data that cannot be protected, through their normative and jurisprudential exclusion, such as ideas, theories, mathematical concepts (art. 9 from Law no. 8/1996 regarding copyright and related rights).

Most of the times marking a work as being under a Creative Commons or GPL license leads to the idea of an absolute freedom to use it, the work being considered as lacking any protection or pertaining to the public domain. For the public less accustomed to what it means to correctly use works that have been uploaded on the internet, CC (Creative Commons) means FREE, or OPEN, the latter word bringing with it another cluster of interpretation (freedom of use, reuse, unlimited access, etc.).

In reality, Creative Commons contracts clearly identify rights that are enjoyed by every user (the licensee) of the work, as well as the limits in exercising these

[6] Monica Adriana Lupașcu, "Public Domain Protection. Uses and Reuses of Public Domain Work", CKS 2015 – Challenges of the Knowledge Society, 9th Edition, p. 559-605.

rights, the permission of use being accompanied, usually, by express restrictions. As I mentioned, the right of access is conferred by the owner and can be exercised in certain conditions agreed and imposed by him to any user. An example used frequently to prove "the distance" that exists between the concept of "open&free" and what an open license can offer in reality, is granted by the model "Attribution-NoCommercial-NoDerivatives", which forbids the commercial use as well as the possibility of creating derivative works. It's true, the aforementioned license is one of the most restrictive ones and its usage is fairly narrow, especially due to the fact that it does not belong to the "open" culture, but its existence proves the fact that choosing this licensing system can also have as an effect a limited usage of the work.

Moreover, and so as to prove the variety of the types of licensing, at the level of CC licenses, there are certain models dedicated to the public domain, or through which, at least, there is an attempt to place certain works closer to the public domain, and maybe their existence could represent one of the reasons for which the entire system is perceived, most of the times, as being exclusively dedicated to freedoms.

Creative Commons' specific Public Domain Licenses

The CC licensing system makes available two models dedicated to the public domain, out of which one is identified as being "CC0 – *No rights reserved*", which allows authors to waive any right over the works and placing them in the public domain sphere. Outside of this instrument, which is awarded especially to authors and thought out as being used only by them, CC licenses also allow that certain works carry marks similar to the public domain. The "Public Domain" symbol (Public Domain Mark), represents another licensing model that "enables works that are no longer restricted by copyright to be marked as such in a standard and simple way, making them easily discoverable and available to others". This licensing has become known under its shortened version - "No known copyright", which is found as an express declaration right as part of the explanation terms of this permission: "*This work has been identified as being free of known restrictions under copyright law, including all related and neighboring rights. You can copy, modify, distribute and perform the work, even for commercial purposes, all without asking permission*."[7]

In addition to the exposed terms, the Public Domain license also makes available to its potential users the following information, of which, even without being expressly mentioned, all users should take note (there have been three identified as being relevant to this study):

"- The work may not be free of known copyright restrictions in all jurisdictions.

- Persons may have other rights in or related to the work, such as patent or trademark rights, and others may have rights in how the work is used, such as publicity or privacy rights.

- Unless expressly stated otherwise, the person who identified the work makes no warranties about the work, and disclaims liability for all uses of the work, to the fullest extent permitted by applicable law."

The following aspects thus become evident: (i) the fact that the work, although marked as being part of the public domain, can still be protected in certain jurisdictions; (ii) that, in addition to the corresponding protection of these jurisdictions, there could be other rights corresponding to the work, aside from copyright, such as the trademark

[7] https://creativecommons.org/publicdomain/zero/1.0/.

right, and this could be just an example; and, last but not least, that (iii) the person that marked the work as pertaining to the public domain cannot be held accountable in regards to the work or its uses. This last information, that we consider to be extremely important, actually represents an express declaration of non-liability of the person who uses the Public Domain symbol for works made available to the public. Keeping in mind this last declaration, one could wrongly reach the conclusion that other information ((i) and (ii)) previously exposed would practically be the only concrete examples in which non-liability would materialize - the user of the Public Domain symbol would not be held accountable for any conflict with jurisdictions that do not recognize the work's passage into public domain, nor for the case in which, outside of copyright, the work would carry other rights. In reality, the terms of the declaration include a much larger sphere than the information exposed by the license, which remain to be considered simple examples and, as it is also terminologically evident, the sphere of non-liability reaches "*to the fullest extent permitted by applicable law"* and includes *"all uses"*, which, in a stricto sensu interpretation, means that the user of the work cannot even be held liable for the correct/legal use of the Public Domain symbol. It's to be discussed whether or not this sphere has as a limit that which the person in question reasonably should or could have known so as to consider the work to be part of the public domain, if you take into account the fact that the licensing terms warn from the beginning, as shown above, of the fact that the Public Domain symbol is attributed to a work *"free of known restrictions under copyright law."* Therefore, in an interpretation, the person who uses the Public Domain symbol for certain works, can be completely absolved of any responsibility, with a single exception, that in which, knowing those restrictions or those existing and valid rights over a work, still exposes the work as being part of the Public Domain. In another interpretation, the declaration of non-liability would come as a contradiction with the declaration through which the work is communicated as being free of copyright restrictions and with the "No copyright" syntax, being present right before the terms of licensing exactly like a summarized text of the license or its effects.

It's fairly difficult to correctly and completely interpret this license if you take into account at least these three phrases, which, opposing each other at a certain level, manage to also contradict the concept of public domain.

"No copyright" would truly be the syntax that, at a first impression, would coincide best with the effects of a public domain work, but despite all that, the lack of copyright (lato sensu) could also mean the failure to recognise an adequate protection and usage (legal) of works pertaining to the public domain, because arguments for the existence of such a protection are based on the principles of copyright themselves, which, protecting the rights of some owners and authors, must protect the rights of the general public, which concretely means public domain. Taking into account these aspects, it would have been better to use the "No restriction under copyright law" syntax, which would have identified more clearly that the freedom of use implied represents a right that may be exercised în the limits of copyright, and not outside it.

The *"free of known restrictions under copyright law"* syntax and the declaration of non-liability contradict the very notion of public domain, as they question that which should be certain and lacking interpretation. The public domain cannot depend on the sphere of knowledge of one person or

institution, the latter having to answer for marking a work with this symbol because such a guarantee could be a concrete example of an incentive for the reuse of public domain works. The lack of such a guarantee can only lead to inadequate and illegal uses of the symbol, especially if we also take into account the terminological deficiencies of the license, exposed above. In the lack of such a guarantee, it would be recommendable that the Public Domain symbol only be used by authors, the only people able to place a work in the public domain, with all the legal consequences derived from this placement. The people who would want to use a work marked this way, would be able to do so without risk of a contradictory interpretation and with the real possibility of being able to hold accountable the person who wrongly used this symbol. The lack of such guarantees open the possibility of inadequate use of the Public Domain symbols even more and, implicitly, of the works supposedly pertaining to the public domain, which might have repercussions especially on the public domain sphere, since there is a risk of creating a false public domain, whose usage would create a lot of legal issues.

The existing confusions regarding CC licenses could be caused, as I've tried to argue above, not only by a lack of knowledge of the types of licenses, but also of the very possible interpretations that open licenses bear.

Conclusions

The confusion with the public domain really must be avoided, but, highlighting the common characteristics has shown the fact that the model of protection offered through the Creative Commons and GPL licenses can also be successfully used for the protection of public domain works because, in this case as well, a right of access for subsequent use must also be protected, failure to protect it or the lack of guarantees leading, most certainly, to exclusive uses that will break the chain of reuses and will affect the public domain patrimony.

Protecting the right of access means, as I've shown, the protection of non-exclusive use, and in the case of works pertaining to the public domain, this is born on the date on which the copyright protection period expires, different from the moment in which the same right is born in the patrimony of users of a CC/GPL-licensed work, considered as being the moment in which the owner chose to make the work available though an open license. Identifying said moment is important because legal use of the work exists only from that date, a breach of copyright being brought into discussion at any point previous to this moment. Along with the newer versions[8] of the Creative Commons licenses, express mention of their irrevocable nature has also appeared, and this mention at the level of contractual terms of the CC International license represents another form of guaranteeing the right of access to the work, as without this express mention one could sustain the possibility of retraction of the conferred rights, especially in the context of the much-disputed discussions regarding the nature of these terms, as being licenses or contracts[9].

"*Subject to the terms and conditions of this Public License, the Licensor hereby grants You a worldwide, royalty-free, non-sublicensable, non-exclusive, irrevocable license to exercise the Licensed Rights in the Licensed Material.*"

[8] https://creativecommons.org/licenses/by-sa/4.0/legalcode.

[9] Melanie Dulong de Rosnay: "Creative Commons Licenses Legal Pitfalls: Incompatibilities and Solutions" http://www.creativecommons.nl/downloads/101220cc_incompatibilityfinal.pdf.

Open licenses are practically a model that could be taken to the level of subsequent regulation reffering the correct guarantee that the right of access must benefit from in the legislation of any state. Subsequent to this step of the research, there must be an analysis made on what level of protection is currently ensured in the main legislations in regards to the right of access to works, as well as the issues connected with the validity of open licenses.

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CONTRACT ASSIGNMENT – THEORETICAL ASPECTS

Bogdan NAZAT[*]

Abstract

This project aims to study in detail the theoretical aspects concerning the contract assignment, as provided by the relevant regulation, and the doctrine corresponding to old and current regulations. In this respect, this project aims to give the reader a comprehensive look on the institution in question, the regulation offered by the current Civil Code is reviewed taking into account the national and international doctrine.

Keywords*: assignment, contract, Civil Code, Assignor, Assignee, Contracting Party, Assigned party.*

1. Introduction[1].

The concept of *contract assignment* has been first regulated by entry into force of the current Civil Code, and appears as an operation whereby a Contracting Party shall transfer to another person its rights and obligations earned and assumed, respectively, according to a contract.

In other words, the contract assignment may be deemed to constitute a legal operation by which it is transferred the contractual position the *Assignor* holds in the contract.

Given that, although not expressly regulated before 2011, the doctrine corresponding to former regulations was not uniform regarding the concept of contract assignment.

Thus, the authors who would admit the existence of contract assignment have never approached in a uniform manner the mechanism of this concept, a number of definitions being also issued in this respect. Thus, according to an opinion, contract assignment consists of „replacement of a contracting party by a third party during the performance of a contract"[2], emphasizing the financial dimension of the relationship between parties, and allowing contract survival even if one party is replaced[3].

[*] Assistant Professor, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: bogdan.nazat@gmail.com).

[1] For details concerning the evolution and opinions on contract assisgnment, please see L. POP, I.-F. POPA, S. I. VIDU, *Basic principles of civil law. Obligations according to Civil Code*, Universul Juridic, 2012, Bucharest, page 670 et seq.; I. F. POPA, *Contract assignment according to New Civil Code*, Revista Romana de Drept al Afacerilor nr. 2/2003, page 83 et. seq.; A.-I. DANILA, *Contract assignment*, Hamangiu Printing House, Bucharest, 2010, page 2 et seq.

[2] P. MALAURIE, L. AYNES, P. STOFFEL-MUNCK, *Civil Law. Obligation*, Third edition translation from French, Wolters Kluwer Printing House, Bucharest, 2010, page 501.

[3] It is mentioned that „contract assignment ensures the contract survival even if one of the parties is replaced. If the party is no longer able or no longer wishes to perform a contract, then the contract should be terminated. Its assignment makes it possible the performance with a different partner (a third party) who becomes party of the contract; that is especially useful when the contract is a contractor instrument or the legal support of an wealth that

Another approach to contract assignment stated the impossibility of transferring an agreement between parties, this operation consisting of a transfer of contractual position itself, as a complex, homogeneous whole, including rights, obligations, prerogatives and claims[4].

On the other hand, given the personal nature of the relationship based on obligation, it is considered that the transfer of rights and obligations arising from a contract create a whole new legally binding relationship, and not a replacement of a pre-existing part of the relationship[5].

Apart from doctrinal differences, European legislators have recognized and regulated the contract assignment, the common ground of all these doctrines being that almost all require the consent of the assigned party as a precondition of the assignment validity.

2. Regulation. Definition.

§ 1. Regulation

Civil Code regulates the contract assignment at the Volume V, *About obligations*, Title II, *Sources of obligations*, Chapter I, *Contract*, sections 1315 -1320.

In addition to the provisions which establish the general framework of the contract assignment, the Civil Code also provides express regulations on contract assignment, and we dedicated a special section of this work to such regulations.

§ 2. Definition

The legal definition of the assignment contract is provided by section 1315 of the Civil Code, which stipulates that "a Party may substitute a third party in relations arising out of a contract only if obligations have not yet been fully performed and the other party agrees with such substitution."

It can be noticed therefore that the above legal text is not exactly the definition of the contract assignment, the provisions emphasizing the effect of the contract assignment and the requirements to be met for the assignment to be effective.

Having the definition at the section 1315 above a starting point, the literature defined[6] contract assignment as "an agreement (*assignment contract*) between one party (*Assignor contracting party*) of a contract whose performance is in progress

must circulate or merely a subzistence instrument", P. MALAURIE, L. AYNES, P. STOFFEL-MUNCK, *quoted text*, page 501.

[4] F. TERRÉ, P. SIMLER, Y. LEQUETTE, *Droit civil. Les obligations*, Ediția a 10-a, Editura Dalloz, 2009, Paris, page 1300.

[5] L. POP, I.-F. POPA, S. I. VIDU, *quoted text*, page 671.

[6] Among the definitions of contract assignment in the doctrine, we include also. a) „In a modern definition, contract assignment is the legal operation by which one of the contracting parties is replaced by a third person during the performance of that contract, occurring a contractual position transfer, together with all the rights and obligations according to that contract" – L. POP, *Principles of civil law. Obligations. Volume I. General legal regime*, C.H. Beck Printing House, 2006, Bucharest, page 290. b) „[…] contract assignment may be defined as the legal operation by which one of the contraqcting parties (*assignor*), is replaced by a third person (*assignee*), based on a new agreement, during the perfformance of the original contract, between Assignor and Assignee with the with the assigned contract party's consent" – A.-I. DĂNILĂ, *quoted text*, page 93. c) „[…] may be defined as the assignment contract entered into between a party of a contract whose performance is in progress, called the *Assignor contracting party*, and a third person to the assigned contract, called the *Assignee contracting party*, by this new contract being transferred the rights and obligations of the original contracting party, called the *assigned contracting party;* the result of this new contract is not only the assignment of rights and obligations, but the release of *Assignor contracting party*, provided that the *Assigned contracting party* agrees to such assignment" – I. ADAM, *Civil law. General theory of obligations. 2nd edition*, C.H. Beck Printing House, Bucharest, 2014, page 654.

(*assigned contract*) and a third party (*Assignee contracting party*) by which the parties agree to the assignment of all rights and obligations upon and of contracting party in the original contract (*Assigned contracting party*), which has the effect of both the assignment of these rights and obligations, and the Assignor's release, provided that the assigned contracting party agrees to this assignment"[7].

Another recent definition given by legal doctrine is that the contract assignment is "the agreement by which a contracting party (*Assignor contracting party*) transfers to a third party (Assignee contracting party) its rights and obligations under a contract which has not been yet fully performed, subject to its acceptance by the other party (*Assigned contracting party*)"[8].

3. Elements of contract assignment. Parties. Scope.

§ 1. Parties of a contract assignment

As it results from the provisions of section 1315 par. (1) of the Civil Code, contract assignment involves three parties:

a) *Assignor contracting party* or simply *Assignor*, the party who assigns their position held in the original contract (assigned contract);

b) *Assignee contracting party* or simply *Assignee*, the party who replaces the Assignor being transferred all the Assignor's rights and obligations according to the assigned contract;

c) *Assigned contracting party* or simply *Assigned party*, the party whose contractual position in the assigned contract is not changed as a result of assignment.

Legal nature of contract assignment is determined by participation of assigned party to the conclusion of the instrument by which the contract is assigned, given that its consent is, when the law does not provides otherwise, a precondition for the assignment effectiveness.

Thus, we can speak of a *bilateral agreement* concluded between the assignor and assignee or a *tripartite* or *multilateral agreement*, where conclusion of assignment occurs simultaneously with the assigned party consent, expressed in the content of the same instrument. Also, nothing prevents the assignor to give its consent in advance of the contract assignment; this is done usually by an express clause in the assigned contract.

It was established that the contract assignment should not be confused with the sub-contracting. In this regard it should be noted that subcontracting implies the conclusion of a subsequent contract with another person does not have the effect of releasing the contractor who sub-contracts from its initial obligations[9].

Regarded as a legal operation, it is beyond doubt that the contract assignment is a tripartite transaction, involving three persons who must give their consent to such operation.

§ 2. Scope of contract assignment

The scope of contract assignment consists of a complex mix of rights and obligations arising from contracts to which the assignor is a party.

The lawmakers establish by section 1315 of the Civil Code that the contracts

[7] L. POP, I.-F. POPA, S. I. VIDU, *quoted text*, page 676, I.-F. POPA, *Contract assignment from the perspective of the New Civil Code*, in Revista Română de Drept al Afacerilor nr. 2/2003, page 89-90.

[8] G. BOROI, M.-M. PIVNICERU, C.A. ANGHELESCU, D.-N. DUMITRU, B. NAZAT, I. NICOLAE, T. RĂDULESCU, T.-V. RĂDULESCU, *Civil law abstracts. General part. Person. Main real rights. Obligations. Contracts. Successions. Family*, Hamangiu Printing House, 2016, page 144.

[9] For details please see I. ADAM, *quoted text*, page 655.

fully performed and the obligations fulfilled may not be assigned under any circumstances.

As far as the categories of contracts that can be assigned is concerned, given the absence of an express provision to that effect, we can draw the conclusion that any kind of contract can be assigned, in principle, including unilateral agreements, call-off contracts etc[10].

4. Ways a contract assignment can by performed.

Contract assignment may be performed as follows[11]:

a) *as main contract*, in the form of agreements detailed at point 3 above;

b) *as an accessory*[12], as a result of transferring the goods which constitute the object of the contract. For example, contracts of lease or insurance policies, in these cases the assignment operating de jure.

Also, there is an accessory assignment when we deal with the employees' rights protection if the company, a unit or a part of the company is transferred, this procedure being provided by Labor Code[13]. According to section 173 of the Labor Code[14], if such transfer occurs, the employees' rights shall be protected, „the Assignor's rights and obligations according to a contract or existing labor relationship at the time of assignment shall be transferred in full to the Assignee". Thus, in such case, individual employment contracts of all employees shall be transferred to Assignee as an effect of transferring the company, a certain unit or parts of the company.

We could also say that the contract assignment may be perfumed as follows:

a) *conventionally*, through a bilateral or multilateral agreement;

b) *legally*, when it is expressly provided by law (section 1811 – 1813 of the Civil Code for contracts of lease, section 2220 of the Civil Code insurance policies against damage or loss of goods, section 1733 of the Civil Code for the pre-emptive right).

5. Validity of contract assignment - requirements.

§ 1. Substantive requirements

Since the contract assignment is a contract concluded usually between the

[10] For details concerning the scope of the contract assignment, please see A.-I. DĂNILĂ, *quoted text*, page 36 et. seq..

[11] L. POP, I.-F. POPA, S. I. VIDU, *quoted text*, page 677.

[12] Court of Cassation in France stated the following: „even if, willingly entered into the rightful agreement for the purpose of obtaining profit, he shall comply with requirement arising from this agreements; he who subrogates in the rights of other shall also perform the obligations attached to such rights" – Cass. civ. 16th November 1857 in P. MALAURIE, L. AYNES, P. STOFFEL-MUNCK, *quoted text*, page 502. According to authors, this case is about two owners with coparcenary shares of a sugar factory who leased a sugarcane plantation; hey sold the factory to certain buyers who continued to use the plantation; one of the buyers refused to pay the rent for the plantation and invoked the sales contract for thefactory by which buyers stated expressly that do not assume any obligations towards the sellers; the court ruled that the buyers should pay the debt resulted from the contract of lease, the grounds being that the buyers received the rights resulting from this contract.

[13] Law no. 53/2003 concerning Labor Code was republished in the Romanian Official Gazzette no. 345/2011 and subsequently amended.

[14] Section 173 of the Labor Code: The employees shall enjoy the protection of their rights in case of transfer of the undertaking, establishment or parts thereof to other employer, according to the law. (2) The rights and obligations of the assignor, arising from an employment contract or relation existing at the date of the transfer, shall be entirely transferred to the assignee. (3) The transfer of the undertaking, establishment or parts of it may not be a reason of individual dismissal or collective redundancy for the assignor or the assignee.".

Assignor and Assignee, the substantive requirements of contracts validity must be complied with [section 1179 par. (1) of the Civil Code], namely the capacity to enter into a contract, parties' agreement, the object is determined and legal and the cause is lawful and moral.

Where, by the assignment of the contract they are also performed other operations, the specific validity requirement for such operation must be also met, may they be substantive or formal requirements.

§ 2. Formal requirements

According to section 1316 of the Civil Code, „contract assignment and acceptance by the assigned contracting party of such assignment must be concluded in the form required by law for the validity of the assigned contract".

Therefore, the formal requirements a contract assignment must meet are determined by reference to the requirements imposed by law for the validity of the assigned contract. Therefore, if for the validity of the assigned contract the law requires authentication, its assignment contract shall in its turn be authenticated, otherwise the new contract shall be subject to absolute nullity[15].

However, if the form of the assigned contract was priorly determined by the Contracting Parties in the original contract, the assignment is valid even if it fails to comply with the authentication requirement[16].

There are, however, exceptions to these special formal requirements, among which are the following[17]:

a) section 1805 thesis II of the Civil Code stipulates that, even the contract of lease is not a formal contract; acceptance of the assignment of a movable good lease shall be in written form;

b) according to section 1833 of the Civil Code, acceptance of the assignment of a contract of lease shall be in written form.

Also, it was established that[18], if the law requires for the original contract the fulfillment of certain formalities *ad probationem* or for purposes of opposability, then the assignment shall meet the same requirements.

6. Effectiveness of contract assignment - requirements.

§ 1. Assigned contracting party's consent

a) Consent, effectiveness requirement.

Concerning the assigned contracting party's consent, the doctrine has not reached a unanimous opinion on categorizing it as a validity or effectiveness requirement for the contract assignment.

As far as we are concerned, the acceptance of assignment by the assigned contracting party is an effectiveness requirement of contract assignment[19]. In defending this opinion, we consider that the

[15] According to section 1242 par. (1) of the Civil Code „it is subject to abosulte nullity the contract concluded by not observing the form required beyond doubt by law for its valid conclusion".

[16] Section 1242 par. (2) of the Civil Code stipulates that „if the parties agreed that a contract is concluded in a certain form, which tha law does not require, the contract is deemed valid even if the respective form is not observed".

[17] For details please see G. BOROI, M.-M. PIVNICERU, C.A. ANGHELESCU, D.-N. DUMITRU, B. NAZAT, I. NICOLAE, T. RADULESCU, T.-V. RADULESCU, *quoted text*, page 145.

[18] A.-I. DANILA, *quoted text*, page 60.

[19] In defending this opinion, we shall refer laso to the Principles of UNIDROIT in 2010 which, at Section 3, „Assignment of contracts", stipulates on article 9.3.3. the requirement of other party's consent for the contract assignment („The assignment of a contract requires the consent of the other party"). The comments on this article

way the lawmaker elaborated the section 1315 par. (1) of the Civil Code should be taken into consideration („a Party may substitute a third party in relations arising out of a contract only if obligations have not yet been fully performed and the other party agrees with such substitution"). As we explained above, the section in question refers, in an attempt to define the contract assignment, to two essential elements of the concept: effects and requirements.

Therefore, be reference to other texts in the Civil Code which regulate similar situations, as section 1605 of the Civil Code („undertaking the debt agreed with the debtor shall take effect if the creditor consents to such transfer only"), we consider that the section 1315 par. (1) of the Civil Code does not treat the validity of operation, but the fact that the effects of this transfer shall occur only and when the two effectiveness requirements are met.

French doctrine[20] connected the assigned contracting party's consent mostly to two requirements for contract validity, namely the cause and the scope of the contract. Therefore, since the cause and scope of the contract remain unchanged after the transfer of the contract, the assigned contracting party has no legitimate reason to object to the transfer and if it does, shall violate the principle of binding force of the contract. Moreover, it was established that the assigned contracting party's consent is in itself an authorization, which is the reason that it can be anticipated.

b) The method of giving the consent.

Regarding the manner of giving the consent, section 1316 of the Civil Code requires this to take the form imposed by law for the validity of the assigned contract. Also, as we have previously mentioned, the consent can be given in the contract of assignment, or by participating in the conclusion of the assignment agreement by the assigned contracting party or separately, before or after the assignment agreement. If consent is given after the assignment agreement, it may take the form of an affidavit subject to the formal requirement imposed by section 1316 of the Civil Code.

As far as the consent given before the assignment agreement is concerned, this consent may be expressed by inserting a special clause in the contract that is to be transferred or by means of a separate instrument. This separate instrument may be concluded after the assigned contract, but mandatorily before the or at the date of, assignment agreement.

If the assigned contracting party did not give its anticipated consent for the assignment of contract, this contract shall be effective the date such assignment is notified

stress the following issues; a) „The first requirement for the assignment of a contract is that the assignor and the assignee agree on the operation" – thus, the first requirement that must be met for the assignment of the contract is the agreement between Assignor and Assignee; b) „This agreement does not however suffice to transfer the contract. It is also necessary for the other party to give its consent. If it were only for the assignment of the rights involved, such a consent would in principle not be needed (see Article 9.1.7). However, the assignment of a contract also involves a transfer of obligations, which cannot be effective without the obligee's consent (see Article 9.2.3). The assignment of a contract can thus only occur with the other party's consent" – however, the agreement between Assignor and Assignee does not suffice to transfer the contract; it is also required that the assigned contractimg party agrees to the transfer. If the transfer consists of rights only, the consent would not be, in principle, required. However, given that the contract assignment involves the transfer of certain obligations, the assignment canoot be performed without the creditor's consent. Therefore, the assignment of a contract may be performed with the other party's consent only; c) „With the other party's consent, the assignee becomes bound by the assignor's obligations under the assigned contract […]" – based on the assigned contracting party's consent, the Assignee undertakes the obligations of the Assignor in the assigned contract.

[20] P. MALAURIE, L. AYNES, P. STOFFEL-MUNCK, *quoted text*, page 510.

to assigned contracting party or accepted by it. In this respect, section 1317 par. (1) of the Civil Code stipulates that, „if a contracting party priorly consented to the other party's substitution by a third person in the relationship arising from the contract, the assignment shall be effective towards the party at the time the substitution is notified to it or at the time the party accepts the substitution, as the case may be".

Moreover, the parties may agree by express clauses in the assigned contract to a mechanism of transferring the contract by endorsement. Therefore, according to section 1317 par. (2) of the Civil Code, „if all the elements of the contract result from an instrument which contains the „endorsement" clause or other similar stipulation, if the law does not provide otherwise, the endorsement of instrument shall have the effect of endorsee's substitution in all the endorser's rights and obligations".

It is established that, if the law does not require a certain form for assignment validity, the consent may be implicit[21].

§ 2. Parties' obligations are not fully performed

From section 1315 par. (1) of the Civil Code it results that contract assignment is not effective if the parties' obligations are fully performed. This stipulation is logical, given the role of the contract assignment, namely to continue the performance of a contract when, for example, one of the parties is no longer able or does not wish to continue it. Therefore, we may say that in the case of contract assignment, the scope of the contract derives from a contract whose performance is still in progress, which has not been yet fully performed by parties. Otherwise, we no longer speak about transferring a contractual position, together with related rights and obligations, but the transfer of a right which has been previously earned.

This second requirement makes the contract assignment especially suitable for continuing contracts. However, as we have previously mentioned, assignment may also apply, for example, to unilateral contracts, call-off contracts (e.g., if performance is suspended).

By way of exception, it is established that the contract assignment may not apply to contracts whose nature is *intuitu personae*[22]. This limitation of contract assignment applicability is, in our opinion, not completely grounded. Therefore, having in view that, in the case of such contracts (for example, general contractor agreement, mandate agreement, legal services agreement), the creditor concludes the contract considering the skills and abilities of the other party, we do not see any impediment in assigning such contract if the creditor agrees to the assignment, and the consent is expressed considering the Assignee's skills and abilities[23].

7. Effects of contract assignment.

According to those mentioned above, the consent of the assigned contracting party is required for the effectiveness of contract assignment. If such consent is not obtained, the assignment is incomplete, and the effects are partial or non-existent.

Thus, we shall enumerate the following effects:

1. Effects of contract assignment before the assigned contracting party's consent or if such consent is not given.

[21] L. POP, I.-F. POPA, S. I. VIDU, *quoted text*, page 682.
[22] P. MALAURIE, L. AYNES, P. STOFFEL-MUNCK, *quoted text*, page 510.
[23] A.-I. DANILA, *quoted text*, page 38 – 39.

a) *Between parties*, contract assignment, given that it is an agreement shall be subject to mandatory provisions of section 1270 of the Civil Code, which establishes the principle of binding force of the contract.

According to section 1320 of the Civil Code, Assignor has towards the Assignee the guarantee obligation, and this obligation survives irrespective of the assigned contracting party's consent. Par. (1) of section 1320 of the Civil Code imposes a legal guarantee obligation, namely the Assignor guarantees that the assigned contract is valid.

Moreover, according to section 1320 par. (2) of the Civil Code, „when the Assignor guarantees the performance of contract, it shall be committed as a fidejussor (guarantor) for the obligations of the assigned contracting party", and this guarantee shall be conventional.

b) *To the assigned contracting party*, the contract assignment does not produce any effect if the party's consent is not given.

As we previously mentioned when detailing the matter assigned contracting party's consent, the active dimension of a legal obligation relation may be transferred irrespective of the existence of such consent. Thus, the doctrine[24] established that, if the assigned contracting party consent is not given, the contract assignment is incomplete, and may take the form of other legal operation, such as assignment of debt, provided that the opposability requirements are met, according to section 1578 of the Civil Code

Also, it could be taken into consideration the transfer of active side of the obligation relation between parties through the subrogation consented by creditor, as a result of payment by the assignor directly to assigned contracting party, payer being, by reference to the agreement with Assignee, the third person referred to at section 1594 par. (1) of the Civil Code[25].

We should mention here that the contract assignment must be construed by reference to the provisions applicable to legal operation by which the transfer of debt is performed.

2. The effects of contract assignment after the assigned contracting party's consent or if such consent is not given.

a) *The time of contract assignment* is critically important as this time marks the time when the contract assignment produces effects.

This time is determined, on one hand, by reference to the provisions of section 1317 of the Civil Code, detailed above when we described the ways the consent is given. Thus, if the consent is given before the contract assignment, according to section 1317 par. (1) of the Civil Code „the assignment produces effects for that party as of the date the substitution is notified or the date the party accepts such substitution, as the case may be".

On the contrary, when the contract is transferable as a result of certain clauses expressly stipulated in its content, section 1317 par. (2) of the Civil Code says that, „if the law does not provide otherwise, the endorsement of instrument shall have the effect of endorsee's substitution in all the endorser's rights and obligations".

Concerning the consent given after the contract assignment, we consider that the time of assignment is the time when assigned party's consent is delivered to Assignor or Assignee, the provisions of the

[24] L. POP, I.-F. POPA, S. I. VIDU, *quoted text*, page 681.

[25] Section 1594 par. (1) of the Civil Code: „subrogation is consented by creditor when, receiving the payment from a third person, transfers to such third person, as of the time of payment, all its rights and obligations towards the debtor".

offer to contract being applied to the extent that they are not contrary to the special provisions applicable to contract assignment.

b) *Effect on the parties of the assignment agreement* are similar to those presented above, the principle of binding force of the contract being duly applied. Also, provisions of section 1320 of the Civil Code concerning the guarantee obligation, legal or conventional, are applicable also after the consent of assigned party.

c) *Effects between Assignor and assigned contracting party*. The main effect is that provided by section 1318 par. (1) of the Civil Code, namely the Assignor's release from „its obligations towards the assigned contracting party as of the time the substitution produces effects towards the latter".

Therefore, as a result of Assignor's release, the original parties of the assigned contract may not claim form each other the performance of obligations arising from this contract.

However, „if the assigned contracting party states that shall not release the assignor from its responsibilities according to the assigned contract, the assigned party may raise claims against assignor if the assignee fails to perform its obligations. In such case, the assigned party must, under the penalty of losing the right to recourse action against the assignor, the failure to perform the obligations by the assignee within 15 days from such failure or the date the assigned party knew about such failure, as the case may be" [section 1318 par. (2) of the Civil Code]. This 15 day term has the nature of a peremtive period; upon its expiration the assigned party looses the right to recourse action against the assignor.

d) *Effects between the assignee and assigned contracting party*[26]. As a result of assignment, the Assignee shall replace the Assignor and become a party of the assigned contract, together with assigned contracting party. Between them, in principle, the contract shall continue to produce the effects pursued by original parties at the time of its conclusion. Nothing prevents, indeed, the new parties from agreeing to modify the content of the contract after the assignment.

As far as the defending means provided by lawmakers to assigned party is concerned, the assigned party, „may raise against assignee all the exceptions resulting from the contract" (section 1319 thesis I of the Civil Code). Thus, the assigned party may claim against assignee the non-performance exception, limitation period, peremptive period, payment, nullity, termination etc.

However, „the assigned party may not invoke against the assignee the consent flaws, as well as any defends or exceptions arising from its relation with assignor, unless the assigned party reserved this right when consenting to substitution" (section 1319 thesis II of the Civil Code).

e) *Effects to the third persons*[27]. In this category are included the creditors of the parties involved in the operation and the third-party guarantors of original parties' obligations.

The creditors of the parties involved in the assignment operation may promote either the derivative action or the revocatory action according to the pursued interest. Thus, the assignee's and assignor's creditors may bring action against the acceptance of fraudulent assignment of the contract through the revocatory action. The assignee's creditors may bring action against the assigned contracting party through

[26] G. BOROI, M.-M. PIVNICERU, C.A. ANGHELESCU, D.-N. DUMITRU, B. NAZAT, I. NICOLAE, T. RĂDULESCU, T.-V. RĂDULESCU, *quoted text*, page 146.

[27] For details please see L. POP, I.-F. POPA, S. I. VIDU, *quoted text*, page 684-686.

derivative action, while the assigned party's creditors may bring action against the acceptance of fraudulent assignment of the contract through the revocatory action. Also, the latter's creditors may promote derivative action against assignee and assignor, when the latter has not been released from its obligations according to contract, for non-performance of such obligations.

As far as the guarantees agreed by third persons for the performance of obligations by the original parties of the assigned contract is concerned, the following categories may be identified:

1. guarantees agreed for the performance of assigned contracting party's obligations; these guarantees shall survive to the benefit of the assignee;

2. guarantees agreed for the performance of assignor's obligations; these guarantees shall not survive if the assigned contracting party releases the assignor from responsibilities.

Concerning this situation, there were issued certain exceptions, the guarantees surviving when:

i. the guarantor consents expressly to the maintenance of guarantees or if the assignor is changed;

ii. legal guarantees (proprietary rights and legal mortgages) constituted on the assignor's assets;

iii. lack of assigned contracting party's consent to the assignment;

iv. assigned contracting party refusal to release the assignor from responsibility;

v. the guarantors agreed expressly to the maintenance of guarantees in case of contract assignment.

3. in the case provided by section 1318 par. (2) of the Civil Code, if the assigned contracting party fails to notify the assignor within 15 days the non-performance of obligations by the assignee, the loss of right to recourse action leads to the loss of all guarantees constituted for the performance of assignor's obligations, if the parties did not agree on the maintenance of such guarantees.

8. Legal assignment of the contract.

Legal assignment of the contract is the way of transferring the contract by way of law. Among the legal contract assignments, we mention:

a) the case provided by section 1811 of the Civil Code, namely the situation of the contract of lease opposable to acquirer if the parties failed to stipulate the sale of good as grounds for contract termination and the requirements provided by law for opposability were met;

b) the case of acquirer of an insured good, according to section 2220 of the Civil Code, shall comply with the provision of the insurance policy concluded between insurer and the previous owner of that good;

c) by exercising the preemptive right provided by section 1733 of the Civil Code;

d) in case of transfer of the company, a certain unit or parts of the company, the individual employment contracts of the employees shall be transferred to assignee as a result of the transfer of the company, a certain unit or parts of the company, according to section 173 of the Labor Code;

e) assignment of concession contract on a property (land), according to section 41 of the law on the authorization of building works no. 50/1991[28] („the right of concession on the land shall be transferred in case of succession or sale of the property for whose building the concession was created. The same conditions apply to the transfer of building permit").

[28] Law on authorization of building works no. 50/1991 has been republished in the Romanian Official Gazzette no. 933/2004 and subsequently amended.

9. Conclusions

As of the date of applying the current Civil Code, the assignment of debts has become a legislative success, the lawmaker responding by legislating it to the needs claimed by doctrine, case law and, not least, the participants in the legal obligation relations.

This institution may have beneficial effects in terms of special situation of a participant in legal obligation relations, being offered a new way of solving problems caused by the inability or refusal of the contracting party to perform its part of the contract.

Also, this mechanism may have a positive effect on the national economy by the mere fact that the parties are made available other ways of crediting than the traditional modalities.

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THE LEGAL PROTECTION OF REFUGEE: WESTERN BALKANAS

Elena ANDREEVSKA*

Abstract

States have been granting protection to individuals and groups fleeing persecution for centuries; however, the modern refugee regime is largely the product of the second half of the twentieth century. Like international human rights law, modern refugee law has its origins in the aftermath of World War II as well as the refugee crises of the interwar years that preceded it.

The refugee in international law occupies a large space characterized, on the one hand, by the principle of State sovereignty and, on the other hand, by competing humanitarian principles deriving from general international law and from treaty. The study of refugee protections invites a look not only at States' obligations with regard to admission and treatment after entry, but also at the potential responsibility in international law of the State whose conduct or omissions cause an outflow. The community of nations is responsible in a general sense for finding solutions and in providing international protection to refugee. This special mandate was entrusted to UNHCR.

At the start of the 21st century, protecting refugees means maintaining solidarity with the world's most threatened, while finding answers to the challenges confronting the international system that was created to do just that.

The aim of this article is to describe the foundations and the framework of international refugee law, to define refugees and protection of refugees; as well as to provides a brief analysis of the changing migration and asylum dynamics in the region and outlines some of the main challenges arising in this context..

Keywords: *Legal Protections; Refugee; Freedom of Movement; Western Balkan; Managing Borders.*

Introduction

The term "refugee" is a term of art, that is, a term with a content verifiable according to principle of general international law. In ordinary usage, it has a broader, looser meaning, signifying someone in flight, who seeks to escape conditions or personal circumstances found to be intolerable. The destination is not relevant; the flight is to freedom, to safety.[1] Implicit in the ordinary meaning of the word "refugee" lies an assumption that the person concerned is worthy of being, and ought to be, assisted , and, if necessary, protected from the causes and consequences of flight.

Refugees have existed as long as history, but an awareness of the responsibility of the international community to provide protection and find solutions for refugees dates only from the time of the League of Nations and the election of Fridtjof Nansen as the first High

* Professor, PhD, Faculty of Public Administration and Political Science, SEE-University, Tetovo (e-mail:e.andreevska@seeu.edu.mk).

[1] The reasons for flight may be many; flight from oppression, from a threat to life or liberty, from prosecution, from deprivation, flight from war or civil conflict, from natural disasters, flood, food crisis.

Commissioner for Russian refugees in 1921.[2] The League of Nations defined refugees by categories, specifically in relation to their country of origin.[3]

A further international legal instrument of that period is the resolution which the Intergovernmental Committee on Refugees (IGCR) adopted in Evian on 14 July 1938 to define its functions.[4] Its primary objective, "facilitating involuntary emigration from Germany (including Austria)".[5] A major review at the Bermuda Conference in April 1943 expanded the mandate to include "all persons, wherever they may be, who, as a resultant of events in Europe, have had to leave, or may have to leave, their country of residence because of the danger to their lives or liberties on account of their race, religion or political beliefs".[6]

Up until 1950 the League of Nations, and thereafter the UN, established and dismantled several international institutions devoted to refugees in Europe. The International Refugee Organization (IRO) was the last to precede the United Nation High Commissioner for Refugees (UNHCR). The IRO was created in 1947 to deal with the problem of refugees in Europe in the aftermath of the Second World War and was to be terminated by June 30, 1950.[7]

The Office of the UNHCR succeeded the IRO as the principal UN agency concerned with refugees, taking account of the impact of developments within the UN, such as article 14(1) of the Universal Declaration of Human Rights,[8] and the 1967

[2] The International Nansen Office for Refugees was created by the League of Nations Resolution of 30 September 1930 began active operations on April 1931. See League of Nations, *Treaty Series*, Vol. LXXXIX, No. 2005.

[3] Nansen's mandate was subsequently extended to other groups of refugees, including Armenians in 1924, as well as Assyrian, Assyro-Chaldean, and Turkish Refugees in 1928. During the League of Nations period (1921-1946) several institutions were created to perform some or all of the tasks of the High Commissioner for Refugees: the Nansen International Office for Refugees (1931-1938), the Office of the High Commissioner for Refugees coming from Germany (1933-1938), the Office of the High Commissioner of the League of Nations for Refugees (1939-1946) and the Intergovernmental Committee on Refugees (1938-1947). By adhering to the Convention relating to the International Status of Refugees, of 28 October 1933, States Parties for the first time undertook real obligations on behalf of Russian, Armenian and assimilated refugees. See League of Nations, *Treaty Series*, Vol. CLIX, No. 3663. Assimilated refugees were Assyrians, Assyro-Chaldeans, Syrians, Kurds and a small number of Turks.

[4] League of Nations, *Official Journal*, XIXth Year, Nos 8-9, August-September 1938, pp. 676 and 677; C. 244 M. 143.1938 XII, annex. In February 1939 the Member States of the IGCR appointed as Director the newly appointed High Commissioner for Refugees, whose headquarters were likewise in London. The IGCR ended its activities on 30 June 1947, six months after the Office of the High Commissioner closed. During that time the IGCR also protected the "Nansen refugees".

[5] 1938 19 (8-9) LNOJ 676-7. Also see UN Press Release SG/REF/3, 23 Jul. 1979.

[6] See UN doc. A/C.3/5, annexed to GAOR, Third Committee, 1 st. Sess., 1 st Part, 1946, Summary Records: UN doc. A/C.3?SR.1-11. UNRRA.

[7] The Constitution of the IRO continued to practice of earlier instruments, and specified certain categories to be assisted. The IRO was also competent to assist 'displaced parsons', including those deported or expelled from their own countries, some of whom had been sent to undertake forced labor. See Journal of Law & Policy [Vol. 5:129), The Evolution of the International Refugee Protection, Regime Erika Feller, pp. 129-30, available at: http://law.wustl.edu/harris/documents/p129_Feller.pdf.

[8] "Everyone has the right to seek and to enjoy in other countries asylum from persecution". The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217 A. Subsequent regional human rights instruments have elaborated on this right, guaranteeing the "right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions." American Convention on Human Rights, art. 22(7); African [Banjul] Charter on Human and Peoples' Rights, art. 12(3), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

Declaration on Territorial Asylum.[9] The bases for an international legal concept of the refugee are thus to be found in treaties, State and United Nation practice, and in the Statute of the UNHCR.[10]

In the 1980s and '90s, substantial changes came about in the environment in which international refugee protection was to be realized. The number of refugees grew exponentially— no longer as a product of colonialism but due to the steep rise in internal interethnic conflicts in the newly independent states.[11] And the refugee population steadily increased from a few million in the mid-1970s to some ten million by the late 1980s. In 1995 the number of persons needing assistance rocketed to around twenty-five million.

The field of UNHCR competence, and thus the field of its responsibilities, has broadened considerably since the Office was established. Briefly, the movement has been from the Statute through good offices and assistance, to protection and solutions. The class of beneficiaries has moved from those defined in the Statute, through those outside competence assisted on good offices basis, those defined in relevant resolutions of the General Assembly and directives of the Executive Committee, arriving finally at the generic class of refuges, displaced and other persons of concern to UNHCR. [12]

Finally, Migration dynamics in the Western Balkans[13] have undergone fundamental changes during the past years. Countries in the region still have to cope with the consequences of large-scale displacement of the 1991-95 conflicts. Social and economic challenges continue to trigger the movement of nationals from the Western Balkan countries within and from the region. However, the gradual political stabilization has transformed the Western Balkans into a region of transit and increasingly also destination of migrants and refugees from outside the region, including vulnerable groups such as victims of trafficking, unaccompanied and separated children or women at risk.[14]

The Legal Framework of the International Refugee Protection System

The refugee in international law occupies a large space characterized, on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation; and, on the other hand, by competing

[9] Adopted at the 1631st plenary meeting, 14 Dec. 1967; In: Resolutions adopted by the General Assembly during its 22nd session. Volume I, 19 September-19 December 1967. - A/6716. - p. 81. - (GAOR, 22nd sess., Suppl. no. 16)

[10] UNGA res.(V), annexed, pares. 1,2.

[11] The conflicts were fuelled by superpower rivalry and aggravated by socioeconomic problems in developing countries. Solutions to refugee problems became even more elusive— whether in Afghanistan, in the Horn of Africa, or in Southern Africa. To give some examples, 2.5 million people were displaced or fled to Iran from Northern Iraq in 1991; in former Yugoslavia the number of refugees, displaced and others assisted by UNHCR, exceeded four million; and the Great Lakes crisis of 1994 forced three million people to flee their countries.

[12] See Guy S. Goodwin – Gill, *The Refugee in International Law* (Clarendon Press, 1996),15; UNGA res. 36/148, 16 Dec. 1981; UN doc. A/41/324 (May 1986). Despite the protest of individual governments, the international community at larger has not hitherto demurred when UNHCR has exercised its protection and assistance functions in cases of large-scale movements of asylum seekers.

[13] For the purpose of this paper, the Western Balkans includes Albania, Bosnia and Herzegovina, Croatia, Kosovo (UNSCR Resolution 1244/99), Montenegro, Serbia and the Republic of Macedonia.

[14] See the concept note on Refugee Protection and International Migration in the Western Balkans: Suggestions for a Comprehensive Regional Approach, September 2013, available at: http://www.unhcr.org/531d88ee9.html.

humanitarian principles deriving from general international law and from treaty.[15]

The controlling international convention on refugee law is the 1951 Convention relating to the Status of Refugees (1951 Convention)[16] and its 1967 Optional Protocol relating to the Status of Refugees (1967 Optional Protocol).[17] The 1951 Convention establishes the definition of a refugee as well as the principle of non - refulgent[18] and the rights afforded to those granted refugee status.[19]

The 1967 Refugee Protocol is independent of, though integrally related to, the 1951 Convention. The Protocol lifts the time and geographic limits found in the Convention's refugee definition. Together, the Refugee Convention and Protocol cover three main subjects:

- The basic refugee definition, along with terms for cessation of, and exclusion from, refugee status;
- The legal status of refugees in their country of asylum, their rights and obligations, including the right to be protected against forcible return, or refulgent, to a territory where their lives or freedom would be threatened; and
- States' obligations, including cooperating with UNHCR in the exercise of its functions and facilitating its duty of supervising the application of the Convention.[20]

Convention refugees are thus identifiable by their possession of for elemental characteristics: (1) they are outside their country of origin; (2) they are unable or unwilling to avail themselves of the protection of that country, or to return there; (3) such inability or unwillingness is attributable to a well-founded fear of being persecuted; and (4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.[21]

The States which acceded to or ratified the 1951 Convention agreed that the term

[15]Refugee law nevertheless remains an incomplete legal regime of protection, imperfectly covering what ought to be a situation of exception. It is incomplete so far as refugees and asylum seekers may still be denied even temporary refuge or temporary protection, safe return to their homes, or compensation. See UN doc. E/CN.4/1503, para. 9.

[16] United Nations General Assembly resolution 429(V) of 14 December 1950, available at http://www.unhcr.org/refworld/docid/3b00f08a27.html., has lost much of its significance.

[17] The Convention enabled States to make a declaration when becoming party, according to which the words "events occurring before 1 January 1951" are understood to mean "events occurring in Europe" prior to that date. This geographical limitation has been maintained by a very limited number of States, and with the adoption of the 1967 Protocol , has lost much of its significance. The Protocol of 1967 is attached to United Nations General Assembly resolution 2198 (XXI) of 16 December 1967, available at http://www.unhcr.org/refworld/docid/3b00f1cc50.html.

[18] The principle of non-refoulement prescribes, broadly, that no refugee should be returned to any country where he or she is likely to face persecution or torture. The possible application of non-refulgent or an analogous principle of refuge to those outside the 1951 Convention/1967 Protocol is also considered, as is the relationship between non-refulgent and asylum.

[19] Although the 1951 Convention definition remains the dominant definition. The regional human rights treaties have since modified the definition of a refugee in response to displacement crises not covered by the 1951 Convention.

[20] By acceding to the Protocol, States agree to apply most of the articles of the Refugee Convention (Articles 2 through 34) to all persons covered by the Protocol's refugee definition. Yet the vast majority of States have preferred to accede to both the Convention and the Protocol. In doing so, States reaffirm that both treaties are central to the international refugee protection system.

[21] "The Executive Committee reaffirms that the 1951 Convention relating to the Status of Refugees and the 1967 Protocol remain the foundation of the international refugee regime." See UNHCR Executive Committee Conclusion N° 87(f), 1999.

'refugee' should apply, first to any person considered a refugee under earlier international agreements; and, secondly, to any person who, broadly speaking, qualifies as a refugee under UNHCR Statute.[22] Despite differences at the national and regional levels, the overarching goal of the modern refugee regime is to provide protection to individuals forced to flee their homes because their countries are unwilling or unable to protect them.[23]

The 1951 Convention and the 1967 Protocol remain the principal international instruments benefiting refugees, and their definition has been expressly adopted in a variety of regional arrangements aimed at further improving the situation of recognized refugees. It forms the basis for article I of the 1969 OAU Convention on Refugee Problems in Africa.[24]

Moreover, the refugee crisis in Central America during the 1980s led in due course to one of the most encompassing approaches to the refugee question. The 1984 Cartagena Declaration[25]proposed a significant broadening, analogous to that of the OAU Convention.[26]

A key step in establishing the governance – and governability – of refugee is the establishment of national law based on and in compliance with international law. This is usually accomplished through ratification by states of relevant international human rights instruments and international labor standards, followed by their effective implementation.

[22] Art. 1A(2) of the Convention. The 1951 Convention does not define how States Parties are to determine whether an individual meets the definition of a refugee. Instead, the establishment of asylum proceedings and refugee status determinations are left to each State Party to develop. This has resulted in disparities among different States as governments craft asylum laws based on their different resources, national security concerns, and histories with forced migration movements.

[23] Governments normally guarantee the basic human rights and physical security of their citizens. But when people become refugees this safety net disappears. Refugees fleeing war or persecution are often in a very vulnerable situation. They have no protection from their own state - indeed it is often their own government that is threatening to persecute them. If other countries do not let them in, and do not protect and help them once they are in, then they may be condemning them to an intolerable situation where their basic rights, security and, in some cases their lives, are in danger.

[24] Adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session. See Text United Nations, Treaty Series, No. 14691, entry into force 20 June 1974 in accordance with Article XI, Addis-Ababa, 10 September 1969. While incorporating the existing 1951 Convention refugee definition, the OAU Convention added a paragraph specifying that the term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. In other words, the notion of "refugee" was broadened beyond victims of generalized conflict and violence. The OAU Convention was also a significant advance from the 1951 Convention in its recognition of the security implications of refugee flows, in its more specific focus on solutions— particularly on voluntary repatriation, in contrast to the integration bias of the 1951 Convention— and through its promotion of a burden-sharing approach to refugee assistance and protection.

[25] See Regional Refugee Instruments & Related, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, available at: http://www.refworld.org/docid/3ae6b36ec.html.

[26] The Cartagena Declaration on Refugees bases its principles on the "commitments with regards to refugees" defined in the Contadora Act on Peace and Cooperation (which are based on the 1951 UN Refugee Convention and the 1967 Protocol).It was formulated in September 1984 and includes a range of detailed commitments to peace, democratization, regional security and economic co-operation. It also provided for regional committees to evaluate and verify compliance with these commitments. See more at: http://www.refugeelegalaidinformation.org/cartagena-declaration-refugees#sthash.eIijr0C9.dpuf. See also Executive Committee Conclusion No. 22 (1981) on the protection of asylum seekers in situations of large-scale influx.

The 1951 Convention also protects other rights of refugees, such as the rights to education, access to justice, employment and other fundamental freedoms and privileges similarly enshrined in international and regional human rights treaties. In their enjoyment of some rights, such as access to the courts, refugees are to be afforded the same treatment as nationals while with others, such as wage-earning employment and property rights, refugees are to be afforded the same treatment as foreign nationals.[27]

Despite these rights being protected in the 1951 Convention and under human rights treaties, refugees in various countries do not enjoy full or equal legal protection of fundamental privileges. Ethiopia, for example, made reservations to Articles 22 (public education) and Article 17, treating these articles as recommendations rather than obligations.[28] Although not a party to the 1951 Convention, Lebanon is host to a large population of refugees, predominately Palestinians. Restrictive labor and property laws in Lebanon prevent Palestinians from practicing professions requiring syndicate membership, such as law, medicine, and engineering, and from registering property. [29]

The adjudication of asylum claims is reserved to individual States. Although some States, namely those that comprise the Council of Europe, have made an effort to adopt a uniform asylum system, international and regional bodies lack the jurisdiction to adjudicate individual asylum claims.[30] International and regional bodies do, however, adjudicate claims asserting violations of the human rights of refugees and asylum seekers.

Furthermore, the municipal law practice of non-extradition of political offenders is one antecedent to current principles protecting refugees from return to a State in which they may face persecution. In some countries, the principle of asylum for refugees is expressly acknowledged in the constitution.[31]in others, ratification of the 1951 Convention and the 1967 Protocol has direct effect in local law, while in still other cases, ratifying States my follow up their acceptance of international obligations with the enactment of specific refugee legislation or the adoption of appropriate administrative procedure.[32]

[27] 1951 Convention, art. 16 (refugees are to be granted equal access to the courts), art. 17 (refugees are to be afforded the same access to wage-earning employment as foreign nationals), art. 13 (refugees are to be afforded the same rights to moveable and immoveable property as foreign nationals).

[28] See United States Committee fir Refugees and Immigrations, *World Refugee Survey 2009 –Ethiopia, 17 June 2009*, available at: http://www.refworld.org/docid/4a40d2a594.html.

[29] See Human Rights Watch, World Report 2011: Lebanon (2011).

[30] *See* Dublin Regulation (REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013, Official Journal of the European Union, L 180/31. Together with the recast Dublin Regulation, three other legal instruments constitute the "Dublin System" .Regulation (EU) No. 603/2013 concerning the establishment of "Euro act". for the comparison of fingerprints for the effective application of the recast Dublin Regulation and Regulation (EU) No. 118/2014 which amends (EC) No. 1560/2003laying down detailed rules for the application of the recast Dublin Regulation. Also see Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (commonly known as the Qualification Directive).

[31] See UN doc. ST/GENEVA/LIB/SER.B/Ref.9, 68-74.

[32] The Preamble to the Constitution of France acknowledges the principle of asylum, while a 1952 law declares that refugees within the competence of the Office shall include those within the mandate of UNHCR, as well as those within article 1 of the 1951 Convention. Canada also adopted the Convention definition in the 1976 Immigration Act (*Canada: Immigration Act, 1976-77, c. 52, s. 1, 1976*, available at: http://www.reworld.org/docid/3ae6b5c60.html. The Federal Republic of Germany has both constitutional and

Finally, refugees within the mandate of UNHCR, and therefore eligible for protection and assistance by the international community, include not only those who can, on a case-by-case basis, be determined to have a well-founded fear of persecution on certain grounds (so-called 'statutory refugees'), but also other large groups of persons who can be determined or presumed to be without, or unable to avail themselves of, the protection of the government of their State of origin.[33] The agency does this in several ways: it ensures the basic human rights of uprooted or stateless people in their countries of asylum or habitual residence end that refugees will not be returned involuntarily to a country where they could face persecution. Longer term, the organization helps refugees find appropriate durable solutions to their plight, by repatriating voluntarily to their homeland, integrating in countries of asylum or resettling in third countries.[34]

International Migration: The Western Balkans

International migration is the movement of people across borders to reside permanently or temporarily in a country other than their country of birth or citizenship.[35] The United Nations (UN) estimates that in 2013 some 232 million people were living outside their country of birth or citizenship for more than one year. This represents just over three per cent of the world's population and would rank such migrants, if living within the same territory, as the world's fifth largest country. While the number of international migrants has grown steadily, that three per cent proportion of world population has remained stable over the past 40 years.[36]

In current rates of international migration continue, the number of international migrations worldwide could

enacted law provisions benefiting refugees, both of which were amended in 1992/93. In other countries, the admission of refugees and special groups is often decided by the government in the exercise of broad discretionary powers. There are a number of States who host large refugee populations but who are either not a party to the 1951 Convention and 1967 Optional Protocol or who do not have laws or policies in place to address asylum claims. These States include a large number of countries in the Middle East and Asia with significant refugee populations, including Egypt, Jordan, Syria, India, Malaysia, Lebanon, and Pakistan. *See* U.N. Treaty Collection, Ch. V Refugees & Stateless Persons (listing countries that are party to the 1951 Convention); *see* also, UNHCR, Country Operations Plans (explaining the legal framework of countries where UNHCR operates), available at: http://www.unhcr.org/pages/49e456f96.html. In such cases, refugee status determinations are carried out by field offices of the UNHCR.

[33] Now often referred to as 'displaced persons' or 'persons of concern.

[34] In many countries, UNHCR staff work alongside other partners in a variety of locations ranging from capital cities to remote camps and border areas. They attempt to promote or provide legal and physical protection, and minimize the threat of violence - including sexual assault - which many refugees are subject to, even in countries of asylum. They also seek to provide at least a minimum of shelter, food, water and medical care in the immediate aftermath of any refugee exodus, while taking into account the specific needs of women, children, the elderly and the disabled.

[35] Migration - The movement of a person or a group of persons, either across an international border, or within a State. It is a population movement, encompassing any kind of movement of people, whatever its length, composition and causes; it includes migration of refugees, displaced persons, economic migrants, and persons moving for other purposes, including family reunification.

[36] See http://esa.un.org/migration/index.asp?panel=1; A World Bank Fact Sheet 2010: http://siteresources.worldbank.org/INTPROSEPECTS/Resources/334934-1199807908806/World.pdf; United Nations Development Program (UNDP). 2009. Human Development Report 2009: Overcoming barriers: Human mobility and development. http://hdr.undp.org/en/media/HDR 2009 EN Complete.pdf; Conference on Migration and Development, 2006. Background information, http://www.belgium.iom.int/internationalconference/ becgroundlinfo.htm.

reach 405 million by 2050.[37] While South-North movement patterns previously dominated the migration landscape, today international migrants move in equal share from developing to developed countries and between developing countries.[38] Migration is also no longer only unidirectional and permanent; it is increasingly multiphase and multidirectional, often occurring on temporary or circular basis.[39]

Migration today is motivated by a range of economic, political and social factors. Migrants may leave their country of origin because of conflict, widespread violations of human rights or other reasons threatening life or safety. The UN global estimates of international migrants count those living outside their country of birth or citizenship for more than one year. While this estimate includes migrant workers, migrants in an irregular situation and refugees, it does not account for the millions of persons worldwide who migrate on a short-term temporary or seasonal basis to and from another, usually neighboring country for a few weeks or months each year. However, many of these persons are included in legal definitions of "migrant workers".[40] ICRMW is very clear that states have the right to control their borders**,** including the establishment of criteria governing admission of migrant workers and members of their families. [41]

With international migration increasing in scope, scale and complexity, more countries are now simultaneously countries of origin, transit, and destination for migration. New forms of partnership and cooperation have emerged to govern migration, including in the context of South-South cooperation[42] and engaging private as well as non-governmental actors.

In the context of globalization, migration brings both development opportunities and challenges. While many migrants are able to move, live and work in safety and dignity, others are compelled to move as a result of poverty, lack of decent work, and environmental degradation. Human rights violations, including generalized violence, armed conflict, and persecution too often result in forced migration. Closing the gap between humanitarian and development aid by ensuring a more effective transition in the context of the return of refugees and Internally Displaced Persons and their reintegration in places of origin could help

[37] See IOM, (2010), The World Migration Report 2010: The Future of Migration: Building capacities for change, Geneva, available at: http://publications.iom.int/bookstore/free/WMR 2010 ENGLISH.pdf.

[38] United Nations Population Division/DESA, Presentation at the Tenth Coordination Meeting on International Migration, New York, 9-10 February 2012, available at: http://www.un.org/esa/population/meetings/tenthcoord2012/V.%20Sabine%2OHenning%20-%20Migration%20trends.pdf.

[39] Ibid, Supra 36.

[40] See Article 2(1) and 5 of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)**,** United Nations, *Treaty Series*, vol. 2220, p. 3; Doc. A/RES/45/158, entry into force on 1 July 2003.

[41] This balance is reflected in Article 79 of ICRMW: "*Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention".* Under Article 34 of ICRMW, migrants also have a duty to comply with the laws and regulations of the states of transit and destination as well as respect the cultural identity of the inhabitants of the states of transit and destination.

[42] South-South cooperation is a broad framework for collaboration among countries of the South in the political, economic, social, cultural, environmental and technical domains. Involving two or more developing countries, it can take place on a bilateral, regional, sub regional or interregional basis. See UN Office for South-South Cooperation: http://ssc.undp.org/content/ssc.html.

reduce the incidence of forced or involuntary migration.

In the absence of sufficient regular migration opportunities, migrants resort to irregular migration channels which place them at risk during transit and upon arrival in countries of destination. Many migrants, particularly those who are in an irregular situation and those working in precarious sectors, encounter human rights violations, labor exploitation including poor working conditions and low wages, trafficking and sexual abuse, violence, lack of social protection, discrimination and xenophobia. Thus, for too many migrants, their human development aspirations and potential remain unfulfilled, and their important contributions to the host society go unrecognized. Regardless of status, migrants, and in particular those who are most vulnerable, therefore require equal and specific inclusion in the development agenda at global, regional and national levels. [43]

Migration dynamics in the Western Balkans[44]have undergone fundamental changes during the past years.[45] However, the gradual political stabilization has transformed the Western Balkans into a region of transit and increasingly also destination of migrants and refugees from outside the region, including vulnerable groups such as victims of trafficking, unaccompanied and separated children or women at risk.[46] In 2012 the asylum applications from the Western Balkan region in the EU27+ (including Switzerland and Norway) amounted to more than 30,000 which constituted almost 9% of all asylum applications.[47] The recognition rates are low[48]and rejected asylum-seekers are returned to their countries of origin under readmission agreements the EU and its Member States concluded with the countries in the Western Balkans.

Largely owing to its strategic geopolitical location, the Western Balkans has become an important hotspot on one of the main migration routes to the EU. An increasing number of refugees and migrants from outside the region, in particular Afghanistan, Pakistan, Palestine, Syria, Somalia and North Africa, are arriving from Turkey and/or Greece and transiting the region using what is known as "the Western Balkan route." Many lodge asylum claims in one or more of the Western Balkans countries, but often depart before having

[43] See *A life of dignity for all: accelerating progress towards the Millennium Development Goals and advancing the United Nations development agenda beyond 2015*, Report of the Secretary General, UN doc. A/68/202 (26 July 2013), e.g. pares. 93 and 111.

[44] The Western Balkans includes Albania, Bosnia and Herzegovina, Croatia, (UNSCR Resolution 1244/99), Montenegro, Serbia and Republic of Macedonia.

[45] Countries in the region still have to cope with the consequences of large-scale displacement of the 1991-95 conflicts. Social and economic challenges continue to trigger the movement of nationals from the Western Balkan countries within and from the region.

[46] Predominant drivers of migration from the region are poverty, low living standards, unemployment and social exclusion. The liberalization of visa policies in the context of the EU accession process has reportedly been an important contributing factor facilitating legal movements.

[47] The former Yugoslav Republic of Macedonia and Serbia continue to be the main countries of origin. In October 2012 the number of Serbian and Macedonian citizens submitting asylum claims reached almost 6,000 in one month. With almost 15,000 asylum applications lodged in 2012 Serbian nationals remain one of the highest ranked nationalities of asylum applicants in the EU. Source: Euro stat, Asylum Applications in EU27+ from Southeast Europe, 2008-12. 7 February 2013.

[48] See Western Balkans Annual Risk Analysis 2013, Front ex. Available at http://frontex.europa.eu/assets/Publications/Risk_Analysis/WB_ARA_2013.pdf.

their asylum claims processed and their protection needs determined.[49]

All countries in the region have adopted relevant legislation for regulating entry and stay of aliens[50], as well as are parties to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol[51]. Also, they have established national migration management system and national asylum systems. However, shortcomings in the implementation of the legislation and gaps in institutional capacity do not always guarantee that asylum-seekers can access fair and efficient asylum procedures and enjoy the basic standards of treatment.[52] Moreover, Readmission agreements concluded between the EU and Western Balkans countries do not cover only nationals, but also allow for the return of third country nationals who had transited through the Western Balkans to an EU Member State. With regard to the latter, there is no system in place to ensure that returned asylum-seekers whose claims have not been examined on substance in the returning country are protected against refulgent and can access the asylum procedures in the country of return.

It should be noted that Countries of the region have developed a number of good practices at national and regional level which can serve as a basis for further initiatives. These include for instance the creation of the Balkans Asylum Network (BAN) to facilitate regional cooperation and build the capacity of non-governmental organizations active in the field of asylum and migration, the implementation of the border monitoring project in Croatia (2008-present), the establishment of migrant service centers in the Western Balkan countries (62 are currently operational in the region), the elaboration of standard operating procedures for identification and referral of victims of trafficking in Albania, or the monitoring of arrivals of returned migrants at the Pristina airport in Kosovo. Initiatives aimed at regional cooperation and exchange of information on migration issues among law enforcement actors are also undertaken by the Southeast European Law 6 Enforcement Centre (SELEC), the International Law Enforcement Cooperation Unit (ILECU) or under the framework of Police Cooperation Convention for Southeast Europe (PCC). Of particular note is the Migration, Asylum, Refugees Regional Initiative (MARRI) which was created under the former Stability Pact for South Eastern Europe to promote dialogue and closer regional cooperation on migration and asylum related issues among the Western Balkan countries.[53]

[49] See UNHCR, Asylum Levels and Trends in Industrialized Countries, 2011, available at http://www.unhcr.org/4e9beaa19.html. The recent accession of Croatia to the EU has made it an EU Member State with the longest external land border. This may impact the nature and scale of the migration flows passing through the region, including by leading to an increase in the number of irregular migrants trying to enter the EU through Croatia and of those readmitted from Croatia under the existing readmission agreements. The future accession of Romania and Bulgaria to the Schengen zone as well as changes in the socio-political development in Northern Africa, Central Asia and the Middle East are likely to also affect migratory flows in the region.

[50] Laws on foreigners, legislation on border control etc.

[51] Except for Kosovo. See UNSCR 1244/99

[52] For example, recognition rates are extremely low despite the fact that many extra-regional asylum-seekers come from refugee-producing countries. In 2012 the recognition rate; in Montenegro 0.12%; in Serbia less than 1% and 0% in the Macedonia. In Croatia the total refugee recognition rate was 16.75%. See UNHCR data, available at: http://www.unhcr.org/pages/4a013eb06.html.

[53] See Refugee protection and International Migration in the Western Balkans, Suggestions for a Comprehensive Regional Approach, UNHCR and International Organization for Migration (IOM), available at: http://www.unhcr.org/531d88ee9.pdf.

The challenges described above will require new and cooperative approaches building on the region's humanitarian tradition and existing good practices. Against this background, this UNHCR/IOM initiative will assist States in the Western Balkans in establishing and operationalizing a protection-sensitive migration and asylum management system that meets the legitimate concerns of States to protect their borders and territories, reach their migration management objectives and fulfil their obligations under international human rights and refugee law.[54] The initiative will focus on those areas where more coordinated and joint action at both national and regional levels can contribute to resolving the region's particular challenges. These areas include: Protection-sensitive entry systems; Enhancing mechanisms for information sharing; Improvement of reception arrangements; Recognizing refugees; Solutions for refugees; Identifying and providing assistance to persons with specific needs and vulnerable migrants; and Providing assisted voluntary return and reintegration.[55]

Conclusion

Taking stock of where we came from, UNHCR's perception is that refugee protection stands at a crossroads. Its most important tool— the 1951 Convention— sets out a basic framework that remains directly relevant to many, but not to all, displacement situations.[56] Furthermore, alliances on protection are shifting.

The Convention has a legal, political and ethical significance that goes well beyond its specific terms: legal in that it provides the basic standards on which principled action can be founded; political in that it provides a truly universal framework within which states can cooperate and share the burden resulting from forced displacement; and ethical in that it is a unique declaration by the 140 States Parties of their commitment to uphold and protect the rights of some of the world's most vulnerable and disadvantaged.

Assertions that the Convention is no longer relevant are belied by encouraging recent developments. At the Inter-Parliamentary Union meeting in Amman in May 2000,[57] 648 parliamentarians from 124 countries around the world reaffirmed the centrality of the Convention to asylum systems today; EU leaders meeting in Tampere, Finland,[58] followed suit as have the 56 government members of the UNHCR's Executive Committee. States continue to accede to the Convention and State Parties continue to promote accession.

There is no doubt that the Convention regime has gaps. We have to be able to admit this without blaming the Convention for problems to which it was never designed to respond. Recently critics have alleged that the Convention is outdated, unworkable, irrelevant and inflexible, a complicating factor in today's migration environment.

[54] Ibid.

[55] Ibid. See also Meeting on the Western Balkans Migration Route: Leaders Agree on 17-point plan of action, European Commission – Press release, Brussels, 25 October 2015.

[56] Concerns about the 1951 Convention, specifically for what it does not address, have led some states to go so far as to question its continuing value. A great many more states increasingly disregard it or find ways around it, even in situations it directly addresses.

[57] See Press release of the Inter-Parliamentary Union_Geneva, 12 April 2000_N° 1, available at: http://www.ipu.org/press-e/amman1.htm.

[58] See Tampere Kick-start to the EU's policy for justice and home affairs, European Commission , available at : http://ec.europa.eu/councils/bx20040617/tampere_09_2002_en.pdf.

Several states have deemed it an instrument unresponsive both to the interests of states and to the real needs on the ground. The Convention was never conceived only as an instrument for permanent settlement, much less for migration control. The Convention, together with its 1967 Protocol, was drafted to become the global, multilateral, standard-setting agreement on how to protect individuals in need of protection.[59]

Primary responsibility for protecting refugees and all persons within their own country rests with the national authorities of the country. National responsibility is a core concept of any response to refugees It is a fundamental operating principle of the international community and is routinely emphasized by governments themselves, as a function of their sovereignty.[60]

The international obligation not to return refugees to danger is absolute, and applies to all countries regardless of their level of economic development. Meeting the life-saving needs of refugees, setting up fair and efficient asylum procedures, helping refugees return home or integrate in host communities all have a financial cost, met by receiving States, as well as by the international community in a spirit of international solidarity.

The right to seek and enjoy asylum enshrined in the Universal Declaration of Human Rights, and reflected in the 1951 Refugee Convention provides the legal basis for protecting people fleeing persecution, conflict and violence related to their race, religion, nationality, social group or political opinion.

In UNHCR's view, constructive and visionary immigration policies could result in an easing, or at least a balancing, of the pressure on asylum systems. There would be a positive switch in approach to managing migration through migration tools and managing the asylum system through asylum tools. Where there are linkages, and trafficking and human smuggling is a case in point, special additional approaches are called for.

In 2015, UNHCR issued Guidelines on International Protection[61], in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol, to help clarify why the Convention applies to people fleeing conflict and violence in such situations. These Guidelines complement the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1979, reissued, Geneva, 2011) and the other Guidelines on International Protection.[62]

In UNHCR's view, constructive and visionary immigration policies could result in an easing, or at least a balancing, of the

[59] The Convention at 50: the way ahead for refugee protection by Erika Feller, available at: file:///C:/Users/Dell-PA-D/Downloads/02%20(1).pdf.

[60] Yet, it is sometimes the very governments responsible for protecting and assisting their internally displaced populations that are unable or even unwilling to do so and, in some cases, they may even be directly involved in forcibly uprooting civilians. Even then, however, the role of international actors is to reinforce, not replace, national responsibility. This requires a two-pronged approach to encourage States and other authorities to meet their protection obligations under international law while also supporting the development of national and local capacities to fulfill these protection responsibilities.

[61] See UNHCR, Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status, HCR/GIP/15/11, 24 June 2015.

[62] These Guidelines, having benefited from broad consultation, are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers, as well as UNHCR staff carrying out refugee status determination under its mandate and/or advising governments on the application of a prima facie approach. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and the Guidelines on International Protection, available at: http://www.unhcr.org/refworld/docid/4f33c8d92.html.

pressure on asylum systems. There would be a positive switch in approach to managing migration through migration tools and managing the asylum system through asylum tools. Where there are linkages, and trafficking and human smuggling is a case in point, special additional approaches are called for.

Today's conflicts are often driven by racial, ethnic, religious and/or political divisions. In the Central African Republic, South Sudan and the Syrian Arab Republic (Syria), and more recently in Iraq, what may appear at first glance to be indiscriminate violence often targets particular populations on the basis of their perceived support for one of the parties to the conflict.

Therefore, the UNHCR initiative will focus predominantly on the common needs and challenges of the countries in the Western Balkans including Croatia which became the first country in the region to join the EU. Practical cooperation with other countries along the migratory route (such as Austria, Italy, Slovenia, Hungary, Romania, Greece and Turkey, etc.) will be sought as well.

In order to assist States in the region in achieving the objectives outlined above, the joint initiative will seek to develop a sustainable, comprehensive and cooperative framework for concrete action in the area of refugee protection and migration management, at national and regional levels.

On the basis of priority areas identified above, UNHCR, with input from other relevant stakeholders, will work with the Governments in the region towards development of a comprehensive roadmap/framework for action, outlining short and long-term objectives for the region, including concrete proposals for activities at both national and regional levels.

As a final point, the humanitarian situation of migrants along Western Balkans route calls for urgent action using all available EU and national means to alleviate it. To this end, the European Council considers it necessary to now put in place the capacity for the EU to provide humanitarian assistance internally, in cooperation with organizations such as the UNHCR, to support countries facing large number of refugees and migrant, building on the experience of the EU Humanitarian Aid and Civil Protection Department[63].

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THE NOTION OF RELEVANT, „SIGNIFICANT MARKET" IN THE SENSE OF EU LAW AND THE JURISPRUDENCE OF THE COURT IN LUXEMBOURG

Augustin FUEREA*

Abstract

Article 102 TFEU prohibits the abusive use of a dominant position in which an enterprise might find itself, at one time. It should be noted that the Treaty does not prohibit the dominant position in which a company might find itself, but it disapproves with its misuse. To fall under the incidence of the article, the enterprise must find itself in a dominant position „on the internal market or on a substantial part of it" and abuse of that position. What is important in the correct application of art.102 TFEU is to identify the „significant" and relevant character of the internal market. For this reason, we bring to the forefront of attention the meaning given by the Court of Justice in Luxembourg to the notion of „significant market", but also the meaning that the European Commission gives to the same notion. Thus, the analysis helps identifying those features that are necessary for the correct application of provisions of Article 102 TFEU in all Member States of the European Union.

Keywords: *Article 102 TFEU; significant market; the European Union; the jurisprudence of the Court of Justice of the European Union; the European Commission*

1. Introductory considerations

Pursuant to Article 102 TFEU, „any abusive use by one or more enterprises of a dominant position within the common market or on a substantial part of it is incompatible with the internal market and prohibited in so far, as it may affect trade between Member States".

Thus, the Article does not prohibit the dominant position in which a company might find itself, but it opposes to its misuse.

„The dominant position was defined (...) as a position of economic strength from which a company benefits and which enables it to prevent effective competition being maintained on a given market, giving it the possibility to behave, to an appreciable extent, independently of competitors, its clients and ultimately, consumers. This notion of independence is related to the degree of competitive pressure exercised by that enterprise. Dominance entails that these competitive constraints are not sufficiently effective and therefore that company enjoys power on a substantial market, for a certain period. This means that the company decisions are largely insensitive to the actions and reactions of the competitors, customers and to a final analysis, of the consumers. The Commission may consider that effective pressures of the competition are missing, although there is still some actual or potential competition. In general, a dominant position derives from a combination of several factors which, taken

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

separately, are not necessarily decisive"[1].

To fall under the incidence of the Article, the enterprise must find itself in a dominant position „on the internal market or on a substantial part of it" and abuse of that position. What is important in the correct application of provisions of Article 102 TFEU is to identify the „significant" and relevant character of the internal market.

Article 102 TFEU „applies to companies holding a dominant position on one or more relevant markets. Such a position may be held by one company (*single dominance*) or by two or more companies (*collective dominance*)"[2].

2. The concept of relevant, "significant market", in the sense of the European Commission[3]

According to the *Commission Notice on the definition of relevant market for the purposes of Community competition law*[4], „the market definition helps identifying and defining the perimeter within which competition takes place between companies. This allows the establishment of the framework where the Commission can apply the competition policy. The main purpose is to identify systematically, the competitive constraints faced by the companies concerned. Defining the market, both at the product level and geographically must allow the identification of real competitors of the companies concerned which are able to influence the behaviour of such enterprises and to prevent them from acting independently of the pressure of effective competition"[5]. In theory[6], it is appreciated that this Communication „is important from three points of view", namely:

a. „The Commission states that the market definition should be dealt with differently, depending on the nature of the investigation undertaken: an investigation of a proposed concentration is essentially prospective, while other investigations may relate to the analysis of a past conduct"[7];

b. „The Communication has signalled a change in the Commission's way of thinking regarding the market definition (...). The novelty is found in the Commission's detailed instructions on how to apply the fundamental principles[8] of the „market definition (competitive constraints; demand substitutability, supply substitutability and potential competition) and

c. „The Commission strays from some of the concepts used by the Court of Justice"[9].

The Commission's Communication is the subject of *the Instructions regarding the defining of the relevant market*, implemented by Order of the President of the Competition Council no. 388/2010[10]. Under point 5 of the *Instructions*, „the concept of relevant market is different from other definitions of the market, often used in

[1] The Communication of the Commission:Guidelines on the Commission's priorities in applying Article 82 of the EC Treaty to the abusive exclusionary conduct by dominant undertakings, COM (2008) 832 final, Brussels, 5.12.2008, pt. 10 (available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/? uri = CELEX:52008DC0832 & from = RO, accessed on 9 January 2016).

[2] Ibid, pt. 4.

[3] For details about European Commission, see Augustina Dumitrașcu, Roxana-Mariana Popescu, Dreptul Uniunii Europene. Sinteze și aplicații, second edition, Universul Juridic Publishing House, Bucharest, 2015, p. 65 ff.

[4] Published in OJEU C 372, of 9.12.1997 (http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri= OJ:C:1997:372:FULL&from=RO, accessed on 9 January, 2016).

[5] Ibid, pt. 2.

[6] Paul Craig, Grainne de Burca**,** Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină, edition IV, Hamangiu Publishing House, Bucharest, 2009, p. 1261 ff.

[7] Idem.

[8] Ibid, p. 1261.

[9] Idem.

[10] The Order is published in the Official Gazette of Romania, Part I, no. 553 of 5 August 2010.

other contexts. For example, companies use often, the concept of „market" to designate the area where they sell their products or to refer broadly, to the economic sector in which they operate. It is possible that the concept of market used usually by a company, and that of relevant market to overlap. However, it is always necessary to make an analysis of the relevant market from the point of view of competition, according to the information provided below".

It results from the analysis of sections 8-10 of the Instructions that, for defining the relevant market, two aspects are considered, namely: the relevant product market and the relevant geographic market. „*The relevant product market* comprises all those products and / or services that the consumer considers interchangeable or substitutable, by reason of their characteristics, price and intended use. *The relevant geographic market* comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, where the conditions of competition are sufficiently homogeneous and which can be delineated from neighbouring areas because the conditions of competition differ appreciably, in those areas. Therefore, *the relevant market* within which a particular competition matter should be assessed is determined by analysis of both the relevant product market, and the relevant geographic market „.

At the same time, for defining the relevant market, one has to resort to the following *principles, considered fundamental*: the competitive constraints; the demand substitutability; the supply substitutability and the potential competition.

a. The constraints of competition. Under section 13 of the *Instructions*, „companies are dealing with three main sources of competitive constraints:

- demand substitutability;
- supply substitutability;
- potential competition.

From the economic point of view, to define the relevant market, *the demand substitutability* is the fastest and most effective disciplinary element that acts on the suppliers of a specific product, especially in terms of their pricing decisions. An undertaking or association of undertakings cannot have a significant impact on the existing sales conditions, e.g. on prices when its customers are able to orient themselves without difficulty to available substitute products or to suppliers located elsewhere. Therefore, the process of defining the relevant market consists mainly in identifying the effective alternative sources of supply to which the customers of firms in question may resort, both in terms of products / services offered by other providers and in terms of their geographical location".

Regarding „the competitive constraints arising from the *supply substitutability (...)* and *potential competition*, they are not generally, immediate and require always the analysis of additional factors. Such constraints are not, generally, taken into account in defining the relevant market"[11].

b. Demand substitutability[12]. „The assessment of the demand substitutability involves determining the range of products considered by the consumer as interchangeable. To achieve this, the SSNIP[13] test can be used. The SSNIP test attempts to identify the narrower relevant

[11] Pt. 12 of the *Instructions*.

[12] Pts. 13-17 of the *Instructions.*

[13] "Hypothetical monopolist test (SSNIP test – the small, but significant and non-transitory increase in price), first used by the European Commission for the case Nestle / Perrier from 1992" (according to the *Instructions*).

market on which a hypothetical monopolist could perform profitably, a small but significant and non-transitory increase (usually, a price increase between 5% and 10% is considered) in the price, by evaluating the customer feedback to that increase. This test can provide information about the facts needed to define the relevant market.

Therefore, the starting point in defining the relevant market is to identify the type of products that companies involved are marketing and the geographical area concerned. Later, it will be tested whether other products and geographical areas have the ability to exert sufficient competitive pressure on the price policy of the enterprises involved and with immediate results in order to be included in the relevant market.

At conceptual level, the test of the hypothetical monopolist explores whether customers would be able to orient themselves toward substitutes, easily available, or to suppliers located in a different geographic area where a hypothetical monopolist would practice in that geographic area, a smaller, but significant and non-transitory increase in price for that (those) product (products). If the demand substitutability is sufficient to make unprofitable, due to lower sales, the price increase of the hypothetical monopolist, the closest substitute product or another geographic area will be included on the relevant market. The process will be repeated until the products and the geographic areas in question shall be such, that a small, but significant and lasting price increase practiced by a hypothetical monopolist would become profitable. The set of products and geographic areas so determined shall constitute the relevant market. An equivalent analysis is applicable in cases concerning the concentration of the buying power, where the starting point of the analysis is the supplier, and the price test allows the identification of alternative distribution channels for products of the respective provider".

c. Supply substitutability[14]. „In defining the relevant market, the supply substitutability could also be taken into account, in cases where it would have effects equivalent to those on the demand substitutability, in terms of effectiveness and achievement of immediate results. This means that, if a hypothetical monopolist practiced in that geographic area for that product, a small, but significant and non-transitory increase in price, suppliers who do not produce currently, that product, should be able to switch production toward that product and to market it on short term, without incurring significant additional costs or risks. When these conditions are met, the additional production brought on the relevant market will have a disciplinary effect on the competitive behaviour of companies involved. Such an effect is equivalent, in terms of effectiveness and immediate results, to that of the demand substitutability.

The above mentioned situations usually occur when companies sell products of various quality classes. Even if, in the view of a particular final customer or group of customers, the various quality classes of a particular product are not substitutable, they will be grouped into a single relevant product market, provided that most of the suppliers are able to provide these different quality products immediately and without incurring significant additional costs. In these cases, the relevant product market will encompass all products that are substitutable in demand and supply and sales of such products will be added together, in order to calculate the total market value and volume.

[14] Pts. 18-21 of the Instructions.

The same reasoning may lead to grouping different geographic areas".

d. Potential competition. „Potential competition, the third source of competitive constraint is not taken into account in defining the relevant market, since conditions, under which the potential competition is an effective competitive constraint, depend on the analysis of specific factors and circumstances related to the entry conditions on the market. Where appropriate, this analysis will be performed only in a later stage when the general position of the undertakings concerned, on the relevant market will have already been determined and when this position will have raised competition concerns"[15]..

3. The concept of relevant "significant market" in the sense of the Court of Justice

The following judgments of the Court of Justice are significant for defining the concept of "relevant market".

a. *United Brands Company and United Brands Continental BV*[16]. In this case[17], United Brands Company of New York was founded by the merger of United Fruit Company and the American Seal Kap Corporation. When filing the action, United Brands Company constituted the most important group on the global market of bananas, for which, in 1974, it provided 35% of the exports. Its European subsidiary, United Brands Continental BV from Rotterdam was responsible for coordinating sales of bananas in all Member States of the European Economic Community, except for the United Kingdom and Italy. Following complaints received from several European companies, the Commission decided to initiate the infringement procedure of the Article from the Treaty prohibiting the abuse of dominance. According to the Commission, United Brands Continental BV had abused its dominant position in that:

- it compelled distributors (from Germany, Denmark, Ireland, the Netherlands and the Belgo-Luxembourg Economic Union) not to resell bananas to the United Brands Company while still green;

- it practiced dissimilar charge prices for equivalent services in sales of Chiquita bananas in relations with its trading partners, distributors established in these Member States, except for the Scipio group;

- it practiced unfair selling prices for Chiquita bananas sales to customers established in Germany (except for the Scipio group), Denmark, the Netherlands and the Belgo-Luxembourg Economic Union and

- it ceased for a period of time to deliver Chiquita bananas to a company in Denmark.

Following that procedure, the Commission adopted a decision according to which United Brands Company received a fine of one million units of account and was ordered:

- to cease infringing the provisions of the Treaty;

- to notify all distributors established in Germany, Denmark, Ireland, the Netherlands and the Belgo-Luxembourg Economic Union, of the removal of the ban to resell bananas while still green;

- to inform the Commission about this and

- to inform the Commission twice a year for 2 years, of prices charged during the

[15] Pt. 22 of the Instructions.

[16] Judgement in the case *United Brands Company and United Brands Continental BV v. / Commission of the European Communities*, 27/76, ECLI:EU:C:1978:22.

[17] The text is processed after the text published on the website of the European Institute of Romania: http://ier.ro/sites/default/files/traduceri/61976J0027_rezumat%20IER.pdf (accessed on 9 January 2016).

previous six months to customers in Germany, Denmark, Ireland, the Netherlands and the Belgo-Luxembourg Economic Union.

United Brands Company and United Brands Continental BV brought before the Court in Luxembourg an action aimed, primarily, at the annulment of the Commission's decision and at ordering it to pay a unit of account for non-pecuniary damage and, alternatively at eliminating or at least reducing the fine if the principal judgment is preserved.

In the content of the action, the two companies[18]:

- challenge the analysis made by the Commission of the relevant market, and also of the product market and the geographic market;

- deny that it is in a dominant position on the relevant market within the meaning of article 86 of the Treaty;

- consider that the clause relating to the conditions of sale of green bananas is justified by the need to safeguard the quality of the product sold to the consumer;

- intend to show that the refusal to continue to supply the Danish firm was justified;

- take the view that it has not charged discriminatory prices;

- take the view that it has not charged unfair prices;

- complain that the administrative procedure**[19]** was irregular;

- dispute the imposition of the fine and, in the alternative, ask the court to reduce it.

In the analysis that it performed on the relevant market, the Court took into account the product market and the geographic market.

Thus, market delineation is made, both in terms of the product and geographically because „the conditions of competition (...) must be examined depending on the relevant *product features* and with reference to *a particular geographic area* where the product is marketed and where the conditions of competition are sufficiently homogeneous to appreciate the effect of the economic power of the undertaking concerned"[20].

Concerning *the product market*, the Court starts in its approach, from what the applicant claimed, namely that:

- „bananas are an integral part of the fresh fruit market, because they are reasonably interchangeable by consumers with other kinds of fresh fruit such as apples, oranges, grapes, peaches, strawberries, etc. or whether the relevant market consists solely of the banana market which includes both branded bananas and unlabelled bananas and is a market sufficiently homogeneous and distinct from the market of other fresh fruit"[21] and that

- "bananas compete with other fresh fruit in the same shops, on the same shelves, at prices which can be compared, satisfying the same needs: consumption as a dessert or between meals"[22].

According to the Court, „in order to consider that the banana is the subject of a market sufficiently different, the banana must be individualized by its special features that distinguish it from other fresh fruit, so to be less substitutable with these fruits and to be competition with them only in a less

[18] Judgement in the case *United Brands Company and United Brands Continental BV v. / Commission of the European Communities* (ECLI:EU:C:1978:22) pt. 7.

[19] See Elena Emilia Ștefan, *The topicality and the importance of the administrative agreement within the Romanian Law*, CKS-eBook, 2015, p.388- 394

[20] Ibid, pt. 11.

[21] Ibid., pt. 12.

[22] Ibid., p. 13.

obvious way[23]. The conclusion reached by the Court is that "a very large number of consumers having a constant need for bananas are not noticeably or even appreciably enticed away from the consumption of this product by the arrival of other fresh fruit on the market and that even the personal peak periods only affect it for a limited period of time and to a very limited extent from the point of view of substitutability. Therefore, (...) the banana market is a market is sufficiently different from that of the fresh fruit"[24]. However, the Court's reasoning is interesting, namely[25]:

- the ripening of bananas takes place the whole year round without any season having to be taken into account.

- throughout the year, the production of bananas exceeds the demand and can satisfy it at any time. Owing to this particular feature the banana is a privileged fruit and its production and marketing can be adapted to the seasonal fluctuations of other fresh fruit which are known and can be computed.

- there is no unavoidable seasonal substitution since the consumer can obtain this fruit all the year round.

- since the banana is a fruit which is always available in sufficient quantities the question whether it can be replaced by other fruits must be determined over the whole of the year for the purpose of ascertaining the degree of competition between it and other fresh fruit;

- the studies of the banana market on the Court's file show that on the latter market there is no significant long term cross-elasticity any more than - as has been mentioned - there is any seasonal substitutability in general between the banana and all the seasonal fruits, as this only exists between the banana and two fruits (peaches and table grapes) in one of the countries (West Germany) of the relevant geographic market[26];

- as far as concerns the two fruits available throughout the year (oranges and apples) the first are not interchangeable and in the case of the second, there is only a relative degree of substitutability[27];

- this small degree of substitutability is accounted for by the specific features of the banana and all the factors which influence consumer choice[28];

- the banana has certain characteristics: appearance, taste, softness, seedlessness, easy handling, a constant level of production which enable it to satisfy the constant needs of an important section of the population consisting of the very young , the old and the sick[29] and

- as far as prices are concerned two FAO studies show that the banana is only affected by the prices - falling prices - of other fruits (and only of peaches and table grapes) during the summer months and mainly in July and then by an amount not exceeding 20%[30].

As regards the *geographic market*, based on the assessment of the European Commission according to which Germany, Denmark, Ireland, the Netherlands and the Belgo-Luxembourg Economic Union constitute a geographic market, it is necessary to examine whether United

[23] Ibid., p. 22.
[24] Ibid., pts. 34, 35.
[25] Ibid., pts. 23-33.
[26] Ibid., pt. 29.
[27] Ibid., pt. 30.
[28] Ibid., pt. 31.
[29] Ibid., pt. 31.
[30] Ibid., pt. 32.

Brands Company has the opportunity to impede effective competition, the Court concluded that „the geographic market, as defined by the Commission, which constitutes a substantial part of the common market must be considered relevant market in order to assess the possible dominant position of the applicant"[31].

b. Nederlandsche Banden Industrie Michelin[32]. Nederlandsche Banden Industrie Michelin, a Dutch company attacked before the Court in Luxembourg, the Commission decision through which it was fined, requiring thus, either its cancellation or its reduction. The decision of the European Commission was grounded on its findings, according to which Nederlandsche Banden Industrie Michelin infringed the Treaty provisions on the prohibition of abuse of dominant position on the market of new spare tyres for trucks, buses, etc., and the practices for which the company is culpable are the following[33]:

- (a) Nederlandsche Banden Industrie Michelin tied tyre dealers in the Netherlands to itself through the granting of selective discounts on an individual basis[34] conditional upon sales "targets" and discount percentages, which were not clearly confirmed in writing, and by applying to them dissimilar conditions in respect of equivalent transactions; and

- (b) Nederlandsche Banden Industrie Michelin granted an extra annual bonus on purchases of tyres for lorries, buses, as well as on purchases of car tyres, which was conditional upon attainment of a "target" in respect of car tyre purchases.

The reasons on which the applicant based its action are the following[35]:

a) the Commission's administrative procedure was irregular because :

- the Commission did not provide the applicant with the documents in the file, in particular the results of inquiries addressed to users and the undertaking's competitors;

- in its decision, the Commission made no mention of the results of the hearing or of the statements made by witnesses and experts at the hearing and

- during the administrative procedure the Commission did not disclose the criteria upon which it planned to fix a fine.

b) the Commission wrongly considered that Nederlandsche Banden Industrie Michelin had a dominant position. The applicant questioned the Commission's assessment as it relied on:

- an incorrect definition of the substantial part of the common market at issue and

- an incorrect assessment of the Nederlandsche Banden Industrie Michelin company's position in relation to its competitors as regards, on the one hand the company's share of the relevant product market , and particularly the definition of that market, and on the other hand, the other evidence tending to prove or disprove the existence of a dominant position;

c) The Commission wrongly decided that the discount system of Nederlandsche Banden Industrie Michelin and the grant of an extra discount amounted to an abuse within the meaning of the Treaty.

d) The Commission wrongly considered that the conduct in question was

[31] Ibid., pt. 57.

[32] Judgment in the case *NV Nederlandsche Banden Industrie Michelin v. / Commission of the European Communities*, 322/81, ECLI:EU:C:1983:313.

[33] Ibid, pt. 3.

[34] Rebates = amount refunded by the seller to the buyer, which has been fixed in advance in relation with the importance of the turnover (according to https://dexonline.ro/definitie/risturn%C4%83, accessed on 10 January 2016).

[35] Judgment in the case *NV Nederlandsche Banden Industrie Michelin v. / Commission of the European Communities* (ECLI:EU:C:1983:313), pt. 4.

liable to affect trade between Member States and

e) the Commission should not have fined the company Nederlandsche Banden Industrie Michelin or at any rate should have fined it at a lesser amount.

For the purpose of investigating the possibly dominant position of an undertaking on a given market, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products. However, it must be noted that *the determination of the relevant market* is useful in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained and behave to an appreciable extent independently of its competitors and customers and consumers. For this purpose, therefore, an examination limited to the objective characteristics only of the relevant products cannot be sufficient: the competitive conditions and the structure of supply and demand on the market must also be taken into consideration"[36].

Given that the EU executive agreed not to take into account when assessing market share, the original new tyres, the Court held that „due to the special structure of demand characterized by direct orders from car manufacturers, competition is conducted in this area, according to completely different rules and factors"[37].

Referring to spare tires, the Court found that:

- there is no interchangeability between car and van tyres, on the one hand and heavy-vehicle tyres, on the other. Therefore, car and van tyres have no influence at all on the competition, on the market of heavy-vehicle tyres"[38].

- the structure of demand for each of those groups of products is different. Most buyers of heavy-vehicle tyres are trade users, particularly haulage undertakings, for whom, (…), the purchase of replacement tyres represents an item of considerable expenditure and who constantly ask their tyre dealers for advice and long-term specialized services adapted to their specific needs. On the other hand, for the average buyer of car or van tyres, the purchase of tyres is an occasional event and even if the buyer operates a business, he does not expect such specialized advice and service adapted to specific needs. Hence, the sale of heavy-vehicle tyres requires a particularly specialized distribution network which is not the case with the distribution of car and van tyres"[39] and

- there is no elasticity of supply between tyres "for heavy vehicles and car tyres owing to significant differences in production techniques and in the plant and tools needed for their manufacture. The fact that time and considerable investment are required in order to modify production plant for the manufacture of light-vehicle tyres instead of heavy-vehicle tyres or vice versa means that there is no discernible relationship between the two categories of tyre enabling production to be adapted to demand on the market. Moreover, that was why, when the supply of tyres for heavy vehicles was insufficient, the Nederlandsche

[36] Ibid, pt. 37 (the translation is taken from http://ier.ro/sites/default/files/traduceri/61981J0322.pdf accessed on 9 January 2016).
[37] Ibid., pt. 38.
[38] Ibid., pt. 40.
[39] Idem.

Banden Industrie Michelin decided to grant an extra bonus instead of using the surplus production capacity for car tyres to meet the demand"[40].

Finally, the Court accepted that in order to establish the existence of a dominant position, the market share of the applicant should be considered at the level of replacement tyres for trucks, buses and similar vehicles and tyres for cars and vans should not be taken into account.

4. Conclusions

In conclusion, for defining the relevant market, according to the European Commission, two aspects must be taken into consideration, namely: the relevant product market and the relevant geographic market. However, for defining the relevant market, it has to be resorted to the following *principles, considered fundamental*: competitive constraints; demand substitutability; supply substitutability and potential competition. In addition, there are also to be considered, including, the opinion of the Court of Justice of the European Union, meaning that *„the determination of the relevant market* allows evaluating whether the company has the ability to prevent maintaining an effective competition and to behave, to a considerable extent, independently of its competitors, customers and consumers. Consequently, it cannot, to this end, be confined to examining the objective characteristics of the relevant products, but it should also consider the possibilities of competition and the structure of supply and demand on the market"[41]

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[40] ***Ibid.,*** pt. 41.

[41] Judgment in the case NV Nederlandsche Banden Industrie Michelin v. / Commission of the European Communities (ECLI:EU:C:1983:313), pt. 37.

IMPLICATIONS OF THE RECOURSES IN THE INTERESTS OF LAW ON THE PROVISIONS OF LAW NO. 554/2004

Claudia Marta CLIZA*

Abstract

Law no. 554 was adopted in 2004 and amended in 2007. In the meantime and during all this period, the Supreme Court adopted a lot of recourses for the interest of law and these decisions modified the law in a deeply manner. This study is dedicated to these recourses and the way they affected the law.

Keywords: *Law no. 554/2004, recourses for the interests of law, modifications, first degree, recourses.*

1. Introduction

This study aims the default modifications that not the lawmaker, but paradoxically, the judge, has brought to Law no. 554/2004. It should be noted that the decisions to be contemplated by the analysis of this study are recent and fall under the scope of the actual tendency of the High Court of Cassation and Justice to come up with explanations on any matter it is requested a settlement of matters of law.

The institution of the High Court of Cassation and Justice referral in order to rule a prior resolution for the settlement of certain matters of law is new[1], and together with the recourse in the interests of the law, the institution aims to provide an uniform legal practice and both civil procedural institutions are extremely welcome in the Romanian legal frame, in order to establish case law patterns which provide the person subject to the law a greater confidence in the act of justice.

The number of litigations caused by the local government is currently large among civil litigations. This is something normal if we take into account the fact that within the administrative law, understood as a branch of public law, the term of local government holds the central position and it is natural to be so. As shown in the doctrine, the administration is the most complex activity of the state; it is ever-present within the society, the people's life and this is why there is the constant concern of decision makers to make from the local government a force in the interests of the people[2].

Therefore, the material law essentially correlates with the procedural law in the settlement of the administrative litigations.

Practically, the aforementioned civil institutions outline the possibility of the High Court of Cassation and Justice to „clear" the obscurity of the law, so that the courts of law do not rule non-uniform

* Associate Professor PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: cliza_claudia@yahoo.ro).

[1] The institution of the settlement of matters of law was introduced by means of the New Code of Civil Procedure, respectively articles 519 – 521.

[2] Elena Emilia Stefan, *Drept administrativ. Partea I* (Universul Juridic Publishing House, Bucharest, 2014), p. 8.

judgments, the premise for the person who resorted to the law to ask „why did I lose the trial" while citizen X, who was in the same situation as me, won? The question is natural and frustrating and the act of justice lacks of finality in such situations.

The obscurity of the law also affected Law no. 554/2004 of the contentious administrative, and these civil procedural instruments appeared and corrected the interpretations of the courts of law.

By means of the proposed analysis, this study reviews four matters of law settled by the High Court of Cassation and Justice, by taking into account four articles of the aforementioned law, a matter which has never been subject to any doctrinal analysis up to this point.

The author of this study aims to analyze the practice of the High Court of Cassation and Justice in this field, by summarizing the decisions which were ruled and by emphasizing their importance.

It should be noted that the institution of the ruling of a prior resolution for the settlement of a matter of law is regulated, as provided above, in art. 519 – 521 of the Code of civil procedure. In summary, in order for the referral under art. 519 of the Code of civil procedure to be admitted, the following conditions must be fulfilled at the same time[3], namely:

— the case where the matter of law is raised, is on the dockets of the court of last resort;

— the referral concerns a matter of law, namely an issue regarding the interpretation of a legal regulation for which the settlement in principle is required;

— the settlement of the case on the merits depends on the clarification of the respective matter of law;

— the matter of law the clarification of which is required, is new;

— the High Court of Cassation and Justice did not rule on the respective matter of law and it is not contemplated by any pending recourse in the interests of the law[4].

2. Prior resolutions for the settlement of the matters of law

2.1. Decision no. 10/2015

The first reviewed decision is Decision no. 10 of May 11th, 2015[5], ruled in Case no. 427/1/2015, by the Court Panel for the settlement of matters of law which took into consideration the referral filed by the Court of Appeal of Craiova — Division of the contentious administrative and fiscal, by Closure of December 11th, 2014, ruled in Case no. 7.752/101/2013, in order to rule a prior resolution on the interpretation of the provisions of art. 23[6] of Law no. 554/2004 of the contentious administrative, as further amended and supplemented (Law no. 554/2004).

The matter of law submitted to the High Court of Cassation and Justice was the following:

[3] G. Boroi, O. Spineanu-Matei, D.N. Theohari, G. Raducan, D.M. Gavris, A. Constanda, C. Negrila, V. Danaila, F.G. Pancescu si M. Eftimie, *Noul Cod de procedura civila. Comentariu pe articole. Vol. I. Art. 1-526* (Hamangiu Publishing House, 2013), 1008 – 1010.

[4] G. Boroi, *Noul Cod de procedura civila. Comentariu pe articole*, 998.

[5] The court panels for the settlement of matters of law, published in Official Journal, Part I no. 458 of 2015.

[6] G.-V. Birsan si B. Georgescu, *Legea contenciosului administrativ nr. 554/2004 annotated* (Hamangiu Publishing House, 2nd edition, rev., Bucharest, 2008): „the action in contentious administrative having as scope the annulment of a regulatory administrative act annulled under a final and irrevocable court ruling, which was published in the Official Journal of Romania, Part I, or as the case may be, in the official journals of the counties or of Bucharest, lacks of object, as these court rulings are generally mandatory and they produce effects in the future (The High Court of Cassation and Justice, division of the contentious administrative and fiscal, dec. no. 2182 of May 29th, 2008, not published)".

„The provisions of art. 23 of Law no. 554/2004 shall be interpreted in the sense that the court ruling whereby a regulatory administrative act was annulled, is applicable only to those individual administrative acts issued under the respective act, after the annulment resolution or is it also applicable to those which, although they were previously issued, on the date of final annulment resolution were appealed in cases pending on the dockets of the court of law?"

The point of view of the court panel that filed the referral was that the provisions of art. 23 of Law no. 554/2004 provide, unequivocally, that such court rulings are generally mandatory and produce effects in the future. These provisions are exempt from the principle of the relativity of the court rulings, providing that the court ruling on the annulment of a regulatory administrative act produce erga omnes effects as the regulatory administrative act which is executed produce the same effects in practice. This feature of the court ruling logically leads to the conclusion that the court ruling whereby a regulatory administrative act was annulled in full or in part, is applicable to all matters of law.

The *erga omnes* effects are produced only for the future, an aspect which results, with no doubt, from the provisions of art. 23 first thesis, final part of Law no. 554/2004. Therefore, the legal relationships and legal effects produced by the regulatory act during its execution, until the date of its irrevocable annulment, shall remain in force and shall produce legal effects.

In what concerns the words „they only produce effects in the future", has to be construed as meaning that the invalidity of the regulatory administrative act, pronounced under an irrevocable court decision, does not produce retroactive natural effects, but only ex nunc effects, for the future, starting from the moment of its acknowledgement, by its publishing on the Official Journal of Romania, Part I, and for the issuance authority, as of the date of the final annulment resolution due to the fact, as a party to the proceedings whereby the resolution for the annulment of a regulatory administrative act was ruled, the issuance authority cannot rely on the failure of the resolution to be published in the Official Journal of Romania, Part I, as an argument for the substantiation of the dismissal to settle a petition.

Therefore, the invalidity of the regulatory administrative act cannot be opposed to the legal effects caused by the administrative acts issued prior to the mentioned time, but only to the legal effects caused by the administrative acts subsequently issued.

In what concerns the extension of the court ruling on the annulment of a regulatory administrative act similar to the effects of the motion to dismiss on grounds of unconstitutionality in what concerns pending cases (as it was noted by means of the decisions ruled by the Court of Appeal of Craiova attached to the referral), the referring court noted that the invalidity of the individual administrative act issued under a regulatory administrative act, in this case the taxation decision, must be analyzed on the time of its issuance (the invalidity grounds being previous or concomitant). The contrary solution would result in the invalidity of all individual administrative acts (in this case the taxation decisions) issued before the resolution on the annulment of the regulatory administrative act, a situation which would violate the legal certainty principle.

Therefore, in the opinion of the referring court, in consideration of the provisions of art. 23 of Law no. 554/2004, the annulment of a regulatory unilateral administrative act produces erga omnes effects only for the future, similar to the

repeal or expiration, and the legal relationships and the legal effects produced by the regulatory administrative act during its execution and up to its final annulment, shall remain in force and shall produce legal effects. The High Court of Cassation and Justice decided that the provisions of art. 23 of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, are construed in the sense that the irrevocable/final court resolution whereby a regulatory administrative act[7] was annulled in full or in part is effective on those individual administrative acts issued under the respective act and which, on the date of the annulment court resolution, are appealed in cases pending on the dockets of the courts of law.

2.2. Decision no. 11/2015

The second analyzed decision is Decision no. 11/2015[8], whereby a settlement in principle on the following matter of law is provided: „If the provisions of art. 3 of Law no. 554/2004 of the contentious administrative, as further amended and supplemented (Law no. 554/2004), in conjunction with the provisions of art. 63 par. (5) letter e) and art. 115 par. (2) of Law no. 215/2001 of the local government, republished, as further amended and supplemented (Law no. 215/2001), and with the provisions of art. 19 par. (1) letter a) and letter e) of Law no. 340/2004 on the prefect and the prefecture, republished, as further amended and supplemented (Law no. 340/2004), and of art. 123 par. (5) of the Constitution, shall be construed in the sense that the prefect is acknowledged the right to appeal before the court of the contentious administrative, all the acts of the local government which he deems illegal or only the acts of the local government which fall under the scope of the provisions of art. 2 par. (1) letter c) of Law no. 554/2004, respectively only administrative acts".

In the reasoning of the point of view, the referring court referred the case law to the Court of Appeal of Bucharest, where the matter of law was settled differently, as shown below.

In an opinion, it was noted that art. 123 par. (5) of the Constitution is a general provision of principle, the role of which is to establish the public guardianship institution[9], without its text aiming the exact definition of the acts issued by the authorities of the local government which can be appealed before the contentious administrative, this delimitation being achieved by the „organic law", according to the reference of the constitutional text.

The organic law is law no. 340/2004, a special regulation, an exception both from the provisions of Law no. 554/2004, and from the provisions of Law no. 215/2001, and which, by means of the provisions of art. 19 par. (1) letter e), limits to the administrative acts the scope of the acts which can be appealed before the contentious administrative.

Furthermore, art. 3 of Law no. 554/2004, which refers to the „acts issued by the authorities of the local government" and

[7] Dana Apostol Tofan, *Drept administrativ. Volumul II*, (All Beck Publishing House, Bucharest, 2004), p. 49: „*Therefore, in what concerns the termination of the legal effect, the administrative acts shall produce effect until their removal from force, which is regularly performed by the issuing body, by the hierarchically higher authority or by the courts of law, being about suspension, revocation or cancellation*" (A. Iorgovan, op. cit., 2002, p. 69).

[8] The courts of law for the settlement of matters of law, published in Official Journal, Part I no. 501 of 2015.

[9] Elena Emilia Stefan, *Drept administrativ*, p. 145: „*During interwar period, the public guardianship institution was expressly established by the law, the state granting a high importance to this form of administrative control (...) Law no. 554/2004 of the contentious administrative comes to detail the procedural elements of the public guardianship as follows: the prefect can appeal before the contentious administrative court the acts issued by the local government, if he deems them illegal*".

to the „contentious administrative court" shall be construed by reference to the definition of the activity of „contentious administrative" given by art. 2 par. (1) letter f) of Law no. 554/2004, which refers to the term of „administrative act" provided for by art. 2 par. (1) letter c), and not to the general term of „act".

According to art. 1 par. (8) of Law no. 554/2004, the actions filed by the prefect before the contentious administrative are subject both to Law no. 554/2004, and to special law, including to Law no. 340/2004, which limits to the administrative acts the scope of the acts which can be appealed.

In another opinion, it was noted that art. 123 par. (5) of the Constitution deliberately refers to all the acts of the local government, and such an interpretation is supported by the general obligation incumbent including on the local government, provided for by art. 1 par. (5) of the Constitution, on the observance of the Constitution and of the law in all activities, regardless the nature of the legal relationships they are performed in.

Such an interpretation is also supported by the general role of the prefect established by art. 19 par. (1) letter a) of Law no. 340/2004, respectively the role to „ensure, within the county or, as the case may be, within Bucharest, the application and observance of the Constitution, laws, ordinances and resolutions of the Government, of the other regulatory acts, and of public order". Another argument is that art. 115 par. (7) of Law no. 215/2001 refers, without distinguishing, to the „orders of the mayor".

Therefore, the acts filed by the prefect by means of the contentious administrative shall be deemed admissible, regardless of the type of the acts issued by the mayor.

The High Court of Cassation and Justice decided that, for the interpretation of the provisions of art. 3 of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, in conjunction with the provisions of art. 63 par. (5) letter e) and art. 115 par. (2) of Law no. 215/2001 of the local government, republished, as further amended and supplemented, and of art. 19 par. (1) letter a) and letter e) of Law no. 340/2004 on the prefect and prefecture, republished, as further amended and supplemented, and of art. 123 par. (5) of the Constitution, the prefect is acknowledged the right to appeal before the contentious administrative court, the administrative acts issued by the authorities of the local government[10], within the meaning of the provisions of art. 2 par. (1) letter c) of Law no. 554/2004 of the contentious administrative, as further amended and supplemented.

2.3 Decision no. 12/2015

The third decision which is subject to this analysis is Decision no. 12/2015[11] on the assessment of the referral filed by the Court of Appeal of Bucharest – Division VIII of the contentious administrative and fiscal, by Closure of November 24th, 2014, ruled in Case no. 30.461/3/2013, whereby a settlement in principle is provided on the following matter of law:

„If, under the terms of Law no. 215/2001 of the local government, republished, as further amended and supplemented (Law no. 215/2001), and of Law no. 554/2004 of the contentious administrative, as further amended and supplemented (Law no. 554/2004), the territorial and administrative division, by means of its executive authority, respectively the mayor, is entitled to appeal

[10] Iuliana Riciu, *Procedura contenciosului administrativ* (Hamangiu Publishing House, Bucharest, 2009), p. 131 and the following.

[11] The court panels for the settlement of matters of law, published in Official Journal, Part I no. 773 of 2015.

before the contentious administrative court the resolutions adopted its deliberative authority, respectively the local council or, as the case may be, the General Council of Bucharest".

The matter of law subject to settlement, as formulated by the referring court, aims the right of the territorial and administrative division, by means of its executive authority, respectively the mayor, is entitled to appeal before the contentious administrative court the resolutions adopted its deliberative authority, respectively the local council or, as the case may be, the General Council of Bucharest, under the terms of Law no. 215/2001 and of Law no. 554/2004.

The High Court of Cassation and Justice notes that the modifications occurred in case of the provisions of Law no. 215/2001, do not establish expressis verbis the right of the territorial and administrative division, by means of its executive authority, respectively the mayor, to appeal before the contentious administrative court the resolutions adopted by its deliberative authority, respectively the local council or, as the case may be, the General Council of Bucharest.

The acknowledgment of such a right cannot be inferred by way of interpretation, as a consequence of the removal of the law text expressly providing the right of the mayor to refer to the prefect if he considered that the resolution issued by the local council was illegal.

In such conditions, according to the „*lex dixit quam voluit*" interpretation rule, it can be concluded that the lawmaker did not intend to acknowledge the right of the territorial and administrative division, by means of the mayor, to appeal before the contentious administrative court, the resolutions adopted by the local council or, as the case may be, by the General Council of Bucharest, since, if he had intended to acknowledge such a right of the mayor, he would have done it expressly.

The High Court of Cassation and Justice notes that the provisions of Decision of June 23rd 2003[12] of the High Court – United Divisions, keep their validity, meaning that „the acts issued by the local council and the mayor are independent, and none of these authorities can pursue directly a remedy at law against the other symmetric authority, the sole authority vested with such a power being the prefect". In this respect, we note that the provisions of art. 46, in art. 71 par. (1) and art. 27 par. (1) of Law no. 215/2001, in force on the date of the decision, are included in the content of art. 45 and art. 68 par. (1) of Law no. 215/2001, in force on the date of this decision, respectively in the content of the provisions of art. 115 par. (7) of Law no. 215/2001, art. 19 par. (1) letter a) and e) of Law no. 340/2004 and art. 3 par. (1) of Law no. 554/2004.

Notwithstanding, under art. 62 par. (1) of Law no. 215/2001 and art. 1 par. (8) of Law no. 554/2004, the mayor is acknowledged the right to file court actions and to represent the territorial and administrative division before the courts of law. However, in what concerns the lawfulness of the acts adopted by the local council, both the Constitution of Romania, and Law no. 340/2004 and Law no. 554/2004 establish the express competence of the prefect in the form of the public guardianship control[13].

[12] Published in Official Journal no. 690 of October 2nd, 2003.

[13] Iuliana Riciu, *Procedura contenciosului administrativ*, p. 132: „*The public guardianship control is achieved by a higher hierarchical level authority and shall be exercised only by means of the contentious administrative court, which will rule on the lawfulness or opportunity of the control acts, but there are also opinions which note*

To accept the theory according to which the territorial and administrative division, by means of its executive authority, namely the mayor, is entitled to appeal before the contentious administrative court, the resolutions adopted by its deliberative authority, respectively the local council or, as the case may be, the General Council of Bucharest, means that the mayor acquires the prerogative of the public guardianship control. Given that the public guardianship control is expressly and restrictedly provided within the constitutional level, by means of art. 123 par. (5) of the Constitution, and, within the organic law level, by means of art. 115 par. (7) of Law no. 215/2001, art. 19 par. (1) letter e) of Law no. 340/2004 and art. 3 par. (1) of Law no. 554/2004, as a prerogative of the prefect, the court of law is not able, by way of interpretation of the provisions in force, to grant to certain competent public authorities something they were not granted by the lawmaker.

Whereas, within the current legislative frame, the lawmaker did not expressly acknowledge the right to file court actions, although when he wanted to acknowledge at the same time the right of several subjects of law to exercise similar or identical powers, he achieved this by introducing express provisions, the High Court of Cassation and Justice admitted the referral and established the following: under the terms of Law no. 215/2001 of the local government, republished, as further amended and supplemented, and of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, the territorial and administrative division, by means of its executive authority, respectively the mayor, is not entitled to appeal before the contentious administrative court, the resolutions adopted by its deliberative authority, respectively the local council or, as the case may be, the General Council of Bucharest.

2.4 Decision no. 13/2015

The last decision analyzed by this study is Decision no. 13/2015[14] on the appeal filed by the Board of the Court of Appeal of Constanta on the interpretation and application of the provisions of art. 2 par. (1) letter f) and art. 10 of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, respectively art. 94 and 95 of the Code of civil procedure, on the nature of and the jurisdiction[15] over the cases contemplating the claims whereby a general directorate of social assistance and child protection requests the obligation of a county or local council or of another general directorate of social assistance and child protection to bear the living costs for the persons benefiting from protection measures provided by Law no. 448/2006[16] on the protection and promotion of the rights of persons with disabilities, republished, as further amended and supplemented, and Law no. 272/2004 on the protection and promotion of child rights,

that this control relates only to lawfulness and not to opportunity. (...) It is important to note that the public guardianship body cannot annul an act deemed to be illegal which was issued or adopted by the body under guardianship, this power belonging only to the contentious administrative court, upon the referral of the body in charged with the public guardianship".

[14] The panel with competence to judge the recourse in the interests of the law, published in Official Journal, Part I no. 690 of 2015.

[15] On the one hand, the first opinion considered that these litigations have a civil nature, and the jurisdiction belongs, depending on the value of the claim, to the court of law or to the tribunal, as common law courts. On the other hand, the second orientation of the case law considered that these cases are contentious administrative litigations, and the jurisdiction belongs in the first instance to the tribunals.

[16] Published in Official Journal, Part I no. 1 of 03/01/2008.

republished, as further amended and supplemented.

In what concerns this recourse in the interests of the law, it is noted that the litigations covered by the referral fall under the scope of the contentious administrative, taking into account the capacity of public authorities of the parties, and their scope consists of the dismissal to settle a petition concerning a right provided by the law.

The legal nature of the correlative rights and obligations to finance the social assistance system is specific to the administrative law, due to the fact the application of the legal provisions claimed in the referral covers the organization and establishment of the powers of the local government bodies and the relations between these bodies.

According to the provisions of art. 32 letter c) and art. 37 of Law no. 47/2006[17] on social assistance national system (in force until December 22nd, 2011) the county councils establish and organize under their subordination, general directorates of social assistance with financial and technical responsibilities in order to support social services; the social assistance is mainly financed from funds allocated by the state budget or local budgets, and according to art. 40 par. (1) of the same law, the county budgets allocated funds for the financing of social services organized within the county and for the financing of social works established under the resolutions of the county councils and municipalities, of the towns and communes or under special law, as the case might be.

In relation to the provisions of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, the legal nature of the relation referred to judgment obviously belongs to the administrative law, due to the fact the application of the legal provisions claimed by court actions cover the organization and fulfillment of the responsibilities of the local government bodies and the relations between these bodies – the powers of the local council and of the county council, on the one hand, and the financing of the general directorate of social assistance and child protection, on the other hand, all of them involving the local government body.

The source of the obligation of payment of the amounts representing the balance between the monthly average costs and the monthly living contribution incumbent on the social assistance services beneficiaries – persons with domiciles in other localities – is an administrative act[18].

In the application of the regulations in the field of social assistance, the local government bodies shall be bound to establish under administrative act the contribution of the community to the financing of the activities for the protection of disadvantaged persons.

The content of the administrative law relations consists of the rights and obligations of the subjects of this relation, the peculiarity of which is that the exercise of the subjective rights is a legal obligation.

It should be stressed out that, according to art. 2 par. (2) of Order no. 468/2009 of the Chairman of the National Authority for Persons with Disabilities on the approval of the Instructions for the application of art. 54 par. (4) of Law no. 448/2006 on the protection and promotion of the rights of persons with disabilities, the request of the leader of the general

[17] Published in Official Journal, Part I no. 239 of 16/03/2006.

[18] Antonie Iorgovan, *Tratat de drept administrativ. Vol. II* (Editura All Beck, editia 4, Bucuresti, 2005), p. 25: „*administrative act is that main legal form of the activities of the local government bodies, which consists of an unilateral and express manifestation of will of granting, modifying or removing rights and obligations, in the fulfillment of public power, under the main lawfulness control of the courts of law*".

directorate of social assistance and child protection of the territorial and administrative division where the person with disabilities is domiciled, on the admission of the person in a public residential center of another county than the domicile county, is the administrative act whereby the settlement of the costs is performed.

Furthermore, the legal nature of the litigations having as scope the granting of social assistance benefits and the provision of social services – including those regulated by Law no. 448/2006, republished, as further amended and supplemented, and Law no. 272/2004, republished, as further amended and supplemented – obviously results from the provisions of art. 143 par. (1) of Law no. 292/2011 of social assistance.

According to this legal text, the administrative acts issued by the central and local public authorities on the granting of social assistance benefits and social services provision can be appealed before the contentious administrative, under the terms provided by Law no. 554/2004 of the contentious administrative, as further amended and supplemented.

The High Court of Cassation and Justice admitted the recourse in the interests of the law filed by the Board of the Court of Appeal of Constanta and therefore established that, in the interpretation and application of the provisions of art. 2 par. (1) letter f) and art. 10 of Law no. 554/2004 of the contentious administrative, as further amended and supplemented, respectively art. 94 and art. 95 of the Code of civil procedure, the litigations having as scope court actions whereby a general department of social assistance and child protection requests the obligation of a county or local council or of another general directorate of social assistance and child protection to bear the living costs for the persons benefiting from protection measures provided by Law no. 448/2006 on the protection and promotion of the rights of persons with disabilities, republished, as further amended and supplemented, and Law no. 272/2004 on the protection and promotion of child rights, republished, as further amended and supplemented, fall under the jurisdiction of the contentious administrative courts.

3 Conclusions

This study aimed to analyze four interpretations granted to certain texts of Law no. 554/2004 by the High Court of Cassation and Justice, on which the national courts raised either the issue of a non-uniform interpretation, or of the potential different interpretations of the law, which are yet unsettled by means of a recourse in the interests of the law.

The High Court of Cassation and Justice granted, by means of its interpretation, the clarity so much needed by the judge in the application of the law, having as final goal the confidence in the act of justice of the person subject to the law.

It should be noted that the New Code of Civil Procedure built such a mechanism enabling the access of the person subject to the law, to an uniform interpretation during the legal proceedings, without being necessary to wait the ruling of a final court decision.

The lawmaker made a great achievement for human justice, by guaranteeing to the persons resorting to the courts of law that they will benefit from all the procedural means to achieve a fair and equitable rulin.

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GENERAL PRINCIPLES OF LAW

Elena ANGHEL[*]

Abstract

According to Professor Djuvara "law can be a science, and legal knowledge can also become science when, referring to a number as large as possible of acts of those covered by law, sorts and connects them by their essential characters upon legal concepts or principles which are universally valid, just like the laws of nature".

The general principles of law take a privileged place in the positive legal order and represent the foundation of any legal construction. The essence of the legal principles resides in their generality. In respect of the term "general", Franck Moderne raised the question on the degree of generality used in order to define a principle as being general – at the level of an institution, of a branch of the law or at the level of the entire legal order.

The purpose of this study is to find out the characteristics of law principles. In our opinion, four characteristics can be mentioned.

Keywords: *principle, general, experience, values, universal.*

1. Introduction

In its great historical spatial diversity, despite the natural differences, the law has a permanent nature, represented by a bunch of constants. Not only principles, but institutions are conserved, according to the continuity of social life; the state does not create law, but establishes a law, the positive law"[1].

The general principles of law take a privileged place in the positive legal order and represent the foundation of any legal construction. The essence of the legal principles resides in their generality.

The purpose of this study is to find out the characteristics of law principles. In our opinion, four characteristics can be mentioned.

2. Content

2.1. The generality of law principles

Mircea Djuvara pointed out that „in the filed of the science, the scientific progress consists of generalization. The scientific method consists of the knowledge of as many actual cases as possible and of their concentration in unitary laws by means of their essential similarities. The law of gravitation was a huge progress due to the fact it succeeded in combining a huge number of phenomena"[2].

In its entirety, the science of the law tends to generalization: the law is the result of judgment and the judgment consists of generalization; positive law has a general application; the rule of law is general and

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

[1] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, pag. 250.

[2] Mircea Djuvara, *Teoria generală a dreptului (Enciclopedie juridică)*, All Publishing House, Bucharest, 1995, pag. 225.

impersonal. According to Djuvara, the rule of law was always created by individual cases, by means of their comparison, a higher and higher level of generality being developed. In this respect, the author refers to the Greek primitive organization period, described by Homer, when the resolution ordered by the king, in case of a dispute, called „Themistes", was repeated in all similar cases so that, due to his will of reaching the same settlement, the idea of a general rule emerged over time[3]. Nowadays, statist law provides such general regulations that they can embrace the whole activity of a society. The Napoleonic Code has the great merit of having worded „precisely and clearly so general regulations that they could regulate almost all social life of its time"[4]. Djuvara concludes that, in the field of the law, generalization is necessarily required by the „logical postulate which rules the entire legal thinking, namely the rational idea of justice"[5].

Therefore, the generality is a defining element of the law system. But, within the law framework, „the legal construction of principles is the ultimate expression of refined abstraction"[6]. The generality is related to the law principles essence, is the „the core of the definition", according to Bergel.

Gheorghe Mihai notes that the principles of the law are called both general and fundamental, without the distinction between these two terms being explained. In his opinion, „fundamental" is the attribute of something that has the capacity to substantiate, and „general", in current sense, concerns „what is valid for a whole class of objects, what belongs to the entire class". Therefore, the principle is „the simplest and the most general sentence of which we can infer a totality of knowledge or precepts" and which substantiates, as an essential judgment, this entirety"[7].

Furthermore, the author insists on the fact that we should not confuse the generality of a principle with its extension. The principle, as a main idea, is only one, the founder of the law, the rest being „founded founders, not principles"[8]. For example, the principle of the freedom to adduce the evidence is an extension of the principle of freedom. Therefore, principles are not ranked according to the degree of generality, all of them being „the most general sentences". According to the author, if we refer to principles which are specific to certain areas of the law, we should call them „rules of method", mandatory rules, and not guidelines.

Most authors express a contrary opinion, meaning that in their opinion, principles have a different degree of generality. Therefore, Sofia Popescu shows that the general principles of law are different in terms of the degree of generality[9]: some of them have full applicability, being valid for the entire law system, while others are applicable only to private law or public law or to a certain branch of the law. While branch legal disciplines organize branch principles, the general theory of law concerns the most general principles. By setting aside the whole positive law, the general theory of

[3] *Idem*, pag. 234.
[4] *Idem*, pag. 468.
[5] *Idem*, pag. 447.
[6] *Idem*, pag. 312.
[7] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, pag. 362
[8] Gheorghe Mihai, *Despre principii în drept*, in Studii de Drept Românesc, year 19 (43), no. 3-4/1998, pag. 273-285.
[9] Sofia Popescu, *Principiile generale ale dreptului, din nou în atenție*, în Studii de Drept Românesc, year 12 (45), no. 1-2/2000, pag. 7-25.

law, by means of synthesis, can approach to universality.

In what concerns the principles of international law[10], Grigore Geamănu distinguishes, according to their generality, between fundamental principles and other principles of international law. The fundamental principles „represent a full generalization of the international rules of law", by being part of that bundle of rules which is the essential and specific part of this law[11]. The other principles of international law have a lower degree of generality, according to the author.

Furthermore, Franck Moderne wonders what degree of generality would be needed in order to classify a principle as being general, the generality being perceived, as Norberto Bobbio shown, at the level of an institution, of a branch of the law or at the level of the entire legal order[12].

Philippe Jestaz is reserved in expressing a clear point of view, both in what concerns the definition of general principle concept which has so many meanings that, according to the author, we need to resort to our intuition, and in what concerns the generality of the principles of law[13]. In his opinion, the principles of law have three characteristics: permanent, general and unanswerable. The general characteristic consists of the fact that the principle crosses several institutions or branches of law; for example, the principle which good faith is presumed on finds its applicability in various fields. Any rule of law entails in its structure a presumed fact (for example, any married woman gives birth to a child) and a consequence of this fact (the child's father is the husband of the mother). However, a principle consists of a multitude of presumed facts, so that we are not aware of the consequences of the fact unless we resort to certain rules of law. Jestaz concludes that the generality of a principle is a very relative concept, due to the fact that there is no standard to establish the degree of generality where a regulation becomes principle.

The generality of the general principles of law is „maximum", therefore they cannot be placed at the same level with the rules of law. We share the opinion of Jean - Louis Bergel, according to which the aforementioned expression, although pleonastic, is the most appropriate, due to the fact that it outlines the specific generality of these principles and distinguishes them, in this regard, from the rules of law. Therefore, a rule of law is general because it is applicable to an indefinite number of acts and facts, however, in relation to some of them, it can have a special characteristic. On the contrary, a principle is general „in what concerns an indefinite series of applications"[14]. In order to reinforce this statement, professor J. Boulanger exemplifies: the provision of the Civil Code according to which the conceived child is entitled to receive inheritance, is only a rule

[10] Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, București, pag. 39: *international law principles should not be confused with the EU principles* (Augustina Dumitrașcu, Roxana-Mariana Popescu, Dreptul Uniunii Europene. Sinteze și aplicații, ediția a II-a, revăzută și adăugită, Universul Juridic, București, 2015, pag. 128).

[11] Grigore Geamănu, *Principiile fundamentale ale dreptului internațional contemporan*, Edit. Didactică și Pedagogică Publishing House, Bucharest, 1967, pag. 15.

[12] Franck Moderne, *Légitimité des principes généraux et théorie du droit*, in Revue Française de Droit Administratif no. 15(4)/1999, pag. 723.

[13] Philippe Jestaz, *Principes généraux, adages et sources du droit en droit français*, in Les principes généraux du droit, Droit français, Droits de pays arabes, droit musulman, Bruylant Bruxelles, 2005, pag. 171.

[14] Jean - Louis Bergel, *Méthodes du droit. Théorie générale du droit*, 2nd edition, Dalloz Publishing House, 1989, pag. 100.

of law on inheritable devolution, while *infans conceptus pro nato habetur quotiens de commodis eius agitur* (the conceived child is considered born whenever his interests are concerned) is a genuine rule of law, by being applied in all situations which relate to the beginning of personality development. Therefore, Bergel concludes that the principles govern the positive law, by drawing the limits of the branches of law, while the rules of law are only applications of or exceptions from these principles.

Gh. Mihai provides a response to this statement, namely, by being the most general sentence, the principle does not admit exceptions, even more if we talk about a basic principle; rules involve exceptions, however, „if a principle is declared as such, the exceptions abolish its capacity of principle"[15]. The author criticizes those definitions which distinguish between the principles and the rules of law, by arguing that the first are abstract and general, and the letter would be actual and particular: „by taking over the abstract and general characteristics from the filed of the regulations and moving them into the filed of the principles, means that all regulations are converted into principles or that all principles are converted into regulations"[16].

According to Gh. Mihai, the distinction between principles and regulations is performed by means of justification: „the principle is the conceptual and axiological horizon of the regulations, the regulations are valid constructions of this horizon"[17]. The differences between the principles of law and the rules of law shall be discussed in another chapter.

2.2. The principles of law are the outcome of the experience

By defining the principles as the most general ideas which arise from judgment and which substantiate law, we should not understand that they could be designed outside social facts. They have to support the totality of rules of positive law and to find their justification within social life. Therefore, we point out that the principles are not the outcome of a simple speculation, but on the contrary they are created by means of the experience.

Mircea Djuvara wrote that, setting aside the experience in the field of the law is nonsense, by being impossible to create law only by means of rational deductions. „The knowledge of the legal phenomenon should start from the practice developed from actual cases. In order for the truth to be achieved, the legal science should start from the actual to the abstract and not the other way". Here is the how the instruments of law are created according to the author: the law starts by ascertaining the things of the society, it always starts from the examination of particular cases, which applies legal and rational assessments to, by means of the legal consciousness of the society. Following the assessment of these actual social relationships, by means of induction, higher and higher levels of generalization are reached. Out of these general laws, legal consciousness achieves more precise forms of positive law, which are deemed outcomes of the legal techniques. The principles of law emerge from the legal text established as such, whereas „the legal experts seek the logical ground of each provision". The principles represent the higher level of abstraction, but they have no meaning

[15] Gheorghe Mihai, *Fundamentele dreptului. Teoria răspunderii juridice,* vol. V, C. H. Beck Publishing House, Bucharest, 2006, pag. 140.

[16] Gheorghe Mihai, *Despre principii în drept*, in Studii de Drept Românesc, year 19 (43), no. 3-4/1998, pag. 273-285.

[17] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, pag. 363.

outside the actual social facts: these principles „have no value, unless they are in relation to the initial particular cases they emerge from"[18]. Therefore, „all the principles of law are the outcome of continuous and necessary observations of the necessary needs of the society and these principles are not only the outcome of abstract speculation".

The philosophy of law recorded different guidelines in the construction of the principles of law. Therefore, Paul Roubier distinguishes three important categories of thinking: formalist school (positivists), idealist school (iusnaturalists) and realist school, which gathers under this name, historical and sociological doctrines[19]. Positivists thought that any rule of law is an expression of the king's power; the rule is mandatory for the individuals, regardless if it is applied, therefore, the effectiveness of the rule is not important according to this theory.

Iusnaturalists substantiated law on a bundle of natural and permanent principles, the systems of positive law emerge from. These principles emerge from the nature of things, they are ordered by the judgment, by remaining the same, regardless time and space. „The lawfulness of the rule emerges from its compliance with an intangible pattern (natural or rational order)", therefore the lawmaker is also bound to comply with it, according to Roubier.

By expressing doubt against the transcendental nature of law and by disclaiming the ideas of natural law, realist school sought the ground of the law in the life experience of people: the law is a spontaneous outcome of social life and every rule emerges from experience. Realists tried to point out the influences of the past, of the traditions, by being concerned not about the natural human being, but about the real human being, not about the alleged permanent principles, but by laws emerged from the spirit of the people.

By being against the codification of law, German historical school substantiated law on experience. Savigny, the prominent representative of this theory, believes that the law is the work of nature, so that it does not have to be created, but it is self-created as a natural phenomenon, such as religion or language. The law is the outcome of a collective action, it is developed at the same time with the spirit of the people and reflects its entire history; therefore, it cannot find its expression in law, but in tradition. The tradition watches over the conservation of the law, by representing the inheritance transmitted sequentially from a generation to another.

The sociological school, represented by Durkheim, developed the ideas of Auguste Comte, whose research followed the method of observation of facts and the role of the experience. Durkheim believes that the law is the result of the intervention of the society in its own interest, namely in order to improve life conditions of social body. The social interest is what prevails: the law emerges from the society and not from the individual.

Free Law School was established by François Gény, as a fight against the theories which believed that the legislation is the sole source of the law. The arguments against these theories were the following: the law is a spontaneous outcome of the society; the formal sources of law are only procedures for the ascertainment of the law, in fact, the law precedes them, due to the fact the law is the outcome of social powers, it does not emerge from the state, but from the society. According to Roubier, the rules of law system substantiated on formal sources, has, to some extent, a virtual characteristic, an

[18] Mircea Djuvara, *op. cit.*, pag. 245 and the following.
[19] Paul Roubier, *op. cit.*, pag. 55.

absolute overlap between the law of the sources and the actually practiced law, being impossible. The validity of formal sources of law depends on their compliance with the real sources[20].

According to professor Benoît Jeanneau, most of the general principles of law, are the result of the wording of latent rules emerging from social life, rules emerged from the repetition of fragmentary text, which at one point in time, the judge promoted them as more or less general principles[21].

We note that this theory is shared by Mircea Djuvara. According to the author's opinion, the law actually practiced within a country is not necessarily and absolutely in accordance with the law drawn up by its sources. There is a „positive latent law" beyond the construction of the positive law: it is the own law of the society, consisting of a series of social practices which, without being guaranteed by the state authority, have a long practical efficiency within society life.

However, every legal system expresses the community life experience of that space, an experience which varies depending on ideologies, traditions and religious symbols. Sometimes, this positive law has such strong roots in the consciousness of the society that the respective legal system remains immovable under the power of tradition; this is the case of Muslim system, which still tries to break away from the clutches of tradition, by slowly progressing under the influence of Western law principles.

There is no place where the law can afford to ignore the experience that its history has gained for centuries. Legislative experience „is not the experience of the legal normality, which is established in rules, but of its clear disclosure, as unambiguous as possible and especially, as public as possible. According to Gheorghe Mihai, this experience could be a logical historical finishing of human normative experience, or in other words, it would be the formalized prescriptive living".[22] In our opinion, the principles of law emerge from this clear disclosure and serve as a basis for positive law.

2.3. The principles of law are axiologically established

The law system cannot be reduced to a set of axiomatic rules of law, as Kelsen believed, but it necessarily entails value judgments. „The importance lies in the social value of the result and not in the logical beauty of laws. If law is faulty, misfit, anti-economic or even unfair, a perfectly logical judgment will only serve to increase the flaw of the premise, of the initial rule"[23].

According to Ion Craiovan, the law is „generated, structured and directed towards the inseparable connection with the constellation of values of the historical time in which it is developed and in certain conditions the law itself accedes to the statute of value"[24]. The author conceives the

[20] Paul Roubier, *op. cit*., pag. 76 and the following.

[21] Benoît Jeanneau, *Les règles et principes non écrits en droit public*, sous la direction de Pierre Avril et Michel Verpeaux, Panthon Assas Publishing House, Paris, 2000, pag. 12.

[22] Gheorghe Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III, All Beck Publishing House, Bucharest, 2004, pag. 35.

[23] Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *Teoria generală a dreptului*, C. H. Beck Publishing House, Bucharest, 2006, pag. 35.

[24] Ion Craiovan, *Tratat de teoria generală a dreptului*, Universul Juridic Publishing House, Bucharest, 2007, pag. 31.

culture as a merger between the knowledge and the value. The knowledge is not sufficient in order to grant an unitary view to the act of culture, therefore the value appears as a "fulfillment of the knowledge" in relation to human beings, their aspirations and needs.

The law always starts from the social actions, but it also means legal consciousness, ideals and social values. Gheorghe Mihai deeply outlines that people do not coexist, people live together[25]. The coexistence is specific to the herds, packs or hordes; but the human community means collaboration, cooperation, unity which implies the value awareness. The individuals, as free beings endowed with sense and consciousness, choose their behaviors, measure their actions, relate to behavior standards and assess the consequences of their actions. „The actual law is not everlasting outside these values and these values are always typically expressed in the statements of the principles of a law system".

The principles of the law are the expression of the values promoted and defended by means of the law. Such great is the importance of the values, that they classify any positive law from the axiological point of view. However, the people do not cohabit only legally, but also morally, politically and religiously. The law does not exhaust the wealth of the horizon of the values: besides the independent legal values which build the rules of law, there are also other values, namely non-legal values (equity, welfare, utility, dignity, truth) which are necessary for the human coexistence and which the law takes over, legalizes, promotes and defends by means of its rules.

The law, as a dimension of the society, is not limited to the totality of the legal regulations in force; the values are those which give meaning to the rigid normative feature. The basis of the law is praxio-axiological[26]. The bases of positive law consist of principles, values, ideals, which have accompanied the society since the beginning of its existence. By being guided by the ideals, the law is a social control mean for the individual: human beings comply with the rules of law due to the fact they grant them cultural normative models, which they acknowledge as being necessary for them and they follow them. The law is valued; it sums up the standards of conduct emerging from the consciousness of value of the society. By means of these ideals, the law falls under the scope of „must be". According to Mircea Djuvara, the ascertainment of the ideal of a society must be the beginning of any law scientific research.

Therefore, the development of the law falls under the scope of the values and principles. The values belong to the given of the law, they are always social. The principles are value bearers. As the principles are the bases of the positive law, the values are crystallized, enshrined and protect by rules of law. The values impact the legal order both in the process of law creation, due to the fact the lawmaker creates the rules of law in this axiological space, and in the process of law fulfillment, thus the values being promoted by effective legal means[27].

[25] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, pag. 164 and the following.

[26] Gheorghe Mihai, *Natura dreptului: ştiinţă sau artă?*, in Studii de Drept Românesc, year 12 (45), no. 1-2/2000, pag. 42.

[27] Ioan Ceterchi, Ion Craiovan, *Introducere în teoria generală a dreptului*, All Publishing House, Bucharest, 1992, p. 27.

In the application of the law, the enshrined values become references for the personality of the individual who, endowed with responsibility, will guide and assess the conduct according to their standards. Therefore, „the normative legal universe is built on principles and is humanized by the work of the values"[28]. The law is mandatory within the relations between the individuals not as a necessary result of the coercive power of the state, but as the adherence of the members of the society to its regulations. The individuals willingly comply with the rules of positive law in so far they give expression of the values emerging from the legal consciousness of the society. Therefore, the law has to be accepted by the members of the society, in terms of values and regulation, exactly in this order, due to the fact that the principles and accordingly, the values these principles assimilate, represent the bases of the objective law, have logical precedence against the regulations of the positive law. Therefore, the axiological dimensions of the principles also impact the rules of positive law.

According to Gheorghe Mihai, the value „is not given, as the properties of the things, it is not based on the real world, but on the ideal world, of the pure validity"[29]. However, although the individuals are similar by means of the values they receive, they are still different by means of their valorization, due to the fact that „each and every value is valued by means of the actions".

If the law were not related to values, the law would be an artificial structure of rules without scopes. The individual acts in a regulated framework; as the values are expressed by rules of law, the individuals value them by means of their actions. For human beings, the value is the reference of the responsibility: they assume the values that the law crystallizes in its rules of law and act according to their consciousness. Gheorghe Mihai distinguishes between moral assumption and legal assumption of social values, therefore: the moral assumption of the value is „universal and absolute and no speculative derogation of it impacts its substance", while the legal assumption of the same value is „neither universal, nor absolute, as long as the same lawmaker falls in contraction in the same respect"[30].

2.4. Certain principles of law benefit from universality

In antiquity, Cicero expresses his belief in an universal law and according to him „it is not one thing in Rome, and other at Athens; one thing today and another tomorrow, but in all times and nations this universal law must forever reign, eternal and imperishable"[31]. Iusnaturalists strongly supported the transcendental nature of law, from a dual perspective: there is natural law, consisting of the totality of natural, permanent principles, which are dictated by the judgment, being the same regardless of time and space; the positive law emerges from these eternal principles and by being the work of a lawmaker, it can only be changeable and imperfect.

If by 18 century, it was considered that the law was universal and unchangeable, being developed by human judgment out of the nature of things, Montesquieu revolutionized this thinking, by proving that

[28] Gheorghe Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III, All Beck Publishing House, Bucharest, 2004, pag. 155.

[29] Gheorghe Mihai, *Fundamentele dreptului. Teoria răspunderii juridice,* vol. V, C. H. Beck Publishing House, Bucharest, 2006, pag. 42 and the following.

[30] *Idem*, pag. 55.

[31] *Apud* Ion Craiovan, *Tratat de teoria generală a dreptului*, Universul Juridic Publishing House, Bucharest, 2007, p. 91.

law is the result of development factors. A great number of theories were developed against metaphysical foundation of law, by disclaiming the ideas of natural law. The historicism denied the universality of principles, by claiming that a historical *a priori*, which emerges from the spirit of the nature corresponds to each period and people. For the positivists, the law is the work of the lawmaker, for the sociologists is the result of facts.

According to Alexandru Vălimărescu „in order to avoid the free will of the lawmaker, we have to admit the existence of an *a priori* law, developed by human judgment which is also incumbent on the lawmaker"[32]. It is important to admit the existence of certain principles which are binding on everybody, to find an „outside rule", regardless if we call it natural law, rational or objective law, *donné* or *règle du droit*. The author explains that „the postulation of the existence of an absolute principle, which depends neither on the contingency of fact nor on the free will of the people who hold the great power", is essential.

Nowadays, we witness to some extent, the revival of the natural law. The principles of law represent the universal bases of the legal field, due to the fact they can be found in the depth of each positive law system. As of 1920, „the general principles of law recognized by civilized nations" were proclaimed in art. 38 of the Statute of the International Court of Justice, by being expressly recognized as a source of public international law. The current international view reinstates the universality of these principles, the establishment of mechanisms appropriate in order to ensure the globally protection of the inherent rights, natural for individuals, being in the center of the concerns of all states. In our opinion the institution of the Ombudsman is an extremely important institution of the European scene considering the role played by it in protecting the rights and interests of the European citizens[33] As they „express a sole truth which is mandatory for the judgment", these principles which substantiate law are transferred from a legal system to another, from the internal legal order to the international legal order and vice versa.

Under the integration into an united Europe, it is easy to note the tendency of the law towards universality. The predictions of Nicolae Titulescu – „starting from national, passing to regional, heading towards universal" were fulfilled. The European Union is opened to all European states which undertake to jointly promote universal values such as, humanism, human dignity, freedom, equality, solidarity, tolerance. The violation of the principle of equality and non-discrimination exists when a different treatment is applied to equal cases without any objective and reasonable grounds, or if there is a disproportion between the scope aimed by means of the unequal treatment and the used means[34]. The building of the European construction entails a blending of different legal orders, without impacting the foundation of member states national identity, and the reconfiguration of national, European and international relations. Such a difficult process would not be possible if the sense of European identity would not be expressed by means of universal principles

[32] Alexandru Vălimărescu, *Tratat de Enciclopedia dreptului*, Lumina Lex Publishing House, Bucharest, 1999, pag. 287.

[33] Elena Emilia Ștefan, *The role of the Ombudsman in improving the activity of the public administration*, Public Law Review no.3/2014, pag.127-135.

[34] Decision no. 107/1995 of the Constitutional Court, published in Official Journal no. 85/1996, *apud* Elena Emilia Ștefan, "*Opinions on the right to nondiscrimination*", CKS e-Book 2015, pag. 540-544.

and values, which breathe life into this continent[35]. It is important to keep in mind that in the European Union, the European Court of Justice "develops the general principles of law, which can be considered to be judge-made law – almost quasi-legislative"[36].

Giorgio del Vecchio pointed out that we should not understand that the general principles of law belong to a certain positive law system. The statement according to which the general principles of law are valid for only one people and that there are as many general principles as particular systems, would be contrary to the universal belief in *ratio juris*, which dates from Roman times and which is still valid today[37].

The objective law benefits form universality, due to the fact it is based on principles. The principles, in terms of ontology, give meaning to the law from the beginning of the society, namely before being discovered and worded by the law science. They substantiate law from the axiological perspective and guide the lawmaker in the construction of positive law.

3. Conclusions

In its great historical spatial diversity, despite the natural differences, the law has a permanent nature, represented by a bunch of constants. Positive law „does not exhaust the extension of the Law, and does not rebuild its foundations. Not only principles, but institutions are conserved, according to the continuity of social life; the state does not create law, but establishes a law, the positive law"[38]. Philippe Jestaz assigns a permanent feature to the principles of law, by showing that „they crossed centuries and survived numerous legislative convulsions"[39].

The assessment of legal principles, as found in the Western and Arab-Muslim legal systems, reveals their universal value, the fact that they „are identical or quasi-identical in Romanian law, in, Islamic Sharia and in the modern European legal systems"[40]. These principles are and shall remain universal as they crystallize eternal values for human beings of all time and places, independently of the social realities which delimitate their legal status of persons in law.

According to professor Djuvara, „the law can be a science, and the legal knowledge is converted in science when, by covering a large number of the documents contemplating law, sorts and connects them according to their essential characters by concepts or *universal legal principles*, just like the laws of nature"[41]

[35] For more details on European Union's legal principles, see Laura-Cristiana Spătaru-Negură, *Old and New Legal Typologies*, CKS e-Book 2014, pag. 365-466.

[36] Laura-Cristiana Spătaru-Negură, *Some Aspects Regarding Translation Divergences Between the Authentic Texts of the European Union*, CKS e-Book 2014, pag. 378.

[37] *Apud* Sofia Popescu, *Principiile generale ale dreptului, din nou în atenţie*, in Studii de Drept Românesc, year 12 (45), no. 1-2/2000, pag. 9.

[38] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, pag. 250

[39] Philippe Jestaz, *Principes généraux, adages et sources du droit en droit français*, in Les principes généraux du droit, Droit français, Droits de pays arabes, droit musulman, Bruylant Bruxelles, 2005, pag. 171.

[40] Sélim Jahel, *Les principes généraux du droit dans les systèmes arabo-musulmans au regard de la technique juridique contemporane*, in Les principes généraux du droit, Droit français, Droits de pays arabes, droit musulman, Bruylant Bruxelles, 2005, pag. 29-46.

[41] *Apud* Ioan Ceterchi, Ion Craiovan, *Introducere în teoria generală a dreptului*, All Publishing House, Bucharest, 1992, pag. 5.

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THE REPRESENTATION OF THE ADMINISTRATIVE AND TERRITORIAL DIVISIONS BEFORE THE COURT OF LAW

Elena Emilia ȘTEFAN*

Abstract

The appropriate establishment of the local authority entitled to have the capacity of legal representative before the courts of law, when an administrative and territorial division is party to a case, raised many problems within the judicial practice. Not often, the motion to dismiss on grounds of lack of passive legal standing of the administrative and territorial divisions in the capacity of defendant in a dispute, was claimed or substantiated. This is why, this study aims to determine, in terms of the legislation in force, the local government authorities which are entitled to have the capacity of legal representative of the administrative and territorial divisions within a contentious administrative dispute. In order to emphasize the importance of the appropriate construction of the legal texts which regulate the subject in question, in the end of this study, we will expose a selection of case studies of the national case law.

Keywords*: Constitution, local government authorities, the motion to dismiss on grounds of lack of passive legal standing, contentious administrative, the Constitutional Court of Romania*.

1. Introduction

During the interwar period, the administrative law was the discipline which: „covered the activity of an authority. The state is a community situated on a territory consisting of governors and governed persons[1].” Along with the same lines, in what concerns the activity of the local government, deemed in the same time as an administrative authority, it was shown that it fulfills its duties by means of certain bodies consisting of natural persons or groups of natural persons, such as: ministers, prefects, police commissioners, county councils, town councils etc.[2]

The national legislation provides that the activity of the local government authorities is based on a series of principles of which the lawfulness principle is distinguished as being the base of the organization of state activity in general[3]. While in the field of private law, concepts such as economic freedom, competition[4], the principle of mutual consent, etc prevail, these concepts are unknown for the public law. Principles such as local autonomy, decentralization, public services

* Lecturer PhD, Faculty of Law, “Nicolae Titulescu” University of Bucharest (email: stefanelena@gmail.com).

[1] Paul Negulescu, *Tratat de drept administrativ.Principii generale*, vol.I, ed. IV, Marvan Publishing House, Bucharest, 1934, p.38.

[2] Anibal Teodorescu, *Tratat de drept administrativ*, vol.I, ed. V, Institutul de Arte Grafice Eminescu S.A., Bucharest, 1929, p.150.

[3] For a broad analysis of lawfulness principle, see Elena Anghel, *The lawfulness principle*, in CKS-eBook 2010, vol. I, Pro Universitaria Publishing House, Bucharest, ISSN 2068-779.

[4] See Laura Lazăr, *Abuzul de poziție dominantă. Evoluții și perspective în dreptul european și național al concurenței*, C.H.Beck Publishing House, Bucharest, 2013, 272 p.

deconcentration, etc. are specific to local government.

The principle of local autonomy established by art. 120 par. (1) of the Constitution, does not entail total independence and exclusive competence of the public authorities within administrative and territorial divisions, but they are bound to obey the legal regulations valid throughout the territory of the country, the legal provisions adopted in order to protect national interests[5]. The Constitutional Court of Romania states that, in its case law, the local government authorities whereby the local autonomy is fulfilled are the local councils and the mayors appointed within communes and towns, as well as and the county council[6].

Therefore, the European Charter of local autonomy itself, adopted in Strasbourg on October 15th, 1985 according to art. 3 item 1, refers to the internal legal framework, by means of the regulation of the local autonomy concept: "the right and effective capacity of local government authorities to settle and manage, within the law, in own behalf and in the interest of local population, an important part of public affairs"[7] Taking into account that art. 4 par. (2) of the Treaty on the European Union[8], provides that „The European Union observes (…) their national identity inherent to their fundamental, political and constitutional structures, including in what concerns local and regional autonomy". In a conference which remained memorable within the legal field, held at the Institute of Administrative Sciences on January 31st, 1926, Constantin Argetoianu, concluded the following, in the applause of the public: "the issue of decentralization is today, the same as yesterday, a problem to be solved in our country"[9].

The powers provided by the law in force for the public authorities within the administrative and territorial divisions include the powers of representation of their interests before the courts of law, according to Law no. 554/2004 of the contentious administrative[10]. In what concerns the legal proceedings within the contentious administrative, we hereby state that they are supplemented, according to art. 28, by the provisions of the Civil Code and the Code of civil procedure, up to the extent they are not inconsistent with the specificity of power relations between public authorities, on the one side and the persons aggrieved in their legitimate rights or interests, on the other side.

2. Content

2.1. The concepts of administrative and territorial divisions and local public authorities

The legal ground of the representation before the courts of law of the administrative and territorial decisions is the following: the

[5] The Constitutional Court of Romania, Decision no. 1162/2010, published in Official Journal no.747/2010.

[6] The Constitutional Court of Romania, Decision no. 822/2008, published in Official Journal no.593/2008.

[7] The Constitutional Court of Romania, Decision no. 566/2004, published in Official Journal no.155/2004.

[8] For details on the Treaty on the European Union, see Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, pag. 62-63.

[9] Constantin Argetoianu**,** *Administrative decentralization and regionalism*, Conference held at the Institute of Administrative Sciences on January 31st, 1926, published in Revista de Drept Public no. 2/1995, pp.99-111.

[10] Law no. 554/2004 of the contentious administrative, published in Official Journal no. 1154/2004 (latest amendment by Law no. 138/2014 on the amendment and supplementation of Law no. 134/2010 on the Code of civil procedure, as well as for the amendment and supplementation of related regulatory instruments, published in Official Journal no.753/2014).

Constitution of Romania and Law no. 215/2001 on the local government[11].

First of all, it is necessary to define the meaning of administrative and territorial divisions, according to the legislation in force and then to analyze the local government authorities which are entitled to represent before the courts of law the legal interests of the administrative and territorial divisions. The Constitutional Court of Romania considered that the administrative organization of the territory means its delimitation, according to economic, social, cultural, environmental, population etc. criteria, in administrative and territorial divisions, for the purpose of the organization and operation of the local government under the decentralization, local autonomy and public services decentralization principles, and under the eligibility principle of the local government authorities[12].

As we know, according to the Constitution of Romania, there are provisions on the administrative and territorial divisions and on the local government authorities in various articles, as follows:

- Art. 3 par. 3: „the territory is organized administratively into communes, towns and counties. According to the provisions of the law, certain towns are declared municipalities".
- Art. 120 par 1: "the local government within the administrative and territorial divisions shall be based on the principles of decentralization, local autonomy and public services deconcentration".
- Art. 121 par.1: "the local government authorities by which the local autonomy in communes and towns is fulfilled, are local councils and mayors designated according to the law".
- Art.122 par.1: "the county council is the local government authority coordinating the activity of commune and town councils, with a view to carry out the public services of county interest".
- Art. 123 par. 4: "there are no subordination relationships between prefects, on the one side, local councils and mayors, as well as county councils and their chairmen, on the other side".

Law no. 215/2001 on local governments provides on the subject approached by us on various articles, of which we hereby mention the following:

- Art. 1 alin.2 letter d): "deliberative authorities – local council, county council, General Council of Bucharest, local councils of administrative and territorial subdivisions of municipalities".
- Art. 1 par. 2 letter e): "executive authorities: mayors of communes, towns, municipalities, administrative subdivisions of municipalities, general mayor of Bucharest, the chairman of the county council".
- Art. 20 par. 1: "communes, towns, municipalities are the administrative and territorial divisions the local autonomy is exercised in and where the local government authorities are organized and function".

[11] Law no.215/2001 on local public government published in Official Journal no.204/2001 with latest amendment by law no. 265/2015 for the approval of Government Emergency Ordinance no.68/2014 for the amendment and supplementation of certain regulatory instruments

[12] The Constitutional Court of Romania, Decision no. 1177/2007, published in Official Journal no.871/2007, mentioned by Toader Tudorel, *Constituția României reflectată în jurisprudența constituțională,* Hamangiu Publishing House, Bucharest, 2011, p. 246.

Compared to the revised constitutional text, Law no. 286/2006 which brought essential amendments and supplementations to Law on the local government by leading to its republishing, identifies an executive authority within the level of county government, in the person of the chairman of the county council referred to in art. 1 par. 2 letter e) dedicated to the definition of certain terms and phrases (together with the mayors of communes, towns, municipalities and administrative and territorial subdivisions and with the general mayor of Bucharest), as executive authority[13].

2.2. The representation of the administrative and territorial divisions before the courts of law

Therefore, according to the legislation in force, the local deliberative authorities of Romania are the following: local council, county council, General Council of Bucharest, local councils of administrative and territorial subdivisions of municipalities, while the executive authorities are the following: mayors of communes, towns, municipalities, administrative subdivisions of municipalities, general mayor of Bucharest, chairman of the county council.

The question that arises is the following: in case of a dispute submitted for settlement to the contentious administrative court, which is the representative of the administrative and territorial division before the courts of law, the local deliberative authorities or the local executive authorities?

The answer to this question is simple. Law no. 215/2001 of the local government is the one providing the answer in art. 21 par. (2): the administrative and territorial divisions are represented before the courts of law by the mayor or by the chairman of the county council, as the case may be. According to the doctrine, this provision establishes the correlative right and obligation of the mayor (in case of communes, towns and municipalities) and respectively, of the chairman of the county council (in case of county), to represent before the courts of law the administrative and territorial divisions, in any circumstance, in relation to the place where the legal text is situated, in chapter called "*General provisions*".[14]

Furthermore, an interesting provision is the indication according to which in order for the protection of the interests of the administrative and territorial divisions, the mayor, respectively the chairman of the county council, represents the administrative and territorial divisions before the courts of law in the capacity of legal representative and not on own behalf (art. 21 par. 2^1).

According to an author, such an explanation was not necessary because the fact that the two authorities do not represent themselves before the court of law, bur the administrative and territorial division, was inhered from the provisions of par.(2)[15]. The quoted author states that this matter is reinforced by the provisions of par.(3), which provide the right of the mayor, respectively of the chairman of county council to authorize a long term higher legal education person within the specialized body of the mayor, respectively of the county council, or a lawyer, to represent the interests of the administrative and territorial division, and of the local government authorities before the courts of law[16].

[13] Dana Apostol Tofan, *Unele considerații privind reprezentarea unităților administrativ-teritoriale în justiție*, în Curierul Judiciar no.11/2010, Bucharest, p. 635.

[14] Idem, p. 637.

[15] Mihai Cristian Apostolache, *Primarul în România și Uniunea Europeană*, Universul Juridic Publishing House, Bucharest, 2015, p. 69.

[16] Idem, pp.69-70.

In what concerns the meaning of the concepts of capacity to be a party to legal proceedings and of legal standing, it should be noted that each concept has a different meaning. According to the Code of Civil procedure, there are two types of capacity to be a party to legal proceedings: use and exercise capacity. Therefore, as an author stated, the capacity to be a party to legal proceedings is the reflection on the procedural plan of the of the civil capacity of the material civil law, defined as that part of legal capacity of the person consisting of the capacity to have and exercise civil rights and to have and to undertake civil obligations, by concluding legal instruments[17]. According to art. 36 of the Code of civil procedure, the legal standing emerges from the identity between the parties and the subjects of the legal dispute, as it is submitted to the court of law.[18] The doctrine stated that the legal standing is the title which grants to a person the power to bring before the court of law the right of which sanction is required[19]. The quoted author showed that it is the procedural rendering of the capacity of holder of the right under which a person files a court action.

We should not fail to take into account the provisions of art. 123 par. 6) of the Constitution which expressly state that the prefect may appeal before the contentious administrative court, an act of the county and local council or of the mayor, if the act is deemed illegal[20]. This right of the prefect is called public guardianship. The institution of the public guardianship is established within the constitutional level in art. 123 par. (5) of the Fundamental Law. It is inconceivable in a state subject to the rule of law that an illegal act of a local authority cannot be appealed before the court of law by the prefect, as the Government representative, taking into account the fundamental mission of the Government to ensure the applications of the laws[21].

Law no. 215/2001 on the local government provides that the administrative and territorial divisions are legal entities of public law, with full legal capacity and patrimony. These are legal subjects of fiscal law, holders of the sole registration code and of the accounts opened with treasury and banking units.

The Constitutional Court of Romania, by means of Decision no. 356/2002 established that the mayor has the capacity to represent the administrative and territorial divisions before the court of law only in relations with third parties and not with the local council which, as in case of the mayor, is a body of the administrative and territorial division and has the same legitimacy as the mayor[22].

According to the Code of civil procedure, the conditions for the filing of a civil action are the following: any petition can be filed and supported if the person filing it has the capacity to be a party to legal proceedings, has the legal standing, raises a claim and substantiates an interest. Legal liability is involved in ensuring lawfulness,

[17] Oliviu Puie, *Contractele administrative în contextul noului Cod civil și al noului Cod de procedură civilă*, Universul Juridic Publishing House, Bucharest, 2014, p. 59.

[18] Law no. 134/2010 on the Code of civil procedure, republished in Official Journal no. 247/2015 (with the last amendment by Government Emergency Ordinance no. 1/2016 for the amendment of Law no. 134/2010 on the Code of civil procedure, and of related regulatory instruments, published in Official Journal no. 85/2016).

[19] Idem.

[20] In what concerns the parties to disputes submitted for settlement to contentious administrative courts, see Marta Claudia Cliza, *Drept administrativ, Part II*, Universul Juridic Publishing House, Bucharest, 2012, pp.109-115.

[21] The Constitutional Court of Romania, Decision no. 314/2005, published in Official journal no.694/2005.

[22] The Constitutional Court of Romania, Decision no. 66/2004, published in Official Journal no.235/2004.

as the mere approval of sanction measures would not be effective if their application did not pursue the restoration of the rights established by the law[23].

2.3. Case studies

In a case, the High Court of Cassation and Justice noted that the arguments of the appellant and of intervener commune Becicherecu Mic on the existence of a typing mistake and on the impossibility to remedy it on the merits, are unsubstantiated[24]. The High Court of Cassation and Justice showed that the Court of Appeal correctly noted that art. 19 of Local government law provides that towns, communes and counties are legal entities of public law and that they have patrimony and legal capacity, and that the real estate in question is the property of commune Becicherecu Mic. In this case, the signature of the mayor on the statement of claim is obviously biding on the administrative and territorial division which is the holder of the real estate contemplated by the dispute, respectively commune Becicherecu Mic, a fact which was not challenged by either party and which was noted in the recitals of the ruling under appeal.

Last but not least, we state that by means of Decision no. 12/2015 of the Panel for the settlement of law matters, the High Court of Cassation and Justice recently established that, under law no. 215/2001 of the local government (...) and of law no. 554/2004 of the contentious administrative (...), the administrative and territorial division, by means of its executive authority, namely the mayor, is not entitled to appeal before the contentious administrative court the resolutions adopted by its deliberative authority, respectively the local council, or the General Council of Bucharest, as the case may be[25].

In another case, the court held that the local public authorities have passive legal standing in case of a legal action on an element of the service report of a public officer within the local government body, as the commune, as a legal entity and therefore, a collective subject of law, can only undertake and fulfill obligations by means of its authorities which the law-maker vested with a certain competence[26].

As the concession right on the goods which are public and private property of the commune belongs, according to art. 36 par.(5) letter a) and b) exclusively to the local council, the mayor is not entitled, neither on own behalf, nor in the capacity of representative, to challenge the lawfulness of such a resolution, the decision to grant concession adopted by the local council being the decision of the administrative and territorial division, according to another case.[27]

3. Conclusions

As the title of this study anticipated, we analyzed an extensive bibliography in

[23] Elena Anghel, *The responsibility principle*, in Proceedings of the Challenges of the Knowledge Society Conference (CKS) no. 5/2015, pag. 364-370.

[24] The High Court of Cassation and Justice, division of contentious administrative and fiscal, decision no. 2298 of May 3rd, 2007, not published, *apud* Gabriela Bogasiu, *Legea contenciosului administrativ comentată şi adnotată*, edition III, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2015, p.34-35.

[25] The High Court and Cassation and Justice, the Panel for the settlement of legal matters, decision no. 12 of May 25th, 2015, published in Official Journal no. 773/2015, Dana Apostol Tofan, *Drept administrativ*, vol. II, edition 3, C.H.Beck Publishing House, Bucharest, 2015, p.206.

[26] Craiova Court of Appeal, division of contentious administrative and fiscal, decision no. 898 of September 20th, 2005 in Culegere de practică judiciară 2005, Lumina Lex Publishing House, Bucharest, 2006, p.27-30

[27] Suceava Court of Appeal, division of contentious administrative and fiscal, decision no. 311 of February 26th, 2010, apud G Bogasiu, *op.cit.*, p. 36.

order to identify which authority is entitled to represent the interests of the administrative and territorial divisions of Romania before the courts of law. According to the legislation, doctrine and case law, the administrative and territorial divisions are represented before the court of law, by the mayor or by the chairman of the county council, as the case may be. We exposed in the conclusions of the study, a selection of case studies which were meant to reinforce the conclusions we reached during the draw up of this study.

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UNITY IN DIVERSITY. THE EUROPEAN UNION'S MULTILINGUALISM

Laura-Cristiana SPĂTARU-NEGURĂ*

Abstract

It is undeniable that the European Union represents the most ambitious legal and linguistic project, integrating 28 Member States and 24 official languages.

What we undertook with this study was to explore the importance of multilingualism in the European Union and the problems that unity in diversity involves. This study tried to touch upon both theoretical aspects (i.e., what the multilingualism of EU law implies) and practical issues (i.e., the interaction between legal languages at national and at EU level, problems emerging from multilingualism, illustrated by the relevant case law of the European Court of Justice).

In many ECJ cases, it was underlined that multilingualism is essential to the EU legal order. The meaning of EU law cannot be derived from one version of the official languages and the ECJ regularly heads for a uniform interpretation of the contradictory versions.

The present study is part of a more complex research on this theme and it is meant to approach certain important points of my PhD thesis. A first part of this research on multilingualism has already been published.

Keywords: *European Union, diversity, unity, multilingualism, languages.*

1. Introduction

1.1. About law and language

Language is the core of national or minority group identity.

The linguistic diversity is a *specific value* of the EU which should be protected. Contrary to the provisions of Treaty establishing the European Coal and Steel Community (authentic in French only) the European Union (and the European Community first) has always been based on the principle that at least one official language of each Member State[1] should become an official language of the Union.

As for the provision of Article 314 of the Treaty establishing the European Community, the treaty was drawn up in a single original in four texts equally authentic (*i.e.*, Dutch, French, German and Italian languages). This Article has been amended by the Accession Treaties upon each entry into the Community/Union of new Member States.[2] As from the 1st of July 2013, the European Union has 28 Member States, the last Member State entering the European family being Croatia. Almost every Member

* Assistant Lecturer, PhD., Law Faculty, "Nicolae Titulescu" University of Bucharest, Romania, (e-mail: negura_laura@yahoo.com).

[1] There are multilingual legislative systems in the EU: *Belgium* (French, Dutch and German) and *Malta* (Maltese and English). Other multilingual legislative systems in the world: Canada and Switzerland.

[2] In 1973, English, Irish and Danish, in 1981 Greek, in 1986 Spanish and Portuguese, in 1995 Finnish and Swedish, in 2004 Czech, Estonian, Hungarian, Lithuanian, Latvian, Maltese, Polish, Slovenian and Slovak, in 2007 Romanian and Bulgarian, in 2013 Croatian became official languages in the EU.

State has its own official language, *in the EU being recognized 24 languages* per total.[3] Moreover, "depending on how languages are defined and what inclusion criteria are used, more than 100 regional and minority languages are spoken in Europe".[4] However, despite *the struggle* of Europeans to keep their linguistic diversity, we notice that the number of languages spoken in Europe has certainly dropped: "[m]any languages have disappeared, and some European states gave even managed to impose an almost perfect linguistic unity on their territory: English in the UK, German in Germany, French in France or Italian in Italy. Some states even share the same official language".[5]

Like in the past years, we still wonder why EU does not agree on a common language.

Linguistic diversity is part of cultural diversity, which is one of the fundamental values of the EU.

The relation between law and language is very clear. As one author points out very precisely "[l]aw is a highly institutionalized communicative order regulating and giving a special meaning to social action by means of norms expressed in natural language, sometimes using technical terms, as opposed to artificial language with formalized and logical syntax and technical terms and symbols".[6]

Languages are bridges between people. Their diversity means richness and difference. *Law cannot exist without language*, since legal concepts cannot be embodied in any way other than by using linguistic signs; therefore, a legal norm and its linguistic expression are inseparable.

Moreover, "people live together, not just coexist",[7] as it is emphasized in the legal doctrine.

Nowadays, we are discussing about an interdisciplinary field on law and language, called *legal linguistics*. This domain covers "a number of different areas including the development, characteristics, and usage of legal language, comprehensibility of legal texts, language for specific purposes (law), legal translation and interpreting, legal terminology and lexicography, analysis of legal discourse, legal style, semiotics of law, language in the courtroom, forensic linguistics as evidence, and various issues related to language policy and planning, and linguistic human rights".[8]

2. Content

2.1. The EU Multilingualism

From the beginning, we want to emphasize that Europe is different from other continents including by the language

[3] However, it must be emphasized that until 2007 Irish was an authentic language of the Treaties but was not included among the official and working languages of the EU. Irish became, with the accession of Ireland, an authentic language of the Treaties but it did not acquire the status of an official language under Regulation No. 1 until 2007 when the regime was extended to Irish with some limitations.

[4] *Anne Lise Kjaer and Silvia Adamo*, "Linguistic Diversity and European Democracy: Introduction and Overview" in Linguistic Diversity and European Democracy: Introduction and Overview, *Anne Lise Kjaer and Silvia Adamo (eds.)* (Ashgate, 2011), 4 (footnote omitted).

[5] *Magali Gravier and Lita Lundquist*, "Getting Ready for a New Tower of Babel" in Linguistic Diversity and European Democracy: Introduction and Overview, *Anne Lise Kjaer and Silvia Adamo (eds.)* (Ashgate, 2011), 75.

[6] *Joxerramon Bengoetxea*, "Multilingual and Multicultural Legal Reasoning: The European Court of Justice" in in Linguistic Diversity and European Democracy: Introduction and Overview, *Anne Lise Kjaer and Silvia Adamo (eds.)* (Ashgate, 2011), 98.

[7] *Anghel Elena*, Values and Valorization (in Proceedings of the Challenges of the Knowledge Society Conference, ISSN 2359-9227, 2015) accessed March 28th, 2016 http://cks.univnt.ro/cks_2015_archive.html, 357-358.

[8] *Lelija Socanac; Christopher Goddard; Ludger Kremer (eds.)*, "Curriculum, Multilingualism and the Law", Nakladnizavod Globus, (Zagreb, 2009), 9.

factor in the configuration of state boundaries. As one author points out: "[a] quick glance at the political map of the continent makes this quite clear. With very few exceptions, European states' official denominations offer us a direct reference to a state's official language, be it Greek in Greece, Polish in Poland, Danish in Denmark or French in France. This is not the case in the Americas, for instance, where languages such as «Canadian», «Mexican», «Bolivian» or «Brazilian» simply do not exist. […] The idea of the national language is a European idea".[9]

Since the 1950s when the founders of the European Communities (France, Germany, Italy and the Benelux countries) started the project of unification, an important role in the official discourse was given to diversity. It was underlined that the establishment of a common market should not be the sole goal of the unification, but also the cultural diversity. Regarding this concern, it is remarkable what Jacques Delors stated in the 1990s: "you don't fall in love with a common market: you need something else". Moreover, in the documents following the Maastricht Treaty, diversity was mentioned. "The highlighting of diversity may well be considered as the genuinely new element of the European Union's incipient «constitutional» discourse, an element that set the EU apart from the historical precedents of nation-state construction".[10] Delors' "something else" could have been the Treaty establishing a Constitution for Europe.

Afterwards, as stated by the Treaty on the Functioning of the European Union, the multilingualism of the EU reflects its commitment to respecting and promoting its cultural and linguistic diversity. Even in the Treaty of Lisbon, diversity is acknowledged:

It [the Union] shall promote economic, social and territorial cohesion, and solidarity among Member States.

The Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.[11]

The multilingualism is one key characteristic of EU law – "if not *the* key manifestation – of cultural diversity in Europe today".[12] It is an "indispensable component of the effective operation of the rule of law in the Community legal order".[13]

Why recognizing equal official status to all languages? We consider that this was the solution found by the European legal architects to "immunizing the European institutions against the nationalist setbacks they anticipated in case some Member States felt symbolically discriminated against because of the preferential treatment given to the languages of others".[14]

Multilingualism can be *strong* (all official language versions are equally authentic) or *weak* (one language version is authentic, while the others are official translations). In the history of the European construction, we can find both strong and weak multilingualism. For example, the EU adopted the strong multingualism, because all language versions of an act are authentic, while the European Coal and Steel Treaty

[9] *Peter Kraus*, "Neither United nor Diverse? The Language Issue and Political Legitimation in the European Union" in Linguistic Diversity and European Democracy: Introduction and Overview, *Anne Lise Kjaer and Silvia Adamo (eds.)* (Ashgate, 2011), 19.

[10] *Idem*, 23.

[11] *Kraus*, "Neither United nor Diverse?", 26.

[12] *Idem*, p. 27.

[13] *Bengoetxea*, "Multilingual and Multicultural Legal Reasoning", 100.

[14] *Kraus*, "Neither United nor Diverse", 23 (footnote ommited).

adopted the weak multilingualism, because the French version was considered to be authentic. An example of today's weak multilingualism would be the case law of the ECJ, because the authentic version is the language-of-the-case version.

As stated in our last year's study[15], from the doctrine and from the ECJ case law, we notice that by adopting the strong multilingualism, the EU faces many problems, leading to contradictions or variations between the language versions of EU acts.

Some authors point out that "embracing weak multilingualism instead of the strong variety would solve some of the EU's multilingualism problems without creating new ones (purely political problems apart), and without squandering any of the opportunities multilingualism may offer in the EU context".[16] The solution for such problems would consist in looking to the single authentic version.

There are however *benefits* of the multilingualism. For instance, translation could lead to a better and clearer version of the original,[17] because by translating the implied assumptions made in the original version may be identified.

Strong multilingualism has the advantage to offer the same rights from a Member State to another Member State, because all European citizens have the right to discover the EU law in their own language.

At an analysis of the EU's language regime, we notice that there is an *external and internal side* of the regime. On one hand, the *external side* concerns the communications between the EU to the Member States and their citizens (*output – e.g.* publication of legal texts in the Official Journal in order to be read by the citizens) or the relation between the Member States and their citizens to the EU (*input – e.g.* the language rules for Court proceedings involving citizens and EU institutions). It concerns the accessibility of the EU legal acts. The external side is governed by the equality of Member State languages, reason for why the majority of EU texts are being published in the 24 EU official languages.[18] On the other hand, the *internal side* concerns the internal procedures (*e.g.* judicial, administrative, governmental and parliamentary proceedings). As one author pointed out, "[w]hile the external side concerns at least in part questions of the rule of law – which requires *e.g.* access to the courts and the publication of a law to guarantee its accessibility — the internal side deals mainly with questions of the internal procedures of a government, or a court, and therefore mainly with questions of good governance".[19]

We must emphasize that the internal side of the EU language regime is "less visible" than the external side. It is interesting to see that "the more an internal procedure of an institution, or an inter-institutional procedure, involves elected or

[15] *Laura-Cristiana Spătaru-Negură*, Reconciliation of Language Versions with Diverging Meanings in the European Union (in Proceedings of the Challenges of the Knowledge Society Conference, ISSN 2359-9227, 2015) accessed March 28th, 2016 http://cks.univnt.ro/cks_2015_archive.html, 502.

[16] *Theodor Schilling*, "Multilingualism and Multijuralism: Assets of EU Legislation and Adjudication?" German Law Journal (vol. 12, no. 07, 2011), 1463.

[17] *Gerard Caussignac*, "EmpirischeAspekte der zweiprachigenRedaktionvomRechtserlassen" in RechtssprachеEuropas. Reflexion der Praxis von Sprache und MehrsprachigkeitimSupranationalenRecht, *Friedrich Muller and Isolde Burr (eds.)* (2004).

[18] Of course, new official languages may be, and usually are, added with each enlargement of the EU.

[19] *Schilling*, "Multilingualism and Multijuralism", 1469 (footnote omitted).

appointed politicians as opposed to civil servants or experts, the more the respective language regime tends to respect the criterion of the equality of Member State languages".[20] We agree with the author's opinion because the national politicians working at the Council or at the European Parliament "are not selected according to their linguistic abilities"[21], while the EU public functionaries have to know two official languages in addition to their mother tongue. There is, however, an exception – for the ECJ judges, Member States are encouraged to select and appoint judges with advanced French skills. This selection may discriminate the most prepared candidates for the job.

The paradox expressed in the EU motto "united in diversity" affects also the EU legal regime, the legislation being translated into 24 official languages. All the official languages have equal authenticity. We consider that "in stressing the equal value of the different linguistic versions of the Community acts, the Court [the European Court of Justice] discounted legal argument brought by some States, aimed at supporting the greater value of the different linguistic versions, based, for example, on the corresponding percentage of population in the Community; the Court will not allow the interpretative value of an official version to vary in proportion to the number of individuals of member States where certain languages are spoken".[22]

In the doctrine it is underlined that even if EU law is not a case law "the interpretation and application of EU law in accordance with the Treaties are possible only through the jurisprudence of the European Court of Justice".[23] As stated by the Court in the *EMU Tabac* case[24],"all the language versions must, in principle, be recognised as having the same weight and this cannot vary according to the size of the population of the Member States using the language in question".

In many ECJ cases, it was underlined that multilingualism is essential to the EU legal order. For instance, in the case *Kik v. OHIM*, it was said that:

> *Multilingualism is an indispensable component of the effective operation of the rule of law in the Community legal order, since many rules of primary and secondary law have direct application in the national legal systems of the Member States.*[25]

Another example can be discovered in the *CILFIT* case, where the Court stated:

> *It must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally*

[20] *Schilling*, "Multilingualism and Multijuralism", 1470.

[21] *Ibidem.*

[22] *Fabrizio Vismara*, "The Role of the Court of Justice of the European Communitities in the Interpretation of Multilingual Texts" in Multilingualism and the Harmonisation of European Law, *Barbara Pozzo and Valentina Jacometti*, (Kluwer Law International, 2006), 66. See also judgment in Case C-296/95 *The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham* [1998] ECR 1605, and Case 9/79 *Marianne Wörsdorfer, née Koschniske, v Raad van Arbeid* [1979], ECR 2717. In these cases, the Court held that in case of doubt, the text of the legal norms should not be considered in isolation, but it should be interpreted and applied in the light of other texts drawn up in the other official languages.

[23] *Roxana-Mariana Popescu*, Features of the Unwritten Sources of European Union Law (in Proceedings of the Challenges of the Knowledge Society Conference, ISSN 2359-9227, 2013) accessed March 28th, 2016 http://cks.univnt.ro/cks_2013_archive.html, 640.

[24] Case C-296/95 *The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham* [1998] ECR 1605, par. 36.

[25] Judgment of the Court in Case C-361/01 P *Christina Kik v. Office for Harmonisation in the Internal Market* [2003] ECR I-8283.

authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.[26]

The meaning of EU law cannot be derived from one version of the official languages, therefore the languages are interdependent and "[h]ence EU citizens cannot purely rely on their own languages when they want to know what EU law says on a particular issue. In principle, EU citizens must know the law in each and every official language because the meaning of the law is anchored not in one single language version, but in all the language versions taken together".[27]

We have to keep in mind that "[l]aw must itself contain the equilibrium between the letter and spirit of rules".[28]

The differences between the languages are inevitable because they are not absolute copies one of each other. In this case, the EU multilingualism leads to "legal miscommunication, misinterpretation, incoherent and divergent texts and, ultimately, an obstacle to achieving what lies at the very core of the rule of law, namely legal certainty".[29]

But to what extent must language be regarded as *a barrier* to the development of a uniform European law?

3.Conclusions

What we undertook with this study was to explore the importance of multilingualism in the European Union and the problems that *unity in diversity* involves.

It appears that the meaning of EU law cannot be derived from one version of the official languages, therefore the languages are interdependent and "[h]ence EU citizens cannot purely rely on their own languages when they want to know what EU law says on a particular issue. In principle, EU citizens must know the law in each and every official language because the meaning of the law is anchored not in one single language version, but in all the language versions taken together"[30].

The differences between the languages are inevitable because they are not absolute copies one of each other; therefore, the EU multilingualism leads to "legal miscommunication, misinterpretation, incoherent and divergent texts and, ultimately, an obstacle to achieving what lies at the very core of the rule of law, namely legal certainty".[31]

This study tried to touch upon both theoretical aspects (*i.e.*, what the multilingualism of EU law implies) and practical issues (*i.e.*, the interaction between legal languages at national and at EU level, problems emerging from multilingualism, illustrated by the relevant case law of the European Court of Justice).

Of course that the meaning of EU law cannot be derived from one version of the official languages, therefore the languages are interdependent and "[h]ence EU citizens cannot purely rely on their own languages when they want to know what EU law says on a particular issue. In principle, EU citizens must know the law in each and every

[26] Judgment of the Court in Case C-283/81, *Srl CILFIT and Lanifacio di GavardoSpA v. Ministry of Health* [1982] ECR 3415, par. 18.

[27] *Kjaer and Adamo*, "Linguistic Diversity and European Democracy", 7.

[28] *Anghel Elena*, The Importance of Principles in the Present Context of Law Recodifying (in Proceedings of the Challenges of the Knowledge Society Conference, ISSN 2359-9227, 2012) accessed March 28th, 2016 http://cks.univnt.ro/cks_2012_archive.html, 756.

[29] *Kjaer and Adamo*, "Linguistic Diversity and European Democracy", 7.

[30] *Kjaer and Adamo*, "Linguistic Diversity and European Democracy", 7.

[31] *Ibidem*.

official language because the meaning of the law is anchored not in one single language version, but in all the language versions taken together"[32].

As stated by the European Commission, "[t]he responsibility of the European legislator for adequate linguistic and terminological choices is the more underlined by the fact that, with regard to undefined or unclear concepts or diverging linguistic versions of an act, it is ultimately the European Court of Justice to decide on the EU meaning of the concept or to conciliate between diverging language versions. The jurisprudence of the Court is quite clear on this point and its approach prefers a systematic and teleological interpretation over a textual one".[33]

Of course that multilingual judicial reasoning means "more than mere comparison of language versions although it cannot possibly neglect or elude such comparison. It would involve deploying all linguistic techniques or skills and interpretation methods[34] to all language versions and being aware, when drafting the terms of its reasoning, of how such terms would be translated into the other official languages so that the message is clearly understood and, as the case might be, any possible ambiguity is properly preserved".[35]

However, the ECJ[36] "regularly heads for a uniform interpretation of the contradictory versions"[37], therefore the wording contained in the majority of the language versions should be accepted. But, if one of the language versions is due to a discernible typing error, the other versions are decisive.[38] We have to underline that "[t]his interpretation is not necessarily according to the (contradictory) wording of the provision in question but rather according to its meaning and purpose[39]".[40]

Upon our research, there are also *challenges* raised by multilingualism. One of them is the *use of foreign origin words*, due to the origin of the original drafting language. It appears that the "EU translators often seem to be more purist than draftspersons or writers within the national administration".[41] Consistency should be the key, because using two different equivalents can lead to inconsistencies where the context of their use is not defined (e.g. the Dutch national equivalent of the term *conformity – overeenstemming* - disappeared in the course of time in favour of the term *conformiteit* which took its place in legal texts.).

[32] *Kjaer and Adamo*, "Linguistic Diversity and European Democracy", 7.

[33] EUROPEAN COMMISSION, Directorate-General for Translation, *Studies on translation and multilingualism.Lawmaking in the EU multilingual environment*, 1/2010, 153.

[34] For more information on the ECJ's interpretation methods, please see and *Augustin Fuerea*, Manualul Uniunii Europene, 5th edition revised and enlarged, after the Lisbon Treaty (*Bucharest: Universul Juridic Publishing House, 2011*), 175.

[35] *Bengoetxea*, "Multilingual and Multicultural Legal Reasoning", 115.

[36] For more information on the ECJ's case law as a source of EU law, please see *Roxana-Mariana Popescu*, Introducere în dreptul Uniunii Europene, (*Bucharest: Universul Juridic Publishing House, 2011*), 96.

[37] *Schilling*, "Multilingualism and Multijuralism", 1487 (footnote omitted).

[38] Case C-64/95 *KonservenfabrikLubella v. Hauptzollamt Cottbus* [1996] ECR I-5105, para. 18.

[39] *E.g.* Case 100/84 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1985] ECR 1169, para. 17.

[40] *Schilling*, "Multilingualism and Multijuralism", 1488.

[41] For example, within the Austrian and German administration, the terms *Monitoring, Governance, Follow-up* and *Implementierung*are more frequently used than the terms *Überwachung, Staatsführung, Folgemassnahmen*and *Umsetzung*subsequently used by German translators at EU institutions for the same concepts. EUROPEAN COMMISSION, Directorate-General for Translation, *Studies on translation and multilingualism.Lawmaking in the EU multilingual environment*, 1/2010, p. 84.

Another challenge is the *impact of the original language* as a source language on the official languages in the translation phase.[42] However, nowadays, we notice that English is the preponderant drafting language at the Commission who influences the former drafting language, French. Of course that French influenced also English in the past, because English became official in 1973, therefore the vocabulary was established mainly on French texts. It is relevant what Simone Glanert underlines about using English as a working language "[i]n practice, the recourse to English as a working language compels most of the participants in the various task forces to operate in a foreign tongue and thus to relinquish their native language. In effect, each lawyer is expected to explain her national law to all the other members of her working group. Given the multiplicity of languages around the table, this account, in the name of efficient communication, can only take place in a common working language, that is, in English. Concretely, the Italian lawyer, for example, in order to elucidate the present state of Italian law with respect to a particular legal problem, must therefore translate the Italian legal rules and principles into the common working language. In the same way, her German colleague, who wants to describe the German point of view with regard to a specific question, is constrained to express the German legal ideas in the English language. Once the different national legal solutions have been translated into the working language, further discussions will generally take place in English".[43]

Another difficulty appears from this challenge when English uses two terms with *similar meanings* and other languages do not have two equivalents but only one for both terms and they create an artificial new term to be able to distinguish between them.[44] Another difficulty that appears is the *syntactic and stylistic impact* (e.g. different punctuation rules in English that overrule the orthography rules of national languages, abusive use of passive voice, excessive use of some words – *shall, will, should*). Moreover, some languages have problems adapting to the wide usage of figurative phrases and metaphors, which are not common to the national official texts which are more neutral (e.g. the Latvian legal system – the translators literally translated the EU legal texts, fact which created many problems because of the concepts like: *sunset clause, carbon footprint, open sky, predatory pricing behaviour*).

Another difficulty is the lack of clarity in the source language version, which can drive to opposite results: inconsistencies in the translations or better quality of the translations.

We consider that in order to solve these conflicts resulted from translations of the European acts, the national judges should read other language versions of the EU acts than their own, not just when the national version is very absurd.

[42] New disciplines are used in their 'internationalised' English form (*victimology*) and when they are translated, it is often a transliterated form (in Spanish *victimología,* in French and Romanian *victimologie,* in German *Viktimologie*) and seldom with an indigenous term (*iospairteolaíocht*in Irish). Additionally, some English terms linked to modern technologies, are still often used in their original form (*on-line, website, newsletter,* and *voucher).*

[43] *Simone Glanert*, Europe, "Aporetically: A Common Law Without A Common Discourse", Erasmus Law Review, vol. 5, no. 3/2012, accessed March 28th, 2016 http://connection.ebscohost.com/c/articles/85331719/europe-aporetically-common-law-without-common-discourse.

[44] For example, the Slovak language when translating *effective* (delivering the desired outcome) and *efficient* (using resources to best effect) using different terms. Despite the efforts made to translate them differently, the terms are used as synonyms.

Is the linguistic question in the European Union *the new legal Pandora's box*? After all, how deliberative democracy should function in polities that are made up of many linguistic groups and seem to forget the impact that linguistic diversity may have on political communication and mutual understanding across languages.[45]

Consideration must be given concerning the goal of bringing Europeans from a range of countries together, because this may affect the European citizens' right to speak their own language.

In the end, languages "are exclusive, and they exclude. Even if the possibility for speakers of a minority language to speak their own language should be protected, representing a fundamental constitutional right in democratic societies, supported at both national and European level, minorities would be culturally, socially and politically isolated if they were unable to speak the language of the majority. Therefore, one might conclude that language rights should be concerned not only with the protection of linguistic diversity and the right to speak one's own language, but also with the right to learn the language that enables one to be among those who exercise power, or, less ambitiously, to understand the linguistic code of those in power".[46]

Could we talk about the hypocrisy of the Member States concerning the language diversity? As some authors point out "[m]ost EU Member States seem to endorse the view that diversity is valuable only if they are in charge of that diversity, defining its meaning and limits. Thus, minority language rights are protected and diversity celebrated only with respect to languages with a long historical presence in Europe. The increasing and widespread presence of non-European immigrant languages is not protected by language laws".[47] Nowadays, English is the *de facto* language of the European Union, becoming "the dominant supranational language".[48]

But following and respecting the European motto is not just a question of good intentions, but it requires institutional ambition and consistency. "Needless to say, many nuances will have been lost throughout the different translation processes, but the question remains whether and when these nuances will be noticed and acted upon and whether the nuances are so grave as to lead to inconsistencies".[49]

Of course that we have to see that multilingualism is an advantage, a blessing of the EU and not an obstacle, a curse. We consider that, despite the various problems with the EU multilingualism described in this study, it is "quite unlikely that anything would change in legal terms in the foreseeable future".[50]

However, we consider that lawyers should research more in languages and legal interpretation. Interdisciplinary efforts could solve the multilingualism problems of the EU.

[45] *Kjaer and Adamo*, "Linguistic Diversity and European Democracy", 1.
[46] *Idem*, p. 9 (footnotes omitted).
[47] *Kjaer and Adamo*, "Linguistic Diversity and European Democracy", 10.
[48] *R. Phillipson*, "The EU and Languages: Diversity in What Unity?" in Linguistic Diversity and European Democracy: Introduction and Overview, *Anne Lise Kjaer and Silvia Adamo (eds.)* (Ashgate, 2011), 69.
[49] *Bengoetxea*, "Multilingual and Multicultural Legal Reasoning" in Linguistic Diversity and European Democracy: Introduction and Overview, *Anne Lise Kjaer and Silvia Adamo (eds.)* (Ashgate, 2011), 101.
[50] *M. Bobek*, "The Multilingualism of the European Union Law in the National Courts: Beyond the Textbooks" in Linguistic Diversity and European Democracy: Introduction and Overview, *Anne Lise Kjaer and Silvia Adamo (eds.)* (Ashgate, 2011), 141.

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- http://curia.europa.eu/juris/recherche.jsf?cid=220683.

SIGNIFICANT CONTRIBUTIONS OF THE GATT AND THE WORLD TRADE ORGANIZATION TO THE SETTLEMENT OF INTERNATIONAL ECONOMIC DISPUTES

Andrei GRIMBERG[*]

Abstract

This study examines the role of the degree of legal controversy with respect to a panel ruling in determining the countries' tendency to block/appeal a panel report. It shows that, under both the GATT and WTO regimes, there is an asymmetric advantage between the plaintiff and the defendant. The plaintiff's potential benefit of blocking/appealing an adverse panel ruling is smaller than the that of the defendant, but it bears the same cost structure as the latter. This disadvantage to the plaintiff is diminished under the WTO procedure compared to the GATT, though it is not completely eliminated. The study also shows that the level of legal controversy over panel rulings increases, in general, proportionate to the increase in the frequency at which panel reports are blocked under the GATT regime. However, the tendency to appeal a panel report under the new WTO procedure is, basically, higher than the tendency to block a panel report under the GATT, when such reviews in appeal were not available.

Keywords: *GATT, WTO, dispute settlement, mechanism, developing county, trade*

1. Introduction

Since its inception in 1947, the General Agreement on Tariffs and Trade (GATT) has evolved into a global framework of international trade laws, which is still in effect today under the World Trade Organization (WTO). The relative effectiveness of the GATT legal system has to a large extent depended on its dispute settlement mechanism.[1] This procedure allows member states to challenge other member countries' "questionable trade measures with reference to the GATT/WTO agreements." Hence, it has served as a mechanism of mutual surveillance and enforcement of the GATT/WTO.

A general problem that overshadowed the dispute procedure under the GATT regime was the common practice to require that all decisions be made by consensus.[2] The defending party objecting to the consensus could delay or block the procedure. Therefore, the most serious problem posed by this procedure is the potential of the defending country to block an adverse panel report. The practice established under the GATT is that "a panel of experts would be established to hear and rule on a dispute, if a bilateral agreement could not be reached between the disputing parties". However, because only the

[*] Assistant Lecturer, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: avocatgrimberg@yahoo.com).

[1] Layla Hughes, *Limiting the Jurisdiction of Dispute Settlement Panels – The Appellate Body Beef Hormone Decision* in "The Georgetown International Environmental Law Review", vol. 10, 1998, pp. 915-942.

[2] Jacques H. J. Bourgeois, *Comment on a WTO Permanent Panel Body*, in "Journal of International Economic Law", vol. 6, nr. 1, 2003, pp. 211-214.

"contracting parties" have the power to decide on a given matter, the panel report has to be adopted or approved by the contracting parties before its become binding. In the face of an adverse panel report, the defending party can therefore block the report and thus avoid implementing the recommendations made by the panel.

Although during 1950s-1970s, only one out of 41 panel rulings was blocked, the blocking problem became more obvious during the 1980s, when ten out of 47 panel reports were blocked.[3] Due, perhaps, the international diplomatic pressure or considerations regarding possible future disputes, some countries chose not to veto to a panel report, unless it was necessary indeed.

In 1995, the World Trade Organization (WTO) was established, replacing the GATT, and a new dispute settlement procedure was put in place under the WTO, which altered some of the features of the previous GATT mechanism.[4]

The most significant alteration was the removal of the consensus rule for panel adoption and hence the elimination of the blocking problem. The panel report on any dispute will be deemed automatically adopted. To protect the parties against errors that may occur at panel level, a new appellate procedure was created instead. In the case of appeal, the dispute will be referred to an appellate panel, whose judgment will be final and, certainly, adopted automatically, unless there is a consensus against adoption. In the first six years of operation of the new WTO, this new appellate procedure has been invoked at an enormous frequency: 78% of panel rulings were appealed.

Another issue, less explicit, about the dispute settlement mechanism under the GATT/WTO is the potential of a developed country to influence the dispute settlement procedure, if a dispute arises with respect to its relations with a developing county. During the dispute settlement process[5], this political consideration might also affect the ability of the parties to close a bilateral settlement and might also influence the developing country's decisions to move the procedure forward or to give up.

Depending on the degree of confidence in the effectiveness of the dispute settlement procedure under the GATT/WTO and the international acceptance of using the WTO procedure as a valid mechanism to solve trade conflicts, the developed countries might influence this system to a grater of lesser extent.

The data on settlement of dispute cases under the GATT regime during the 1950s-1980s vary in terms of the number of complaints filed and the procedural outcomes. One possible indication of the degree of political power's influencing the course of the peaceful settlement process is the proportion of cases withdrawn. In the 1950s, 53 trade disputes were brought under the GATT legal system, of which ten were withdrawn. In the 1960s, the system basically became void. The settlement procedure was invoked only seven times and no complaint was withdrawn. In the 1970s, the legal activities seemed to thrive again, with 32 new cases filed, of which 5 were

[3] Ernst-Ulrich Petersmann, Dispute Settlement in International Economic Law – Lessons for Strengthening International Dispute Settlement in Non-Economic Areas, in "Journal of International Economic Law", vol. 2, nr. 2, 1999, pp 189-248.

[4] Kara Leitner, Simon Lester, WTO Dispute Settlement 1995- 2002 – A Statistical Analysis, in Journal of International Economic Law, vol. 6, nr. 1, 2003, pp. 251-261.

[5] Gabrielle Marceau, Peter N. Pedersen, Is the WTO Open and Transparent? A Discussion of the Relationship of the WTO with Non- Governmental Organisations and Civil Society's Claims for More Transparency and Public Participation, in "Journal of World Trade", vol. 33, nr. 1, 1999, pp. 5-49.

withdrawn. This impetus continued to the 1980s, when we witnessed both an upsurge in the litigation settlement activities (115 complaints) and an increase in the number of withdrawn cases (40 cases).

The data above illustrate some interesting evolutions in the peaceful settlement mechanisms under the GATT/WTO regime, which might affect countries' interests and the political costs of using the system.

The goal of this paper is to develop a unified theoretical model to explain the facts observed in a stylized way across different decades of the GATT/WTO regimes.

The paper tries to answer some questions raised by the specialized literature, such as:

1. How can we explain the upsurge in the blocking incidence during the 1980s and what were the costs and benefits of the parties in dispute when they decided to block the adverse panel ruling?

2. Why has the new appellate procedure been invoked under the WTO at such a high rate and to what extent has the new appellate procedure altered the disputing parties' incentive structure to challenge a panel ruling?

3. Is there a systematic way in which we can explain the pattern of filing dispute settlement activity and of the withdrawal incidence over different decades of the GATT regime?

4. Can we, in theory, draw up a map of the characteristics the system has acquired during these decades in the form of an underlying variable that in turn will determine the pattern of the filing activity and the frequency of the various procedural outcomes?

Many studies on the GATT and WTO dispute settlement mechanisms have been conducted in the field of law and political science. However, there is only a short list of economics literature available at the moment, attempting to explain the way this international litigation procedure operates. Butler and Hauser (2000)[6] was the first theoretical paper to systematically investigate this mechanism from an economic outlook. However, they focused mainly on the new WTO dispute settlement procedure. As such, the incentives and interactions amongst countries in using the dispute procedure under the GATT regime were disregarded in this paper. Secondly, Butler and Hauser (2000) theoretical model maintained a complete information framework and, consequently, only cases with positive expected outcomes from panel proceedings were examined. With this structure, one cannot explain the withdrawn or abandoned cases that exist in the database.

Literature on this topic has seen an enormous progress in the economic analysis of "civil" legal disputes. A comprehensive analysis of this literature was made by Cooter and Rubinfeld (1989).[7] However, most of this literature assumes that the expected outcome from a trial is positive. This assumption effectively excludes the possibility that a plaintiff might drop the case after bringing a lawsuit, while also reducing quite drastically the strategic possibilities of the plaintiff.

The specialized literature includes a series of papers on the settlement decisions

[6] Monika Butler, Heinz Hauser, *The WTO Dispute Settlement System: A First Assessment from an Economic Perspective,* in "Journal of Law, Economics, & Organization", Oxford University Press, vol. 16, nr. 2, October 2000, pp. 503-533.

[7] Robert D. Cooter, Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, in "Journal of Economic Literature", vol. XXVII, September 1989, pp. 1067-1097.

developed by Bebchuk[8] (1984) and Reinganum and Wilde[9] (1986), with one-sided asymmetric information, and Schweizer (1989) and Daughety and Reinganum (1994), with two-sided asymmetric information.

P'ng (1983), Nalebuff[10] (1987) and Bebchuk (1988) are a few exceptions. Using Bebchuk (1988)'s terminology, they "allow the possibilities of a negative-expected-value (NEV) suit and the outcome that a suit might be withdrawn or dropped if a settlement fails. These three papers have in common the fact that there exists one-sided asymmetric information, but are different in the side which owns private information and/or which proposes the settlement offer. These three models are not so satisfactory in terms of explaining withdrawn suits, however, because upon closer inspection, the "withdrawal" outcome in these models either does not exist in the equilibrium (Nalebuff 1987), or exists in the equilibrium only because no cost is incurred by the plaintiff by filing and then withdrawing a suit"(P'ng 1983 and Bebchuk 1988). In reality, it is more than likely that the plaintiff will not have to incur some costs by bringing a lawsuit.

According to Nalebuff (1987), the defendant holds private information about the expected outcome of a trial. Initially, the plaintiff sees his lawsuit as having a positive value for him, but he might be requested to revise its estimate of the expected value of filing the lawsuit, if his request for settlement is rejected. Nalebuff (1987) shows that, in equilibrium, the plaintiff always asks for a sufficiently large settlement so that, if his offer is rejected, he may proceed to court with probability one.[11] This implies that, in equilibrium, we cannot have a withdrawal outcome. In P'ng (1983), a plaintiff with a NEV complaint might be able to secure a settlement from the defendant in a Nash equilibrium. However, as Bebchuk (1988) indicates, this is not a sub-game perfect equilibrium.[12] The defendant has perfect information and he knows when the plaintiff has a NEV complaint. This is not a credible threat for the plaintiff to go to trial, if the defendant refuses to settle. Therefore, the defendant will not settle with the plaintiff with a NEV complaint and such a plaintiff will simply have to drop the lawsuit after starting it. However, the outcome of this "withdrawal" equilibrium will disappear, if we attach some litigation costs, in the event of such a strategy employed by the plaintiff. Since a plaintiff with a NEV complaint knows he will not be able to secure any settlement by bringing a complaint against the defendant, he will simply opt not to file the action at all, so as to avoid incurring litigation costs.

In Bebchuk (1988)[13], the plaintiff has private information regarding the expected judgment, so that, in some scenarios, a plaintiff with a NEV complaint will be able to get an offer to settle by exploiting the fact that the defendant is unsure about the actual merit of the plaintiff's case. In the case that the settlement fails, the plaintiff with a NEV complaint may always choose to drop the lawsuit. Again, however, this "withdrawal" equilibrium outcome will not exist, in the

[8] Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information,* "Journal of Economics", vol. 15, nr. 3, 1984, pp. 405–415.

[9] Jennifer F. Reinganum, Louis L. Wilde, *Settlement, Litigation, and the Allocation of Litigation Costs*, "Journal of Economics", vol. 17, nr. 4, 1986, pp. 557-566.

[10] Barry Nalebuff, *Credible Pretrial Negotiation*, "Journal of Economics", vol. 18, nr. 2, 1987, pp. 198-210.

[11] *Ibidem.*

[12] Lucian Arye Bebchuk, *Suing Solely to Extract A Settlement Offer*, "Journal of Legal Studies", vol. 17, 1988, pp. 437-449.

[13] *Ibidem.*

event that the plaintiff has to incur some costs with the filing and the withdrawal of the lawsuit. Given that the plaintiff possesses complete information, he knows, based on such information, whether the defendant is willing to settle or not. Faced with litigation costs to start a lawsuit, a plaintiff with a NEV complaint will choose not to file the case in the first place, unless a settlement is foreseeable.

To explore the effects of the political power, this study allows for some potential litigation costs the plaintiff would be expected to incur by bringing a dispute under the GATT/WTO settlement procedure. Such potential litigation costs include possible international political costs that might derive from an aggravated international relationship with the defending country. For example, such cost might take the form of a loss of an existing financial aid or preferential treatment provided by the defending country, or damage to a possible mutual cooperation between the countries from commerce or politics viewpoint.

On the other hand, a government usually brings a case under the GATT/WTO in response to a request made by a domestic industry or a lobby group. By agreeing with their request, the government gains political support from the part of these industries or lobbyists, which may consist of more political contributions or a larger electorate in the future.

These potential international political costs[14], less the internal political support, stand for the various political powers that might influence a country's decision to use the dispute system.

The P'ng (1983) and Bebchuk (1988)[15]'s one-sided asymmetric information models, as we said before, cannot explain the withdrawn cases, if there are positive litigation costs associated with this outcome. Nevertheless, the "withdrawn or abandoned" cases account for quite a significant share of the complaints filed under the GATT system. All in all, they amount to 27% of 207 complaints filed under the GATT during 1948–1989.

To explain these withdrawn cases, this paper uses a two-sided asymmetric information framework with potential litigation cost.

The intuition regarding the withdrawal outcome is that, because the litigation (political) costs will accrue with time for a complaining country once it files a dispute against another member country under the GATT, a complaining country that is not optimistic enough about the panel judgment will not sue through the panel procedure. In other words, it will withdraw the complaint, if the defendant refuses to settle.[16] However, the complaining country foresees some chances that the defending country might settle on account of the asymmetric information. If the prospect and the extent of a settlement are large enough, this might justify its decision to file the complaint in the first place.

The results of the model indicate that, as the political cost increases in relation to the potential benefit of using this mechanism to settle trade conflicts, the dispute procedure is initiated less frequently, whereas the incidence of withdrawn/abandoned cases increases at first, but then it decreases down to zero.

Conclusions

This study also examines the role of the degree of legal controversy with respect to a panel ruling in determining the

[14] D. Carreau, P. Juillard, *op. cit.,* p. 133 et seq.
[15] Lucian Arye Bebchuk, *op. cit.,* 1984, pp. 405–415.
[16] Chad P. Bown, *op. cit.,* pp. 811-823.

countries' tendency to block/appeal a panel report.

It shows that, under both the GATT and WTO regimes, there is an asymmetric advantage between the plaintiff and the defendant. The plaintiff's potential benefit of blocking/appealing an adverse panel ruling is smaller than the that of the defendant, but it bears the same cost structure as the latter. This disadvantage to the plaintiff is diminished under the WTO procedure compared to the GATT, though it is not completely eliminated.

The study also shows that the level of legal controversy over panel rulings increases, in general, proportionate to the increase in the frequency at which panel reports are blocked under the GATT regime. However, the tendency to appeal a panel report under the new WTO procedure is, basically, higher than the tendency to block a panel report under the GATT, when such reviews in appeal were not available.

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THE SOME REGARDS CONCERNING THE TERM OF DECIDING THE APPEAL IN CRIMINAL PROCEEDING

Denisa BARBU[*]

Abstract

The right to exercise the Appeal is not absolute, it is being confined from several points of view. An Appeal limit is time. The requirements of legal certainty require time conditioning of the exercise for the appeal. The possibility of the unlimited Appeal can be exercised over time would lead to the establishment of a legal uncertainties and to disseminating a continuing tension among both acquitted defendants in first instance, similar to that of Mr. K. the main character from the novel The Process by Franz Kafka.

The meaning of the matter is given by art. 410 from NCPP, stating that the Appeal may be exercised within 10 days. The preamble o the analysis for the Appeal term should stop on its legal nature.

The term of Appeal is a legal term, procedurally, peremptory/ adjournment (depending on your perspective). The term is one that is lawfully prescribed expressis verbis by the legislator, not allowed by the judge to set another term. Furthermore, we appreciate that the wrong words of the judgment of the Court regarding the duration of the term of appeal does not affect the length of time within which the attack of appeal may be exercised.

Keywords: *legal term, procedural term, peremptory/adjourning, instating time, belatedly.*

1. Introduction

The time limit for the appeal is one of procedure, given that its mission is to organize the work of the Court[1]. Instating the term-limits in the category of peremptory terms or, as the case may be, or of the adjournment, differ in relation to the perspective of the situation.[2]

The term is an unanswerable when it is viewed from the standpoint of the exercise of the Appeal by the person entitled, and adjourning, when viewed from the standpoint of the implementation of the execution of the judgment. This dichotomizing of the deadline

[*] Lecturer, PhD, Faculty of Law and Administrative Sciences, Valahia University of Targoviste (e-mail:denisa.barbu77@yahoo.com) .

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[1] The older doctrine of procedural terms were defined conceptually in a particularly suggestive manner, as follows: "the procedural time-limits may be defined as (n.i.) *all those terms that are dictated solely by the need to systematize the repressive action, the limitations imposed by these terms without having any other role than to insure promptness in repression. The reason of this policy lies in its repressive activity and discipline that they are modeled on the intrinsic* penal considerations", I. Tanoviceanu, *Tratat de drept și procedură penală*, ed. a II-a, vol. IV, Curierul Judiciar, București, 1924, p. 469.

[2] See in this respect I. Neagu, *Tratat de procedură penală*, Editura PRO, București, 1997, pp. 546-547.

for the peremptory-adjourning appeal is of major importance in the appreciation of sanctions in case of non-compliance incidents of the period. Therefore, failure to appeal within the person's appeal limit draws him from the exercise right and if he still wants to exercise over the term, the Court will reject the Appeal as being tardy. On the other hand, the execution of a warrant of arrest of the person convicted at first instance within the time in which the appeal can be said draws against the mandate arrest and the procedural act of arrest with nullity.

Given the procedural nature of the appeals term, the calculation will follow the rules set out under art. 269 from NCPP[3].

In relation to the period of declaring the appeal there is the interest: the time of beginning for the term (*dies quo*) and the moment of fulfillment of the term *(dies a quem*).

2. Content

Regarding the time of the beginning of the term, we must distinguish relative to individuals carrying the appeal. Thus, art. 410 paragraph (1) provides that for the Prosecutor, any person aggrieved, and also the parts of the process (the accused, the civil party and the person civil responsible) the term of appeal flows from the communication of the copy of the minute, stating that according to art. 407 paragraph (1) of NCPP in a given sentence after a copy of the minute of the judgment should be communicated *ex officio* to the parties, to the Prosecutor, to the injured person and, if the defendant is arrested, to the administration of the place of imprisonment. It should be noted the indication that the time limit for appeal will begin to run from the date of communication of the copy of the minute only to the extent that the communication has been made lawfully.

Thus, any irregularity that affects the communication procedure of the copy of the minute to extend the lead at the moment of the term starts to run. For example, to the extent that the procedural agent finds in the house of the accused a minor under 14 years of age and decide to give them a copy of the minute, its communication is affected by a case of relative nullity based on violation of the provisions of art. 261 para. (1) of NCPP. In these cases, of wrong summoning the defendant's appeal filed irregularly over the period will be reviewed by the Court of appeal, considered as made on time. In this regard, the jurisprudence decided that where the communication of the copy of the minute it was done at a different address than that known as the address where the defendant resides, the appeal of the defender of the defendant, after more than 10 days after such communication was made, should be considered as filed within term[4]. The situation of the exercise of the appeal over the period in case of unauthorized communication of citation should not be confused with the situation of the reactivation of the person within the period, because in the latter case the communication of the copy of the minute was done in compliance with all legal

[3] Art. 269 from NCPP, entitled *Calculation of procedural terms*, provides for the following:

"(1) in calculating the procedural terms starting from the time, day, month or year as set out in the Act which caused the relevant, unless the law provides otherwise. (2) The calculation of time limits on hours or days does not count the hour or day on which time starts to run, nor the time or the day on which it is fulfilled. (3) Time limits on Months counted or years expire, as appropriate, at the end of the day corresponding to the last month of the time at the end of the day and the corresponding month of last year. If this day falls within a month that has no corresponding day, the period shall expire on the last day of that month. (4) When the last day of a period falls on a working day, the period shall expire at the end of the first working day that follows."

[4] See C. Apel București, s.a. II., pen., dec. 857/1997, quoted after I. Neagu, , M. Damaschin, *Tratat de procedură penală. Partea specială*, Universul Juridic, București 2015, p. 293.

requirements, but the part was an accidental impossibility of exercising the appeal within. Non-communicating in any way a copy of the minute equals irregular communication and produce the same legal effects.

With respect to appeal triggered by a witness, an interpreter, expert or advocate, the legislature has been more permissive, stipulating that they may exercise the appeal *immediately after the conclusion of the willing on the trial expenses, allowances and judicial fines and not later than within 10 days of the pronouncement of the sentence which has settled the case.* We note that in this case the legislature has not established a fixed term, as well as in the other two situations covered under art. 410, limited to only a limit to determine objectively the extent to which appeal may be exercised. Having regard to the provisions of art. 284 paragraph (2) of the NCPP[5], in legal literature has been the question of whether and to what extent persons who have pursued the appeal provided for in art. 284 paragraph (2) in the NCPP the following may exercise subsequently the appeal on the same object. There are arguments for both admissibility of the two remedies, and for the admissibility of a single appeal in this hypothesis. An argument in support of the possibility of exercising both successive remedies is that they provide for provisions which are stipulated in favor of parties, and the suppression of a litigation about the interpretation should represent an altogether exceptional situation. The argument that opposes the latter opinion is judged with the power of judged action which is equipped by a judgment of the initial application for annulment or reduction of the fine applied. As far as we are concerned, we opt for the admissibility of both successive means of applying solutions for implementing judicial fines, at least until the next legislator's intervention.

We believe that the particulars relating to the regularity of the procedure are applicable to communications in respect of witnesses, experts, interpreters and lawyers.

In the sequence of things, art. 410 paragraph (3) regulated even for outsider of the process a term within which the appeal must be declared. Thus, external persons to the process who have suffered damage as a result of procedural acts or measures ordered by the Court may declare the appeal within 10 days of the date on which they become aware of the act or measure which caused the injury. The term is certain only in respect of its duration, time of start and end-of which is placed under the sign of uncertainty. We say that the start and end-moments of the term are uncertain because it relates to a situation where subjective, i.e. the date on which the people have learned about the procedural act or measure for deleterious assessing, relative assertion, eminently. However, it is desirable that at the time of analysis of the Appeal application, the Court to check conditions and evidence attesting to the circumstances in which it was aware and to avoid as far as possible, the acceptance of applications submitted from an appeal duration of time from the delivery of the sentence. For example, to the extent that it was willing the seizure extended with regard to the assets owned by a person of the criminal process, we appreciate that the time limit at which time starts to run the appeal might be the moment in which it is communicated to the person concerned the measure or the moment when the procedure of enforcement began with respect to those goods.

In the doctrine was no question which is the solution to the incident where the appeal is filed earlier to communication of the copy

[5] The text of law provides: "The person fined may request the cancellation or the reduction of the fine. The request for cancellation or reduction can be made within 10 days of the notification of the Ordinance or of the completion of the Amendment".

of the minute. In the existing jurisprudence under the old Code of criminal procedure but which retains its topicality of *lege lata*, the question was cut using a logic and a reason without blemish, for this reason we consider it opportune to partial rendering of this judgment: "*provisions of the article 363 para. (1) and (3) of the Cod of Criminal Procedure in 1968, relating to the term for the appeal and the date on which it has as its purpose the intention of the legislator, sanctioning the party, which was not diligent to exercise appeal within a certain time. How the civil side* (valid for other holders of the appeal-n.n.) *has expressed this expeditiously prior to the date at which the term of appeal flows, cannot be dealt with rejection as inadmissible of the appeal, the procedural provisions in force, showing no sanction for such situations*"[6].

It should be noted that the mere flow of the term of Appeal determines a suspensive effect of enforcement of the judgment of the Court, which means that at the time of the beginning and until the expiry of any enforcement of the provisions of the appeal of the Court will be halted. Exception are the decisions or provisions of a judgment which are enforceable in law.

The holder of the Appeal is in a time of favor under art. 411 from NCPP governing the reinstatement within the time limit. To be susceptible of relief, it is necessary to fulfil the following conditions:

- the appellant to declare appeal later to the expiry of appeal;

- the delay in submission of the appeal may have been determined by a thorough foreclosure;

- the application for an appeal to be filed not later than 10 days following the end of preventing;

- by request of the Appeal, the appellant should solicit the relief within the appeal.

Two issues need to be resolved in the matter of the reactivation of the appeal term, i.e. what it means *thorough cause of foreclosure* is *the legal nature of the period of 10 days.*

Regarding the first aspect, the specialized doctrine[7] took the opinion of the judicial practice according to which it is considered that it is necessary that the person has to be found out in a fortuitous case or force majeure, i.e. to be an event occurred which prevented an Act, event that could not be fitted or removed. In line with this review, it was determined to be a cause of foreclosure that warrants a thorough restoration of the person within the appeal term: the loss of mental faculties for the period of time during which it had declared the appeal, a flood, a fire or another calamity[8]. Going on the same reason, it was held that there is no justification reinstatement within the time limit for appeal, disagreeing about a profound cause of the appeal foreclosure which was declared over the period of a foreign citizen, with the reasoning that, not knowing the Romanian language he did not know that there are appeal, since the Court was assisted by defender and interpreter.[9]

[6] The Court of Appeal Iasi, The Criminal Section, and for causes with minors, the criminal decision no. 209/2001, in the journal Studii de practică judiciară 1994-2006, ediție îngrijită de G. Antoniu, Editura Hamangiu, București, 2006, p. 103-104, citat după D. Grădinaru în M. Udroiu *(*coordonator), *Codul de procedură penală.Comentariu pe articole*,Ed. C.H.Beck, 2015,p. 1054.

[7] D. Grădinaru in M. Udroiu *(*coordonator), *op. cit*., p. 1055.

[8] I. Neagu, M. Damaschin, *Tratat de procedură penală. Partea specială*, Editura Universul Juridic, București 2015, p. 297.

[9] The Supreme Court of Justice, The Criminal Section, the decision No. 858/2003, www.legalis.ro, quoted after M. Udroiu, *op. cit*., p. 253.

As far as we are concerned, we consider that the thorough question of foreclosure we must understand all those circumstances that begin where the perpetrator's guilt ends. We believe that the analysis in the determination of the cause of foreclosure must be made on a case by case basis, specifically in relation to the case data, the courts not lingering from the assumptions of fortuitous and force majeure case. In our opinion, even a relative impossibility to act may constitute a solid foundation for the admissibility of the request for reinstatement within the time limit.

We appreciate the correct opinion expressed in the literature[10] whereby the Declaration requesting reinstatement within the time limit of the appeal may be included in the request for appeal, and may constitute an annex to the appeal or it can be made even oral in the Court of Appeal.

Given that, according to art. 551 point 2 (a), the judgment of the Court shall become final upon expiry of the appeal when the appeal was not concerned, art. 411 para. (2) provides naturally that the decision is final until such time as the Court of Appeal recognizes the request for relief. At the same time, until the dilatory reinstatement period for appeal, the Court of Appeal is conferred by the faculty to suspend the execution of the judgment appealed against. The legislature does not provide guidance on the criteria that the Court might use the appropriate character of suspension of execution of the sentence of the Court. We appreciate that in the latter case the Court decision must not be arbitrary, suspended by imposing on it only in those situations where, at an initial cursory, the request for relief would be admissible.

As regards the time-limit within which the request should be exercised for relief, it is 10 days long and runs from the time when he ceased because of foreclosure. The term is one legal, procedural and peremptory, so non-application or revocation of the person within making a request for reinstatement within the time limit, and any application submitted subsequent to the expiration of this time limit is to be rejected as being belatedly introduced.

To the extent of these, the Court considers that the request of the appellant for relief is unfounded, and there is no cause of thorough foreclosure, will reject and will find the appeal to be tardy, the solution of the first instance being consolidation and definite character.

Art. 411 final para. covers a unconciliating between the reactivation of proceedings within the time limit of the appeal and the procedure for reopening the criminal trial resulting from the lack of the person convicted. Thus, whenever the person concerned satisfies the conditions for eligibility for both procedures, he will have to use only the procedure for reopening the criminal process. What A final statement will be made in connection with the equivalence cases governed by article 270 of NCPP. Making an application to the case of the text of the law, the application of appeal filed within the period prescribed by law, the administration of the place of holding times at military unit or at the post office by registered mail shall be deemed to have been filed on time. The registration or attestation made by the administration of the place of possession on the request, receipt or postal office, and the registration or attestation made by the military unit on the application for appeal filed serve as proof of filing.

Regarding the Attorney, the general rule is that the act is deemed to be made in term if the date on which it was placed on the register of the Office of exit is within the time limit required by law to carry out the act. To this rule, the legislature has provided for an exception in the matter of the appeal. Thus, with regard to the request for the appeal submitted by the Prosecutor, it will be deemed to have been entered into if the date

[10] M. Udroiu, Procedură penală. Partea specială.Sinteze și grile, Ediția 3,Ed. C.H.Beck, București, 2016 p. 309.

on which the period was registered at the court registry is within the interval of time provided for the filing of appeals.

3. Conclusions

What must be emphasized is that it is irrelevant whether the injured party or parties were present at the declaring or debate, if they were represented by a lawyer or not chosen or appointed ex officio, if there are underage or major parties, or whether or not deprived of liberty, the term of appeal is an imperative procedural legal term[11], which runs from the date of service of a copy of a legal sentence the minute both Criminal Prosecutor and the injured party or parties.

Also, the term of appeal runs from the date of service of the judgment of the grounds therefor, except in the meantime that the judgment was not enforced when the term will run from the time of the execution of the mandate, if the first court did not legally copy the minute of the sentence.

However, the date of service for a copy of the criminal sentence motivated it is irrelevant for the time of the beginning of the appeal term, unless the judgment is made on the very day of the solution and communicated together with the copy of the minute.

There is a possibility that on the proof of delivery and from the minutes of the copy on the sentence does not result to be noted that this act has been delivered to the addressee or one of the persons referred to in art. 261 NCCP[12] nor any indications of the existence of procedural about the impossibility of the communication of the copy of the minute, and the time limit for the appeal is not going to run from the date of receipt and proof of the minutes of instruction, whereas communication was carried out in the illegal manner.

Where the display notification does not equate with the communication of the minute, but the term of appeal is presumed to flow only from the date of fulfilment of the first instance in which it was supposed to be present at the seat of the Court or the subject of the procedure for picking up a copy on the minute. We emphasize that in this case there are 2 options: first, when the subject of the proceeding or part shall be presented in the Court within the time set by it, and the time limit for appeal will run from that date, and the second, when the subject of the proceeding or part fails to appear or are submitted after expiry of the period set by the Court for removal of the copy of the minute, in this case the term for the declaration of the appeal will flow from the expiry of the term settled by the Court.

We reiterate that the provisions of art. 270 para. 3 NCCP regarding the consideration of that act/appeal request is made within the Prosecutor if the date on which it was placed on the register of the exit office is within the time limit required by law to carry out the act, does not apply in the matter of the appeal.[13]

A statement will be made regarding the impossibility of formulating the appeal over the term of the party who has not applied for the judgment in that lacked both at all court deadlines and the decision (regardless of the reason for absence)[14], NCCP not granting this possibility, without compensation in such a case, and may use only the path of reopening the criminal trial resulting from the lack of the person convicted provided by art. 466 and the following. The NCCP respectively which

[11] M. Udroiu, *op.cit.*, p.308.
[12] *Ibidem.*
[13] *Idem*, p.310.
[14] *Idem*, p.312.

were ordered out of the application of the death penalty or postpone the application of the death penalty.[15]

Therefore, the call represents a non-mandatory way in the espionage mechanics process through which the judicial control is carried out, aiming to ensure a balance between the need to commence a legal ruling and thorough and to respect the right of the parties to the trial subjects and to a fair trial.[16]

Also, fixing a time limit for appeal by the legislator is justified by the need to ensure the principle of achieving the alacrity of the criminal repression.

In this way, it removes the possibility of avoiding the execution of the judgment, but the judgment is ensured by the verification before bringing it into force[17].

The appeal is known since the Roman criminal processes called "*provocatio ad populum",* through which the convicted have the right to appeal against the sentence handed down to the people.[18]

In most European countries' laws, the Appeal appears as a second degree of jurisdiction over the cause fund, but also as that last ordinary appeal, an appeal is considered an extraordinary remedy.[19]

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[15] *Ibidem.*

[16] N.Volonciu, A.S. Uzlău s.a*., Noul Cod de procedură penală comentat*, Hamangiu, București, 20014, p.999.

[17] Dumitru Gheorghe, *Drept procesual penal,* Universul juridic, 2011, p.433.

[18] I.Neagu, *Drept procesual penal, Tratat*, Global Lex, București, 2002, p.657.

[19] In the French Law, the appeal has a detailed regulation regarding the decisions in criminal matter. (art. 496-510). The institution of the appeal is seriously regulated in the Geman Law, as well, and it distinguish among the appeals of fact and the appeals of law, the conditions of carrying out, the effects, etc. .(part III art. 296-358). In this systems of law we meet the „opposition" which is of the Court that had the Decision.