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BEATING BANKS THROUGH KNOWLEDGE

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Abstract

In Romania, in the last decade, a significant number of solutions favorable to consumers with foreign currency denominated loans were obtained in courts against the banks or non-bank financial institutions. The judges noted the unfairness of the contractual terms inserted in the loans agreement and absolute nullity of these clauses. Also, in the context of the global economic and financial crisis triggered by the collapse of the banking system with the consequence of depreciation and/or sudden and high fluctuation of domestic currencies against the "safe-haven currencies", the theory of unpredictability becomes a particularly important institution.

This paper deals with the concepts of „abusive clauses", „unfair commercial practices" and „providing untruthful information to consumers to influence their choices". It is also presenting a view of good faith and equity on the performance of contract and the "distribution of the risk" of the contract in the conditions of applying to the "unpredictability theory" in the context of terms of law doctrine and the relevant case law.

The objective of this study is to demonstrate that by applying the theory of unpredictability to the occurrence of currency risk associated with loans in foreign currency and by subjecting to examination by court to the clauses whereby the consumer must assume the risk given by the changing of the circumstances of the execution of the contract can be obtain by the consumer or a rebalancing of the understanding of the parties or the cancellation clause which significantly unbalanced the consumer's obligation to bear any risk.

Keywords: *„abusive clauses", „unfair commercial practices" and „providing untruthful information to consumers to influence their choices", "distribution of the risk", "theory of unpredictability".*

1. Introduction

In the last ten years, Romanian courts had to face a large number of files in which the National Agency for the Protection of the Consumers and/or the consumers requested the lack of effects of the abusive clauses included in the agreements of bank credits entered into between consumers and professionals. Although for most of the times the courts established the presence of abusive clauses and admitted the complaints, other contracts of the same type belonging to the same professional continued to produce their effects. Moreover, that final solutions obtained in court did not stopped the professionals from concluding other contracts whose content include the clauses qualified by the court as abusive. Starting from this reality and in order to stop its continuation in the future, certain aspects on abusive clauses of the Law no 193/2000 were modified in 2010. Given that the problem of the over indebtedness of the consumers due to the contracts concluded before the economic and financial crisis

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starts, the existence of the abusive clauses in loan contracts is currently an important topic of public debate in Romania, as well as in other European States.

Although it is prohibited by law for professionals to insert abusive clauses in contracts (paragraph 3 of art.1 of Law 193/2000 regarding abusive clauses from the contracts concluded between professionals and consumers, republished), the Romanian credit contracts contains unfair terms which stipulates e.g.: risk commissions, account administration fees, unilateral increase in interest rates, modifiable fixed interest, variable interests which vary and increase only upward, even if they were connected to the ROBOR/ EURIBOR/ LIBOR indexes or variable interests calculated following an internal and non-transparent bank indexes. Also we can meet clauses providing for the extension of mortgage in favor of the bank or terms excluding the consumer's right to undertake legal actions or to exercise a different legal remedy or the obligation of the consumer to give up to all legal actions in course and to any pretention when concluded a novation of contract in the case for the initial contract the consumer is having a dispute in front of the court.

1.1. The Romanian legislation regarding abusive clauses

The European Directive 1993/13/CEE, whose provisions were transposed into Romanian legislation by Law 193/2000, defines abusive clauses as being those contractual clauses which have not been negotiated directly with the consumer, and will be considered abusive if by themselves or together with other provisions generate disadvantage for the consumers and, in a manner contrary to good faith, a significant imbalance between the rights and obligations of the parties.

The abusive clauses from the contracts concluded between the professionals and the consumers are being enumerated by the Law 193/2000 and we can enumerate from it:

The trader's exclusive right to interpret the contractual clauses;

The trader's right to unilaterally alter the terms of the contract;

Provisions that limit or cancel the consumer's right to demand indemnifications in case the professional does not comply with his/her contractual obligations.

The consumer's obligation to obey some contract terms he never had the real possibility to know when signing the contract;

Provisions that restrict or cancel the client's right to denounce or to unilaterally cancel the contract, in cases when the professional either unilaterally changed the contractual clauses, or he/she did not fulfil his/her obligations or he/she imposed to the client clauses regarding payment of a fixed amount (in case of unilateral denunciation);

According to Law no. 193/2000, the provisions regarding the abusive clauses are applicable to those juridical reports that take place between consumers and traders. Art.1, paragraph 1 of this law, provides that any contract concluded between traders and consumers for the sale of goods or for providing services will include clear contractual clauses, in no uncertain terms, for their understanding not being necessary specialty knowledge.

These clauses are mentioned in contracts of adhesion and the consumers does not have the possibility to negotiate the terms of the contract with the bank. The biggest problem for the consumers is that the bank has the possibility to appreciate discretionarily when financial imbalance occurs in the market. The consequence is the modification of the contract terms without any real negotiation between the parties. Furthermore, if the consumers do not agree with these terms, the banks notify them to

pay back in advance the money (ECJ, Kušionová v. SMART Capital a.s, 2014) within 30 days.

2. The Theory of unpredictability in Romanian Civil Code

During the execution of the contract, might appear certain circumstances which can make the execution of the contract excessively burdensome for the consumer. Sometimes, during their execution, contracts are exposed to certain events related to the economic conjuncture. Most often, they are related to currency fluctuations. An example represent the acceleration growth of the currency in which the loan was granted which leads to an increased monthly installments owned to the bank. We can mention the case of Swiss franc which in 2007 had a rate of 1.9 RON and in 2015, a rate of 4.6 RON.

In this case, should be applied the principle of unpredictability.

Art.1.271 New Civil Code, in paragraph 1 provides that "The parties are bound to fulfil their obligations even if their fulfilment has become more onerous, either due to the increase in the costs of fulfilling their own obligations or due to the decrease of the value of counter performance"

Art.1.271 paragraph 2 provides "However, if the contract execution has become excessively onerous due to an exceptional change in circumstances, which would render the binding of the debtor to fulfil the obligation evidently unjust, the court of law may order: a) the adaptation of the contract in order to equitably distribute between the parties the losses and benefits resulting from the change in circumstances; b) the termination of the contract at the moment and under the conditions established by it".

Art.1.271 paragraph 3 provides that "The provisions of para. 2 are applicable only if: a) the change in circumstances intervened after the conclusion of the contract; b) the change in circumstances as well as their extent were not and could not have been reasonably considered by the debtor at the moment of contract conclusion; c) the debtor did not undertake the risk of the change in circumstances and it could not have been reasonably considered that he had undertaken that risk; d) the debtor tried within reasonable term and in good faith to negotiate the reasonable and equitable adaptation of the contract."

The Romanian Civil Code of 1864 did not expressly regulate unpredictability, but doctrine and case-law accepted it as per art. 970 para.2 Civ. Code of 1864 (the current 1.272, paragraph 1 N.C.C.). Art. 970 paragraph 2 Civ. Code of 1864 provided that: "They (the agreements) bind not only for what is expressly contained in them, but for all consequences, what equity, custom or law endue the obligation with, according to its nature."

According to Art. 1170 from the New Civil Code, "the parties must act in good faith, at the negotiation and at the signing of the contract, and also during its execution. They cannot remove or limit this obligation" which means that the risk of the grown of currency of the loan has to be assumed properly, by both parties, the creditor and the debtor.

The modification of consequences is relevant only in exceptional cases. The principle according to which agreements lawfully concluded between the parties are legally binding is not absolute, sacrosanct. When occurred events have the capacity to fundamentally alter the balance of the contract, there results the exceptional situation which the theory of unpredictability refers to.

In the context of the global economic crisis triggered by the collapse of the banking system, the theory of

unpredictability becomes a particularly important institution. These circumstances affected the execution of loans contracts. Major discrepancies appeared between the value of performance on the conclusion of the contract and the value of performance on the date of fulfilment of obligations. It became excessively onerous (in the case of the debtor). In other words, we will refer to the category of loan contracts in which, during their execution, an event that may produce a severe imbalance in value between the parties' performances is likely to occur. At the beginning of the financial crisis, the national currency depreciated against euro by up to 50% and more than doubled against Swiss franc, placing consumers with forex denominated loans in an extremely difficult position.

Good faith in contract execution was the most viable argument to justify the necessity of accepting the theory of unpredictability. In the case of unpredictability, the bad faith of the debtor in triggering the modification of circumstances cannot be considered. The lack of fault of the debtor is a fundamental condition, also considered in the regulation of the theory of unpredictability in the NCC.

Regarding the bank credit agreements, in judicial practice, the contract for personal loans by mortgages has a special legal nature, the debtor's obligation consisting mainly in repaying the loan within the time limits specified in the document. As regards payments due, the substantial change of the debtor's financial opportunities can give to the consumer the possibility to invoke the unpredictability, especially when initially the debtor has respected even partially his obligations. The abusive character of some contractual clauses determines according to the theory of unpredictability a significant imbalance between the parties to such contracts. The theory of unpredictability applies to long or open term contracts and sometimes to fixed term contracts. Even if the possibility that unpredictability may be invoked regarding other types of contracts is not excluded, it preponderantly applies to long-term contracts. The category of long-term contracts includes successive performance contracts and some contracts that are under suspensive conditions (legal, conventional, judicial).

Even that the Romanian Constitutional Court (CCR) decided through 62/ 7.02. 2017 that the conversion of loans in Swiss francs at historical rates is unconstitutional, basically the Romanian Constitutional Court in the motivation of the Decision confirms what we want to prove, namely, extract from the decision: 49 (...) "Adapting to the new conditions may be performed inclusive through the conversion of the payment of the monthly installments into Romanian national currency at an exchange rate established by the court related to the particular circumstances of the case in order to rebalance the obligations, an exchange ratio which can be those at the date of conclusion of the contract or at the date of occurrence of unpredictable event or at the value at the date of conversion."

So, if the court finds the intervene of unpredictability, it can balance the contract by converting the balance of the credit at the foreign exchange rate from the date of concluding the contract or at the date of the appearing of unpredictable event or to order recalculation the monthly installments in foreign exchange at a ratio determined by the court as in Civil Sentence 21.02.2017a 1920/2017 of District Court of 2nd Sector Bucharest.

In short, if unpredictability is proven, then the court may include in the decision, a solution to freeze the exchange rate at the time of occurrence the state of unpredictability.

The Decision 62/2017 also does not intervene in any way on the possibility of

declaring as unfair the terms of the contract related to the assuming the entire currency risk, so that consumers will be able to choose between appealing to law 193/2000 and subsequently to obtain the freezing of the exchange rate at the date of conclusion of the contract or will request the balancing of the contract, due to occurrence of unpredictability.

Among the conditions listed above for finding unpredictability is reflected negative condition of not assuming the risk of exceptional change of circumstances by one of the parties to the contract.

Customizing to the situation of credit agreements in foreign currency, in the event that there is a clause aimed award-added risk over this negative condition cannot be considered fulfilled.

Finally, the remaining unresolved issue is the delicate relationship between clauses related to risk theory unfair and unpredictability. Sketch primary indicates the prevalence of the idea that it would be necessary to invoke the unfairness of a term (of course this can be covered and indirectly - the judge is not bound to rule effectively on invalidity, but may ignore the impact of this clause if it considers abusive.

A compatibility between theory unpredictability and performance of contracts for credit is only possible if the indexation clause is regarded as unfair because it covers risks not contemplated at the time of contracting (possibly associated with the idea of lack of information on the risk of over-added.

The normal risk is defined as being: "predictable fluctuations of the value of performances by considering the nature of the contract and the original balance established by the parties." The initial situation represents the landmark to which the current situation is compared in order to establish the fundamental alteration of the contractual balance. 2. The non-existence of a clause to maintain the contract value – the premise for applying unpredictability under the conditions of art. 1.271 NCC A.

The contracting parties, by their agreement, may intervene with the purpose of rebalancing the contract by concluding an agreement to adapt it to the new conditions. Furthermore, they will be diligent in the sense that they will anticipate certain unpredictable events that may occur during the execution of the contract and even in the contract that regulates the legal relationship between them (the initial contract), to regulate certain clauses that are aimed at maintaining the contract value. In order to apply the theory of unpredictability, as it is regulated in art.1.271 para.2 and 3 of the NCC, it is necessary that the contract does not contain a clause whose aim is to maintain the contract value, a preventive unpredictability clause. If a clause to maintain the contract value existed (preventive unpredictability clause), then what would apply is the legal regime of that clause, by virtue of the principle of contractual freedom, and not the provisions of art.1.271 para. 2 and 3 of the NCC. It is preferable, of course, and even recommended that the parties, when they conclude a contract, be cautious and provide clauses for its maintenance. This is also recommended in practice, considering the exceptional nature and the limited scope of unpredictability, as the fulfilment of all the conditions for unpredictability is rarely possible. As a result, the parties may provide in the contract more flexible clauses with regard to the restrictive conditions of unpredictability regulated by art.1.271 of the NCC

In case of adhesion contracts – like the loan contracts – that comprise abusive clauses, the law authorizes certain control authorities to notify the court from the professional's domicile or headquarters and to request his/her obligation to change the

contracts under developments, by removing the abusive clauses, as it is provided by art.12 of Law no.193/2000. These authorities are represented, according to art.8 of the law, by the National Authority for Consumers' Protection representatives, as well as by the authorized specialists of other public administration authorities, according to their competencies. Besides them, the consumers prejudiced through the respective contracts have the right to address to the court.

In this case of unpredictable event, the Civil Code points out, the court can order "the updating of the contract, to fairly distribute between the parties both the losses and benefits" or "the cessation of the contract." Both options can be ordered by court only if "the change in circumstances occurred after the contract was signed" and "was not and could not have been foreseen by the debtor," provided "the debtor did not take on the risk of changing circumstances" and if "the debtor tried, within a reasonable period and in good faith, to negotiate the reasonable and fair updating of the contract."

The court cannot change itself the clauses considered abusive from the contract, but it will be able to force the professional to change all adhesion contracts in development, when there is observed such a clause exists in the contract, as well as to eliminate the abusive clauses from the pre-formulated contracts which are meant for use in the professional activity, as it is provided by art.13 paragraph (1) of the law to which we refer to. In case the court observes that there are no abusive clauses in the contract, it will cancel the report issued by the official examiner according to the law.

According to the civil provisions, nobody can exercise any right with the purpose of being detrimental to or to prejudice another person excessively, unreasonably and contrary to good faith, without being penalized for reasons of abusive exercise of rights (art.15 Civil Code). In the juridical literature, it is considered that the penalty applied to the abusive clauses is the nullity of the contract included by it. Actually, the penalty of nullity is also based on the legal provisions comprised in art.1 paragraph 1 of Law no. 193/2000, according to which any contract must include clauses which are clear, in no uncertain terms and easy to understand for all parties. Actually, the nullity has as basis also incompliance with the basic condition for the validity of a contract regarding its cause which must be licit and moral, due to the fact that an abusive clause has as grounds bad faith at concluding the contract. Having in view the fact that through inserting an abusive clause, only a part of the professional's will is corrupted by the bad faith at concluding the contract, breaching the legal condition regarding the cause affects only a part of the contract, respectively the abusive clause. This partial nullity will demolish only one part of the contract concluded, respectively the clause considered as being abusive and the contract remains partially valid. In case the abusive clauses do not produce effects against the consumer client, then, with his/her agreement, the contract will continue to produce effects, if the contract can be continued following to eliminating the clauses under discussion. In case the contract cannot produce effects following to eliminating the abusive clauses, then the consumer has the right to pretend its cancellation, according to art. 7 of Law no. 193/2000, case when he/she is entitled to obtain indemnifications also, the professional's responsibility being a liability in tort. Both in practice and in the doctrine there are numerous discussions based on the penalty of the abusive clauses motivated by the reality that the law regarding these

clauses does not refer to a juridical procedure through which to be removed the effects of the abusive clauses, as it is provided by other legislations, like the French or Quebec region legislations. The existence of the abusive clauses must be proved by the one who invokes it, respectively by the consumer / client, according to the civil provisions in force, through evidences provided by the Civil Procedure Code; Law no. 193/2000 does not comprise special provisions in the domain. The object of the evidence can be represented by any of the three conditions necessary to the existence of such a clause: lack of negotiation, lack of good faith, the presence of a significant imbalance.

3. Conclusions

Into the loan contract where there is a series of clauses that already breach the legal norms and a certain clauses have already been proven as unfair, they can be considered as being abusive clauses, not being able to be directly negotiated with the client and not being in his/her favor, as well as being contrary to good faith. It would be desired to be brought modifications to the actual Romanian law regarding the abusive clauses for clarifying these aspects that refer to the above mentioned juridical mechanism to remove the effects of these clauses.

The court cannot change itself the clauses considered abusive from the contract, but it will be able to force the professional to change all adhesion contracts in development, when there is observed such a clause exists in the contract, as well as to eliminate the abusive clauses from the pre-formulated contracts which are meant for use in the professional activity, as it is provided by art.13 paragraph (1) of the law 193/2000. In case the court observes that there are no abusive clauses in the contract, it will cancel the report issued by the official examiner according to the law.

These abusive clauses in loan agreements must be eliminated even in cases where the consumers have not denounced them yet. The economic imbalance between consumers and banks is obvious and the lack of predictability of consumers is seriously affected. In contracts of adhesion, the consumers have no option but to adhere to the contract, negotiation being impossible. So, we believe it is necessary to eliminate all the abusive clauses and ensure predictability of the contracts if we want to protect the consumers. To legislate the consumers' rights to be fully, correctly and accurately informed on the main characteristics of the products and services provided by the trading companies, which is attained through the elements of identification and characterization provided by law.

Although there is still a long way to go, Romanian consumers do not lose hope that their rights will be better protected through the harmonization of European Union legislation with national legislation and after the years of fights against the abuse of economic power the first step in defending their rights would be a better quality legislation.

The situation of Romanian consumers may not be unique in Europe and it seems the same pattern can be seen in most of situations: low level of consumers' financial literacy, lack of any responsibility from the banks in lending, weak reaction from the authorities, not only to the methods used by the banks, but also in regards to the involvement in public education. The situation has begun to change, painfully slow for those affected, although it still faces a very strong reaction from the banks. It is very important the things our organization warned about even since 2004-2005, such as over-indebtedness or irresponsible lending, are in the public discussion and there are small steps taken to improve the situation of those affected and to prevent such situations to appear in the future.

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PRACTICAL ASPECTS REGARDING THE CLAIM FOR THE ANNULMENT OF THE RESOLUTIONS OF THE GENERAL MEETING OF SHAREHOLDERS, FROM A SUBSTANTIAL AND PROCEDURAL PERSPECTIVE

Roxana - Mihaela CATEA*

Abstract

The purpose of this paper is to provide a brief analysis of the legal framework regarding the procedural and substantial dispositions governing the claim for the annulment of the resolutions of the general meeting of shareholders. The main objective is to render a practical tool both to stakeholders and third parties who are interested in the legal means available for blocking the implementation of any measures which are contrary to the company's interest.

Further to the amendments brought through the New Civil Procedural Code, the claim for annulment of the resolutions of the general assembly must be analyzed from a procedural point of view, as well as from a substantial standpoint. The shareholders must be aware of the grounds for challenging a general assembly's resolution to properly safeguard their rights. One common issue which is invoked as grounds for annulment is the abuse of majority of the majority shareholder. However, the difficulty of alleging such a reason is left to practitioners. Therefore, its application, although not wide, is highly imaginative.

Keywords: *joint stock company, limited liability company, majority shareholder, minority shareholder, grounds for annulment*

1. Introduction

This study aims to support young practitioners in establishing preliminary guide marks by assessing the possibility to file a claim in annulment of company resolutions based on the dispositions of Law no. 31/1990.

Although recent doctrine is emphasized on the substantial grounds for the annulment of general assembly's resolutions, few studies focus on practical matters which the claimant or the defendant may encounter. Therefore, this study represents an introduction into the basic practical knowledge one must be aware of in its capacity as shareholder in a Romanian company or in its capacity as legal practitioner if attempting to suspend or annul the resolution of the general meeting of shareholders.

Its relevance and importance resides in the necessity for the shareholders and their legal representatives to be aware and actively assert their rights to oppose disagreeable resolutions. While there is unanimity in accepting that the common will of the shareholders represents the core of the company, in practice there are frequent situations in which there is substantial disagreement between the shareholders' points of view, frequently leading to adopting resolutions without considering the

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minority shareholder's input. Since these disagreements must be resolved prior to the company to continue conducting business, it is mandatory for the shareholders to effectively express their point of view in a manner in which the company's interests are protected through the independent filter of the court.

The utility of the below analysis lies in the fact that although it reviews general concepts, it is focused on the conclusions of recent case law, outlining specific issues which are not covered by legal provisions and their solution.

1.1. General considerations regarding the legal framework applicable for Romanian companies

- The functioning and operation of companies in Romania is regulated by the New Civil Code, which constitutes the common legal framework for both civil companies and companies destined for commercial activity.
- The New Civil Code which entered force in October 2011 establishes the general principles for Romanian companies which are not oriented for lucrative purposes, whereas the special norms comprised in Law no. 31/1990 regarding companies for commercial activity ("**Law no. 31/1990**") set out rules for companies aimed at creating profit, by conducting production activities, commerce activities or supply of services.
- Although Law no. 31/1990 does not contain a precise definition of the company for commercial activity, this concept has been delimitated from simple company through certain characteristics as described by legal scholars[1]:
- the company for commercial activity has legal personality and becomes a different legal subject apart from the simple company, established based on the New Civil Code, which is generally a company without legal personality and the company for commercial activities, which becomes a new subject of law, able by itself to enter commercial relations with other subjects of law,
- the company for commercial activity is fundamentally different from a civil company given the nature of its operations. While the company for commercial activity conducts production and commerce activities or supply of services aimed to obtain profit, the civil company carries out activities which are not aimed to obtain profit.
- as opposed to the civil company, which does not require special formalities for its incorporation, apart from those deriving out of the assets contributed as share capital or from special norms, the company for commercial activity must observe special rules dictated by Law no. 31/1990**.**

2. Legal nature of the general assembly of shareholders' resolution

The legal nature of the general assembly of shareholders' resolutions is somewhat controversial in Romanian doctrine. While some authors characterize the resolution as a agreement between the shareholders who aim to satisfy their own purpose, other believe have implied that the shareholders resolution represents a convergent manner of manifesting the their will. The most truthful opinion[2] outlines the *sui generis* character of the general assembly of shareholders' resolution. Therefore, the resolution of the general meeting of shareholders conveys the will of the shareholders aimed to fulfill both their purpose and the company's purpose.

[1] Vasile Nemes, *Commercial Law according to the New Civil Code*, Hamangiu Publishing, 2012, p. 84.
[2] Stanciu D. Cărpenaru, *Treaty of Romanian Commercial Law*, Universul Juridic Publishing, 2016, p. 211.

3. Means for invoking the irregularities of the general assembly of shareholders' resolution

Law no. 31/1990 stipulates two different claims, based on the procedural standing of the party invoking the grounds.

As such, art. 132 of Law no. 31/1990 opens the way of the claim for the annulment of the resolution to shareholders, third parties having an interest, the company's directors and the company's censors, who can invoke absolute or relative grounds for nullity.

It is generally asserted in legal writings[3] that breaches of the dispositions of the Articles of association are sanctioned with relative nullity, since the clauses of the Articles of association aim to safeguard the shareholders' personal interest.

Law no. 31/1990 stipulates a special means of challenge for the company's creditors and for any other persons prejudiced by the resolutions of the shareholders adopted to the amendment of the company's constitutive act, Law no. 31/1990 stipulates two different claims, based on the procedural standing of the party invoking the grounds.

As such, art. 132 of Law no. 31/1990 opens the way of the claim for the annulment of the resolution to shareholders, third parties having an interest, the company's directors and the company's censors, who can invoke absolute or relative grounds for nullity.

It is generally asserted in legal writings[4] that breaches of the dispositions of the Articles of association are sanctioned with relative nullity, since the clauses of the Articles of association aim to safeguard the shareholders' personal interest.

Law no. 31/1990 stipulates a special means of challenge for the company's creditors and for any other persons prejudiced by the resolutions of the shareholders adopted to the amendment of the company's constitutive act, through the opposition governed by article 61. Shareholders are not entitled to file the opposition[5] since Law no 31/1990 expressly stipulate the special claim for the annulment of the resolutions for this category of claimants.

Generally, the purpose of such opposition is not to obtain the annulment of the resolution but to repair the prejudice produced by its adoption. Romanian courts[6] have established the distinction between the opposition and the claim for the annulment of the resolution of the general meeting of shareholders considering that the approval of the opposition freezes the effects of the resolution against the opponent, until the requested damages for repairing the prejudice produced by the resolution are repaired. It is only when the material prejudice is not repaired that the opposition may lead to the annulment of the resolution itself.

The opposition may be filed by means of a claim addressed before the trade registry where the company is registered. The trade registry shall then forward the opposition to the competent tribunal within the range of the company's registered office for judgment.

As per article 62 of Law no. 31/1990, the term for filling the opposition is of 30

[3]S. David în St. D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, *Companies Law. Comments. IIIrd Edition,* C.H. Beck Publishing House, Bucharest, 2006, p. 401.

[4]S. David în St. D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, *Companies Law. Comments. IIIrd Edition,* C.H. Beck Publishing House, Bucharest, 2006, p. 401.

[5] Bucharest Court of Appeal, VIth Commercial Section, Decision no. 1299/2002, published in Bucharest Court of Appeal's Practice Collection for 2002, Brilliance Publishing, 2004, p. 152.

[6] Craiova Court of Appeal, Commercial Section, Decision no. 54/21.01.2005.

days as of the date of publishing the resolution in the Romanian Official Gazette.

4. Conditions for filling the claim for the annulment of the general assembly of shareholder's resolutions. Legal procedural standing

In compliance with art. 132 of Law no. 31/1990, the persons entitled to file a claim for the annulment of the general assembly of shareholder's resolutions must fall under the following categories:

- the company's shareholders who participated at the adoption of the general assembly of shareholders' resolutions and who voted against the matters approved by the general assembly, if their objection has been included in the minutes of the general assembly,
- the company's shareholders who did not participate at the adoption of the general assembly of shareholders' resolutions,
- the company's directors, in order to prevent any prejudicial consequences for the company itself,
- the company's censors,
- any person justifying an interest for the annulment of the general assembly of shareholders' resolution.

Therefore, while the shareholders may invoke both absolute and relative nullity as grounds for the annulment of the resolution, other third parties who justify an interest may request the annulment only based on its absolute nullity[7]. As such, their claim shall not fall under any statute of limitation.

Also, as opposed to other categories of claimants, the shareholders do not have to prove their interest in requesting the nullity of the resolution since Law no. 31/1990 presumes that the interest directly derives from their capacity as shareholders and is an expression of the social character of the claim[8], which is aimed to support both the shareholders and the company.

Based on the above, Romanian courts[9] have interpreted that a shareholder who participated in the general assembly and expressed its intention to abstain from voting in favour or against the matters discussed on the agents of the meeting is not allowed to file the claim for the annulment of the resolution.

From the interpretation of art. 132 par. 5) of Law no. 31/1990, Romanian courts[10] have rightfully reached the conclusion that passive legal procedural standing in a claim for the annulment of a general assembly of shareholder's resolution can only be granted to the company itself, which shall be represented by its board of directors or its directorate.

5. The competent court and means of appealing the ruling of the first court

In compliance with art. 63 of Law no. 31/1990, the competence for filling the claim for the annulment of the resolution of the general meeting of shareholders is within the competence of the tribunal within the territorial range of the company's registered office.

The ruling issued by the tribunal is subject only to appeal which shall be judged by the higher court of appeal.

[7] Bucharest Court of Appeal, VIth Commercial Section, Decision no. 604/2002, published in Bucharest Court of Appeals' Practice Collection, 2002, p. 149.

[8] Stanciu D. Carpenaru, *Commercial Law Treaty*, Universul Juridic Publishing, 2016, p. 212.

[9] Bucharest Court of Appeal, VIth Commercial Section, Decision no. 1290/2003, published in Bucharest Court of Appeal's Practice Collection, 2003, Ed. Brilliance, Bucharest, p. 230.

[10] Former Supreme Court of Justice, Commercial Section, Decision no 2142/2003, published in the Jurisprudence Bulletin.

Once the ruling over the annulment of the resolution of the general meeting of shareholders is delivered, it shall be published in the Official Gazette. Starting from the date of publishing, the ruling shall be opposable to all the shareholders, per article 132 par. 10) of Law no. 31/1990.

6. Grounds for the annulment of the general assembly of shareholders' resolution

6.1. Legality vs Opportunity of the Resolution

Prior to an analysis of the grounds which certain shareholders and interested third parties must prove for the annulment of a general assembly of shareholders' resolution, it is relevant to mention that the court entrusted with such a claim may proceed to analyze exclusively arguments related to the legality of the resolution.

Therefore, as many courts[11] have decided, the opportunity for the adoption of a general shareholders' resolution is outside the scope and object of a claim aimed for the annulment of said resolution. As such, any reasons pertaining to the profitability of the shareholders' decision for the company or for the shareholders' themselves cannot be duly analyzed by the court. For example, the court vested with a claim in annulment of a resolution approving a credit agreement cannot decide that the conclusion of a credit agreement leads to the bankruptcy of the company. However, the court can dispose the annulment of the resolution approving the conclusion of a credit agreement, if the conditions disposed by Law no. 31/1990 for the adoption of said resolution are breached.

This solution is based on the fact that the cases when the court is allowed to intervene in the prerogatives reserved for the company's shareholders are expressly provided by law and thus, it would be inadmissible for the court to act as one of the company's organs in lack of any such provisions in this respect.

The general resolution of the meeting of shareholders is meant to express the general will of the company in deciding its future trajectory. Therefore, all resolutions are governed by the principle of majority, meaning that the will of shareholders must be formed through the shareholders' involvement and is mandatory for its shareholders. While the court cannot analyze and determine whether the measures adopted by the shareholders are appropriate for the company, the court is entitled to rule on the legality of the resolution or on its compliance with the Articles of association[12].

As pointed out in legal literature[13], the ground for the annulment of the resolution of the general meeting of shareholders may be either the absolute nullity, for breaching norms securing the public order and general interests or the relative nullity, for violating norms securing the personal interest of the company's shareholders, which are mostly related to the shareholders' will or capacity.

From this perspective, the claim in annulment cannot completely solve the problems encountered within the company which lead to disagreement among the shareholders. The court may only intervene insofar as to verify the legality of a

[11] Former Supreme Court of Law, Commercial Section, Decision no. 6200/2001, published in the Jurisprudence Bulletin and in Judicial Courier no. 9/2002, p. 55).

[12] Constanta Court of Appeal, Decision no. 330/COM/2004, published in the Judicial Bulletin 2004, Lumina Lex Publishing House, Bucharest, 2005, p.66.

[13] Stanciu D. Cărpenaru, *Treaty of Romanian Commercial Law*, Universul Juridic Publishing House, 2016, p. 213.

resolution, in compliance with Law no. 31/1990 itself or in compliance to the law of the parties expressed through the company's Articles of association. Therefore, even though the resolution is annulled, the court cannot replace and supplement the shareholders' will for that particular operation or suggest its amendment so that both shareholders are accommodated with the result.

It is also relevant mentioning that Law no. 31/1990 prohibits the directors to file a claim for the annulment of a resolution when the object of the resolution is the revocation of said directors, as per article 132 par. 4).

6.2. Suspension of the resolution of the general meeting of shareholders

Law no. 31/1990 also grants the person requesting the annulment of the resolution of the general meeting of shareholders the right to ask the court to dispose the interim suspension of the resolution's execution, until the main trial for the annulment of the resolution is definitively resolved. The suspension may be granted pursuant to article 133 of Law no. 31/1990 and to article 997 of the New Romanian Procedural Code.

In order to obtain such a suspension, the claimant must prove the fulfillment of several conditions before the competent court. One of these conditions is the urgency for the court to dispose the suspension. Another condition is that the appearance of rightfulness belongs to the claimant. Also, the claimant must prove either that the suspension is necessary for conserving a right which would otherwise be prejudiced through the delay in obtaining the suspension, or for the prevention of a damage which could not otherwise be repaired or for the removal of any difficulties arisen with the enforcement.

For the court to dispose the interim suspension, the claimant may be asked to pay a bail, computed as a percentage established by the court.

6.3. Frequent grounds encountered in practice for filling the claim in annulment

6.3.1. Some cases of expressly stipulated grounds for invoking nullity, as mentioned under Law no. 31/1990

Law no. 31/1990 comprises a series of cases when the legislator believed it is important to specify the nullity sanction. Out of these expressly mentioned cases, some stand out through their frequency in practice, such as breaches of convocation formalities and breaches related to the length of the representation powers of a third party for a shareholder participating in a meeting.

A. Breaches of convocation formalities, sanctioned with absolute or relative nullity, as the case may be

Pursuant to article 117 of Law no. 31/1990, a summoning notice must comprise the date and time of the meeting, along with a detailed agenda of the items envisaged to be discussed. If the court is vested with analyzing the lack of observance of the convocation formalities for the adoption of a resolution by the shareholders and from the evidence administered by the parties, the court[14] concludes that the convocation formalities have been breached, it shall dispose its annulment.

This case covers any situations in which either a shareholder was not duly summoned for the general meeting or the agenda transmitted through the summoning notice lacked some or all of the points which were discussed during the meeting, thus making the it difficult for the shareholder's will to be duly formed. Any type of agenda

[14] Former Supreme of Justice, Decision no. 51/2002.

comprising general items such as the economic situation of the company while the shareholders are voting the sale-purchase of shares represents a breach of legal dispositions and is sanctioned with the annulment of the resolution, as decided by the High Court of Cassation and Justice[15].

Another case when the court[16] considered the resolution of the general meeting of shareholders is null is when it acknowledged that the meeting has been convened at the registered office of one of the shareholders which conflicted with another shareholder.

However, the High Court of Cassation and Justice[17] deemed that if the reference date was missing from the summoning notice sent to the shareholders of a joint stock company, this circumstance does not trigger the nullity of the resolution if the claimant does not prove a specific damage deriving from the lack of the reference date.

If the summoning formalities have not been at all fulfilled or have been performed by persons who are not entitled to perform them at all, the applicable sanction is the absolute nullity of the adopted resolution, as confirmed by recent case law[18].

B. Shareholders were represented in the general assembly by members of the board of directors, by members of the directorate and of the supervision council or by the company's employees

Article 125 of Law no. 31/1990 stipulates a specific case when the resolution of the general meeting of shareholders is deemed null in case the shareholders were represented in the general assembly by members of the board of directors, by members of the directorate and of the supervision council or by company employees. Since the interest protected through art. 125 is a general one, the applicable sanction is the absolute nullity of a resolution adopted with its breach.

Although the company's shareholders are allowed to be represented at the general meeting, article no. 125 of Law no. 31/1990 establishes an interdiction for shareholders to be represented by the same company's members of the board of directors, of the directorate and of the supervision council or by its employees.

If Law no. 31/1990 would allow for shareholders to be represented by the directors or by employees, then there might be doubts whether the will of the company is duly born or whether it is impeded as a result of the involvement of other members functioning within the company, who may have contrary interests to the ones of the company.

Besides the claim in annulment of the resolution of the general meeting of shareholders where the latter breached the provisions of article 125, as outlined by the legal doctrine[19], the company and the other shareholders may file a claim requesting damages from for the repair of the prejudices caused because of such violations.

6.3.2. A case of indirect nullity, which is not expressly stipulated by Law no. 31/1990

6.3.2.1. Majority abuse, sanctioned with relative nullity

In case the company is formed by shareholders with different participations and who have different views regarding the

[15] High Court of Cassation and Justice, Ruling no. 966/09.03.2007.
[16] High Court of Cassation and Justice, Ruling no. 2690/28.09.2006.
[17] High Court of Cassation and Justice, Ruling no. 3505/ 09.11.2011.
[18] Bucharest Court of Appeal, Decision no. 195/11.04.2006, published in Bucharest Court of Appeal's Practice collection for commercial trials, Wolters Kluwer Publishing, 2007, p. 31-33.
[19] SS. David in St. D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, *Companies Law. Comments*, IIIrd Edition, C.H. Beck Publishing, Bucharest, 2014, p. 414.

politics of the company, it opens the gate for frequent misunderstandings related to the guidelines of the company. These disputes are manifested most actively in cases when the will of the company should be congruent, however it lacks common vision and consistency in the decision process. It is often the case that a shareholder owning a participation sufficient to grant him the possibility to determine the adoption of a certain decision without the support and approval of other shareholders with a significantly lower participation when the majority shareholder shall force passing the decision, irrespective of the other shareholders' point of view. In this case, there are no formal breaches of the law or of the Articles of association.

If this type of decision, although not contrary to the Articles of association or to the law, is contrary to the company's best interest while being supportive of the majority shareholders' interest, then we can consider that a majority abuse was committed.

Article 136^1 of Law no. 31/1990 expressly stipulates that shareholders must act in good faith and exercise their rights while observing the legitimate rights and interests of other fellow shareholders.

Legal scholars[20] have identified specific criteria for the identification of an abuse of majority participation, as folloews:

- exercising a shareholder right without the observance of law and of morality,
- exercising a shareholder right in bad faith,
- exercising a shareholder right by exceeding its limits,
- exercising a shareholder right without the observance of the social and economic purpose of its regulation.

Using a right abusively has been also regulated in the civil legislation, through article 15 of the New Civil Code, which states that no right may be exercised with the direct purpose of harming another person in an excessive and unreasonable manner, contrary to goof faith. Legal scholars[21] have determined that for an abuse of rights to be acknowledged as such, the right must be exercised in bad faith and must be inappropriately used, outside its normal limits.

Nonetheless, a shareholder's majority participation is not always a signal of an abuse of majority since its dominant position must be concretely manifested in a resolution regarding a specific operation. The accusation of having a dominant position should be interpreted in connection to a relevant issue and it is related to the shareholder's conduct in a given situation and not in general.

7. Effects of filling the claim for the annulment of the general assembly of shareholders' resolution

Once a claim for the annulment of the general assembly of shareholders' resolution is filed before a court of law and approved by the latter, certain effects derive out of this situation. The effects of the nullity are the same, regardless whether the nullity is absolute or relative.

Since the resolution is mandatory for the shareholders, once it is invalidated by the court, the shareholders must be restored to their position prior to adopting the resolution. With respect to the company's management, the latter is obliged not the enforce the resolution once it has been invalidated by the court. As regards the

[20] Lucian Saulean, *Commercial Companies. General Meetings of shareholders*, Hamangiu Publishing, p. 213.
[21] Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *New Civil Code Comments*, Hamangiu Publishing, 2013, p. 15.

company itself, it shall abstain from enforcing the resolution. Also, any registrations before the trade registry based on the resolution shall be erased, as it was outlined by legal scholars[22].

However, as Romanian courts have established[23], trade registry mentions cannot be erased solely based on filling a claim for the annulment of the general assembly of shareholders' resolution.

Once the court definitively annuls a resolution of the general meeting of shareholders, any subsequent resolutions which are directly connected with the annulled resolution are therefore annulled. As shown in recent case law[24], if the subsequent resolutions are not connected with and are not the result of the annulled resolution, then the latter's nullity shall not affect them.

Given that the any valid resolutions are mandatory for the shareholders, irrespective if they have voted in favour or against them, once the court issues a final ruling for their annulment, there resolutions are no longer mandatory for the shareholders or for third parties.

8. Conclusions

While the main aspects for filling the claim in annulment of the resolution of the general meeting of shareholders may be stipulated by the legislator, in order to supplement these findings one must turn to case law, since Romanian courts have extensively interpreted the grounds for obtaining such an annulment.

Although the claim in annulment generally represents a means of protection for the minority shareholder who disagrees with the majority of shareholders, their protection within the legal dispositions should be increased de lege ferenda, since the court cannot supplement the will of the shareholders if the latter do not reach an agreement. In such case, the minority shareholder's rights are difficult to be asserted and so are the breaches perpetrated by the majority shareholders in their abuse of majority.

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[22] Marian Bratis, *The establishment of the joint stock company*, Hamangiu Publishing, 2008, p. 521.

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CHARACTERISTICS OF THE CARGO INSURANCE CONTRACT IN CASE OF INTERNATIONAL LAND TRANSPORT

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Abstract

Cargo international transport is an engine for the development of the economic relations between states involving cross-border movement of goods through the crossing of at least one border of a state (international transport) or by crossing at least two border crossing points, in which case we are in the presence of an international cargo transit. During the transit the goods transported may be subject to an insurance.

The object of the cargo insurance is, thus, represented by the goods, the items expressly listed in the insurance policy, within the territorial limits specified in the insurance policy, both during the transport and during the storage, in the latter case, at the express request of the insured and with the acceptance of the insurer.

This paper analyzes the characteristics of the cargo insurance aiming to present the theoretical and practical aspects of interest with regard to the cargo insurance concluded in case of an international land freight transport.

Keywords: *international freight transport, cargo, insurance, risk, land transport of goods*

1. Introduction

For the goods to satisfy the needs for which they were created, it is necessary that they are transported from the production site to the place where they meet the demand, so that, often, their exploitation is carried out on the international market. Therefore, the transport meets the need for movement of goods, their transit being, often, international (from the territory of a state to the place of destination located in another state).

In the field of international cargo transport we find insurance contracts within sale-purchase contracts, with direct implications on the execution of the contract, including on the transport[1]. The transport and insurance costs directly contribute to the formation of the international prices of goods.

The insurance of the goods that are subject to the international trade activity is concluded depending on the conditions included in the sale-purchase contract, respectively the clauses regarding the conditions of delivery of the goods.

The cargo insurance contract for road transport represents the agreement between the insured and the insurer based on which the insured undertakes to pay a premium to the insurer, and the latter takes over the risk of the of the occurrence of the insured event, binding himself to pay to the insured, on its occurrence, a compensation or an amount insured within the agreed limits of the content. The conclusion of the

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[1] A. Butnaru, *Transporturi şi asigurări internaţionale de mărfuri,* Publishing House Foundation România de Mâine, Bucharest, 2002, p. 227.

insurance for the period of transport and storage of the goods that are subject to foreign trade sale-purchase operations is optional[2].

1.1. Insurable interest.

The insurance of the cargo transported is mainly depending on the need for the existence of a patrimonial interest, assessable in money[3] with regard to the insured goods and the compensation. Under no circumstances, the insured will receive a compensation greater than the damage suffered.

For the cargo insurance for the damage suffered during transportation using road vehicles, the holder of the interest of the insurance is the forwarder or the owner of the cargo (the recipient, the purchaser) to whom the compensation is paid if the event occurs.

The forwarder is bound by the generic obligation to prepare the legal and material conditions regarding the movement of the freight carried. The forwarder must, among other things, carry out any necessary operations, from the technical and administrative point of view, in order to make possible the intended transport[4], which may include, according to the time of the cargo risk transfer, the conclusion of the cargo insurance. But, the diligence of the cargo insurance may also belong to the recipient of the cargo.

1.2. The risk of the contract.

Since Incoterms Rules become binding upon their acceptance and insertion in the sale-purchase contract[5], they become of great importance, including in terms of the legal relationship arising from the insurance of the goods which are subject to the sale-purchase and international transport contracts.

In relation to the Incoterms Rules there will be determined the time when the risk is transferred from the seller to the buyer. In this way, each party will be concerned to conclude the insurance when the risk lies with him.

The general rule is that, during the transport, the goods are carried on the purchaser's risk. The international experience has shown that there are periods, during transport, when the risk is either under the liability of the seller or that of the buyer, or that of the insured, depending on those agreed in the sale–purchase contract.

One of the obligations of the forwarder is to deliver the goods to the carrier. The delivery of goods to the carrier means not only the beginning of the hold of the carrier for the cargo but also the transfer of the risk to the buyer of the goods (its owner).

The circumstances of casus fortuitus and of force majeure raise the question of the risk of the contract both in case of the transport contract and also in case of cargo insurance contract for transport.

In the transport contract, the forwarder, creditor of the specific performance, unfulfilled due to fortuitous causes by the carrier, supports the corresponding damages, not having the right to ask for their coverage by the carrier, but neither does he owe the price of the transport. The carrier bears the risk of the contract exclusively from the perspective of the right for the cost of the transport, in the meaning that loses the amount of money

[2] A. Butnaru, op. cit. p. 231.
[3] A. Butnaru, op. cit. p. 231.
[4] Ghe. Piperea, *Dreptul Transporturilor*, curs universitar, 3th Edition, C.H. Beck Publishing House, 2013, p. 29.
[5] C. Alexa, GH. Caraiani, R. Pencea, *Reglementări și uzanțe în comerțul și transportul international de mărfuri*, Scrisul românesc, Craiova, 1986, p.7-19.

representing the contract price of the transport[6].

If within the insurance contract the case of force majeure represents a clause exempting from liability of the insurer, if this risk occurs, the insurer will not indemnify the owner of the goods. By default, the carrier can not be held liable for loss or damage to goods due to this type of causes. What it is being carried is not the cargo of the carrier but the cargo of the forwarder, the carrier being a simple holder of the goods. The liability of the carrier is a contractual liability, which is based on its fault for failure to fulfill its obligations[7].

1.3. The insurance policy.

The proof for the cargo insurance is the insurance policy which is a document that includes, on principle, the following elements: the name and the address of the insurer, the name and the address of the insured, the object insured, the risks insured, the duration of the insurance, the amount insured, the insurance premium.

The cargo insurance policy used to ensure the goods during the road transport and the storage shall be drawn up in a single original document. At the request and on the expense of the insured, the insurer can issue duplicates or copies of the insurance policy.

In international trade, the insurance policy has the value of a credit instrument. It can be "nominal", "bearer" or "registered", when it can be sent or given as security, as appropriate[8].

The cargo insurance policies are of several types:

1. *subscription policy* (to ensure all goods shipped from the insured within a specific period of time),
2. *floating policies or open policies* (policies that establish a certain limit of values that is ensured and that decreases with each transport carried out, until it is finished),
3. *travel policies* (policies for insurance of the goods from the place of their performance to their place of unloading),
4. *reinsurance policies*.

The mandatory elements in the insurance policy and, also, constituent parts of the insurance contract, are the following: the contracting parties, the object and the insured value, the means of transport, the risks insured and the risks excluded, the insurance premium.

1.4. The parties of the contract.

The parties of the insurance contract are *the Insurer*, that is represented by an insurance company and *the Insured*, who can be any person who has an insurable interest, cargo owners, forwarders, creditors, insurers that reinsure.

1.5. The object of the contract.

The object of the contract is represented by any goods transported in international traffic or that is stored for shipment.

1.6. The amount insured.

For cargo insurances, the amount insured includes the following components: the price of the goods (according to the original invoice or to the value of the goods on the market of the place of shipping, at

[6] Ghe. Piperea, *Dreptul Transporturilor*, curs universitar, 3th Edition, C.H. Beck Publishing House, 2013, p. 32 şi 33.

[7] Ghe. Filip, *Dreptul transporturilor*, Şansa Bucureşti Publishing House, 1996, p. 66.

[8] According to the provisions of the Law no. 58 of 1934, the legal provisions regarding the form of the endorsement also apply to the endorsement applied to an insurance policy issued by order.

the time of the insurance), the cost of the transport (e.g.: costs for loading and unloading the cargo), the hoped benefit (e.g.: unforeseen expenses at the conclusion of the loss determination contract) and, possibly, customs duties.

The amount insured is the value within whose limits the insurer pays the compensation.

Within the cargo insurance for transport there are also policies that do not include precise specifications regarding the amount insured. Depending on determining the amount insured at the time of the conclusion of the contract, we can distinguish between *assessed policies* and *not assessed policies.* In case of the not assessed policies, when the insured risks occurs and in order to obtain the compensation, the insured will have to prove the value of the goods affected by the damage by invoices, delivery notes, bill of lading, bank statements, etc. If the insured or the beneficiary of the insurance holds an assessed policy, it will not to have to prove the value of the goods insured because it was established when the contract was concluded[9].

The insured amount determined under the insurable value, respectively, the so-called under-insurance, makes a partial coverage by the insurer, in relation to the actual value of the damages suffered by the goods during transport, the percentage of the under-insurance being applied to the insured value of the goods.

1.7. The insurance premium

Is the amount of money that the insured pays in advance to the insurer, the latter binding himself to take the risk of occurrence of certain event and to pay the beneficiary, who may be the insured or a third person, a compensation within the limits set by the contract.

Among the determining factors in establishing the level of the insurance premiums we specify:

1. *the scope of the risks* covered by the policy conditions, such as the existence of special risks required to be covered by the insured, determined by the nature and characteristics of the goods (e.g. breakage or scattering in case of transporting glass or food),
2. *use of a particular type of packaging* (e.g. use of a cheaper package),
3. *the duration and methods of carrying out the freight transport* (some insurers do not pay compensation for the damage suffered as a result of the delay or the extension of the travel or they increase the insurance premium when there are more transshipments of the goods as a result of increased risk of damage),
4. *the way that the means of transport looks like* (e.g. the age of the means transport can contribute to the risk assessment and, thus, to the establishment of the insurance premium) and
5. *the conjunctural state of the international insurance market*[10].

1.8. The risks insured.

Road transport insurances were influenced by the maritime transport, the latter having a longer tradition.

For the road transport, the cargo insurance can be carried out for general risks and for special risks, the insurance conditions being classified as general conditions of insurance and special conditions of insurance.

The general conditions of insurance cover either a wide range of risks (e.g.: “all

[9] C. Iliescu, *Contractul de asigurare de bunuri în Romania*, C.H. Beck Publishing House, 1999, p. 148.
[10] C. Iliescu, *Contractul de asigurare de bunuri în Romania*, C.H. Beck Publishing House, 1999, p. 150-151.

risks" insurance) or "named perils". The special risks are insurable separately, in exchange for the payment of additional insurance premiums.

Within the cargo insurance procedure for international road transport the same insurance conditions as in maritime insurance are practiced, namely: conditions A, B and C.

Condition A ("all risks of loss and/or damage") offers the largest coverage but is also the most expensive. Under this condition, risks listed separately as exclusions are not covered.

Condition B covers the losses and/or the damage of the goods during transport, contains a smaller number of covered risks, risks that are expressly mentioned in the content of the insurance condition. By default, the insurance premium is smaller. Among these risks we specify: fire or explosion, overturning, collision of the means of transport with a foreign object, earthquake, volcanic eruption, lightning, water entering the means of transport, container or storage place, total loss of a package lost or dropped whilst loading onto or unloading from the means of transport. Together with these risks, some insurers also include other risks such as: collapse phenomena (bridges, buildings, tunnels), falling trees, breakage of dams, water pipes, avalanches, lightning, floods, earthquakes.

Condition C covers losses and/or damages of the goods during transport and covers fewer risks than those included under Conditions A and B. There have been included: fires and explosions, overturning or crashing of the means of transport, as well as the collision of the means of transport with a foreign object, other than water.

The insurance of the goods through conditions A, B and C covers certain categories of expenses among which we specify: those made by the insured in order to save the freight loading, for the prevention of an imminent danger or to minimize the losses and/or the damages incurred; the ones regarding the determination of losses and/or damages made by the insured, if the damage is suffered due to a cause which is specified in the insurance; rescue expenses, paid by the insured, established according to the provisions of the insurance contract and/or the applicable law; expenses that represent the rate of liability according to the clause "mutual fault in case of collision" if this clause is provided by the contract[11].

The payment of an additional premium may lead to the extension of any of the conditions mentioned above, so that *special risks* are covered, such as: robbery, theft, non-delivery, strike and risks related to the nature of the cargo.

Within the cargo insurance conditions a part is represented by *the risks excluded*, respectively, those for which no compensation is paid, the losses, the damages or the expenses caused by: willful misconduct of the insured or his representatives, as well as the criminal or administrative consequences of this behavior; losses indirectly related to the prohibition of sending or receiving the goods, moral damages, or loss of the profit expected; losses resulting from commercial operations; the usual loss in weight or volume, drying, evaporation, leakage or normal wear and tear of the insured goods; insufficient or improper packing or preparation of the insured goods; inherent defect or the nature of the insured goods; customs or commercial offenses; fines, confiscations, seizure, smuggling,

[11] V. Ciurel, *Asigurări şi reasigurări Abordări teoretice şi practici internaţionale*, Bucharest Publishing House, 2000, p. 454.

prohibited or clandestine trade; insolvency or failure to fulfill the financial obligations by the owners, managers, or operators of the means of transport.

On principle, these risks are included in the category of uninsurable risks, in the meaning that none of them may be additionally insured.

Furthermore, from the general conditions of insurance are also excluded the risks of war and strikes, these risks could be, however, subject to a special insurance, in exchange for the payment of an additional amount.

Some special goods are subject to special conditions, being possible to conclude a special insurance, considering the nature, the volume, the weight or the value of that cargo (e.g.: transportation of bank bills, securities, coupons, bank notes and coins, precious metals, artworks, dangerous goods, postal parcels, even those with declared value, perishable goods, live animals and others).

Within the transit or combined road transport "the storage risks" condition is also important. This condition covers the losses and the damages of the insured goods, during the storage of the goods, for the following events: fire, explosion, lightning, heavy rain, including its indirect effects, earthquake, hurricane, collapse or landslide, avalanche. The exclusions presented also apply to this condition.

In order for this clause to take effect it is absolutely necessary that the warehouses of the forwarder and the beneficiary are indicated[12]. Romanian arbitration practice takes into consideration the correctness regarding the refusal of payment for the compensation "as long as the warehouses in question, both of the supplier and of the beneficiary, located outside the port of unloading of the goods, were not indicated in the insurance policy"[13].

The special conditions of insurance represent a supplement to the general conditions of insurance of goods, the insured requesting an additional protection for certain risks. The most common *special conditions* are: the risks of war; the risks of strikes; the risks of theft, robbery and non-delivery.

There is also a number of typical risks arising from the nature of the cargo. There are taken into consideration phenomena such as: overheating, spoilage, breakage, scattering, etc.

Unless otherwise provided in the cargo insurance contract, the general exclusions that have been presented are also valid for the special conditions herein mentioned.

Due to the increased incidence of the risks covered, the condition "risks of theft, robbery and non-delivery" need a few specifications.

It covers the losses and the damage for the insured goods caused by theft, robbery and non- delivery of the goods. The compensation is determined starting from the sum insured plus the expenses incurred by the insured on the account of the insurance company aimed at limiting the damage or reconditioning of the goods. Also, one can proceed to some cuts in situations such as: inexact triggering of the risk without bad faith by the insured; causing damages to the insurance company by non-preservation of the right to sue for compensation against those responsible, compensation, possibly, with the premiums remaining to be paid; payment of the deductible, etc. The resulting amount represents the final compensation.

[12] C. Iliescu, *Contractul de asigurare de bunuri în Romania,* All Beck Publishing House, 1999, p. 153.

[13] Decision no. 139 of the 29th of August 1977 of the Court of Appeal Bucharest quoted by O. Căpățână in Revista română de studii internaționale no. 3/1980, p. 267.

1.9. Interpretation of the contract.

The judge must see the intention of the parties, the meaning and the occurrence of the exclusion clauses of the guarantees or of those regarding the loss of the right (forfeiture) which give the insurer the opportunity to discuss the guarantee itself, emptying the insurance contract of its essence or contents. The interpretative approach of the judge of the case is, currently, extremely complex since the detection of the content of the contractual clauses in order to establish the rights and the obligations of the parties must take into account, besides the regulatory framework conferred by the provisions of the common law, also those of the commercial law and those of the special legal provisions, without ignoring the community law in the field[14].

In addition, the judicial practice has shown that the interpretation of the cargo insurance conditions often presents difficulties, arising from the ambiguity or the lack of information from the insurance conditions or the existence of special conditions, derogating from the general ones. Consequently, we present some of these issues of wide interest:

The cargo insurance contract is the work of the insurer who "thinks it" (conceives it), drafts it and offers it for signing to those who want to be ensured against any sinister or against the event of the occurrence of a risk. The insured usually adheres to the preset contract, without doubting the general and/or special conditions stipulated by it or the content itself of the "prefabricated" legal act.

As a consequence of *the adhesion* character of the insurance contract, the doctrine and the specialized practice stated that clauses that are equivocal, ambiguous or obscure are interpreted in favour of the insured ("*contra proferentem*").

The ambiguity covers two main causes of interpretation/where the interpretation of the contract is required: one is *the lack of information* within the provisions of a contract, a second one is the situation where certain policies are abundant in clauses and documents that provide *excessive information*;

The lack of information found while reading the contract gives it an imprecise and partly ambiguous character; the insufficiency of information may result, for example, from the lack of definitions, the use, by those who write the policies, of generic, inappropriate words or phrases, or that do not circumstantiate the situations and that become inaccurate in a particular context.

In case of lack of information, materialized, for example, by the lack of a definition of the terms used, it appears the problem of resolving differences arising between the "common" meaning of the words and their "legal" or "technical" meanings, meanings absolutely necessary for the courts, for example, when they are called upon to interpret the words or the phrases in a way that should be acceptable and accessible, especially to an ordinary ensured that requested some type of coverage (insurance).

Rules of interpretation. On principle, there are two rules of interpretation that can be applied: *the first* is that, if in doubt, the words of the contract are interpreted to the detriment of the party trying to diminish (or shirk from) their contractual obligations; *the second* establishes that, if in doubt, the words of the contract are interpreted to the detriment of the party who proposed their insertion in the contract (considering that it

[14] Mona-Maria Pivniceru, *Efectele juridice ale contractelor aleatorii*, Hamangiu Publishing House 2009, p. 97.

was its duty that those words/phrases are clear, leave no room for equivocal).

In accordance with the principle (or rule) contra proferentem, if the meaning of a contractual provision is ambiguous, it would be preferred and considered that the meaning is averse to the party that proposed (or imposed) that clause. In the name of fairness, the principle contra proferentem claims not to ever intentionally distort the clear sense of the words used to form the clauses of a contract[15].

An exclusion provided by an insurance contract is formal when it is *express, clear, precise and unequivocal*; it dispels any hesitation between non-insurance and the worsening of the risk insured, i.e. all the uncertainties regarding the intent of exclusion[16].

The exclusion is considered to be clear and precise when it refers to *"precise criteria and assumptions restrictedly listed"*, being desirable that the insurer tries an exhaustive enumeration of the clauses for exclusion from the guarantee.

There are regarded as imprecise the exclusions that relate to approximations or rules (standards) that are unclear, inaccurate, adding more difficulty for the insured when the insurer has the tendency to reduce or even to refuse to grant the guarantee.

The exclusion should also be limited, i.e. to allow the insured to know the exact extent of the guarantee underwritten and to understand the terms of the agreement concluded.

In case an exclusion clause from the guarantee is neither formal nor limited, there are two solutions, both favorable to the insured: either the clause is assessed as lacking validity or it will be considered ambiguous or inaccurate and, consequently, it will be interpreted by the court against the insurer who drafted it[17].

The conflict between the general and special provisions frequently impacts on the object of the insurance contract, especially regarding the extent of the guarantee owed by the insurer;

To be considered as being formal, an exclusion should not only be included in the general conditions of the policy, but also in the particular ones, in view of the fact that *"the clauses of the particular conditions benefit of primacy over the general conditions if they are not compatible with each other".*

2. Conclusions

The distinctiveness of the cargo insurance contract consists of the complement of the technique for taking over the risk by a third party, who, at the same time, does not take part in the operations that he insures, but provides only the performance of the insurance, with the legal aspect concerning the contractual nature of any insurance operation, regardless of the risks covered and the ways of covering.

The presentation led to the finding of the fact that the cargo insurance represents a complex insurance, with multiple characteristics given by its technicality but also by the multitude of legal issues that may arise from the analysis of the general and special conditions, especially when they are drafted inaccurately, equivocally, ambiguously.

[15] Elena-Maria Minea, *Încheierea și interpretarea contractelor de asigurare*, C.H. Beck Publishing House, 2006, p. 211.
[16] Elena-Maria Minea, *op cit.* , p. 226.
[17] Elena-Maria Minea, *op cit*., p. 227.

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ISSUES RELATED TO THE APPEARANCE, EVOLUTION, FUNCTIONS AND UTILITY OF THE LEGAL EXPENSES INSURANCE CONTRACTS, ESPECIALLY WITHIN THE EUROPEAN UNION'S STATES

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Abstract

This report aims to provide a concise comparative analysis of the features of legal expenses insurance (also known as insurance for legal protection or LEI), that can be found and have been adopted in several European jurisdictions (France, England and Wales, Germany, Austria, Switzerland, Finland etc), as well as in other law systems (Australia and Japan). We are studying the reasons that led to the implementation of this instrument in each jurisdiction, the evolution of its use and spread and, also, its effect on counteracting the shortcomings of the systems of justice fees and legal aid, resulting in providing access to justice, as a part of the right to a fair trial, as it is guaranteed by art.6 par.1 of the ECHR.

Keywords: *the right to a fair trial, access to justice, the European Convention of the Human Rights, justice fees, sharing of the legal expenses, insurance for legal protection (LEI).*

1. The importance of the research. Introductory concepts regarding the free access to justice in the ECHR system. The implicit limitations of the respective right, related to the ability of the states to regulate the duty to pay justice fees, as well as the instruments they implement, so that the exercise of „the discretion" would not be an obstacle in the way of the access to justice.

This study has a special practical importance, whereas its conclusions have in view the actual ways of ensuring access to justice, as a part of the right to a fair trial, as it is guaranteed by art.6 par.1 of the European Convention of the Human Rights.

Due to the lack of a Convention's specific regulation, regarding the content of the right to a fair trial, this one has been settled, in a praetorian way, within the jurisprudence of the Strasbourg Court[1].

As for the inclusion of the access to justice among the rights guaranteed by the Convention, which represent the content of the right to a fair trial, this has been achieved, for the first time, in the case Golder vs. United Kingdom[2], when the European Court of the Human Rights noted the fact that article 6 par.1 „does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are

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[1] I.Deleanu, *Drepturile fundamentale ale părților în procesul civil*,.Universul Juridic Publishing House, București, 2008, p.130.

[2] The case Golder vs. the United Kingdom, par.28-31, 36,material studied online at December, 16th. 2016 at the address: http://hudoc.echr.coe.int/eng?i=001-57496.

distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term". This is the reason why it has been concluded that the Court should be the one to decide, by interpretation of the content of article 6, if the right of access to court is to be included in the mentioned content.

It has been noted[3] in the same above mentioned case that the Strasbourg Court admitted that the right of access to justice cannot be an absolute right, as it is subject to some limitations[4]. The Court established that those limitations are implicit, as the settlement of the right of access by the states is compelled by its very nature and the differences in settlement will be determined by the available resources and specific needs of each nation (more precise, its' society)[5].

These limitations are the expression of the states' sovereignty, this being the basis for granting them an „appreciation margin"[6].

The appreciation margin (discretion) has been defined as the recognized ability of the states to exert their national sovereignty, in the way of limiting the revaluation of some of the fundamental rights acknowledged by the Convention. The jurisprudence of the European Court has been permissive and constantly granted to the signatory states „some discretionary powers", „a certain freedom" or „an estimation power". This Court's approach has been qualified as „allowable and even necessary", in the context of numerous normative acts, with interpretable provisions[7].

The appreciation margin is shown by the very settlement of certain time limits of elapse and prescription, levying of legal taxes related to the justice activity or by the requirement of covering certain preliminary procedures, as a prior condition for the referral to the court.

On another case[8], it was noted that the appreciation margin must be exerted with caution, so that it would not alter the very substance of the right guaranteed by the Convention.

Even if the Strasbourg Court is the authorized forum to observe the compliance with the provisions of the Convention, this does not also imply empowerment of the Court to evaluate and decide upon the best solution to apply in the specific case.

On the same occasion of solving the Ashingdane case[9], there were noted the criteria that states must satisfy to exert „the appreciation margin" (hence, the name of

[3] C.Bîrsan, Convenția Europeană a drepturilor omului. Comentariu pe articole. Ediția 2, C.H.Beck Publishing House, Bucharest, 2010, p.430.

[4] "as this is a right which the Convention sets forth (see Articles 13, 14, 17 and 25) (art. 13, art. 14, art. 17, art. 25) without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication", Golder case, precit, #38.

[5] „Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals"…", The case Ashingdane v. the United kingdom, par.57, material studied online, at 04.01.2017, at the address: http://hudoc.echr.coe.int/eng?i=001-57425 .

[6] In this regard, there are of utmost importance (relevance), the reasons stated, both, in the previous case (Ashingdane) and, also, in the case Cordova v. Italy (no.1, 40877/98), par.54. The case Cordova v. Italy, studied at 26.12.2016, at the address: http://hudoc.echr.coe.int/eng?i=001-60913 .

[7] I.Deleanu, *Instituții și proceduri constituționale în dreptul român și în dreptul comparat*, C.H.Beck Publishing House, București, 2006, p.318.

[8] The case Ashingdane v. the United Kingdom, cited above, par. 57.

[9] Ibidem.

the „Ashingdane Criteria"[10]), in order to prevent the arbitrary application of the law and to ensure the right to access. These rules must be observed cumulatively and they are the following:

- the regulated measure or the ordered proceeding (aiming restriction of the right to access) has to be motivated by its very purpose (a "legitimate aim"). This is the case of consecrating a system of legal fees, aiming to protect the general interest, expressed by the proper administration of justice, which cannot be possible without a suited financing;
- the adopted proceeding (which leads to restriction of the right) must be proportional to the general interest that it has to defend. The reasonable relationship of proportionality ends when the very substance of the right of access is altered.

In the specialty literature, it was noted[11] that, in certain cases, the Court (E.C.H.R.) additionally asks for the fulfillment of the requirement that the normative act (the national norm), or the jurisprudence that represents the basis of the restriction of the right of access, should be clear, accessible and foreseeable[12].

The latter condition is pursued only in those cases when evaluating the satisfaction of the first two requirements is delayed or obstructed because, *primo*, it is considered that the restriction of the right has been a disproportionate measure in relation to the particular circumstances of the case or, *secundo*, the reality referred to justice has not been the subject of enough causes to make the interpretation be unequivocal.

In fact, the approach of this exam is not based on the specific requirement of the law, as it happens in the case of the relative rights, guaranteed by the art.8-11 of the Convention, (for these last ones, the right of interference must be provided by the national law, as it is, *per se*, a condition of legality), but it seeks exclusively to confirm the occurrence of an alteration to the very substance of the right or it is able to help assessing the proportionality degree of the measure[13].

Even if among the means to exercise state sovereignty, within the above-mentioned context, there also is the empowering of the member-states to regulate the imposing of the justice fees, for the purpose of partly covering the expenses of the public service of justice, the imposition of this requirement[14] has to comply to the same line of thinking presented above, so that it should not be exerted arbitrarily, but by observing some of the requirements noted in the European court of human rights practice and which also determines the evaluation of the proportionality of limiting the right of access.

As a consequence, the provisions leading to an exaggerated amount of court

[10] The reasons for the need of obeying those rules were frequently indicated within ECHR jurisprudence and may be found, inter alia, in the following cases: Bellet v. France (23805/94), Fălie v. Romania (nr. 23257/04), Kemp and others v. Luxemburg (no. 17140/05), R.P. and others v. the United Kingdom (no. 38245/08), Čamovski v. Croatia (no. 38280/10), Kardos v. Kroatia (no. 49069/2011), Baka v. Hungary (no. 20261/12), Zavodnic v. Slovenia (no. 53723/2013).

[11] D.Bogdan, *Procesul civil echitabil în jurisprudența CEDO. Vol.I. Accesul la justiție*, Hamangiu Publishing House, 2009, Bucharest, p.27.

[12] The case Lupaș and others v. Romania, #67, material studied online at the date of 04.01.2017, at the address: http://hudoc.echr.coe.int/eng?i=001-78568; the same conclusions were took over and used, among others, in the cases Tsasnik and Kaounis v. Greece (no. 3142/08), #35 and Nasui v. Romania, # 20 (no. 42529/2008).

[13] D. Bogdan, cited above, p.27.

[14] ECHR held that they „have never denied that the interests of the good justice administration might justify imposing of financial restrictions regarding a person's access to a tribunal", the case Beian v. Romania (nr.2), 07.02.2008, par.26, material studied online at 05.01.2017,at the address: http://hudoc.echr.coe.int/eng?i=001-84881.

fees have been declared unacceptable. Nevertheless, the limitation of access is not caused, *eo ipso*, by the respective exaggerated amount, but by the specific situation or circumstances of the justice seeker, who is expected to pay those taxes. Such a situation, that can block the access, is "the total lack of plaintiff's means"15 or the fact that the party has no income[16].

The profession or social statute of the party is also irrelevant (*exempli gratia*, businessman), as long as the respective amount, "from the ordinary justice seeker's perspective, was unequivocally substantial", so that "the fee required for the plaintiff to formulate court action was excessive" and "led to his divestment from entering legal proceedings and his case not be heard by a court", which disagrees with the guarantees of a fair trial[17]. It also is irrelevant if the justice seeker, whose right to access has thus been violated, is a legal person, since they, too, benefit from the rights registered under "the same laws and same procedures"[18].

However, the Court decided[19] that "the judicial tax regime" is "flexible enough", when the party is offered "the opportunity to request (total or partial) exemption from payment of tax", if it satisfies the eligibility requirements or if it shows the risk to face "certain special difficulties". If these conditions are met, the establishing of the amount of legal fees, by reference to the dispute, fell under "the discretion (appreciation margin) of the state".

As a conclusion, the examination of internal rules, regarding the organization of court fees system, compatibility with the aim of an effective access to justice, will be undertaken necessarily by observing the dichotomy: *de facto* obstacle-positive obligation.

Given that the justice seeker's insufficient funds represent a hindrance[20] for the right of access, so that the regulating and organizing of the legal fees system complies with the above mentioned requirements, in order to ensure a real access to court, each state has the positive obligation[21] to adopt the necessary measures they appreciate to be useful, including among them, for example, the establishing of a legal aid system, to counteract the possible shortcomings of the requirement to tax the filled applications, claims and actions.

In our view, among the measures that must be considered by the Court when it decides if the provisions of art.6 par (1) of the Convention have been violated, there are also those related to the existence and functioning without failure of a legal expenses insurance system (LEI). Even though the states do not control the insurance companies that operate on their territory, the objective possibility of the justice seekers to ensure the financing of

[15] The case Ait-Mouhoub v. France (28.10.1998), par.61, material studied online at 05.01.2017, at the address : http://hudoc. echr.coe.int/eng?i=001-58259.

[16] The case Mehmet și Suna Yigit v. Turkey (17.10.2007), par.38, material studied online at 05.01.2017, at the address: http://hudoc.echr.coe.int/eng?i=001-81734.

[17] The case Kreuz v. Poland (19.06.2001), par.61-66, material studied online at 05.01.2017, at the address: http://hudoc.echr.coe.int /eng?i=001-59519.

[18] The case SC Marolux SRL and Jacobs v. Romania, par. 33-34, material studied online at 05.01.2017, at the address: http://hudoc.echr.coe.int/eng?i=001-123332.

[19] The cause Urbanek v. Austria, 09.12.2010, published in R. Chiriță (coordinator), *Dreptul de acces la o instanță. Jurisprudență C.E.D.O.*, Hamangiu, Publishing House, Bucharest, 2012, p.135-136.

[20] For explanations regarding the notion, the juridical nature and the list of the factual obstacles which may affect the right of access to a tribunal, see C.Bîrsan, cited above, p.437-442.

[21] For conclusions about the evolution of the ECHR jurisprudence regarding the recognition of the existence of the positive duties of the states and, latter on, about the expanding of this category's limits, see D. Bogdan, cited above, p. 14-15.

their actions to court, using this method, must be evaluated and taken into consideration as one of the factors to define the person's "specific situation", because, along with the possibility to access the public legal aid, it represents one of the instruments that help ensuring the free access to justice.

2. Legal expenses insurance. Definition. Legal nature. Classification.

Legal expenses insurance (or legal protection insurance) has been established in France, in 1820, the clients of the insurers being able to choose that the latter administrate their legal matters, regardless their quality in the litigation: plaintiffs or defendants. Another 100 years passed until this kind of policy started to be widely used. Their popularity emerged considering the beginning of the use of automobiles, so that they were adapted as provisions (clauses) of the car insurance contracts. The need to circulate in all the European countries also brought a series of risks, such as the differences between the national legal systems and the language differences, all these being covered by the very above mentioned instrument. Even nowadays, the legal expenses insurance (also known as legal protection insurance) is the most common, as an add-on to the motor insurance[22].

The shortcomings of the legal aid system, which did not cover a significant amount of justice seekers, have been crucial for the appearance of the legal expenses insurance (LEI), which was dedicated to the middle class people, as well as to the small businesses, namely people too wealthy to benefit from the legal aid, but, at the same time, not having enough financial means to cover all costs related to each and every insignificant litigation[23].

Legal expenses insurance (LEI) has been defined[24] as "a means of financing unpredictable legal costs by spreading the risk of liability among subscribers to a scheme (more exactly, the LEI insurance scheme), thereby reducing the cost to each".

Although the doctrine also uses the term of "legal expenses insurance", we think the phrase "legal protection insurance" is more appropriate, for it refers to a wider range of legal activities. In this respect, we must take into consideration the fact that the range of expenses payable by the insurer is not limited only to the legal fees (due to the state for the public justice service), but it may also include the ones for mere giving legal advice, drafting of legal documents (contracts) or initializing and carrying out of amicable procedures (such as mediation) etc.

Art.127-1 of Insurances Code from France[25] offers a comprehensive definition of this type of policy. According to its content[26], we are dealing with a legal protection insurance when this one aims

[22] Legal expenses insurance (LEI) Report – European market overview, Germany, the U.K. and Bulgaria, SeeNews (Research on demand), cited above, p.5.

[23] M. Reimann (editor), *Cost and fee allocation in civil procedure, Ius gentium: comparative perspectives on law and justice 11*, Springer Publishing House, Dordrecht, Heidelberg, New York, London, 2012, p.39.

[24] Material studied online at 23.12.2016, at the address: http://www.lawfoundation.net.au/report/lei.

[25] The law no. 2007-2010 of 19 February 19, 2007, material studied online at 27.12.2016, at the address: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=C02F5FB732C5E1E02EFEC240A3AB16AB.tpdila21v_3?idSectionTA=LEGISCTA 000006157261&cidTexte=LEGITEXT000006073984&dateTexte=20161227.

[26] The article no. 127-1 of the French civil procedural code states that: Est une opération d'assurance de protection juridique toute opération consistant, moyennant le paiement d'une prime ou d'une cotisation préalablement convenue, à prendre en charge des frais de procédure ou à fournir des services découlant de la couverture d'assurance, en cas de différend ou de litige opposant l'assuré à un tiers, en vue notamment de défendre ou représenter

"any operation which, in exchange for the payment of a premium or a tax, previously established, consists of taking over the procedural costs or provision of services on behalf of the insurance policy, in case any dispute or litigation arises between the insured party and a third party, especially for the purpose of defending or representing the insured party in his claim in a civil, criminal, administrative or any other kind of procedure, or against a complaint involving him, or to amicably achieve remedial of the caused damage."

Legal expenses insurance (LEI), or Legal protection insurance, is another category (a separate category) of "non-life" insurance[27]. This type of insurances ("Legal expenses and costs of litigation") has been specifically established by being included at point A of art.17 of the Annex to the Directive no. 73/239/EEC[28], the first Directive related to non-life insurances).

As for the overall share within the non-life insurances category, the LEI policies have a low percentage, of less than 2% (with variations between 1.5%-1.8% within the period 2002-2013, then a constant growth till 2010 and a slight decrease between 2011 and 2012, followed by a revival in 2013, which shows that this type of insurance is very sensitive to the economic fluctuations)[29].

A decisive fact for the individualization of LEI insurances is that the insured risk is represented by the necessity to cover the court costs related to justice actions brought against the policies' holders, irrespective of the fact the claimant is an individual or a legal person.

This type of insurance has its origins in Europe, where it is operated predominantly by private businesses (insurance companies) for profit. Policies tend to provide cover for unforeseeable legal events and may be sold either to individuals, or to a group or a category of subscribers, as stand-alone contracts or on add-on basis to other insurance contracts (for example, to a motor insurance)[30].

The range of legal services covered by legal protection insurances is a wide one, from legal advice, to drafting of legal documents (*exempli gratia,* drafting of a contract or a will), or representing the parties in the court[31].

However, in case the legal protection insurance had been concluded voluntarily (*i.e.*, it is an independent policy), the settlement (the financing) of the above listed activities will be ensured up to the value limit established by the policy, irrespective of the fact that the expenses thus covered are those advanced by the victim of the accident for court referral, or, if the case, are the expenses that must be refunded to the

en demande l'assuré dans une procédure civile, pénale, administrative ou autre ou contre une réclamation dont il est l'objet ou d'obtenir réparation à l'amiable du dommage subi.

[27] Information from the guide "*The legal protection insurance market in Europe*", edit. oct.2015, p.4, material prepared by RIAD (the International Association of Legal Protection Insurers), studied online la 16.12.2016, at the address: http://riad-online.eu/fileadmin/documents/homepage/News_and_publications/Market_Data/RIAD-2015.pdf.

[28] First Council's Directive no 73/239/EEC of 24 July 1973, on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance, material studied online at 29.12.2016, at the address: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31973L0239.

[29] Information from the guide "*The legal protection insurance market in Europe*", oct.2015, cited above, p.4-5.

[30] Material studied online at 23.12.2016, at the address: http://www.lawfoundation.net.au/report/lei.

[31] Legal expenses insurance (LEI) Report – European market overview, Germany, the UK and Bulgaria, SeeNews (Research on demand), p.5, material studied online at 18.12.2016, at the address: https://seenews.com/static/pdfs/LegalExpensesInsurance ReportEuropeanMarket Overview.pdf.

adverse party by the losing party[32].

Therefore, the services granted to the holder of a legal protection insurance are not only limited to refunding the amounts paid by this one as lawyer's fee or other related court fees, but, in time, they were extended to offering professional advice, by the in-house lawyers of the insurance companies or by outsourced appointed professionals. The insurance holder can be granted professional assistance also for concluding extrajudicial transactions, or can be represented in court by the insurer himself. The range of the services settled on behalf of the respective insurance differs from a jurisdiction to another, due to the fact that they have different ways of regulating the outsourced legal services.

As a rule, the insurer is allowed to provide legal assistance, as well as assistance related to extrajudicial transactions. *A contrario*, in most of the EU states, the representation in court or in other administrative procedures is not allowed, or they must comply with conditions that differ from a system of law to another. The most restrictive related legislation is in Germany, where the only benefit the insurers can give is payment of damages, since they are not authorized to offer legal advice, to assist the insurance holders in the extrajudicial procedures or to represent them in court. Giving legal advice is prohibited in Poland, as well[33].

Classification of LEI type insurances subjects to the following criteria:

a) the date of concluding the insurance contract, considering the date of occurrence of the insured event;
b) according to the legal nature of the insurance and
c) according to the object of the contract (usually revealed by the policy's holder).

a) Depending on the date the policy has been concluded, the legal protection insurances can be: before-the-event (BTE) insurances or after-the-event (ATE) insurances, specifying that the latter category is sensibly more expensive than the first one[34].

The after-the-event type insurances are available only in England and Wales and, later on, we will come back with related details. Unlike the before-the-event type policies, they are purchased either when a litigation situation occurs, or even after the time the referral to court has been made. In order to study the particularities of the ATE type insurances, we must observe the risks involved in starting a lawsuit within the British legal system, such as: high litigation expenses, difficulty in estimating the costs and the risk undertaken by the losing part of having to pay burdensome legal costs. These risks motivate the parties to adopt safety measures for the event they lose in court, so that they shouldn't be forced to pay both their own lawyer's fee and a significant part or even the entire amount of the adverse party's expenses.

All these precautions can be materialized, on one hand, by concluding an ATE type insurance, which provides protection (to a certain point), in case the insured party would be compelled to pay for

[32] Report from the Commission to the European Parliament and the Council on certain issues relating to Motor Insurance, COM (2007), 0207 final, pct 2.2. material studied online at 21.12.2016, at the address: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52007DC0207.

[33] Information from the Report "The legal protection insurance market in Europe", oct.2015, drafted by RIAD (The International Association of Legal Protection Insurers), cited above, p.5.

[34] Legal expenses insurance (LEI) Report – European market overview, Germany, the UK and Bulgaria, SeeNews (Research on demand), cited above, p.5.

the litigation expenses of the adverse party and, on the other hand, by concluding a "no win-no fee" type convention with their own lawyer.

In England and Wales (but not in Scotland, too), the winning party is granted the right to ask for the adverse party to be ordered to pay the insurance premium related to the ATE policy, this one being included in the category of other litigation expenses. On the other hand, in case of losing, the risk is undertaken by the insurer, so that the insurance premium will not be paid at all. The immediate effect was that the insured party cannot be forced, under any circumstances, to pay for the litigation expenses.

Considering this situation, likely to defy the principle of equality of the parties, Lord Jackson's Report included, among its recommendations, the regulation of the inadmissibility of recovering the ATE insurance premiums and the success fees from the defendant and the analyzing of the opportunity to adopt the BTE (before-the-event) insurance system[35].

b) From the perspective of its legal nature (its' form), this type of insurance can be materialized in an added clause (package-deal or add-ons) within another insurance contract, over liability for traffic accidents, or professional indemnity or even a home insurance contract, the latter being the most prevalent form within the EU states. Still, in some jurisdictions (like Germany), the legal expenses insurances can even be stand-alone products[36].

In Switzerland and Finland, the package-deal type insurance (as a clause) can also be added to the insurance contracts for commercial activities liability. When the legal protection insurance is embedded in another policy, it devolves upon the insurer not only the task of undertaking the risk related to the liability, but also the financing of the costs related to the litigation following the occurrence of the insured event. From this type of legal protection insurance usually benefit the defendants in cases of tort liability and, for the insurers, it involves covering both the expenses of the insured party for preparing the defense and the possible litigation costs that ought to be paid in case the plaintiff wins.

The price related to the package-deal type insurances is kept to a reasonably low level, because the insurance scheme provides a spread of litigation costs to all the subscribers from the respective category, so the number of litigations occurred is small comparing to the number of sold policies.

This type of legal protection insurance is widely spread all over most of the E.U. states, but also in Australia, Japan etc. Its popularity within these jurisdictions is confirmed by the high percentage of citizens owing such an instrument, many middle class members being protected by such an insurance related to daily activities, such as: home ownership, driving a car, pursuing of a profession or developing a business.

As for the stand-alone type policies, they are also rather popular and spread (mainly in the West European states) and they are individual insurances, protecting the parties against any possible legal costs and aim both parties of a trial (the plaintiff and the defendant). There are two restrictions to this type of insurance: 1. limitation to a certain type of litigations, namely the ones frequently involving individuals (*e.g.*, tort liability related to the performance of real estate rental/lease contracts and consumer

[35] M.Reimann (editor), Cost and fee allocation in civil procedure..., cited above, p. 40-41.

[36] Legal expenses insurance (LEI) Report – European market overview, Germany, the UK and Bulgaria, SeeNews (Research on demand), cited above, p.5.

rights; there are cases when this insurance is also applicable in family law disputes) and 2. limitation in establishing an upper limit for the amounts to be covered by the insurer. Even if this type of insurance also provides a spreading of costs among subscribers, it still involves higher costs comparing to the package-deal type of insurance, since the insured risks are higher (whereas it addresses the plaintiffs as well), which means higher prices. In spite of this fact, most of the middle class people can afford the payment of the premiums[37].

It was found[38] that the stand-alone type legal insurance policies (always concluded voluntarily by the insured party) are offered, in most of the member-states, either by companies specifically dedicated to this type of insurance, or by companies that offer other types of insurances, as well. Still, the development level of the market for these insurances is different from a jurisdiction to another, depending on the degree of maturation of the market's profile, so, in some states, this type of insurance is completely non-existent (such as in Romania) or is very much less on demand and use, while in others (such as Great Britain, Belgium, Germany, Sweden) it is owned by a big part of the population, either as a stand-alone insurance, or as an add-on to contracts like motor insurances or home insurances.

c) The beneficiary of this insurance can be an individual and/or his family. In this case, the insurance covers the amounts related to legal services provided for the following: general legal advice, neighbourhood relations, injuries to the beneficiary, work litigations and even disputes with consumers. Motor legal expenses insurance (MLEI) is a higher category of insurance, which exceeds the upper limits and damage types covered by the standard motor insurances. Finally, the Commercial LEI insurances cover the costs related to any commercial litigation, such as: litigations related to the enterprise and enforcing of the contracts, debt collection, litigations related to ownership right, work disputes and tax issues[39].

During 1969, in Rome, it was founded the International Association of Legal Protection Insurers ("Rencontres Internationales des Assureurs Défense" - RIAD), an independent organization, consisting of insurance companies' representatives, but also legal specialists, from 8 European states. Meanwhile, the organization grew, so that it came to enlist members from 18 European states, Canada, Japan and South Africa.

RIAD's purpose is to establish a global network, capable of giving, to the legal protection insured persons, an easy, affordable and high quality access to justice and the law[40].

To reach this goal, the members of this organization assumed and observed the rules of a strict conduct code, according to which the specialized services are provided. At the same time, the organization submits to interested parties and informs the public about the specific activity of the legal expenses insurance companies, facilitates

[37] M. Reimann (editor), Cost and fee allocation in civil procedure..., cited above, p. 39-40.

[38] Report from the Commission to the European Parliament and the Council on certain issues relating to Motor Insurance, COM (2007), 0207 final, cited above, pt. 2.3.

[39] Legal expenses insurance (LEI) Report – European market overview, Germany, the UK and Bulgaria, SeeNews (Research on demand), cited above, p.5.

[40] Information from the webpage of RIAD, studied online at 26.12.2016, at the address. http://riad-online.eu/about-us/riad-what-is-that/ .

the dialogue between its board, politicians, authorities with control duties and other entities, in order to promote the interests of this specific insurance market. In this regard, the annual conventions are particularly useful.

The RIAD members provide both the related financing and the legal services for the legal protection insurances, expressed either by offering legal advice or by representing the insured persons in the dispute settlement, both, amicably or legally.

Therefore, members holding the status of insurance companies provide, to their clients, products that can: a) finance a quick access to already established legal and support services and b) absorb any risk that clients might face regarding the lawyers' fees or other court costs. The other RIAD members (that provide specialized legal services) offer to the clients high quality services, so that the legal protection can be effective[41].

3. Legal protection insurances regulation within the European Union.

The regulation of legal protection insurances within the union is provided by the Directive no.87/344/EEC[42].

Article no. 2 of the above mentioned Directive establishes its scope.

Therefore, article 2 par.(1) settles the regulation framework of the legal protection insurances, defined by the fact that, in exchange for payment of a premium, the insurers take over the risk of covering the legal costs, but also provide other services related to the object of the insurance, such as:

a) to make sure that the damaged or injured party will be properly indemnified, either by concluding a transaction, or by initiation of legal or criminal proceedings;
b) in case the insured party holds the status of defendant, to provide proper defending of its interests, namely to represent it in any related procedure, should it be civil, administrative or criminal or any other form of complaint.

Article 2 par. (2) also settles the application limits of the normative act, stating that its provisions does not apply in the following circumstances:

- in case of legal expenses insurance policies, when the arisen disputes or litigations concern operation of ships;
- actions taken, in any investigation or proceeding, by the insurer who insured the party for this type of risk, if the insurer is also a beneficiary of these actions;
- in exceptional situations, generated by the member states' sovereign will, regarding the following assumptions:

1. when the legal protection activities take place in another member-state than the one the insured party is resident of;
2. when the insurance policy concerns only legal assistance granted to persons facing a dispute on the occasion of traveling, therefore while being away from the place their permanent residence is;
3. in case the contract stipulates unequivocally that it covers only the situations mentioned in par. 1) and 2) and it is subsidiary to assistance.

The means to concretize the legal protection insurance are established in article no. 3 par.(1): it has to be either a

[41] Ibidem.
[42] Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance, studied online at 22.12.2016, at the address: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31987L0344:EN:HTML .

stand-alone contract, different from other types of insurances, or an add-on to a policy related to covering legal expenses. In this latter case, if the member-state requires it, the value of the premium matching this type of insurance must be indicated. Article no.3 par.(2) provides a series of obligations for the member-states, expressed by taking proper action to prevent any conflict of interest situation.

According to article no.4 par(1), the following express clauses must be included in the legal protection insurances:

a) If, during an investigation or a proceeding, it is necessary to hire an attorney or another law specialist, who is granted, by the national law, the right to offer assistance, to represent and defend the insured party's interests, the latter is given the liberty to choose his own attorney or specialist;
b) The insured person is granted the right to freely choose an attorney or another qualified person to offer assistance (if the law provides it), also in case a conflict of interests arises.

Paragraph (2) of the same text defines the notion of "attorney" by reference to the names (titles) under which the exercise of this profession is recognized in the Directive CE no.77/249/EEC.

As an exception, article no. 5 par.(1) regulates exhaustively the cases when the member-states can grant derogations from the provisions of article no. 4 par.(1), namely when a series of terms are cumulatively met:

1. the insurance covers the expenses generated by using of vehicles on the territory of the respective state;
2. the policy is related to a contract that stipulates ensuring of assistance in case of an accident or a malfunction of such a vehicle;
3. the legal liability is covered neither by the legal protection policy, nor the assistance policy;
4. in case that all parties in the litigation have their legal protection policy concluded with the same insurer, the necessary measures are ordered to ensure that the assistance and representation granted to each party are provided by „fully independent" lawyers.

Even when applying such a derogation, article no.5 par.(2) states that it doesn't exempt the member-states from further applying the provisions of article no. 3, related to the form of the contract and to the measures to prevent and combat any conflict of interests.

4. Debates regarding the application of provisions of article no 4 par.(1) of the Directive no.87/344. Interpretations given in ECJ Jurisprudence.

4.1. On the subject of recognizing, for the member-states, their ability to control the limits of the amounts payable by the insurers on the basis of the legal protection policies (LEI), in case the insured party freely chooses its own lawyer, ECJ ruled on the occasion of the execution of a request for a preliminary decision[43], regarding the interpretation of the text of art.4 par(1) lett. q of the European Union Council Directive no.87/344 EEC.

In the mentioned case, the forum did not recognize the interpretation that, in the lack of an express stipulation of article no.4 par(1) lett. a, to indicate who has the

[43] The preliminary decision of the ECJ, regarding the cause Sneller v. DAS Nederlandse (C-442/12), studied online at 23.12.2016, at the address: http://curia.europa.eu/juris/document/document.jsf?text=&docid=144208&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first &part=1&cid=779980.

authority to decide whether it is necessary to request the services of a law professional (the insured party or the insurer), it is to understand that the liberty the insured party benefits of, starts only if the insurer considers it is necessary to request that lawyer.

A contrario, it has been decided that the text „must be interpreted as meaning that precludes a legal protection insurer, who stipulates in his insurance contracts that legal assistance is in principle granted by his collaborators, to also stipulate that the costs related to legal assistance, provided by a lawyer or a representative freely chosen by the insured party, cannot be incurred unless the insurer agrees it is required to entrust the case to an outside counsel".

This resolution was based on the following considerations:

- the mere interpretation of the norm's text cannot lead to a solution, whereas the interpretation of the E.U. law provisions is exclusively made by referring to the specific context that generated the normative act, as well as to the objectives pursued by the legislator when adopting that regulation (the Eschig Decision[44]);
- the Court interpreted the provisions of the 11-th consideration of the Directive no.87/344 and of the article no. 4 par.(1) of the same Directive, that the liberty to choose a lawyer or other persons accredited to provide representation is justified by the insured party's very interest for legal expenses and it is recognized for any legal or administrative procedure (Stark Decision[45]). For this reason, the interpretation will be that the free choosing of a lawyer, by the insured party, does not justify the legal expenses' restriction only to the situations when the insurer decides it is necessary to engage a lawyer outside.
- in supporting this resolution, the intended purpose, when adopting this Directive, was of no less importance, namely to ensure a wide protection of the insured parties' interests, that does not agree to the restrictive interpretation of art.4 par(1) lett.a of the Directive.
- furthermore, as regards the free choosing of the representative, it has been noted that art.4 par(1) has a general applicability, so it has a binding force (with referral to Eschig par.47 and Stark Decisions, par.29).
- concerning the ability to control the limits of the insurance premiums' amounts, it was found that there are cases when the means (the criteria) according to which the insured party chooses its representative justifies the imposing of restrictions for the expenses that it has to advance or to settle with the insurers. In this respect, it has been reiterated the outcome of the Court in the Stark decision. According to ECJ jurisprudence, enshrining the right to choose a lawyer „does not involve the member-states' obligation to impose, in every circumstance, full coverage of the expenses incurred by defending an insured party, as long as this liberty is not without content". The lack of content would occur in case the upper limit established for the obligation of bearing the costs would lead to the impossibility of reasonably choosing a lawyer or a representative (as per Stark decision, par.33). The shortcomings of such a restriction can be avoided by the contract's parties themselves, as, based on the principle

[44] the case Erhard Eschig împotriva UNIQA Sachversicherung AG (C-199/08), studied online at 03.01.2017, at the address:http://curia.europa.eu/juris/document/document.jsf?text=&docid=72645&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=328942.

[45] the case Gebhard Stark v. D.A.S. Österreichische Allgemeine Rechtsschutzversicherung AG (C-293/10), consulted online at 03.01.2017, at the address: http://curia.europa.eu/juris/document/document.jsf?text=&docid=81542 &pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1 &cid=329332.

of contractual freedom, they can establish a higher limit for covering the legal expenses, with a possible increasing of the premium amount (Stark decision, par.34).

4.2. As regards the freedom of the insured party to choose a lawyer, it was considered the distinction between the terms of „administrative procedure" (inquiry) and (legal) „procedure", used by article no 4 of EU Council Directive no.87/344 EEC.

This text specifies that the insured party is granted the freedom to choose his lawyer (or another person, authorized by the national law to provide legal services) in case the situation requires it, „in order to defend, represent or serve the interests of the insured party in any inquiry or (legal) procedure".

In the European Court of Justice practice, there have been noted[46] the following aspects:

Primo, art.4 par. (1) of the above mentioned Directive establishes that all contracts of legal protection insurance (LEI) will stipulate the insured party's right that, in any inquiry or legal procedure that requires the services of a lawyer or another authorized professional (representative) to defend, to represent or to serve its interests by any other means, it can freely choose that lawyer (representative);

Secundo, the distinction between „administrative procedure" (inquiry) and (legal) „procedure" is unequivocally clear by the very regulation of article no.4 par.(1), so that the two terms are opposite. However, the insured party has the right to choose his representative in both situations.

The opposite solution, of the application of article no. 4 par.(1) only for the procedures undertaken before an actual court (namely, the ones with administrative jurisdiction) would result in making meaningless the notion of „administrative procedure" (inquiry), specifically indicated in the Directive. Given that, as the referred text doesn't make a distinction, applying of any restriction to the „administrative procedure" (inquiry) is considered unacceptable.

Tertio, regarding the constant jurisprudence referring to interpretation of the provisions of the Union law, it is noted that it involves, besides the examination of the wording, also the examination of the norm's context, but also of the European legislator's intend in adopting it (as examples, in this regard, the St.Nikolaus Brennerei und Likorfabrik Decision, 337/82, EU:C:1984:69, par.10, the VEMW and others Decision, C-17/03 EU:C:2005:362, par.41, as well as Eschig Decision, C-199/08, EU:C:2009:538, par.38). As the intend of Directive 87/344 [and, even more, of the article no. 4 par.(1), lett. a)] is to protect the interests of the insured parties, the regulation of a general applicability and of a required value, recognized for the right of choosing the lawyer or the representative, are incompatible with the restrictive interpretation of the mentioned text of the Directive [invoking the motives from the Eschig Decision[47] (C-199/08), as well as the

[46] C.E.J. preliminary decision (7.04.2016), related to the cause Massar v. Das Nederlandse (C-460/16), # 18-23, studied online at 16.12.2016, at the address: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d602888ad73f4f4de1a9b7a80c4107c494.e34 KaxiL c3eQc40LaxqMbN4PahaLe0?text=&docid=175672&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=835112.

[47] the case Erhard Eschig v. UNIQA Sachversicherung AG (C-199/08), CEJ has noted that not even in the case that the ensured event takes place and determines prejudice to a significant number of policy holders, the ensurer is not entitled to designate himself a person to represent all those ensured persons, material accessed online at 26.12.2016, at the address: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62008CJ0199&qid=1482765745355&from=EN .

Sneller Decision[48]].

5. Particularities of the legal protection insurances instrument within some of the EU member-states, as well as within other jurisdictions.

It was noted[49] that, in most of the European Union member-states[50], besides the organization and functioning of a legal aid system (in order to ensure the free access to justice) it has also been established a specialized private insurance system, for covering the legal protection expenses (LEI).

A statistic[51] made during 2013, revealed a ranking of the EU member-states, based on the reference to the percentage rate of each state on the profile market. Thus, Germany was on the first place, with a rate of approx. 45%, followed by France (13%), Netherlands (9%), Great Britain (7.4%), Austria (6.3%) Belgium (5.4%) and Switzerland (5.1%).

In another study[52], it was found that, as regards the add-ons type legal protection insurances, the absolute market leader is Sweden, where the percentage of the households benefitting of such a policy is about 90%. The explanation for this performance is the fact that the LEI clauses are automatically included within most of the home insurances policies.

The LEI type insurances market is on a constant growth. Thus, starting with 2008, the Great Britain's market has been outrun by the Dutch one. The same study revealed the fact that Germany, France, Netherlands and Great Britain totalize 74% of the profile market's overall, while in the other jurisdictions (except for the ones targeted in the report, namely: Germany, France, Netherlands, U.K., Austria, Belgium, Switzerland, Italy, Spain and Finland) it is shown a low interest for this instrument, totalizing a cumulative market share of below 5%[53].

In the following, we will review a few relevant examples, regarding the particularities of the legal protection insurances systems, but also the means by which it has been tried to implement them in some states:

5.1. England and Wales.

As we showed in the above, these jurisdictions are the only ones to use the after-the-event (ATE) type LEI insurance,

[48] The case Jan Sneller v. DAS Nederlandse Rechtsbijstand Verzekeringsmaatschappij NV (C-442/12): in this case, CEJ has ruled that is incompatible with the provisions of article no.4, lett. a) of the Directive no. 87/344 the solution of conditioning the assumption of costs associated with the attorney fees only if the insurer "considers it necessary to entrust the case to an outside counsel" other than its' ordinary collaborators. In this regard, the interpretation of the norm will not be influenced neither by the fact that, in the administrative or judicial proceedings in question, legal assistance is or not compulsory, under the rules of national law. Material studied online at 26.12.2016, at the address: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0442 &from=EN.

[49] Information from the Report „European Judicial Systems. Efficiency and quality of justice no.23" (ed.2016), drafted by the European Commission for the Efficiency of Justice (CEPEJ), Consolidated report regarding the „Authorities responsible for ensuring/granting of the judicial aid and the existence of a private legal protection insurance system", studied online at 27.12.2016, at the address: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%2023%20report%20EN%20web.pdf.

[50] the only countries which do not have such an implemented system were, in 2014, Romania and Bulgaria.

[51] Information from the guide "The legal protection insurance market in Europe", edit. oct.2015, cited above, p.3.

[52] Legal expenses insurance (LEI) Report – European market overview, Germany, the U.K. and Bulgaria (September 2013), p.5, studied online at 29.12.2016, at the address: https://seenews.com/static/pdfs/Legal ExpensesInsuranceReportEuropeanMarketOverview.pdf.

[53] "The legal protection insurance market in Europe", edition oct.2015, cited above, p.3.

namely the policy concluded after the occurrence of the litigation.

Unlike the before-the-event type policies, the ATE policies are purchased either the moment when the dispute arises, or even after the moment the legal procedures have been initiated.

In order to study the particularities of the ATE type insurances, we must observe the risks involved in starting a lawsuit within the British system, i.e.: high litigation expenses, difficulty in estimating the costs and the risk undertaken by the losing part of having to pay burdensome legal costs. These risks motivate the parties to take safety measures for the event they lose in court, so that they shouldn't be forced to pay both their own lawyer's fee and a significant part or even the entire amount of the adverse party's expenses.

All these precautions can be materialized, on one hand, by concluding an ATE type insurance, which provides protection (to a certain point), in case the insured party would be compelled to pay for the litigation expenses of the adverse party and, on the other hand, by concluding a "no win-no fee" type convention with their own lawyer.

In England and Wales (but not in Scotland, too), the winning party is granted the right to ask for the adverse party to be ordered to pay the insurance premium related to the ATE policy, this one being included in the category of other litigation expenses. On the other hand, in case of losing, the risk is undertaken by the insurer, so that the insurance premium will not be paid at all. The immediate effect was that the insured party cannot be forced, under any circumstances, to pay for the litigation expenses.

Considering this situation, likely to defy the principle of equality of the parties, Lord Jackson's Report included, among its recommendations, the regulation of the inadmissibility of recovering the ATE insurance premiums and the success fees from the defendant and the analyzing of the opportunity to adopt the BTE (before-the-event) insurance system[54].

As regards the representation of the insured party in commercial type litigation, usually the party already knows a specific legal adviser and prefers to be represented or advised by this one in the litigation. The insurance companies will try to influence the insured party to accept appointing and using their lawyers, invoking that they will not settle the entire expenditure. This practice is illegal (as we already showed in above). The contractual obligation of paying the amounts related to the legal expenses led to an ongoing concern of the insurers to reduce the level of those costs, which also involves using of professionals with the smallest fees, a solution that might be likely to contravene the interests of the insured parties.

The British insurance companies' Regulation admits to the insured parties the right of appointing their own lawyer. This solution is also confirmed by the Solicitors' Code of Conduct. Therefore, any clause that provides the limitation of the client's right to freely choose his lawyer is likely to question his independence and contravenes his interests.

Even if the insurance companies' Regulation also indicates the hypothesis that the insurer is entitled to appoint the lawyer (only after the initiation of the legal procedure), the same document shows that the right of the insurance holder to choose his representative arises the moment when this one can ask the insurer to pay the insured amount. In the legal practice, it has been assessed that the right of choosing the representative arises when it is obvious that

[54] Legal expenses insurance (LEI) Report – European market overview, Germany, the U.K. and Bulgaria (September 2013), cited above, p.5.

the dispute will develop in a litigation proceeding.

In spite of these established regulations, the insurers do not accept their interpretation, so that they would not be able to coerce, to the insured parties, a specific defender, by selecting him from their own panel of lawyers, which would mean, for them, not having any control over the legal costs or the way the legal service is provided. In sustaining the opposite solution, the insurers invoke the following arguments:

a) that only their panel of lawyers have enough experience in understanding and interpreting the insurance policies, due to the complexity of those conventions,
b) that certain policies do not also cover the legal expenses (even if it is not the case),
c) that the above mentioned Regulation does not apply to this type of insurance, too (which also is a false assertion).

The insurer's practice, to limit the settled amount to the equivalent upper limit value of their own panel of lawyers' fees, or the refusal to pay the fees of the lawyer chosen by the insured-client, can abusively limit this one's right of choosing his own defender[55].

As shown above[56], the provisions of article no.4 par(1) lett.a) of the E.U. Council Directive no.87/344 EEC, have been interpreted by ECJ by reference to the interest protected by the European legislator, meaning that, starting from the need for protection of the insured parties interests and by observing of the general and binding aspect of the right of choosing the representative, a conditionality of this right would be the same with a restrictive interpretation of the provision, which is not allowed.

As a conclusion, it is obvious that all the insurers that provide legal protection insurances all over Europe are compelled to allow their clients to freely choose their lawyer. The importance of conceding this right is proved by the situations when the form of exercising the profession, chosen by the insured party, had already provided a certain number of hours of legal activities (e.g., for clarifying the context of the litigation). In a situation like this, appointing one of the insurer's own lawyers would be an unjust solution.

In case the insured parties are not allowed to choose their own lawyers or there are signs of any conflict of interests between them and the insurers, they may undertake the following steps:

1. notify the insurer about the choosing of the lawyer (or the professional company) which is to provide assistance and representation, as soon as he had made his decision, so that any disagreement related to this aspect can be solved in due time. During these debates, the chosen lawyers or representatives can also intervene, by bringing arguments to prove their related experience and show their willingness to update the insurers about the evolution of the entrusted case;
2. ask for the insurance broker's help, to pressure the insurer to recognize the client's options for his representation. In this case, the higher chances go to the big clients, that can influence the insurer to make a decision, especially if the latter is interested in keeping those clients;

[55] The Guide „Legal expenses insurance and commercial disputes", edition 2011, accessed online at 19.12.2016, at the address: http://www.out-law.com/topics/dispute-resolution-and-litigation/pre-action-considerations/legal-expenses-insurance-and-commercial-disputes/.

[56] See the reasons of the CEJ preliminary decision, regarding the case Sneller v. DAS Nederlandse (C-442/12), cited above.

3. when running out of options, the clients are invited to address the Financial Ombudsman service[57], for settling the differences with the insurer[58].

5.2. Germany.

The percentage rate of the German profile industry on the European market of the legal protection insurances was of 44%, in 2013, a result that can be explained by the fact that it does not necessarily reflect the market volume, but rather its rate of coverage, considering that, in Germany, there are almost 50 operational insurance companies, offering LEI type policies and totalizing a number of 20 million contracts (including both the group and the individual ones). Even if the number of clients for this service diminished from 55% in 2003, to less than 43% in 2013, this decrease does not necessarily reflect a restriction of the activity, as much as a result of reaching a high maturing level of the market, comparing to other EU markets' important growth.

The beneficiaries of a legal protection insurance have the advantage of being able to exercise, or, if the case, to defend their subjective rights, any time it is required, without being held back by financial reasons. However, this advantage also comes with some shortcomings, as it can lead to a different perception within the society and to a malevolent exercising of certain procedural rights. Therefore, the client that has continuously paid his insurance premiums during the last decade will be much less interested in amicably solving the litigation, even if he is given an advantageous offer. Furthermore, even if he loses the case, the client, already caught in a vicious cycle, will also act on appeals, as long as their costs are still borne by the insurer. An experimented judge can easily see what party holds such a policy, by simply observing their attitude during the trial[59].

The explanation for the fact that the risk of the legal costs is more easily insured in Germany is that it's easier to anticipate those costs, in this jurisdiction[60].

This easy way of anticipating the costs is determined by the regulations[61] concerning the calculation method of the fees for the legal services. Thus, the related costs for the legal services are fixed, being established by reference to the value of the litigation's object, in a manner similar to that of establishing the justice fees.

Due to the structure of this legislative framework , the action's holder (the claimant) can calculate, before initiating the legal proceedings, what are the amounts he should advance, both for justice fees and his defender's fee[62].

There is no domestic norm to force the insurers operating in Germany offer the clients a certain type of legal protection insurance, as those contracts' provisions can be established on the basis of the contractual freedom's principle. Usually, the insurance services providers use a standard policy,

[57] The Financial Ombudsman is a national authority, founded by and subordinated to the British Parliament, whose task consist in solving the disputes regarding the financial services. Official page accessed at 19.12.2016, at the address: http://www.financial-ombudsman.org.uk/about/index.html.

[58] the Guide „Legal expenses insurance and commercial disputes", edition 2011, cited above.

[59] G. Dannemann, Access to Justice: an Anglo-German Comparison, material accessed online at 18.12.2016, at the address: http://germanlawarchive.iuscomp.org/?p=374#Legal%20Expenses%20Insurance.

[60] Ibidem.

[61] According to the Law on the Remuneration of Attorneys (Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte - RVG), material studied online at 27.12.2016, at the address: https://www.gesetze-im-internet.de/englisch_rvg/englisch_rvg.html.

[62] The brochure „Law – Made in Germany", p.29, material studied online, at 30.12.2016, at the address: http://www.lawmadeingermany.de/pdfs/Law-Made_in_Germany_FR.pdf.

drafted according to the provisions of the General Conditions for the Legal Protection Insurances (Alldemeine Bedingungen fur die Rechtsschutzersicherung – ARB 2010)[63].

5.3. Austria.

This law system has similar characteristics to the German one, as it is easy to anticipate the costs of a possible trial, the costs of the lawyers' fees also being easily predictable, whereas there are regulated norms[64] for calculating them, established according to the value of the litigation's object. As a consequence, in this country, as well, there has been noted a significant growth of the popularity of the insurance policies related to all legal expenses.

Even if the LEI type contractual clauses, included within the home insurance policies or motor policies can ensure the financing of the legal activities related to those litigations, in most of the cases, the interested people are forced to additionally purchase stand-alone type LEI insurance contracts. To answer the market's demands, many insurers have accommodated the motor insurance policies, to automatically include the LEI clauses[65].

The procedure by which the insurer provides the necessary amounts is started by a notification from the client (claimant) or his lawyer, revealing the intention to initiate a litigation. The insurance company makes sure that two cumulative conditions, related to the litigation, have been met, namely: if the litigation, by its nature, corresponds to the ones covered by the policy and if there are clues that it will not exceed the insured amount. If these conditions are met, the insurer confirms, in writing, to the client the coverage of the costs[66].

5.4. France.

The legal protection insurances are regulated, in France, in the Insurances Code[67], (Book I, title II, chapt.VII, articles L127-1-127-8).

The essence of the legal protection insurance is the fact that it is optional. This convention is like a precaution measure, taken for the situation when the client is involved in a legal procedure and it consists of transferring the related risk to the insurer.

The difference between the LEI insurance and the public legal aid is of a legal nature: while the public legal aid is based on the social solidarity concept, law provided, the LEI insurance is based on

[63] ARB 2010, material studied online at 27.12.2016, at the address: https://www.arbeitsgemeinschaft-finanzen.de/mediathek/ARB_2010.pdf.

[64] the General Fee Criteria for Lawyers *(Allgemeine Honorar-Kriterien für Rechtsanwälte) material studied online at 27.12.2016, at the address:* https://www.rechtsanwaelte.at/index.php?eID=tx_nawsecuredl&u=0&g=0&t=1482967599&hash=d7b836769c25fd18c3e9d08521e11dd4a366a485&file=uploads/tx_templavoila /ahk_ 28052015_01.pdf and The Lawyers' Scales of Fees Act *(Rechtsanwaltstarifgesetz), material studied online at 27.12.2016 at the address:* https://www.rechtsanwaelte.at/index.php?eID=tx_nawsecuredl&u=0&g=0&t=1482968050&hash=d1869c7c70adaad63606eacc0bccf7b46c5e48d0&file=uploads/tx_templavoila/ratg_01012016_01.pdf.

[65] M.Roth, Litigation in Austria – Are costs and fees worth it?, article published in M.Reimann (editor), Cost and fee allocation in civil procedure..., cited above, p.75.

[66] Roth in Vershraegen (Ed.), Austrian law – an international perspective: selected issues, Jan Sramek Verlag 2010, p.144; Wandt, Versicherungsrecht, 5th. Edition, Heymann, 2010, para.938, apud. M.Roth, Litigation in Austria – Are costs and fees worth it?, article published in M.Reimann (editor), Cost and fee allocation in civil procedure..., cited above, p.75.

[67] The Ensurance's Code, material studied 29.12.2016, at the address: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=98DC092B94BD5DE64CE2BC704BAE4543.tpdila09v_1?idSectionTA=LEGISCTA000006157261&cidTexte=LEGITEXT000006073984&dateTexte=20161229.

common risk-taking (according to a contract). In this respect, the insurance for the legal expenses has the same foundation as the one for fire insurance or hospital insurance[68].

Article L127-2 of the Insurances Code provides the means to materialize the legal protection insurance: either as a stand-alone contract, or as a distinct add-on clause of an independent policy, which has to define the LEI insurance's content and to indicate the related insurance premium's value.

Article L127-2-1 defines the concept of "insured event" (sinister) as being the refusal to a request made to, or made by the insured party, as the case. So, the legal quality of the client (plaintiff or defendant) is not relevant.

According to article L127-2-2 par.(1), the consultations granted or the legal actions taken before the moment of the insured event's occurrence does not justify the unlocking of the guarantee. Any contractual clause to provide another solution is considered unwritten. As an exception to this rule, par.(2) of the same article provides that the request of those consultations or taking of those legal actions might be settled by the insurer, provided that the client proves an emergency situation, that required those measures.

Article L127-2-3 states it is compulsory to offer the client a lawyer's assistance or representation, provided that the client or even the insurer acknowledges the fact that the opposite party in the trial benefits of the same conditions for representation.

The provisions of article 4 par. (1) of the Directive no.87/344 EEC are applied in the domestic law by the regulation of art.L127-3 par(1), which provides that when it is required to use the services of a lawyer or another person legally authorized to represent or defend the client's interests, the latter has the right to freely choose in this respect.

According to art. L127-3 par.(2) the client's right to choose his lawyer (or another representative) must be stipulated in the contract for all situations generating a conflict of interests between the client and the insurer. Under no circumstances a contractual clause can provide the restriction of the client's right to choose, unless the upper limit of the guarantee's value is not exceeded (par.3).

Finally, the par.(4) of article L127-3 states that the only case when the insurer is allowed to recommend a lawyer to his client is when the client himself has made a written request in this respect.

On the same line, article L127-5-1, states that the amount for the lawyer's fee will be established only by negotiation between the client and the lawyer. The French legislator specifically forbade the insurers to intervene in this matter.

According to article L127-4, if the case is that the insurer and the client do not agree upon the actions to be taken in order to settle the litigation, this impasse can be overcome with the help of a third party, jointly designated by the first two parties. Furthermore, if parties cannot agree upon the third party, the decision will be made by the court, following a brief procedure. As a rule, the insurer will have the obligation to pay the costs related to that procedure. As an exception, the court can rule for the client himself to make the payment, if it has been established he abusively started that procedure.

In case the client starts the above mentioned contentious procedure and is granted a more advantageous solution than the one suggested by the insurer or by the third party indicated in the previous

[68] R.Perrot, Institutions judiciaries, 15e edition, Montchrestien Publishing House GDJ), Paris, 2012, p.83.

paragraph, the insurer will have to offset the expenses related to that action, up to the guarantee's value upper limit.

In the situation the procedure is held before the third party or in court, the procedural terms established for the appeal are suspended for all the legal procedures covered by the policy and the client can initiate the procedure, by formulating the court referral, until the designated third party finds a solution and presents it to the parties.

Art.L127-5 states the obligation of the insurance companies, should a conflict of interests between them and their clients arise, to inform them they can exercise the rights stated by articles L127-3 and L127-4.

5.5. Switzerland.

In Switzerland, the legal protection insurance policies have been used since 1925, they are widely spread and they cover various legal aspects.

For those who are interested, there have been made available motor insurances, individual insurances and professional and business risk insurances. Regarding the package-deal type insurances, in this jurisdiction, as well, they involve a limitation of the covered litigations' range, so that they cannot be used in family litigations, neighborhood relations, real-estate issues or construction work contracts.

There is a maximal upper limit for the amounts that can be insured by a LEI insurance and it established by most of the profile companies to the amount of CHF 250000 (corresponding to approx. USD 250000). The insurer has the option to deny the financing of the client's actions, should he consider there are no chances of success, in which case he has to inform the client, in writing, about his opinion. The resolution of the financing denial can be appealed to a quasi-arbitrary court, on the insurer's expense[69].

5.6. Finland.

For individuals, the legal protection insurances (LEI) are included as clauses (standard, therefore, compulsory clauses) in the home insurance general policies. The companies, as well, can use such an instrument, in regards to certain claims against them (for example, in case of work accidents, or for discriminatory treatment etc).

Under these circumstances, the range of litigations for which the legal expenses can be insured is rather restricted, as most of the litigations categories (divorce and child custody, work or business litigations) cannot be financed in this way. The amount paid in 2012 was, in general, of 8500 Euro the most, which sufficed only for a modest financing or low value litigations and it only covered the insured party's legal expenses.

The using of this type of insurance policies by legal entities clients has been estimated as much more reduced, specifying that unequivocal statistical data could not have been accessed. Depending on the contractual terms, these insurances cover the financing of the client's expenses and they could, also, involve the adverse party's expenses, should the client have any claims, being forced to pay for them, as well[70].

5.7. The Japanese System – a successful implementation model of the legal expenses insurances mechanism.

From the regulation point of view, the legal protection insurance contracts have to comply to the provisions of the Insurances Law and the insurers observe the provisions

[69] C. Zellweger, Pricey but predictable: civil litigation costs and their allocation in Switzerland, material published in M.Reimann (editor), Cost and fee allocation in Civil procedure..., cited above, p. 284.

[70] J.Männistö, Cost and fee allocation in Finland, published in M.Reimann (editor), Cost and fee allocation in civil procedure..., cited above, p.133.

of the Insurance Business Act. There is no equivalent norm for the EU Directive no.87/344/EC.

The first LEI type insurances appeared, in Japan, in middle 90's. They did not consist of stand-alone contracts, but they were add-on special clauses to non-life type insurance contracts, such as automobile insurances, fire insurances or holder's accidents insurances. Therefore, also the litigations, for which those clauses were effective, were limited to the ones pursuing compensation of damages to the clients' properties or those following a car accident.

During 2012, it was founded a specialized insurance company, providing, to the interested people, stand-alone LEI policies, to cover the financing of a wider range of civil litigations: from divorce cases or inheritance to individual work litigations or even litigations related to contracts' interpretation and unfolding.

Rights protection insurance or Attorney insurance (or „Kenrihogo-hoken") is a system created by JFBA Legal Access Center (JFBA-LAC) and which is administrated by the latter, in cooperation with insurance companies. On September 1-st, 2014, 12 insurance companies joined the system, among which, 3 of the 3 largest groups of non-life insurances.

The „Attorney insurance" system is organized in such a way to observe the provisions of the Attorney act, which do not allow to provide consultancy or representation by other persons than lawyers (art.72), or to intermediate such services, all these actions being submitted to criminal law. Therefore, the insurance companies can neither provide legal services themselves, nor indicate specific lawyers to the clients.

In this context, the only task the insurers have is to finance the related legal costs (justice fees, management of evidence costs, expertise fees etc.), but also the lawyers' fees. On the other hand, in order to properly inform and guide the client, upon this one's special request, JFBA-Access Center will ask the local bar to recommend a lawyer.

Lately, the popularity of this insurance system has grown exponentially. Rights protection insurance had reached a number of 20 million contracts, in 2012, and was used in over 20000 trials, helping to significantly improve the access to justice for the Japanese citizens[71].

5.8. Australia – a different approach for the legal protection insurances (starting by the state's involvement, followed by the slowly transferring to the private insurance system).

The concern for ensuring the free access to justice to the middle class people, not eligible for the public legal aid but, still, not affording to pay the legal services costs, made the object of a huge public debate, in Australia, starting with middle '80s.

The ability of the legal protection insurance systems to provide an improved access to legal services, has been noted in the conclusions of the Australian Senate's Cost of Justice Inquiry-1992, the Access to Justice Advisory Committee's Report - 1994 and observed in the research made by the Law Council of Australia.

In 1983, the Law Foundation started to search for means to improve the general access to justice, by providing legal services affordable to people with small and medium income. After reviewing several possibilities, it has been considered that the

[71] M. Omoto, Judicial system and finance for civil litigations in Japan (contribution paper to the 24th. RIAD Congress in Sevilla, Spain), p. 3, 6-7; material accessed online at 28.12.2016, at the address: http://riad-online.eu/fileadmin/documents/homepage/News_and_publications /Reports_Information/general_publications/_final_version__Judicial_System_and_Finance_for_Civil_Litigation_in_Japan.pdf.

most efficient one would be the establishing of a company specialized in legal protection insurances marketing. In this respect, the Law Foundation and the Government Insurance Office=GIO have established, in 1986, the Legal Expenses Insurance Limited (or LEI Ltd.).

This company operated between July, 1989 and 1996, when the shares of the Law Foundation have been bought by GIO, who, subsequently, liquidated its portfolio of this type of insurances.

The fact that this enterprise supported by state, was not successful, was due, on one hand, to the particularities of the Australian legal system, which does not benefit of a specific regulation regarding the establishing of the lawyers' fees (as we showed *supra* that is the case in some European states, like Austria and Germany), so that it was nearly impossible to estimate the costs for those procedures.

On the other hand, the lack of success was also due to the mistrust in this type of insurances. It has been tried to implement a solution which borrows specific elements of this profile insurances from both USA (where these policies provide protection to insured groups – mostly, members of unions, for usual and predictable legal costs) and Europe (where the insurances address the individuals, but provide protection for a small number of litigations types). The result was a product intended for groups of potential clients (unions, clubs and associations), which was financing the legal costs indicated in the policy, but was also entitling the holders to certain complementary services, such as phone counselling and a small category of in-house type legal services for all litigations.

Even so, neither the large public, in general, nor the potential clients aimed by the insurers, in particular, did realize the benefits of this type of insurance, especially that nor the insurance brokers were familiar to the product's particularities, so they were not able to efficiently promote it. The recession, along with the lack of providing any fiscal facilities, were all the more reasons to prevent the employers from purchasing legal protection insurances, as benefits granted to employees.

Even if it didn't have the expected results, the LEI Ltd. Company's action contributed to the establishing of a legal protection insurances industry in Australia.

After the LEI Ltd. company's liquidation, the respective insurance policies continued to be offered by several insurance companies (private companies). Most of the legal protection insurances offered afterwards were aiming the needs of the educated and financially independent citizen and of his family, addressing, especially, to those concerned by the economic stability. Usually, the protection offered by these policies extends, also, to the client's family, living under the same roof. The same as in Europe, the legal protection insurances can be used related only to certain types of litigations (such as, cases of civil liability tort, the consumer's right, home selling or buying litigations, auto liability, defense in litigations related to the anti-discrimination legislation). They don't include matters of family law, inheritance or real estate business, transfer of real estate property, most of criminal cases.

However, the number of insured persons is not established, but the popularity is significantly lower than the one that these instruments have on the United States and Europe markets[72].

In order to improve the market and to widespread the use of this type of insurance,

[72] A. Goodstone, Legal expense insurance: an experiment in access to justice, Justice Research Centre, Sidney, 1999, material studied online at 27.12.2016, at the address: http://www.lawfoundation.net.au/ljf/site/articleIDs/1A084093CE99046ACA257060007D1456/$file/ insurance.html.

there have been made several suggestions[73], among which:

1. Taking certain fiscal policy measures, expressed by including the costs related to purchasing the legal protection insurances in the scope of deductible expenses;
2. The government should assume the role of promoting the LEI type insurances, so that the public can realize the necessity and the benefits resulting from purchasing this product;
3. Still the government, as being the employer of an important number of people, can encourage the spread of this type of insurance amongst its employees, by supporting certain collective bargaining schemes (enterprise bargaining etc.);
4. To complete the above mentioned promoting activity, the insurance brokers should be properly trained and improved as regards the particularities of this product.

6. Conclusions (and accounts) regarding the use of the stand-alone legal protection insurance contracts in the Romanian jurisdiction.

In Romania there is a widespread use of the clauses referring to the legal protection, included in the professional liability insurance contracts (*exempli gratia*, for lawyers', architects', physicians', expert accountants', assessors' liability etc), RCA type contracts (for motor insurances), home insurance contracts, or the employer's tort liability contracts. Policies that are found less often are the ones intended for the clients-legal persons, like general liability contracts or policies that aim the risks related to a specific business (such as: insurances for construction and assembly works, or insurances for forwarding liability). In these cases, as well, the legal protection insurance is embedded in the main contract and not as a stand-alone type.

Although we went through the websites of at least 20 insurance brokers, we could not find, in their general offer, any product, addressed either to individuals or to legal persons, to be an actual insurance contract for this type of risk. The author shows he found no different situation regarding the profession liability and couldn't find any signs of it either, in the specialty literature or the national courts' practice.

The same fact is revealed also in the „European Judicial Systems. Efficiency and quality of justice no.23 (ed.2016)" report74 drafted by the European Commission for the Efficiency of Justice (ECEJ). This document shows that the only Union's member-states not having such a system, in 2014, were Bulgaria and Romania.

The explanation of this fact is that, usually, the legal protection insurance systems are very developed in the states where the costs related to lawsuits are predictable, for the exact reason that there are established lawyers' fees (as we showed in the above75, regarding the fees' regulation for the law professionals, in Germany and Austria). We consider that this justification can only be partly accepted, since the lawyers' fees, in Romania and Bulgaria, are among the modest ones from the entire European Union.

Therefore, we think that the only possibilities to finance the costs of a civil lawsuit in our jurisdiction remain: either to

[73] Ibidem.

[74] The report „European Judicial Systems. Efficiency and quality of justice no.23 (ed.2016)" made by the European Commission for the Justice Efficiency (CEPEJ), cited above, p.69.

[75] See footnotes no. 60 and 63.

be borne by the involved parties (both, individuals and legal persons), or, if the case, to obtain the approval for the public legal aid, for individuals (under the conditions of the article no.4 of the Emergency Government Ordinance no.51/2008, regarding the legal aid within civil trials) and facilities regarding the payment of the justice fees, granted to the legal persons (according to article no.42 par.(2) of the Emergency Government Ordinance no.80/2013, regarding the court fees).

Given that, both in the national courts' jurisprudence and in CEDO's practice, there have been criticism referring to the inefficacy of the legal assistance system, it results that the implementation and the promotion of certain legal protection insurance policies would be very useful and would be an additional guarantee to ensure an effective access to justice. It remains to be seen how and when such a reform in insurance will be adopted, considering the system's fragility and the development level of the market profile in Romania.

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JURISPRUDENTIAL ISSUES CONCERNING THE BENEFICIARIES OF PROVISIONS OF ARTICLE 49 TFEU

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Abstract

From the interpretation of Article 49 paragraph (1) TFEU it results that restrictions on the freedom of establishment are removed for the purpose to pursue independent activities under conditions of equality with nationals of the Member State of establishment. The beneficiaries of Article 49 TFEU are people moving from the territory of the State of origin (nationals of a Member State) on the territory of another Member State in order to pursue an independent activity, but only under the case-law of the Court of Justice of the European Union; beneficiaries of these rights are also the Member State nationals who obtained qualifications or training in another Member State and then go back to their home state to conduct a business on grounds of that qualification or professional training.

Keywords: *Article 49 TFEU; beneficiaries; ECJ case-law; recognition of professional qualifications; recognition of professional training.*

1. General aspects

Under Article 49 of the Treaty on the Functioning of the European Union (TFEU), at the level of the European Union, „restrictions on the freedom of establishment of nationals of a Member State in another Member State are prohibited. This prohibition aims also at restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in another Member State. The freedom of establishment includes access to independent activities and their exercise, as well as the setting up and management of undertakings, and in particular of companies or firms[1] (...) under the conditions laid down for its own nationals, by the law of the country of establishment". Thus, from the interpretation of Article 49 paragraph (1) TFEU it results that, on the one hand, restrictions on the freedom of establishment are eliminated and, on the other hand, the right „to pursue independent activities on equal terms with nationals of the Member State of establishment"[2] is set. After first reading the article, it can be interpreted that the beneficiaries of the rights mentioned above are only those persons moving from the territory of origin (they are nationals of a certain Member State). Furthermore, „its requirements are satisfied if the person exercising the right of establishment is

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[1] Companies covered by those provisions are those referred to in art. 54 second paragraph of the TFEU, namely „companies formed in accordance with provisions of civil or commercial law, including cooperative societies and other legal persons of public or private law, excepting the non-profit companies".

[2] Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, edition IV, Hamangiu Publishing House, Bucharest, 2009, p. 992.

treated the same as citizens"[3] of the host State (the State where the person moved). In reality, after a careful study of the doctrine of specialty, but especially of the case-law of the Court of Justice of the European Union[4], it is clear that Article 49 TFEU „received a broad interpretation on the two issues"[5] within the meaning that „citizens can, under certain conditions, capitalize the provisions of Article 49 against their own state"[6].

2. The direct beneficiaries of provisions of Article 49 TFEU

As mentioned before, the main beneficiaries of provisions of Article 49 TFEU are people moving from the country of origin to another Member State of the European Union. Invoking this right, by its beneficiaries, before the national authorities[7], is now possible after the Court of Justice in Luxembourg has given direct effect to Article 49 TFEU since 1974 in his famous judgment ruled in *Reyners*[8] case. In that case, Conseil d'Etat in Belgium addressed the Court two questions on the interpretation of Articles 52[9] and 55[10] of the Treaty establishing the European Economic Community (TEEC) concerning the establishment right, related to exercising the profession of lawyer. Those questions were raised in an action brought by a Dutch citizen, „holder of a legal degree under which in Belgium, the access to the profession of lawyer was granted, and who was excluded from that profession on account of his nationality, following the Royal Decree of August 24, 1970 regarding the title and the exercise of the legal profession of lawyer". Regarding the article that is the subject of our study, Conseil d'Etat wanted to know if Article 52 TEEC was, from the end of the transitional period, a „directly applicable provision". It must be mentioned that the question was raised on grounds of the absence, at that time, of certain directives adopted in accordance with the provisions of the Treaty, in order to attain the freedom of establishment as regards to a particular activity, although the transition period for adopting them had expired. In those circumstances, the Court considered that the Treaty had foreseen „that the freedom of establishment should be done at the end of the transitional period", which is why it asserted that Article 52 required such a precise obligation of result, the execution of which had to be facilitated, but not conditional to the implementation of a program of progressive measures"[11]. According to the Court, „the fact that this progressive character has not been complied with, leaves the obligation itself intact, after

[3] Idem.

[4] On the role of the EU Court of Justice jurisprudence in the development of EU law, see Mihaela-Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia*, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015, pp. 182- 188; Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridic,* Hamangiu Publishing House, Bucharest, 2016, p. 156-165.

[5] Idem.

[6] Idem.

[7] With regard to the concept of public authority, see Elena Emilia Ștefan, *Disputed matters on the concept of public authority*, LESIJ no. 1/2015, p. 132-139.

[8] Judgment of the Court dated June 21, 1974, *Jean Reyners v./ Belgian State*, Case 2/74, ECLI:EU:C:1974:68.

[9] The current art. 49 TFEU. See also the comment of Augustin Fuerea, *Dreptul Uniunii Europene – principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, p. 202-203.

[10] The current art. 51 TFEU: „Activities that are associated in this state, even occasionally, with the exercise of the official authority are exempted from the provisions of this chapter, as regards to the Member State concerned.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may exempt certain activities from the application of provisions of this chapter".

[11] Pct. 26 of the judgment *Jean Reyners v./ Belgian State*, ECLI:EU:C:1974:68.

the deadline stipulated for its fulfillment"[12]. Therefore, „from the end of the transitional period, Article 52 of the Treaty has been a provision directly applicable, even despite the absence in a specific area, of directives set"[13] by the Treaty, though, added the Court", such directives have not lost all interest since they have preserved an important area of application of measures meant to facilitate the effective exercise of the right to the freedom of establishment"[14].

Two years later, in 1976, under the same conditions under which directives to attain the freedom of establishment concerning a particular activity were not adopted, the Court went back on the direct effect of Article 49 TFEU, in *Thieffry*[15] judgment. In that case, Cour d'appel de Paris formulated a question on the interpretation of article 57[16] TCEE on the mutual recognition of professional qualifications for the access to independent activities, especially for the purpose of admission in order to exercise the profession of lawyer. In fact, a Belgian lawyer was not admitted into the *Ordre des lawyers auprès de la Cour de Paris* (the Paris Bar), though he was the holder of a „Belgian degree of doctor of law, the equivalence of which to the university degree in French law was recognized by a French university, and who subsequently obtained „certificat d'aptitude à la profession d'avocat" (certificate of qualification for the legal profession of lawyer), after successfully passing that examination, in accordance with the French law"[17]. The reason to refuse the admission requirement was that „the person concerned did not hold a degree to justify a university degree or a PhD degree in French law"[18]. In *Thierry*, unlike *Reyners*, the reason for rejecting the application for registration in the bar was not that of citizenship, but the rejection was based on the recognition of professional qualifications. In those circumstances, the Court requested to be answered to the following question: „the fact to require a national of a Member State wishing to practice the profession of lawyer in another Member State, the national diploma provided by the law of the country of establishment, while the diploma which he obtained in his home country was the subject of recognition of equivalence by the university authorities of the country of establishment and allowed him to pass in that country the qualification examination for the legal profession of lawyer - examination which he passed - is it, in the absence of the directives set out (...) [by] the Treaty of Rome, an obstacle that goes beyond what is necessary to achieve the objective of Community provisions in question?"[19]. The Luxembourg Court held

[12] Pct. 27 of the judgment *Jean Reyners v./ Belgian State*, ECLI:EU:C:1974:68.

[13] Pt. 32 of the judgment *Jean Reyners v./ Belgian State*, ECLI:EU:C:1974:68.

[14] Pt. 31 of the judgment *Jean Reyners v./ Belgian State*, ECLI:EU:C:1974:68.

[15] Judgment of the Court of April 28, 1977, *Jean Thieffry v./ Conseil de l'ordre des avocats à la Cour de Paris*, Case 71/76, ECLI:EU:C:1977:65. See also the comment of Augustin Fuerea, *op. cit*., p. 203.

[16] The current art. 53 TFEU: „(1) In order to facilitate the access to independent activities and their exercise, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, issues directives for the mutual recognition of diplomas, certificates and other formal qualifications as well and on the coordination of laws, regulations and administrative provisions of the Member States relating to the access to and pursue of independent activities.

(2) With regard to the medical, paramedical and pharmaceutical professions, the progressive abolition of restrictions is dependent upon coordination of the conditions for their exercise in the various Member States".

[17] Idem.

[18] Pt. 3 of the judgment of the Court *Jean Thieffry v./ Conseil de l'ordre des avocats à la Cour de Paris*, ECLI:EU:C:1977:65.

[19] Pt. 6 of the judgment of the Court Jean Thieffry v./ Conseil de l'ordre des avocats à la Cour de Paris, ECLI:EU:C:1977:65.

that „when the freedom of establishment provided in Article 52 [the current Article 49 TFEU] can be attained in a Member State either under the laws, regulations and administrative provisions[20] in force or under practices of the Government or of professional bodies, the genuine enjoyment of this freedom should not be denied to a person covered by Community law, just because, for a particular profession, the directives provided in Article 57 of the Treaty have not been adopted yet"[21]. The Court therefore prohibits national authorities of the host State to refuse access to the Bar of nationals of other Member States, on the grounds that they do not hold a French qualification, even if directives in this field have not been adopted yet.

In the same vein, the Court ruled in the case *Patrick v. Ministre des affaires culturelles*[22]. In that case, a British national, holder of a diploma in architecture issued in the UK by the Architectural Association, requested permission to exercise the profession of architect in France and his permission „was refused on the ground that, under [a] law of (...) 1940, that authorization had (...) exceptional character (...) [because] there was no mutual agreement between France and the applicant's home country and that, in the absence of a specific convention to have that purpose, between the Member States of the EEC and, in particular, between France and the United Kingdom, the Treaty establishing the European Economic Community cannot replace it [and] art. TEEC 52-58, which refer to the freedom of establishment (...) [send] to achieve this freedom, to Council directives which have not been adopted yet". The Court wanted to know whether at the state of Community law on 9 August 1973 [...] a British national had reason to invoke in his favor, the benefit of the right of establishment to practice the profession of architect in a Member State of the Community"[23]. The Court's answer was emphatic in the sense that „a national of a (...) Member State, who holds a title recognized by the competent authorities of the Member State of establishment, equivalent to a degree issued and required in that State, shall enjoy the right of access to the architectural profession and to its exercise, under the same conditions as nationals of the Member State of establishment without having to meet additional conditions"[24].

In the same context, of beneficiaries of provisions of Article 49 TFEU, it is also included the recognition of equivalence of diplomas, aspect that has been the subject of the judgment ruled in the case *Heylens*[25]. „By its question, the referring Court seeks essentially to ascertain whether, when in a Member State, the access to a remunerated profession is subject to the holding of a national degree or of degrees obtained abroad, but recognized as its/their equivalent, the principle of free movement of workers enshrined in Article 48 of the

[20] With regard to administrative act, see Elena Emilia Ștefan, *Manual de drept administrativ. Partea II*, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015, pp.21-81.

[21] Pt. 17 of the judgment of the Court *Jean Thieffry v./ Conseil de l'ordre des avocats à la Cour de Paris*, ECLI:EU:C:1977:65.

[22] Judgment of the Court of June 28, 1977, *Richard Hugh Patrick v. Ministre des affaires culturelles*, Case 11/77, ECLI:EU:C:1977:113.

[23] Pt. 7 of the judgment of the Court, *Richard Hugh Patrick v. Ministre des affaires culturelles*, ECLI:EU:C:1977:113.

[24] Pt. 18 of the Judgment of the Court, *Richard Hugh Patrick v. Ministre des affaires culturelles*, ECLI:EU:C:1977:113.

[25] Judgment of the Court of October 15, 1987, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v./ Georges Heylens and others*, Case 222/86, ECLI:EU:C:1987:442.

Treaty [the EC][26] requires that the decision refusing to a worker, national of another Member State, the recognition of the equivalence of the degree issued by the Member State of which national he is, to be able to be subject to appeal in Court and to be motivated. The Court held that „since the requirement concerning the qualifications required to practice a certain profession must be reconciled with the imperatives of the free movement of workers, the recognition procedure of the equivalence of degrees should enable national authorities to ensure objectively that the degree obtained abroad attested that the holder had knowledge and qualifications if not identical, at least equivalent to those certified by the national degree. Assessing the equivalence of the degree obtained abroad must be made by taking into account exclusively the level of knowledge and skills that the degree, given the nature and duration of the studies and practical training which it attests as achieved, presumes to be acquired by its holder"[27]. The Court therefore considers that „when in a Member State, the access to a remunerated profession is subject to the holding of a national degree or of a degree obtained abroad recognized as its equivalent, the principle of free movement of workers enshrined in Article 48 of the Treaty requires that the decision refusing a worker, national of another Member State, the recognition of the equivalence of the degree issued by the Member State, the national of which he is, to be able to be subject to an appeal[28] in Court which may check its legality in relation to Community law and enables the party concerned to ascertain the grounds for the decision"[29].

Another important moment in the evolution of the direct effect of Article 49 TFEU is the judgment in the case *Vlassopoulou*[30]. *Vlassopoulou* represents the boundary between the period in which there was no legislation adopted to facilitate access to independent activities and their exercise and the period characterized by the adoption of directives concerning the mutual recognition of degrees, certificates and other formal qualifications, as well as for the coordination of laws, regulations and administrative provisions of the Member States relating to the access to and exercise of self-employment. In that case, the Court pointed out that although on December 21, 1989, was adopted Directive 89/48 / EEC on the general system for the recognition of higher education diplomas awarded for professional training lasting at least three years[31], it „did not apply to facts from [that] case"[32] because the transposition deadline was January 4, 1991 and the facts occurred prior to that date. Thus, the Court held that „a Member State notified on an application for authorization to pursue a profession to which the access is conditioned under national law, by the possession of a degree or professional qualification, has the obligation to take into consideration the degrees, certificates and other titles which the person concerned has obtained in order

[26] The current art. 45 TFEU on the free movement of workers which is guaranteed in the European Union.

[27] Pt. 13 judgment of the Court of October 15, 1987, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v./ Georges Heylens and others*, ECLI:EU:C:1987:442.

[28] With regard to the object of the legal action, see: Elena Emilia Ștefan, *Drept administrativ. Partea a II-a*, Universul Juridic Publishing House, Bucharest, 2013, p. 76-77.

[29] Pt. 30 of the Court Judgment, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v./ Georges Heylens and others*, ECLI:EU:C:1987:442.

[30] Judgment of the Court of May 7, 1991 *Irène Vlassopoulou v./ Ministerium für Justiz, Bundes - und Europaangelegenheiten Baden-Württemberg*, C-340/89, ECLI:EU:C:1991:193.

[31] Published in OJ L 19, 24.1.1989.

[32] Pt. 12 of the Judgment of the Court, *Irène Vlassopoulou v./ Ministerium für Justiz, Bundes - und Europaangelegenheiten Baden-Württemberg*, ECLI:EU:C:1991:193.

to pursue the same profession in another Member State by comparing the abilities certified by those degrees with the knowledge and qualifications required by the national rules"[33]. „The examination procedure should allow host authorities to ensure, objectively, that the foreign diploma certifies that the holder has knowledge and qualifications if not identical, at least equivalent to those attested by the national diploma. Assessing the equivalency of the degree obtained abroad must be exclusively made by taking into consideration the knowledge and skills that this degree, by taking into account the nature and duration of studies and practical training referred to in the degree, permits to infer that they were acquired by its holder"[34].

The situation did not change even when, the Member States implemented the necessary legislation to facilitate access to independent activities and their exercise, i.e. those Directives on the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for coordination of the laws, regulations and administrative provisions of the Member States relating to the access to and exercise of self-employment. In this regard, we mention *Borrell*[35]judgment where the Court resumed the previous case, as follows: section 11 of the judgment resumed section 16 of *Vlassopoulou* judgment; section 12 resumed section 13 of *Heylens* judgment and section 13 was taken from section 17 of *Vlassopoulou*. The same happened in *Aranitis*[36] judgment, the Court providing the solution by resorting to the jurisprudence already established prior to adopting the legislation to facilitate the access to independent activities and their exercise: pt. 31 of the judgment resumed *Vlassopoulou* (pt. 16) and *Borrell* (pt. 11) jurisprudence.

The analysis of the Court's decisions required Member States, „despite the diversity of national educational systems and training, and in the absence of coordination legislation at EU level, Article 49 TFEU imposes a clear obligation on the national authorities, to examine thoroughly the qualifications held by an EU national, to inform the person concerned of the reasons for which its qualification was not considered equivalent and to comply with his/her rights during the procedure"[37]. Under the Court's case-law, Member States cannot refuse the access of a citizen of an EU Member State, on the territory of another Member State, the access to a profession, because he does not have a qualification obtained in the host country or because, in the host state, a national recognition of the equivalence of foreign qualifications does not exist yet.

3. Expanding the provisions of Article 49 TFEU to the citizens of their home state

As mentioned before, Article 49 TFEU „received a broad interpretation on the two issues"[38] in the sense that „citizens can, under certain conditions, capitalize the provisions of Article 49 against their own

[33] Pct. 16 of the Judgment of the Court, *Irène Vlassopoulou v./ Ministerium für Justiz, Bundes - und Europaangelegenheiten Baden-Württemberg*, ECLI:EU:C:1991:193.

[34] Pt. 17 of the Judgment of the Court of May 7, 1991 *Irène Vlassopoulou v./ Ministerium für Justiz, Bundes - und Europaangelegenheiten Baden-Württemberg*, Case C-340/89, ECLI:ECLI:EU:C:1991:193.

[35] Judgment of the Court of May 7, 1992, Colegio *Oficial de Agentes de la Propriedad Inmobiliaria v./ José Luis Aguirre Borrell and others*, C-104/91, ECLI:EU:C:1992:202.

[36] Judgment of the Court of February 1, 1996 *Georgios Aranitis v./ Land Berlin*, C-164/94, ECLI:EU:C:1996:23.

[37] Paul Craig, Grainne de Burca, *op. cit*., p. 995.

[38] Ibid, *op. cit*., p. 992.

state"[39]. An important role went to the Court of Justice of the European Union, which, in the judgment ruled in the case *Knoors*[40] argued that the fundamental freedoms of the European Union „would not be fully achieved if Member States could refuse the benefit of provisions of Community law to those of their nationals who have used the existing facilities of free movement and establishment and who acquired, by their virtue, their professional qualifications, specified by the directive, in a Member State other than the one whose nationality they already hold"[41]. The Court added that while „it is true that the Treaty provisions relating to the establishment and provision of services cannot be applied to situations which are purely internal to a Member State, it is no less true that the reference in Article 52 [now Article 49 TFEU] to „nationals of a Member State" who wish to establish themselves „in another Member State" cannot be interpreted so as to exclude from the benefit of Community law, the own nationals of a Member State, when they, by virtue of the fact that they resided legally in a Member State and gained a professional qualification recognized by the provisions of Community law are, in terms of their state of origin, in a situation that can be assimilated to that of all other subjects enjoying rights and freedoms guaranteed by the Treaty"[42].

4. Conclusions

Recognizing the right of establishment of persons practicing an independent activity was and still is an inexhaustible source for the Court in Luxembourg to enrich its case-law. Under the case-law[43] of the CJEU, Article 49 TFEU can be invoked by any citizen of a Member State of the European Union in another Member State, regardless of the country where the person concerned obtained a qualification or vocational training, as well as of citizens of a Member State who completed a qualification or professional training in another Member State and then returned to their home state to conduct a business under that qualification or professional training.

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[39] Idem.

[40] Judgment of the Court dated February 7, 1979, *J. Knoors v./ Staatssecretaris van Economische Zaken*, Case 115/78, ECLI:EU:C:1979:31.

[41] Pt. 20 of the Court judgment, *J. Knoors v./ Staatssecretaris van Economische Zaken*, ECLI:EU:C:1979:31.

[42] Pt. 24 of the judgment of the Court, *J. Knoors v./ Staatssecretaris van Economische Zaken*, ECLI:EU:C:1979:31.

[43] With regard to the role of jurisprudence, see Elena Anghel, *The reconfiguration of the judge`s role in the romano-germanic law system*, in LESIJ.JS XX – 1/2013, Pro Universitaria Publishing House, Bucharest, 2013, pp. 65-72.

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JUDICIAL PRECEDENT, A LAW SOURCE

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Abstract

The role awarded to judge varies from one legal system to another. In the Anglo-Saxon legal systems, there is not a self-standing legislative body, so the judge is the one who creates the law; his mission consists in solving a specific case, given the existing judicial precedents; if he cannot find an appropriate rule of law, he has to develop one and to apply it.

In the continental system, creation of law is the mission of the legislature, so the creative role of jurisprudence still raises controversy. Evolving under the influence of Roman law, the continental law systems differ from the Anglo-Saxon by: the continuous receiving of Corpus iuris civilis; the tendency to abstraction, leading to the creation of a rational law; the rule of law, with the consequence of blurring the role of jurisprudence.

Underlining the creative force of jurisprudence, Vladimir Hanga wrote: "The law remains in its essence abstract, but the appreciation of the jurisprudence makes it alive, as the judge, understanding the law, taking into account the interests of parties and taking inspiration from equity, ensures the ultimate purpose of the law: suum cuique tribuere"[**].

Keywords: *jurisprudence, precedent, continental law system, creator role, anglo-saxon law system*

Introduction

In Anglo-Saxon law, the task of creating the law rests mainly with the judge. It was considered that „a law can rarely provide all cases in question; common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an Act of Parliament"[1]. The resolutions pronounced by the judge become mandatory in the future for all similar cases faced by the lower courts, by forming the so-called „case law". The Anglo-Saxon precedent is expressed by maxim „*stare decisis et non quieta movere*", namely „to stand by decisions and not to disturb the undisturbed".

Judicial precedent does not designate the judgment in its entirety, but the principle, the argument based on which the case was settled[2]. „Common law does not consist in the cases in question, but in the general

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[**] Vladimir Hanga, *Dreptul şi tehnica juridică*, Lumina Lex Publishing House, Bucharest, 2000, p. 80

[1] Lord Mansfield, cited by Philippe Malaurie, *Antologia gândirii juridice*, Humanitas Publishing House, Bucharest, 1996, p. 136.

[2] We believe that this matter is well represented by the judgments pronounced by the European Union Court of Justice. In this respect, see Roxana-Mariana Popescu, *Features of the unwritten sources of European Union law*, Lex et Scientia, International Journal, no.2/2013, p. 100-108. As example of the application of such „principles", see Roxana-Mariana Popescu, Influenţa jurisprudenţei Curţii de Justiţie de la Luxemburg asupra dreptului Uniunii Europene – case study: the concept of „charge having equivalent effect to customs duties, Revista de Drept Public, no.4/2013, Universul Juridic Publishing House, Bucharest, p. 73-81.

principles illustrated and applied by them"[3]. Therefore, *ratio decidendi* and *obiter dictum* are distinguished in the structure of the judgment. *Ratio decidendi* designates the essence of the legal reasoning, the principle which led to the respective ruling, and *obiter dictum* means the actual ruling pronounced by the judge. If the judge does not find appropriate principles for the case submitted to settlement, the judge can and must create a new rule of law. By creating a new *ratio decidendi*, the judge contributes to the development of the case law (in the doctrine there was the opinion according to which the system for the recruiting of judges for the Constitutional Court should be rethought and they should be persons from among judges, persons with impeccable moral probity, university professors[4]).

Paper content

Despite its creating nature, the continental literature assigns to the jurisprudential Anglo-Saxon system many difficulties which concern the great number of precedents, the impossibility of their systematization, as well as the subsistence of many obsolete precedents. This state of facts made Hegel to claim the following: „What a monstrous confusion prevails in that country, both in the administration of justice and in the subject-matter of the law".

The role awarded to the precedent in the Anglo-Saxon law is explicable if we take into account the historical factors, namely that England did not see the revival of the Roman law, it lacked of a complete set of rules, and therefore the creation of the law according to the needs of the respective era was required. In this context, *judge made law* seemed the most pertinent and handy ruling. „Common-law was the legal system of a feudal society on the patterns of which the content of the bourgeois law was laid", V. D. Zlătescu[5] noted. By characterizing the judicial precedent as being the „guiding star" of this system, the author states however that, currently, things are going so far that, even in the presence of the text of the law or of the rule of common law, the judges would rather rely on judgments that were previously implemented, than apply directly the text or the respective rule. Therefore, the rules are highly technical and formal, being accessible only to specialists. Furthermore, it is deemed that „the great malady of any legal system based on precedents is the obsolescence", as the law created in this way gets to be unreceptive to social impulses and hostile to society evolution, thus becoming a barrier which can result in considerable damage.

The Roman-Germanic system does not recognize *stare decisis* doctrine, the judicial precedent not being recognized as a formal source of law[6]. The judge is not allowed to decide based on general provisions or regulations, so that the judge cannot justify the decision, by referring expressly to the power of another judgment ruled in a similar case. Therefore, guidance decisions (*arrêts de règlement*), whereby the judge formulates a mandatory general rule for the courts of law are not admitted.

The judgment ruled by the judge in the settlement of a case produces effects only on

[3] Ibidem.

[4] Elena Emilia Ştefan, *Examen asupra jurisprudenţei Curţii Constituţionale privind noţiunea de „fapte grave" de încălcare a Constituţiei*, Revista de Drept Public no. 2/2013, p.92.

[5] Victor Dan Zlătescu, *Panorama marilor sisteme contemporane de drept*, Continent XXI Publishing House, Bucharest, 1994, p. 143 and the following.

[6] For a detailed analysis of the role of precedent in Roman-Germanic system, see Nicolae Popa, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, Edition no. 2, C.H. Beck Publishing House, Bucharest, 2014.

the parties of the lawsuit, having a relative power of res judicata. In what concerns the mandatory nature of the decisions of the Constitutional Court, the failure to comply with the decisions of the contentious constitutional court draws the overall liability[7]. Notwithstanding, it is sometimes considered that, in filling the gaps of law or in the absence of law, the courts of law „persists in a particular decision, given the independence of the judiciary power, this decision acquires the nature of a legal truth, the absolute power of res judicata"[8]. It is natural that, in what concerns the settlement of a case, the courts of law study the judicial practice in the field and draw from the judgments ruled by higher courts. Such a requirement lies in the need for unity, conformity, consistency and continuity of judicial practice. Furthermore, in the continental system, which is subject to the domination of rigid laws, the case law has also a compensatory function, its role being that of conferring certain elasticity to the law.

Therefore, more generally, we can say that that Anglo-Saxon law conserves the judicial precedent as a source of law as its power is general, it extends over other courts or similar cases, and the judge is called to distinguish between *ratio decidendi* and *obiter dictum*. Roman-Germanic law gives an interpretative value to the case law, being a mean for filling the gaps, an inspiration source for the lawmaker, but the judge is bound to rule only on the case.

In order to understand the power of the judicial precedent, despite the fact it is not a source of law in the continental system, we have to make a delimitation between jurisdictional activity, which consists in the issuing of judgments and jurisprudential activity, which creates reference regulations which law is based on.

From the etymologic point of view, *jurisdictio* is the result of joining two terms: *juris* abd *dictio*, which means to tell the law. Generally, the term covers both the prerogative of judging, of applying the law in an actual situation, and the authority vested with this power. We hereby point out that the term of jurisdiction is often misused as the equivalent of the term of justice. Strictly speaking, justice is performed exclusively by the judicial power, all the other entities endowed with the power to judge in certain fields which are strictly regulated, being broadly called jurisdictions. In order to remove the existent confusion, they are also called jurisdictional activity bodies or special jurisdictions, for example, constitutional jurisdiction. The result of the activity of all jurisdictional bodies is the jurisdictional act.

In the opinion of Mircea Djuvara, the jurisdiction act carries a wider meaning, designating an individual nature act whereby the state establishes general rules of positive law applicable in an individual case. The jurisdictional act simply finds, in the light of the positive law regulations, the legal relationships which have to be applied to an actual social fact. The difference between the two terms consist in the fact that „the case law broadly includes not the facts which were acknowledged as law at some point in time, but the facts which were applied, namely the facts which were executed based on the respective acknowledgment". Generally speaking, the jurisdiction act belongs to the organized courts of law, but it is also included in the area of the administrative or political acts; for example, the control of the government

[7] Elena Emilia Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ, ProUniversitaria Publishing House,* Bucharest, 2013, p.269.

[8] Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *Teoria generală a dreptului,* C. H. Beck Publishing House, Bucharest, 2006, p. 148.

in the parliamentary regime is also a jurisdictional act[9].

Therefore, the jurisdictional activity of the judge consists in the settlement of the litigation. In this regard, the judge performs two tasks: that of telling the law (*jurisdictio*), by acknowledging from the claims in litigation the one corresponding to the legal regulations in force and that of ordering the fulfillment of the decision pronounced (*imperium*), by means of the coercive force of the state, if the case may be.

Etymologically speaking, Bergel notes that the jurisdictional act is the act by means of which the judge tells the law. Seemingly simple, the task of qualifying an act of the judge as being jurisdictional is difficult and entails multiple doctrinal controversies, the provided criteria being inexhaustible. Essentially, the jurisdictional act is considered the act whereby the settlement of the litigation is aimed[10].

According to Terré, two aspects are found in every judgment: individual, actual aspect, which claims the pronouncement of the settlement of the case and general principle, which the judgment is founded and substantiated on. These general principles are rather revealed to the judge than the directives of the law, which have a discreet nature, this is why, the Court of Cassation tends to grant a privileged attention to the generalizing function of the judicial act, to the detriment of the individualizing function. According to the author, certain patterns arise from these decisions of the Court of Cassation, which are designated to guide the future work of the judges of the merits, being capitalized based on two trends: law of imitation and law of continuity. Especially in private international law, but also in civil and commercial law, the judge substantiates the decision on general principles which the judge founds and establishes and the violation of which represents a ground of invalidation[11].

The author notes that in French law, Parliaments, as courts of law and the other sovereign courts had the power to pronounce guidance decisions12. We are drawn the attention on the fact that the use of term „decisions" is not exactly correct, as they were not pronounced on the settlement of a litigation between two parties, but they were genuine regulations. Guidance decisions were however limited under two aspects: in space, as their mandatory force was extended only on the division which the respective Parliament belonged to; in time, due to the fact that such decisions were temporary, being valid until the adoption of a law.

By means of the provisions of art. 5 of the French Civil Code, these guidance decisions were prohibited. According to Terré, this does not mean that the judge is prevented to issue decisions in principle, if a connection can be established between the expressed principle and the ruling pronounced in the case. In other words, the text of the law prohibits the judge to create rules, outside the litigation, but it does not exclude the creation of praetorian rules within the jurisdictional activity. In this way, the motivation and the ruling pronounced in a case can be adjusted to other similar cases. Furthermore, it is considered that, if the issuance of decisions in principle is allowed in the settlement of the litigation, there is nothing to prevent their modification in order to be used for the settlement of other cases.

[9] Mircea Djuvara, *Teoria generală a dreptului (Enciclopedie juridică)*, All Publishing House, Bucharest, 1995, p. 280.
[10] Jean-Louis Bergel, *Méthodes du droit. Théorie générale du droit*, 2nd edition, Dalloz Publishing House, 1989, p. 314.
[11] François Terré, *Introduction générale au droit*, 7th edition (Dalloz Publishing House, 2006), p. 285.
[12] *Idem*, p. 279.

Similarly, Djuvara notes that, if the legitimacy of a new regulation is acknowledged, the legitimacy of any other identical act is necessarily acknowledged, based on generalizing legal induction, which leads to a general regulation. But, „this general regulation was not previously established, but it is formed in mind only by acknowledging the individual regulations"[13].

Therefore, it is noted that the decisions „which the judges not only pronounce but also substantiate, lead to the occurrence of the gaps of the legislation in force, and to the rulings of actual and individual application, formulated as general rules of legal issues brought into the respective litigations"[14].

Given all the aforementioned, we conclude that the judgments are of two kinds: judgments in principle, defined by the fact that the ruling is substantiated on a general principle and case judgments, limited to the settlement of an actual case.

The Romanian Civil Code prohibits guidance decisions, but does not prohibit *decisions in principle*. The possibility of the judge to issue a decision in principle does not violate the rule provided by the Civil Code, as this decision only produces *inter partes* effects; the substantiation of the judgment is the one that it is based on a preexistent legal principle. Whenever the law is silent or insufficient, the judge, being bound to settle the case under the penalty of denial of justice, shall seek to found a general principle admitted by the law system. But, „the creation of law is naturally a continuous process where every step generates unforeseen consequences on what we can do and what we should do next"[15]. As the dynamics of social life continuously reveal new aspects, such as euthanasia, human cloning, artificial procreation, the judge often finds himself obliged to create innovative principles, consistent with the existent ones, based on which he can substantiate his ruling. The legislative changes that occur at some point in time raise serious issues for certain fields of law, in terms of interpretation and application of normative acts[16]. In this case, the judge pronounces a decision in principle which, without pretending to be imposed as mandatory, will influence rulings pronounced in similar cases.

The literature shows that the decisions in principle suggest „a potential rule to follow", therefore, the provisions of the Civil Code do not prevent the jurisprudential development of law, but only mandatory precedent[17]. The authors point out that, although the judge settles an actual case, the judge formulates a principle and his reasoning must be a general one, applied to the actual case, but which could be applied to any similar case. Such a decision is substantiated on the „internal logic of the legal system, but not in the sense that it has a generally binding value"[18].

Dimitrie Alexandresco noted that nothing prevented the judges, in motivating their decision, to present general considerations, to state principles of law, to make inductions or deductions. Notwithstanding, „the judges could not motivate their ruling, by simple reference to a previous sentence, although they could

[13] Mircea Djuvara, *op. cit.*, p. 495.

[14] I. Comănescu, D. Paşalega, I. Stoenescu, *Contribuţia practicii judiciare în dezvoltarea unor principii ale dreptului civil socialist*, in Justiţia Nouă 4/1963.

[15] F. A. von Hayek, cited by Philippe Malaurie, *op. cit.*, p. 348.

[16] Elena Emilia Ştefan, Contribuţia practicii Curţii Constituţionale la posibila definire a aplicabilităţii revizuirii în contenciosul administrativ, Revista de Drept Public no. 3/2013, p. 82-83.

[17] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *op. cit.*, p. 147.

[18] *Ibidem*, p. 326.

take into account their own case law or the case law of a superior court"[19].

Similarly, professors Demeter and Ceterchi wrote that, in socialist law, the lack of general-mandatory nature of the judgment did not exclude the possibility that the courts, in solving different cases, took into account previous decisions. The settlement of an actual case raises certain general aspects which, „if settled fairly and persuasively, can be a valuable guide for all state bodies, called upon to settle similar cases"[20]. Furthermore, it is shown that, given the hierarchy of courts, lower courts study the judicial practice of higher courts, without this practice being mandatory, but in order for the pronounced decisions not to deviate from the „general line of law interpretation and application".

Gh. Mihai acknowledges that the primary role of the judge is to apply the law, but „provided that the grounds of several cases are the same, they can be general inspirations derived from a series of previous decisions"[21]. Mircea Djuvara notes that, if a doctrinal opinion of a legal expert or a judgment is „established as mandatory for future disputes, they play the role of the law"[22].

The power of the case law, according to Vălimărescu, is not inferred from text, but from the „power of things and lessons of history"[23]. If a certain issue of law receives the same ruling from several courts, the ruling shall be most often complied with by all the courts, therefore it is deemed that „the case law is established and it has legal force".

Another opinion shows that, although theoretically, the judge cannot introduce a new regulation in the legal system, as the judge only „discovers" a regulation which exists in the system by default, however, „this strictly archaeological work is a mere fiction, beneath which a work of creation is hidden"[24]. The judge cannot claim previous case law as the legal ground of the new decision, due to the fact the judiciary precedent is not formally acknowledged as a formal source in continental law, but, the judge often relies on these principles. The judge „shall claim the principle as being incident to the system and not as being created by the judicial practice".

Given all the aforementioned, in Roman-Germanic system, judicial precedent has only persuasive value: as far as the judge finds that a principle emerges from a constant case law, the judge shall acquire the principle and shall apply it in the case he has to settle. The judge is not bound to comply with the precedent, but the principle can be mandatory for the reason by means of its intellectual value. Given these grounds, the *ratio decidendi* of a previous decision is often found in similar cases, even under the same formulation. Furthermore, due to reasons concerning the consistency of the system, the continuity of the principles and the safety of legal relations, the unification of the judicial practice is a challenge.

The power of a case law, according to Djuvara, is enforced „based on the great principle of stability and of the security of social relations, which is a general principle of justice: without such a consistency of the rulings, not only that similar cases are settled in a particular way, which represents an injustice, but nothing is certain and nobody

[19] Dimitrie Alexandresco, *Principiile dreptului civil român*, vol. I, Atelierele grafice SOCEC, Bucharest, 1926, p. 54.
[20] I. Demeter, I. Ceterchi, *Introducere în studiul dreptului*, Științifică Publishing House, Bucharest, 1962, p. 163
[21] Gheorghe Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III, All Beck Publishing House, Bucharest, 2004, p. 224.
[22] Mircea Djuvara, *op. cit.*, p. 476.
[23] Alexandru Vălimărescu, *Tratat de Enciclopedia dreptului*, Lumina Lex Publishing House, Bucharest, 1999, p. 237.
[24] Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *op. cit.*, p. 146.

knows on what to rely, general legal order being therefore reached"[25].

The literature explains the persuasive value of precedent by considerations relating to the following: the need to ensure non-discriminatory treatment to individuals, which entails the considerations of rulings pronounced in similar cases; the fact that the judges represent a social body with well defined ideas, „which discriminates individual opinions in favor of the continuity of concepts which are expressed in decisions"; the hierarchical control of decisions, by higher courts, which determines, despite the independence of judges, the adoption of solutions in line with those pronounced by higher court[26].

We note that, under the apparent rigor of the provisions of the Civil Code, which force the judge to rule only by case decisions, the judge may, within certain limits, to exceed the framework of the enacted law. Although the judge claims to rely on preexistent law, in fact, the judge gets to create himself general principles of law.

Conclusions

In the light of all the aforementioned, we note that the legal principles drawn from the case law are enforced as mandatory, even if the judicial precedent is not mandatory in our legal system. The decisions establishing these principles are not formally mandatory for the courts of law, but the hierarchy of jurisdictional bodies and the authority of the Supreme Court require, at least in practice, the observance by lower courts of the Praetorian regulations.

Due to these grounds, recent specialized studies place continental case law, in terms of its creative role, between two limits: *de jure* negation and *de facto* acknowledgment[27]. Furthermore, we talk more and more about the power of the precedent in continental system, beyond its persuasive value. As an argument in favor of the acknowledgment of a creative case law, the possibility that the law grants to the judge in order to fill the gaps of the law is claimed, the judge having to choose between the potential meanings of concepts, such as: good faith, public order, good morals, equity. Furthermore, it is shown that the judge is authorized to remove potential contradictions, thus ensuring the consistency of the legal order[28]. Furthermore, the judge is liable to adjust law to the needs of social life, a prerogative that resulted in certain jurisprudential creations such as the institution of matrimonial regime and of the civil liability in French law or the institution of the tort liability and joint tenancy on shares, in Romanian law.

The matter of the judicial precedent role is very complex and very actual. The law creator role of the judge is discussed not only nationally, but also at the European Union level. The doctrine points out that although the rulings of the European Union courts are not *erga omnes* opposable, being binding only upon the parties of the litigation, they have „indirect law creator effect, due to the fact the settlement of similar litigations is also indicated"[29].

[25] Mircea Djuvara, *op. cit.*, p. 476.

[26] Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *op. cit.*, p. 149.

[27] Steluța Ionescu, *Justiție și jurisprudență în statul de drept*, Universul Juridic Publishing House, Bucharest, 2008, p. 115.

[28] Ion Deleanu, *Construcția judiciară a normei juridice*, în Dreptul, an XV, no. 8/2004, p. 25.

[29] Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridică,* Hamangiu Publishing House, Bucharest, 2016, p. 158. For further details on the case law of the European Union courts as source of law, see, Laura-Cristiana Spătaru-Negură, *op. cit.*, p. 156-165.

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PUBLIC PROCUREMENT IN THE LIGHT OF THE NEW LEGISLATIVE CHANGES

Elena Emilia ȘTEFAN[*]

Abstract

The package of laws on public procurement and concessions of Romania which entered into force in May 2016 came with many new elements. Therefore, in this study, we aim to present the new conception of the lawmaker towards this subject. Not least, we will analyze the role of the National Council for Solving Complaints in the procedure for the award of public procurement agreements and other elements in what concerns the complaints in the field of public procurement.

Keywords: *National Council for Solving Complaints, public procurement, remedies, law, aggrieved party.*

1. Introduction

In May 2016 a new package of laws on public procurement and concessions was published in the Official Journal of Romania, as follows: Law no. 98/2016 on public procurement[1]; Law no. 99/2016 on sectorial procurement[2]; Law no. 100/2016 on the concessions of works and services[3]; Law no. 101/2016 on remedies and appeals concerning the award of public procurement agreements, sectorial agreements and of works concession agreements and service concession agreements, and for the organization and functioning of the National Council for Solving Complaints[4].

Following the adoption of this package of laws in the field of public procurement, Government Emergency Ordinance no. 34/2006 on the award of public procurement agreements, public works concession agreements and service concession agreements was repealed[5]. Currently, there is not a case law established based on these legislative changes yet. In the current historical context in which the humanity escalates a new stage of civilization, thus embracing the „unity in diversity", the role of the general principles of law, a legal expression of the fundamental relations of the society, is amplified[6].

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[1] Law no. 98/2016 on public procurement, published in the Official Journal no. 390/2016.

[2] Law no. 99/2016 on sectorial procurement, published in the Official Journal no. 391/2016.

[3] Law no. 100/2016 on the concession of works and services, published in the Official Journal no. 392/2016.

[4] Law no. 101/2016 on remedies and appeals concerning the award of public procurement agreements, sectoral agreements and of works concession agreements and service concession agreements, and for the organization and functioning of the National Council for Solving Complaints, published in the Official Journal no. 393/2016.

[5] Government Emergency Ordinance no. 34/2006 on the award of public procurement agreements, public works concession agreements and service concession agreements, published in the Official Journal no. 418/2006- (currently *repealed*).

[6] Elena Anghel, *The importance of principles in the present context of law recodifying*, in proceeding CKS e-Book 2015, p. 753-762

On another occasion we showed that, at European level, currently, there are tendencies of unification of the legislation in this field, three Directives being adopted, the Member States having to amend the legislation so that to ensure their implementation at national level[7]:

- Directive 2014/23/EU on the award of concession contracts[8];
- Directive 2014/24/EU on public procurement[9];
- Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors[10].

The primacy of the European Union law[11] requires to the national courts, in particular, to guarantee to the litigants the rights which arise from its directives, when the national law precludes the fulfilment thereof[12]. As we have recently shown, the European Union law embraces the theory of monism, namely the existence of a single legal order comprising the international law and the domestic law in an unitary system[13]. Every state has enacted its law according to own socio-political requirements, traditions and values proclaimed by it[14]. Therefore, no state has a legislation that is valid for all times[15], the national lawmaker being always focused on social life and on discovering the needs of the society, thus proceeding with the amendment of the legislative framework.

In this context, we mention that, in what concerns national law, Law no. 554/2004 introduces as a ground for revision, in art. 21 para.(2): the ruling of final and irrevocable judgments by violating the principle of precedence of Community law (...)[16]. As the doctrine showed, the new ground for revision (...) was designed as a domestic remedy, in case of final and irrevocable judgments, pronounced by means of the violation of the principle of precedence of the European Union law, regulated by art. 148 para. (2) of the Constitution of Romania, for the purpose of fulfilling the general obligation incumbent on the Member States under art. 10 of the

[7] Elena Emilia Ştefan, *Drept administrativ Partea a II-a.Curs*, Universul Juridic Publishing House, Bucharest, 2016, p.63.

[8] Available online at: http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A32014L0023, accessed on February 1st, 2016.

[9] Available online at: http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32014L0024, accessed on February 1st, 2016.

[10] Available online at: http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A32014L0025, accessed on February 1st, 2016.

[11] In what concerns the primacy of EU law see Roxana-Mariana Popescu, *Specificul aplicării prioritare a dreptului comunitar european în dreptul intern, în raport cu aplicarea prioritară a dreptului internaţional*, Revista Română de Drept Comunitar, no. 3/2005, p. 11-21.

[12] Dumitru-Daniel Şerban, *Achiziţiile publice. Jurisprudenţa Curţii Europene de Justiţie*, Hamangiu Publishing House, Bucharest, 2011, p. 4. The failure to comply with the EU legal regulations results in the initiation of the infringement procedure in this respect, see Roxana-Mariana Popescu, *General aspects of the infringement procedure*, Lex et Scientia, International Journal, no.2/2010, Pro Universitaria Publishing House, p. 59-67.

[13] Laura Cristiana Spătaru Negură, *Dreptul Uniunii Europene- o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016, p.190.

[14] See Elena Anghel, *Constant aspects of law*, in proceedings CKS-eBook 2011, Pro Universitaria Publishing House, Bucharest, 2011, p. 594.

[15] Laura-Cristiana Spătaru-Negură, *Old and New Legal Typologies*, in proceedings CKS-eBook 2014, Pro Universitaria Publishing House, Bucharest, 2014, p. 354.

[16] Law no. 554/2004 of the contentious administrative, published in the Official Journal no. 1154/2004 (latest amendment by Law no. 138/2014 for 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 normative acts, published in the Official Journal no.753/2014).

Treaty[17] establishing the European Community[18].

2. Content

2.1. Public procurement concept

A number of vulnerabilities of the public procurement system of Romania, both legislative and practical, was found in a project[19], and we hereby list selectively a few of them: incomplete and unstable legislation marked by ambiguity, non-transparent ministry orders, the lack of sanctions for public authorities, limited practice regarding appeals due to high costs and lack of confidence in the effectiveness of the appeals. In the last two decades, the case law of the Court of Justice and the European Union Tribunal in the field of public procurement proved to be extremely rich, more than 200 specific cases being registered on the dockets of the two courts[20].

In what concerns public procurement and concessions, we must provide the following: the concessions of goods are still subject to Government Emergency Ordinance no. 54/2006 on the regime of the agreements of public property goods concession and the concessions of services[21], works, sectoral procurement are subject to the package of laws of 2016. A summary of the new package of laws has been recently published on A.N.A.P.[22] (the National Agency for Public Procurement) official site. A.N.A.P. was established by Government Emergency Ordinance no. 13/2015[23].

The concept of public procurement is defined by art.3 para.(1) of Law no. 98/2016 on classic public procurement, as follows: "the procurement of works, products or services under a public procurement agreement by one or more contracting authorities from economic operators designated by them, regardless if the works, products or services are intended for the fulfilment of a public interest".

According to art. 7 of the law, the contracting authority shall be entitled to purchase directly products or services if the estimated value of the procurement, VAT excluded, is less than RON 132,519, respectively works, if the estimated value of the procurement, VAT excluded, is less than RON 441,730.

Throughout the application of the award procedure, the contracting entity shall be bound to take all the measures in order to prevent and to identify conflict of interest situations, in order to avoid distortion of competition and to ensure equal treatment for all economic operators.

Law no. 98/2016 on public procurement regulates the following procedures for the award of public procurement agreement: open tendering, restricted tendering, competitive

[17] In what concerns the Treaty on European Union, see Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, p. 62-63.

[18] Gabriela Bogasiu, *Law of the contentious administrative*, edition III, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2015, p.545.

[19] https://www.transparency.org.ro/proiecte/proiecte_incheiate/2010/proiect_3/Riscuri%20de%20coruptie%20in%20achizi tii %20publice.pdf

[20] Dumitru- Daniel Şerban, *Achiziţiile publice. Jurisprudenţa Curţii Europene de Justiţie*, Hamangiu Publishing House, Bucharest, 2011, p. 1

[21] For further details on the concession of public property goods, see Marta Claudia Cliza, *Drept administrativ, Partea a II-a*, ProUniversitaria Publishing House, Bucharest, 2011, p.208

[22] http://anap.gov.ro/web/wp-content/uploads/2016/01/0-Informatii-principale-pachet-legi-modificat.pdf, accessed on January 31st 2017.

[23] Government Emergency Ordinance no. 13/2015 on the establishment, organization and functioning of the National Agency for Public Procurement, published in the Official Journal no. 362/2015.

negotiation, competitive dialogue, partnership for innovation, negotiation without prior publication, design contest, simplified procedure, procedure applicable in case of social services and other specific services: *open tendering*; *restricted tendering*; *competitive negotiation; competitive dialogue*; *Partnership for innovation*; *Negotiation without prior publication; Design contest*. Furthermore, the law also refers to the *procedure applicable in case of social services and other specific services* as well as to the *simplified procedure* which is initiated by publishing a simplified contract notice in SEAP, accompanied by the relating award documentation.

The new elements are, among others, the right of the contracting authority to resort to the award of public procurement agreement in case of division into lots, provided that this information is included in the procurement documents; the awarding criteria, in order to establish the most advantageous offer, are the following: lowest price, lowest cost, best value for money, best value for cost.

The concept of ESPD was introduced – the European Single Procurement Document which refers to the fact that the updated declaration on own risk, as preliminary evidence, instead of certificates issued by public authorities or third parties certifies that the economic operator meets the following conditions:

a) He/she is not in any of the exclusion situations (...)
b) He/she fulfils the capacity criteria, as requested by the contracting authority
c) If the case may be, he/she fulfils the selection criteria established by the contracting authority, according to the provisions of this law.

In what concerns sectoral procurement, Law no. 99/2016 defines it as follows: "the procurement of works, products or services under a sectoral agreement, by one or more contracting authorities from economic operators designated by them, provided that the purchased works, products or services are intended for the performance of one of the relevant activities: gas and thermal energy, electric power, water, transport services, ports and airports, postal services, extraction of oil and natural gas – exploration and extraction of coal or other solid fuels".

2.2. National Council for Solving Complaints

Law no. 101/2016 on remedies and appeals concerning the award of public procurement agreements, sectoral agreements and of works concession agreements and service concession agreements, and for the organization and functioning of the National Council for Solving Complaints, regulates matters related to the membership of the Council, status of the personnel of the Council, complaints settlement procedure, the remedy against the decisions of the Council etc.

The National Council for Solving Complaints is an independent body with administrative – jurisdictional activity and legal personality and operates according to Law no. 101/2016. The Council has a web page which can be accessed[24] and where we can find information such as: activity reports, complaints submission form, decisions etc.

The National Council for Solving Complaints has 36 members, selected by competition and appointed by the decision of the Prime Minister. The members of the Council are special status public official

[24] http://www.cnsc.ro/, accessed on January 31st 2017.

called: *counsellors for solving complaints in the field of public procurement.*

The new law introduces the obligation of the aggrieved party to deliver a prior notification, before the submission of the complaint. Under the penalty of rejection the complaint as inadmissible, which can be claimed ex officio, before resorting to the N.C.S.C. or to the court of law, the party which deems itself aggrieved shall be bound to notify the contracting authority on the request of remedy in full or in part of the alleged violation of the legislation on public procurement or concessions within 10 days or 5 days.

2.3. The aggrieved party concept

Further on, we will clarify the concept of aggrieved party, according to the new legislation in the field of public procurement.

Therefore, the concept of aggrieved party under this law is defined as follows: "Any person who considers himself/herself aggrieved in his/her right or legitimate interest by an act of a contracting authority or by the failure to solve a request within the legal deadline can claim the annulment of the act, the obligation of the contracting authority to issue an act or to adopt remedy measures, the recognition of the claimed right or legitimate interest, by administrative jurisdictional or judiciary means, according to the provisions of this law".

On the other hand, art. 52 para.1) of the Constitution establishes the fundamental right of any person aggrieved in his/her legitimate rights or interests by a public authority, by means of an administrative act or by the failure of a public authority to solve his/her request within the legal deadline, shall be entitled to the acknowledgement of his/her claimed right or legitimate interest, the annulment of the act and settlement of the damage, a right which represents the guarantee for citizens' protection against public authorities abuses and for free access to justice[25].

Free access to justice is established by art. 21 of the Constitution and consists in that every person is entitled to bring cases before the law for the defence of his/her legitimate rights, freedoms and interests[26].

Law no. 101/2016 on remedies and appeals concerning the award of public procurement agreements, sectoral agreements and of works concession agreements and service concession agreements, and for the organization and functioning of the National Council for Solving Complaints defines in art. 3 para. (1) letter f) the meaning of aggrieved party: "any economic operator who fulfils the following conditions:

- has or had an interest in connection with the award procedure;
- suffered, suffers or is likely to suffer damage as consequence of an act of the contracting authority, likely to cause legal effects or, as a consequence of the failure to solve within the legal deadline a request on the award procedure". Therefore, the concept of aggrieved party has a broader meaning in the sense of the new package of laws on public procurement compared to art. 52 of the Constitution.

2.4. The law applicable to litigations in the field of public procurement

Hereinafter, we will analyse if the provisions of Law no. 554/2004 of the contentious administrative or of Law no. 101/2016 on remedies and appeals concerning the award of public procurement agreements (...) are applicable in what

[25] Decision no.168/2011 of the Constitutional Court, published in the Official Journal no. 261/2011.

[26] Mihai Bădescu, *Drept constituţional şi instituţii politice*, second edition revised and supplemented, V.I.S.Print, Bucharest, 2002, p.237.

concerns litigations which occur in public procurement procedure.

In the field of public procurement, as a remedy measure, by way of derogation from art. 1 para.(6) of Law no. 554/2004, the contracting authority can revoke / cancel own acts or the entire award procedure following the receipt of a notification the authority finds substantiated[27].

In what concerns the means chosen for complaints, Law no. 101/2016 establishes the alternative jurisdiction, the aggrieved party being allowed to choose the administrative-jurisdictional means, respectively by resorting to the N.C.S.C. or the judiciary means, by resorting to the tribunal, the division of the contentious administrative and fiscal. In this case it is easy to note that this is an alternative jurisdiction.

The difference between the two options of the aggrieved person is that, in case of the judiciary complaint, the applicant shall be bound to pay a stamp duty, unlike the other option, where no fee has to be paid. According to the Constitution, art. 21 par.(4), administrative special jurisdiction is optional and free of charge, excluding the administrative appeals28. No constitutional provision prohibits the legal establishment of a prior administrative procedure, without jurisdictional nature, such as graceful or hierarchical administrative appeal procedure[29].

Given that Law no. 101/2016 is a law dedicated to complaints and appeals in the field of public procurement, the possibility of aggrieved parties to resort to court actions brought against the acts of the contracting authorities in this field is removed under Law no. 554/2004, this special law of remedies derogates from[30].

The fulfilment of the law depends on whether it is accepted and assumed as a value and a rule by the members of the society. In this regard, the understanding of the fulfilment of the law is an act of assessment and search of the justice and of the other acknowledged values[31].

3. Conclusions

As the title of this study is called, we hereby analysed a large bibliographic material in order to identify the new legislative elements of the public procurement field. If before 2016 there was a single normative act, respectively a Government Ordinance, nowadays, we have a package of laws applicable to public procurement procedures and concessions.

Although the public procurement legislation was harmonized with the European legislation, according to an official announcement, in 2016, a large number of fraud cases were found in this field[32]. Therefore, the Romanian Police declared that, in 2016, by means of the Directorate for Investigation of Economic Crimes, after checking the lawfulness of the conclusion and performance of public

[27] Dumitru Daniel Șerban, *Noua legislație privind achizițiile publice*, Hamangiu Publishing House, Bucharest, 2016, p. 49.

[28] Decision no. 478/2004 of the Constitutional Court, published in the Official Journal no. 69/2005, Toader Tudorel, *Constituția României reflectată în jurisprudența constituțională*, Hamangiu Publishing House, Bucharest, 2011, p. 72.

[29] Decision no. 670/2005 of the Constitutional Court, published in the Official Journal no.77/2006, Toader Tudorel, *op.cit.*, 2011, p.72.

[30] Dumitru Daniel Șerban, *Noua legislație privind achizițiile publice,* Hamangiu Publishing House, Bucharest, 2016, p.35.

[31] Elena Anghel, *Values and valorization*, in LESIJ 2/2015; p. 103-113.

[32] https://www.politiaromana.ro/ro/stiri-si-media/stiri/actiuni-ale-politiei-romane-in-domeniul-contractelor-de-achizitii-publice, accessed on February 10th, 2017.

procurement agreements, they filed 946 criminal cases. The damage caused to the state budget, according to the respective announcement, by illegal performance of public procurement agreements, amounted to more than 5 billion RON, and for the recovery of such amount precautionary measures were ordered amounting to 1.7 billion RON.

Not least, a great competition[33] is noted between the economic operators participating in public procurement procedure.

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[33] For further details on the concept of competition, 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.

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A BRIEF ANALYSIS ON BREXIT'S CONSEQUENCES ON THE CJEU'S JURISDICTION

Iuliana-Mădălina LARION*

Abstract

As the United Kingdom of Great Britain and Northern Ireland's effective withdrawal from the European Union advances, there is a growing interest on what solutions shall be found for the complex legal problems raised by Brexit. The research intends to highlight the main issues relevant for the Court of Justice of the European Union's jurisdiction, in an effort to better understand the possible consequences on the European Court's competence to receive, hear and solve cases involving the United Kingdom, as well as on the means to enforce its rulings. The study aims to anticipate and suggest possible approaches to the practical challenges that shall have to be addressed.

Keywords: *Brexit; withdrawal from the European Union; Court of Justice of the European Union; jurisdiction; actions.*

1. Brexit and its challenges

As this study is being written, the United Kingdom of Great Britain and Northern Ireland's Government is preparing to notify the European Council of the state's intention to exercise its right to withdraw from the European Union (EU), using Article 50 of the Treaty on European Union[1]. The United Kingdom (UK) is taking the legal steps necessary to give full effect to the result of the referendum held on 23 June 2016.

Thus, the only withdrawal so far of a Member State from this international integration organisation has become imminent. This raises a lot of questions regarding the legal, economic and social aspects of the process, as well as questions about EU's future, once such a precedent is established[2].

The negotiations that will follow the formal use of Article 50 of the Treaty on European Union shall have their result enshrined in a withdrawal agreement. One of the legal issues that shall have to be taken into account is the matter of the Court of Justice of the European Union's jurisdiction in pending cases involving the UK.

The study shall present the possible consequences on the jurisdiction of the three courts which compose the Court of Justice of the European Union (CJEU): the Court of

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[1] The Treaty on European Union (TEU) was signed at Maastricht on 7 February 1992 and entered into force on 1 November 1993. Article 50 was introduced by the Treaty of Lisbon, signed on 13 December 2007, in force since 1 December 2009. For the consolidated version of TEU see: http://europa.eu/eu-law/decision-making/treaties/index_en.htm, last accessed on 20 March 2017.

[2] See Fuerea, *Brexit – trecut…*, 2016, 631-633 and The White Paper presented by the European Commission on 1 March 2017, available at https://ec.europa.eu/commission/white-paper-future-europe-reflections-and-scenarios-eu27_en, last accessed on 20 March 2017.

Justice[3], the General Court and the Civil Service Tribunal, focusing on their main competences, that is (i. e.) on the main types of actions they can solve. There is also the topic of the efficiency of the means to enforce the CJEU's rulings once UK's withdrawal becomes opposable to the other Member States.

So, for the Member States, including the UK, it is important to know what they can expect from the different stages of this process and how far the limits of the negotiations[4] could extend on the matter of CJEU's jurisdiction.

This brief analysis is meant to contribute to the debate among legal practitioners and officials from the Member States and to help clarify these legal problems. Its main objective is a better understanding of how the European Court works, what it can and cannot do with respect to a withdrawing Member State and how far reaching are the effects of its rulings beyond formal jurisdiction.

For achieving this purpose, the study shall present the powers of the three courts in a temporal correlation with the different stages of Brexit and shall suggest solutions to the legal and practical issues in discussion, supported by doctrinal opinions from established authors and by relevant examples from the CJEU's case-law.

Since the subject matter is rather recent and unprecedented, there are few contributions in legal literature, all the more reason to stimulate the pursuit of knowledge in this global society we share.

2. The jurisdiction of the Court of Justice of the European Union with respect to the withdrawing UK

2.1. Official date of Brexit

The first question to be addressed is what is the moment when Brexit becomes effective, i.e. the moment from which the UK ceases to have the rights and obligations of an EU Member State. The answer can be found in TEU, that establishes two alternative dates.

According to paragraph 3 of Article 50 of the Treaty on European Union[5] the UK shall no longer be bound by the Treaties establishing the EU from the day of entry into force of the withdrawal agreement or, failing that, two years after the day it has notified its intention to withdraw from the EU to the European Council. The period of two years may be extended by a unanimous decision of the European Council, in agreement with the state concerned.

Per a contrario, the UK is bound by the Treaties until the withdrawal agreement enters into force or, if it does not do so within the two-year period from the day the European Council is officially notified, two years after the day of notification. Hence, there is an approximate period of two years that may be extended, in which the UK is still under the CJEU's jurisdiction.

Three distinct stages can be of interest:

a) after the referendum, but prior to the official notification of the European Council;
b) after notification, up until the effective withdrawal date, a period in which negotiations shall take

[3] The former Court of Justice of the European Communities.

[4] For an analysis on the limits of negotiation between the UK and the other Member States in the field of the free movement of persons and services, see Fuerea, *Brexit – Limitele…*, 106-112.

[5] Article 50, paragraph 3 of TEU reads: "The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period." For its legal analysis, see Hillion, 2016, 1-12.

place;

c) after the day of effective withdrawal, a stage in which, at least for a short or medium time after withdrawal, the EU law might still have an echo.

2.2. Prior to the official notification of the European Council

As we have seen, after the referendum the UK has taken the internal legal steps that would allow official notification of withdrawal. Since Article 50 paragraph 1 of the TEU states that a Member State shall decide to withdraw from the EU according to its own constitutional requirements, the UK has had to sort out if, following the result of the referendum, the Government needed the Parliament's approval to use Article 50 of the TEU[6]. The High Court answered that such a permission was necessary and its decision was confirmed by the UK's Supreme Court[7]. It also stated that the withdrawal process is irreversible, though prominent legal authors argued the contrary[8] and even expressed the view that this is a matter of interpretation for the Court of Justice, not for the internal court[9].

However, the Government did get the permission of the Parliament, the proper internal legislation was passed and official notification of the European Council is due until the end of March 2017.

During this time, the UK is under the complete jurisdiction of the CJEU, under all its aspects and it has to give full effect to all of the three court's rulings, just like any other Member State.

A succinct presentation of the role and attributions of the three courts composing the Court of Justice of the European Union[10] is necessary in order to better understand what type of legal relations they can establish with a Member State, including the UK.

The main *sedes materiae* is Article 19 of the Treaty on European Union, Articles 256, 258-277 of the Treaty on the Functioning of the European Union (TFEU) and Protocol no. 3 to the TFEU on the statute of the Court of Justice of the European Union (the Statute)[11].

The role of the CJEU is to "ensure that in the interpretation and application of the Treaties the law is observed"[12]. For this purpose, the CJEU can function as a jurisdictional institution, and give rulings, as well as an advisory one, and render opinions.

Article 19 paragraph 3 of the TEU summarizes CJEU's competence. It can: "(a) rule on actions brought by a Member State, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions; (c) rule in other cases provided for in the Treaties"[13]

From this text, it results that the CJEU's jurisdictional function is also divided into ruling on direct actions and on preliminary references.

One author observes that there are two categories of direct actions: "those over which the Court has jurisdiction by virtue of an agreement between the parties and those

[6] See Hestermayer, 2016, 2-15 and Douglas-Scott, 2016, 6-18.
[7] See Sari, 2017, 2-3, with reference to the *Miller* case. For the UK's court hierarchy see Schütze, 2012, 293.
[8] See Craig, *Brexit…*, 2016, 33-37.
[9] See Sari, 2017, 30-32.
[10] See also Chalmers, Davies and Monti, 2010, 143-149.
[11] For further details and legal texts see Fábián, 2014.
[12] Article 19, paragraph 1 of TEU. For more about the role of CJUE, see Stone Sweet, 2011, 121-153.
[13] Text available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016M/TXT&from = EN, last accessed on 20 March 2017.

where the Court's jurisdiction is conferred by direct operation of the law"[14].

The former may result from a contract concluded by the EU with a jurisdiction clause and "are not very important in practice"[15].

The latter are the actions that can be brought against a Member State, as part of the infringement procedure, for the alleged violation of EU law[16] and the actions against the EU and its institutions, such as annulment actions, actions regarding the EU's institutions' failure to act, the EU's non-contractual liability, actions against penalties[17] or staff cases.

Preliminary rulings procedure, on the other hand, is non-contentious[18] and can be started by a judicial body[19] from a Member State in order to obtain an answer on the interpretation of the Treaties or on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union[20].

The Court of Justice, whose existence dates back to the creation of the three European Communities[21], is at the top of the judicial system created by the Member States of the EU, as shown by its competence and by the judicial remedies. The General Court, established in 1989, on the base of amendments contained in the Single European Act[22], was meant to relieve the Court of Justice of its increasing case-load, which is why the Court of Justice has jurisdiction to do all of the above and the General Court only has jurisdiction to determine the cases expressly provided by Article 256 of the TFEU and Article 51 of the Statute. It can solve a part of the annulment actions, actions for failure to act, tort actions and contract cases, where the contract so provides.

Although Article 256 paragraph 3 of the TFEU gives the General Court competence to answer preliminary references in specific areas laid down by the Statute, the Statute has not yet been modified in this respect[23].

The Civil Service Tribunal determines disputes between the EU and its staff. It was established in 2004, in order to take over these types of cases from the General Court[24] that was also experiencing an increasing case-load in the context of EU enlargement.

Due to this chronology, it is not surprising that there is a right to appeal the General Court's rulings to the Court of Justice and the Civil Service Tribunal's rulings to the General Court.

Concretely, until official notification of withdrawal is made, the UK's legal standing is untroubled. As the case may be, it can stand in any of the three courts as a plaintiff or a defendant in a direct action, it can be the subject of an infringement/enforcement action, it can

[14] Hartley, 2010, 56.
[15] Hartley, 2010, 56.
[16] Also, known as enforcement actions.
[17] See Mathijsen, 2010, 131-132.
[18] See Șandru, Banu and Călin, 19-20.
[19] For the criteria that judicial body has to fulfil, see Andreșan-Grigoriu, 2010, 72-143.
[20] Article 267 of the Treaty on the functioning of the European Union.
[21] See Fuerea, 2011, Manualul…, 14-19.
[22] Text of the Single European Act available here: http://europa.eu/european-union/law/treaties_en, last accessed on 26 March 2017.
[23] See Article 3 of the Regulation (EU, Euratom) of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, available at http://curia.europa.eu/jcms/jcms/Jo2_7031/, last accessed on 20 March 2017. For an analysis on why this transfer of jurisdiction has not happened yet, see Broberg and Fenger, 2010, 25-28.
[24] See Hartley, 2010, 53.

make an appeal, it can ask the Court of Justice's opinion on the base of Article 218 paragraph 11 of the TFEU[25], its judicial bodies may ask for preliminary rulings, its nationals may be the subject of direct actions or staff cases etc.

2.3. Between official notification and effective withdrawal

This shall be a time when the UK is one foot out the door, but still a member of the EU, still bound by EU law[26] and, in our opinion, still completely under the jurisdiction of the CJEU.

This period is dedicated to negotiation between the Member States that will have to solve a series of complex issues such as budget contributions, rights of UK and EU nationals[27], pending cases before the CJEU and so on[28]. But, as long as the UK still has all the rights and obligations set out in the Treaties, the negotiations cannot result in the partial or complete loss of jurisdiction over the UK until effective withdrawal. At the same time, the UK cannot adopt internal legislation to limit CJEU's jurisdiction or UK's courts and nationals access to the European Court, without infringing the principle of the supremacy of EU law and exposing itself to some form of punishment, on the basis of either EU law or public international law.

All of the three EU courts can receive, hear and solve cases involving the United Kingdom, according to their competence. The only way in which CJEU's jurisdiction could be limited during this period is if an agreement would be negotiated on this aspect and if that agreement would enter into force before the withdrawal agreement and the two-year time-limit.

2.4. After UK's effective withdrawal from the EU

The UK shall no longer be a Member State and it shall no longer be under CJEU's jurisdiction. The CJEU shall lack competence, *ratione personae*, to receive, hear and solve cases involving the UK and the UK shall no longer be under the obligation to observe the Court's rulings. This raises the question of the fate of the pending cases. If a case has already been registered, will it no longer be heard? If it was heard, will it no longer be solved? And if it was solved, will the ruling no longer be observed and enforced?

However, "Article 50 is uncharted territory and therefore the content of the withdrawal agreement is uncertain. This is so not merely with respect to the precise details of the future relationship between the EU and the UK, but also more fundamentally with regard to what is put into the withdrawal agreement and what remains for resolution through some later treaty"[29].

Therefore, depending on the outcome of the negotiations and on the practical implications of some measures, the UK may retain some rights and some obligations under a form or another, to make the transition equitable for all the Member States and their nationals, including the UK and its nationals.

It is difficult to speculate on what an agreement on these issues shall include. It

[25] Article 218 paragraph 11 of the TFEU reads: "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised." The text is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E/TXT, last accessed on 20 March 2017.

[26] For a concurrent opinion, see Craig, *Brexit…*, 2016, 34.

[27] About EU citizenship after Brexit, see Mindus, 2016, 7-27.

[28] See also Hestermeyer, 2016, 15-22.

[29] Craig, *Brexit…*, 2016, 37.

would be salutary if it would address the matter of the pending cases and establish criteria for the CJUE to keep jurisdiction over some of them. For example, such a criterion could be the date of the event giving rise to the dispute. If the facts of the matter are prior to effective Brexit, the European Court should be able, in principle, to continue determining the case and the UK should have to observe its ruling, even after withdrawal. This solution would be justified especially in those cases related to cross-border disputes governed by the rules of EU private international law[30] or to intellectual property litigation[31], where "A large part of UK legislation on intellectual rights comes from the European Union"[32].

For a more accurate image, it is useful to have a separate look at each of the main actions the three EU courts can solve[33], as presented above.

With respect to the direct actions, in the infringement/enforcement actions the UK can be a plaintiff, as well as a defendant. The legal basis for this action is represented by Articles 258-260 of the TFEU. The wording of these articles leads to the interpretation that the Member State status of the defendant has to subsist until a judgment is given, since the Court of Justice has to find "that a Member State has failed to fulfil an obligation under the Treaties"[34]. Thus, if the UK is a plaintiff, the action introduced before withdrawal against another Member State should be given a final judgment. Another solution could be to let the Commission decide if it chooses to continue the action UK has introduced or not.

On the other hand, if the UK is a defendant, the action cannot be solved after withdrawal, but the issue may be addressed during the negotiations for the conclusion of the withdrawal agreement, if it has relevance and importance for an amiable separation.

In annulment actions[35], the UK can only be a plaintiff[36], as the goal is for the Court of Justice or the General Court, as the case may be, to review the legality of EU acts. If the act is declared null and void, the ruling produces a retroactive effect (*ex tunc*) and an *erga omnes* effect.

If such an action is registered before effective withdrawal, the Court should be able to give its judgment even after the UK loses Member State status, as it is in everybody's best interest for legality to be established in a system based on the rule of law[37]. Even for a non-member UK the ruling of the Court could be relevant, for example, if UK courts had to solve post Brexit cases in which UK's internal law for intertemporal situations would lead to the conclusion that EU law still applies to the grounds of the matter. Since national courts do not have jurisdiction to decide on the annulment of EU law[38], they have to turn to the European Court's jurisprudence.

[30] For an analysis of how far can the EU rules of private international law extend after Brexit, see Dickinson, 2016, 10-11.

[31] See van Hooft, 2016, 541-564.

[32] Traub, Haleen and Clay, 2016, 12. For how Brexit might affect the sources of UK law see Popa, 2016, 126-136.

[33] For a synthesis about the main actions CJUE can solve, see Fuerea, 2016, *Dreptul…*, 65-123.

[34] Text available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E/TXT, last accessed on 20 March 2017.

[35] Articles 263-264 of the TFEU.

[36] For the legal standing of Member States to introduce an annulment action, as privileged plaintiffs, see Craig and de Búrca, 2009, 637 and Schütze, 2012, 269.

[37] Judgment of 23 April 1986 in case 294/83 *Les Verts/Parliament*, paragraph 23, available at http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 20 March 2017.

[38] Judgment of 10 January 2006 in case C-344/04 *IATA and ELFAA*, paragraph 27, available at http://curia.europa.eu/en/content/juris/c2_juris.htm, last accessed on 20 March 2017.

The same should be the solution for the other direct actions against the EU or its institutions, whether actions regarding EU's institutions' failure to act[39], EU's non-contractual liability[40] or staff cases[41], especially if the plaintiff is a UK national. The main arguments supporting this view are that the UK was a Member State at the time the action was registered, the facts of the dispute occurred prior effective withdrawal and it would be in agreement with the principles of legal certainty and with the principle of the protection of legitimate expectations, ensuring the highest degree of protection for the parties.

The preliminary reference procedure[42] is an instrument of dialogue with the Court of Justice given to the judicial bodies from the Member States. As we have argued, in detail, on another occasion[43], the Court of Justice should answer preliminary references registered and unsolved until effective withdrawal, as the judicial body did fulfil the condition of pertaining to a Member State at the time the reference was registered and an answer may still be necessary to the UK judicial body in order to solve the pending national case. A restrictive interpretation seems excessive and in discord with the two principles mentioned above, especially since the length of the proceedings is at the discretion of the Court of Justice. Otherwise, two references from UK courts registered the same day might find themselves in the absurd situation in which one receives an answer and the other is rejected for lack of competence, depending solely on the duration of the procedure.

The solution is different for the references registered with the Court of Justice after Brexit, even if they arose from facts that happened before withdrawal, since Article 267 paragraph 1 of the TFEU expressly requires that the reference be made by a court or tribunal of a Member state, meaning that the judicial body would belong to a Member State at the time the reference is made.

As emphasized by other authors[44], it is also our opinion that the date of registration of an action with the European Court should be the moment taken into account in order to establish if the state is still a Member State or not and if the national or the judicial body is still from a Member State or not.

As to appeals against the rulings of the General Court or of the Civil Service Tribunal and applications for revision based on Article 44 of the Statute, it is our belief that the UK and its nationals should retain the right to appeal or ask for revision even after effective Brexit, if either were a party to the proceedings[45]. Producing a final solution to a case is essential for legal certainty. Therefore, it is the legitimate interest of the parties to use all the judicial remedies available, especially since they have little influence on the lengths of the procedure and cannot be sanctioned for not having been offered a final ruling before the UK's withdrawal.

If a ruling was given before effective Brexit, EU legal means of enforcement, like the infringement procedure, are no longer

[39] Articles 265-266 of the TFEU.
[40] Articles 268 and 340 paragraphs 2 and 3 of the TFEU.
[41] Article 270 of the TFEU.
[42] Article 267 of TFEU.
[43] See Larion, 2016, 76-84.
[44] See Broberg and Fenger, 2010, 90.
[45] The exception provided by Article 56 paragraph 3 of the Statute for Member States that were not parties and did not intervene in the main proceedings is not justified for former Member States. The former Member State does not have an interest to appeal anymore, since the obligation to observe the ruling as *res judicata* and as a part of the EU case-law ceases to exist.

available in case the UK does not, after Brexit, give full effect to what the CJEU decided. For example, the UK could be ordered to pay a sum of money as a result of an infringement procedure conducted just before its withdrawal from the EU. If UK refuses to pay, there would only be recourse to means of public international law, ranging from diplomatic means to sanctions[46].

If the other Member States so require, perhaps it could be possible for the UK to accept to keep the obligation to obey any of the three court's rulings that were given in cases in which the UK or a UK national was a party to, as well as to observe the rulings that produce *erga omnes* effects, which have relevance for UK courts in pending or future cases, by inserting a provision in this respect in the withdrawal agreement, as well as some kind of enforcement means based on this new international treaty.

In the future, the UK might come again under the CJEU's jurisdiction, at least for some types of actions, like a direct action based on contractual liability[47], if it concludes a contract or an international agreement with the EU, as any other third country can. For example, if the UK becomes a member of the European Free Trade Association (EFTA), the Agreement on the European Economic Area already authorises courts and tribunals of the EFTA Member States to refer questions to the Court of Justice on the interpretation of an agreement rule[48].

3. Conclusions

The unexpected result of the referendum held in the UK on 23 June 2017 has given rise to many new challenges for the EU, which has to redefine itself, to regain the trust of EU nationals, to firmly address all the reasons for which it is vulnerable to a certain type of nationalist propaganda and to draw up a new vision for its future[49].

At the same time, Brexit represents an opportunity to witness something without precedent: a Member State's withdrawal from the EU, with all its legal and practical implications. Finding solutions for all the terms of this separation shall obviously be a highly complex task, but the prize shall be, in the end, a better understanding of how Article 50 of the TEU works and the development of EU law.

The study has approached the specific issue of the CJEU's jurisdiction throughout the withdrawal process: before the official notification of the European Council on the basis of Article 50 of the TEU, from the day of official notification until the day withdrawal becomes effective, i.e. EU law ceases to apply for the UK and the period after withdrawal. Focusing on the main competences of the courts composing the CJEU, we have highlighted to what extent CJEU shall or should retain jurisdiction during these different stages of Brexit and offered our opinion on what legal solutions could be chosen for pending cases in order for all the participants, including UK and its nationals, to obtain the highest legal protection possible.

[46] For solving disputes according to public international law, see Miga-Beşteliu, 2008, 1-21, 167-169.

[47] Article 272 of the TFEU.

[48] Article 107 of the Agreement on the European Economic Area and Protocol 34 annexed to it, available at http://www.efta.int/legal-texts/eea, last accessed on 20 March 2017.

[49] The 27 Member States still committed to a common future are taking steps in order to define a vision of even stronger unity and solidarity for EU's future, the latest example being The Rome Declaration, signed on 25 March 2017, at the 60th anniversary of the Treaties of Rome, signed on the same day in 1957, in the same city. Its text is available here: http://www.consilium.europa.eu/en/press/press-releases/2017/03/25-rome-declaration/, last accessed on 26 March 2017.

The research is meant to raise awareness about the legal problems that have been identified, to sparkle more substantial debate, aimed at identifying all the aspects which may be relevant for CJEU's jurisdiction in relation to a withdrawing state, to stimulate creativity in finding innovative answers to the questions raised and, perhaps, to inspire in determining the future content of the withdrawal agreement.

Further efforts could focus in detail on the infringement procedure, on any of the other direct actions or on the limits of the negotiations between Member States on the matter of CJEU's jurisdiction.

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HUMAN BEINGS TRAFFICKING IN THE EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW

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Abstract

After last year's analysis regarding the European Union's commitment to fight against the human beings trafficking, we have considered to further explore the human beings trafficking approach in the European Court of Human Rights case-law, the most developped regional jurisdiction on human rights.

Surprisingly, the European Convention for the Protection of Human Rights and Fundamental Freedoms does not make an express reference to the human beings trafficking. However, we have to bear in mind that the Convention is a living instrument, its interpretation being made in the light of the present-day conditions. Thus, taking into consideration the global threat of this phenomenon, it is more obvious than ever that the Convention could not neglect this issue.

Keywords: *human beings trafficking, European Court of Human Rights, Convention, case-law.*

1. Introductive Remarks

Through this study, we propose an analysis to increase the understanding between the protection of human rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "*European Convention on Human Rights*" or the "*Convention*") and one of the most serious global threats, the human beings trafficking. This is really necessary in order to strengthen human protection at the national level, having in mind that the European Court for Human Rights (hereinafter the "*ECHR*" or the "*Court*") represents the most developed regional jurisdiction on human rights[1]. To attain this purpose, the present study seeks to provide the most relevant examples from the Court's case-law.

Right from the beginning, we underline that the Convention does not make any express reference to the human beings trafficking (although the Convention prohibits "slavery and the slave trade in all forms" under Article 4). This should not surprise us, having in view that the Convention was inspired by the Universal Declaration of Human Rights proclaimed in 1948 by the General Assembly of the United Nations, which does not expressly address the human beings trafficking problem either.

However, as it is stated in the Court's case-law and it is widely recognized in the legal doctrine, the Convention is "a living instrument (…) which must be interpreted in

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[1] For general information on the European system of human rights protection instituted by the Council of Europe, please see Raluca Miga-Besteliu, *Drept international public*, 1st volume, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 184-185, and Bogdan Aurescu, *Sistemul jurisdictiilor internationale*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2013, p. 211 and following.

the light of present-day conditions"[2], fact that raises many challenges for its judges.

As underlined in the legal doctrine "human rights concern the universal identity of the human being and are underlying on the principle of equality of all human beings"[3], therefore all individuals have the right to complain if the domestic authorities[4], natural or legal persons violate their individual rights under the Convention in certain conditions.

Through time, individuals have filed complaints against the Contracting States of the Convention[5], arguing that a breach of the Convention rights has resulted from human trafficking, among others. As it is easy to imagine, this thing is possible because each individual has the right not to be submitted to slavery.

2. ECHR's Relevant Case-law

It is obvious that the Contracting States have the obligation to protect the victims of trafficking, otherwise their legal responsibility may be invoked[6]. In order to investigate this topic, we will proceed to a chronological analysis of the most relevant cases dealt by the Court during the time.

One interesting case is *Siliadin v. France*[7], in which the Court found that it involved a servitude situation, therefore not exactly slavery. The applicant was a Togo minor citizen brought to France by a relative of her father, where she had been forced to work as a maid for many years, thirteen hours a day, and seven days a week. She was vulnerable and isolated, with her identification papers confiscated, no financial resources and afraid to contact the authorities because of her irregular imigration status. The Court recognized that Ms Siliadin was held in servitude, because of the lack of freedom and of the work hours on every week day. This case represented a significant milestone with regard to the increase of the human beings trafficking phenomenon, the victim being considered to be placed in a state of servitude.

The most relevant case in this respect is the case of *Rantsev v. Cyprus and Russia*[8]. On short, the applicant was the father of a young lady who died in Cyprus, where she went for working as a cabaret "artiste". The applicant complained that the Cypriot authorities had not done everything they could to protect his daughter from trafficking while she was alive, as well as to

[2] *Tyrer v. The United Kingdom*, application no. 5856/72, judgment dated 25.04.1978, para. 31, available at http://hudoc.echr.coe.int/eng?i=001-57587.

[3] Augustin Fuerea, *Introducere in problematica dreptului international al drepturilor omului – note de curs*, Editura ERA, Bucuresti, 2000, p.4.

[4] The domestic authorities can breach individual rights trough juridical acts, material and juridical facts, material and technical operations or political acts; in this respect, please see Marta Claudia Cliza, *Drept administrativ*, Partea a 2-a, Pro Universitaria Publishing House, Bucuresti, 2011, p. 14 and following, and *Marta* Claudia Cliza, *Revocation of administrative act*, in the Proceedings of CKS eBook, 2012, Pro Universitaria Publishing House, Bucharest, 2012, p. 627.

[5] On the other side, it is important to have in mind also the European Union. For an interesting study on the European Union law infringements that caused damages to individuals, please see Roxana-Mariana Popescu, *Case-law aspects concerning the regulation of states obligation to make good the damage caused to individuals, by infringements of European Union law*, in the Proceedings of CKS eBook, 2012, Pro Universitaria Publishing House, Bucharest, 2012, p. 999-1008.

[6] For general information on the legal responsability of states, please see Raluca Miga-Besteliu, *Drept international public*, 2nd volume, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 29-56.

[7] Case of *Siliadin v. France*, application no. 73316/01, judgment dated 26.07.2005, available at http://hudoc.echr.coe.int/eng?i=001-69891.

[8] Case of *Rantsev v. Cyprus and Russia*, application no. 25965/04, judgment dated 07.01.2010, available at http://hudoc.echr.coe.int/eng?i=001-96549.

punish the responsible persons for her ill-treatment and death. Moreover, Mr Rantsev complained that the Russian authorities failed to protect his daughter, Ms Rantseva, from trafficking, as well as to investigate her trafficking and death.

As underlined in *Rantsev v. Cyprus and Russia*, in 2010, the Court recognized that the global phenomenon of trafficking in human beings "has increased significantly in recent years"[9], fact that determines the Court to be very cautious. In the same judgment, the Court appreciated that "trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere (…). It implies close surveillance of the activities of victims, whose movements are often circumscribed (…). It involves the use of violence and threats against victims, who live and work under poor conditions (…)"[10].

Moreover "[t]here can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention"[11].

The ECHR held that human beings trafficking was prohibited by Article 4 of the Convention (the prohibition of slavery and forced labour), therefore Cyprus was found guilty for violating its positive obligations set under this article for two aspects: (i) its failure to set up an appropriate legal and administrative framework to combat trafficking and (ii) the failure of the police to take operational measures to protect Ms Rantseva from trafficking, although there was a credible suspicion that she might have been a victim of trafficking in human beings. Cyprus was also found guilty for violating Article 2 of the Convention (the right to life), as a result of the authorities to effectively investigate Ms Rantseva's death.

Additionally, the Court held that Russia also violated Article 4 of the Convention (the prohibition of slavery and forced labour) because it failed to investigate how Ms Rantseva had been recruited and to take steps to identify the recruiters and the recruitation methods.

In 2011, the Court ruled in the case *V.F. v. France*[12], which concerned the applicant's procedure for deportation to country of origin, Nigeria. The applicant underlined that if she were deported to Nigeria, she would be at risk of being forced back to prostitution that she managed to escape very hardly, being also subject to reprisals, and without being protected by the Nigerian authorities, she considered that the French authorities were not allowed to expel potential victims of human trafficking. Although the Court was aware of the high level of Nigerian women trafficked to France and acknowledged their difficulties for obtaining protection from the authorities, the Court declared the application inadmissible because it was manifestly ill-founded. The reason, for which the Court did that, was because the applicant did not manage to prove that the police knew or, at least, should have known, that she was a human trafficking victim. As for the risk of being forced into prostitution once arrived in Nigeria, the judges considered that she would have received assistance from the Nigerian authorities on her return, despite

[9] *Idem*, para. 278.
[10] *Idem*, para. 281.
[11] *Idem*, para. 282.
[12] *V.F. v. France*, application no. 7196/10, judgment dated 29.11.2011, available at http://hudoc.echr.coe.int /eng?i=001-108003.

the fact that the specific domestic legislation had not fully achieved its aims.

Another interesting case dealt by the Court is *M. and Others v. Italy and Bulgaria*[13]. The applicants, M. and her parents, Bulgarian citizens of Roma origin, arrived to Italy in order to find work, following a promise of work in the villa of a Roma man of Serbian origin. They alleged that six days later, beaten and threaten with death, they were forced to leave the Italian village and to return to Bulgaria, leaving their daughter there. They complained that their daughter was detained at gunpoint, forced to work and to steal, as well as sexually abused by the respective Roma family, claiming that the Italian authorities failed to investigate the case in an adequate manner. More specifically, they complained that Italy had breached Article 3 of the Convention (prohibition of torture and inhuman or degrading treatment) because it did not prevent M.'s ill-treatment by securing her speedy release, Article 4 of the Convention (prohibition of slavery), based on human beings trafficking, as well as Article 14 of the Convention (prohibition of discrimination) for racial discrimination. Although the Court agreed that the circumstances could have amounted to human trafficking, the Court rejected all the complaints (except on Article 3 found as a violation on the grounds of ineffective investigation) because the evidence submitted was not enough to prove the truthfulness of their allegations. Thus, the Court did not accept that the respective circumstances had amounted to the recruitment, transportation, transfer, harbouring or receipt of persons for the purpose of exploitation, forced labour or services, slavery, servitude or the removal of organs.

Another case that could have been interesting is *F.A. v. the United Kingdom*[14], which raised the question of human beings trafficking of a Ghanaian national to United Kingdom. Unfortunatelly the Court found the complaints inadmissible because they had not been raised in an appeal to the Upper Tribunal, fact that drove to the failure of meeting the admissibility criteria set in the Convention.

In a very recent case, *L.E. v. Greece*[15], the Court had to deal again on human beings trafficking. The case concerned a complaint made by a Nigerian citizen who was forced into prostitution in Greece. Although she was recognized as a human trafficking victim for sexual exploitation, the applicant had been required to wait almost one year after informing the authorities about her situation, before she was granted the status of a victim. The Court found that there had been a violation of Article 4 of the Convention because the effectiveness of the preliminary inquiry and subsequent investigations of the case had been compromised by several shortcomings and it found several delays and failings of the Greek State's procedural obligations. Moreover, the Court held that in the case there were also violated (i) Article 6 paragraph 1 of the Convention (because the length of the proceedings had been excessive and did not meet the "reasonable time" requirement) and (ii) Article 13 of the Convention (because of the absence in the Greek legislation of a remedy by which the

[13] *M and Others v. Italy and Bulgaria*, application no. 40020/03, judgment dated 31.07.2012, available at http://hudoc.echr.coe.int/eng?i=001-112576.

[14] *F.A. v. the United Kingdom*, application no. 20658/11, decision dated 10.09.2013, available at http://hudoc.echr.coe.int/eng?i=001-127061.

[15] *L.E. v. Greece*, application no. 71545/12, judgment dated 21.04.2016, available at http://hudoc.echr.coe.int/eng?i=001-160218.

applicant could have enforced her right to a reasonable time hearing).

Another relevant case dealt very recently by the Court is *J and Others v. Austria*[16], which concerned the investigation made by the Austrian authorities into a human trafficking allegation (human trafficking and forced labour). Two Filipino nationals who were working as maids or au pairs in the United Arab Emirates were the applicants in this case. They alleged that their employers confiscated their passports and exploited them, facts that reminded us about the *Siliadin* case. The applicants claimed that this treatment continued during a short trip to Vienna, where they managed to escape. Following a criminal complaint against their employers, the Austrian authorities found that they do not have jurisdiction over the alleged offences commited abroad, deciding also to discontinue the investigation in this case concerning the events in Vienna. The applicants argued that the Austrian authorities had failed to protect them and to carry out an effective and exhaustive investigation based on their allegations, especially that they had a duty under international law to investigate also those events which had occurred abroad. The Court found that there had been no obligation under the Convention for the Austrian authorities to investigate the foreign elements (the recruitment made in Philippines or the exploitation in the United Arab Emirates), because the States are not held under Article 4 of the Convention to provide for universal jurisdiction over the human trafficking cases commited abroad. As for the Austrian events, the Court noted that the authorities were diligent, taking all the reasonable steps in the respective situation: supported the applicants through a Government funded NGO, interviewed them by special police officers, granted them residence and work permits, imposed a personal data disclosure ban for their protection. Since no mutual legal assistance agreement existed between Austria and the United Arab Emirates, no further steps in this case were possible. For these reasons, the Court found that the Austrian authorities had complied with their duty to protect the applicants; therefore there had been no violation of Articles 4 and 3 of the Convention.

Although not finalized, two other cases against Greece are interesting for our research and we are waiting for the Courts' judgments.

The first case is the *Chowdury and Others v. Greece*[17], in which the applicants, 42 Bangladesh nationals, were recruited in Greece, without having a Greek work permit, in order to work at the main strawberry farm in Manolada. They alleged that the respective work amounted to forced or compulsory labour. In the application, the claimants argued that Greece failed to comply with its positive obligation to prevent them from being subjected to human trafficking, to adopt preventive measures to that end or to penalize their employers.

The second case is *T.I. and Others v. Greece*[18], in which the three applicants, Russian nationals, who were recognized as victims of human trafficking, complained of the Greek State's failure to discharge its obligations to penalize and prosecute acts relating to human trafficking in their case. The applicants invoked the violation of Articles 4, 6 and 13 of the Convention.

[16] *J and Others v. Austria*, application no. 58216/12, judgment dated 17.01.2017, available at http://hudoc.echr.coe.int/eng?i=001-170388.

[17] *Chowdury and Others v. Greece*, application no. 21884/15, communicated to the Greek Government on 09.09.2015.

[18] *T.I. and Others v. Greece*, application no. 40311/10, communicated to the Greek Government on 06.09.2016.

We look forward to discover the Court's approach in those two cases.

But in the Court's case law there were times when the Court had to analyse the respect of the Convention as for the measures taken by the Contracting States against traffickers, for instance *Kaya v. Germany*[19] and *Tas v. Belgium*[20].

In the *Kaya* case, the applicant, a Turkish national living in Germany for thirty years, was convicted for attempted aggravated trafficking in human beings and battery. After he has served two thirds of his prison sentence, he was expelled from Germany to Turkey, because the courts considered that he could continue to pose a serious threat to the public. The applicant alleged that his deportation to Turkey had breached Article 8 of the Convention (the right to respect his private and family life). Having in mind that the applicant's expulsion was based because he had been sentenced for serious offences in Germany and that he had been eventually able to return to Germany, the Court held that the German authorities' actions were in conformity with the Convention and that no violation of Article 8 could be retained.

In the *Tas* case, which concerned the confiscation of the premises used in the connection with human trafficking, the Court declared the application as inadmissible, being manifestly ill-founded. The arguments held by the Court were that taking into account the States' margin of appreciation in controlling the use of property in combating criminal activities, then the interference with the applicant's right to the peaceful enjoyment of his possessions had not been disproportionate to the legitimate aim pursued, *i.e.* to combat human trafficking.

3. Concluding Remarks

After the analysis of the Court's case-law we can conclude that, although the Convention does not mention if there is a formal hierarchy of the human rights enshrined in it, it is recognized the fact that "a balance has to be achieved between conflicting interests, usually those of the individual balanced against those of the community, but occasionally the rights of one individual must be balanced against those of another"[21]. As it is stated in the legal doctrine, "the human being is the central area of interest for the lawmaker"[22].

The doctrine divides the rights set out in the Convention into *unqualified rights* (some of which are non-derogable) and *qualified rights*[23].

In the category of *unqualified rights* we can include the human beings trafficking under the umbrella of prohibition of slavery and forced labour as defined in Article 4 (prohibition of torture), which is also an absolute right, because no derogations under Article 15 (derogation in time of an emergency) are permitted. Other unqualified rights are the right of life in Article 2 (subject to some exceptions), prohibition of torture,

[19] *Kaya v. Germany*, application no. 317532/02, judgment dated 28.06.2007, available at http://hudoc.echr.coe.int/eng?i=001-81338.

[20] *Tas v. Belgium*, application no. 44614/06, decision on the admissibility dated 12.05.2009, available at http://hudoc.echr.coe.int/eng?i=002-1551.

[21] Robin C.A. White and Clare Ovey, *The European Convention on Human Rights*, fifth edition, Oxford University Press, 2010, p. 9, *Evans v. United Kingdom*, application no. 6229/05, judgment dated 10.04.2007, available at http://hudoc.echr.coe.int/eng?i=001-80046.

[22] Elena Anghel, *The notions of "given" and "constructed" in the field of the law,* in the Proceedings of CKS eBook, 2016, Pro Universitaria Publishing House, Bucharest, 2016, p. 341.

[23] Robin C.A. White and Clare Ovey, *The European Convention on Human Rights*, 5th edition, Oxford University Press, 2010, p. 10.

inhuman or degrading treatment in Article 3, the right to liberty and security in Article 5, the right to a fair trial in Article 6, the prohibition of punishment without law in Article 7, the right to marry in Article 12, the right to an effective remedy in Article 13, the prohibition of discrimination in Article 14, the right to education and the right to free elections in Article 3 of Protocol 1; and the prohibition of the death penalty in Protocols 6 and 13.

Qualified rights are the ones which are mentioned in the Convention, but the Contracting States may interfere with it for the purpose of securing certain interests: the right to respect for private and family life enshrined in Article 8, together with the freedom of thought, conscience and religion in Article 9, freedom of expression in Article 10, freedom of assembly and association in Article 11, protection of property in Article 1 of the Protocol 1, freedom of movement in Article 2 of Protocol 4.

Any interference with a qualified right will require that the Contracting State prove that the interference was justified: the interference was according to law, the aim was to protect a recognized interest and the interference was necessary in a democratic society.

Despite the concerted efforts of the national public authorities[24] with the international organizations, in the following years we will still encounter many varieties of the human beings trafficking (from prostitution to organ harvesting), and many States that do not act with responsibility[25] towards their nationals or other categories of individuals found on their territory[26].

As a response to the importance of trafficking in human beings, international organizations try to move forward. For instance, the Council of Europe had also adopted the Convention on Action against Trafficking in Human Beings in 2005 which was the first convention to recognize in an express manner the fact that the human beings trafficking represents a violation of human rights and an offence to the dignity and integrity of each human being.

But the question related to the present paper is how will the Court deal those cases? The answer is simple: TIME will answer this question.

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ASPECTS OF GUILTY PLEA AND PROCEDURE OF GUILT ADMITTANCE, NEW JUDICIAL INSTITUTIONS FOR A CRIMINAL TRIAL OF HIGHER QUALITY

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Abstract

During the broad reform process that has taken place in recent years for the criminal proceeding activity, following the entry into force of the new Criminal Procedure Act on February 1st 2014, there have been changes of some legal institutions from the old Criminal Code, such as the procedure of admitting the deeds the defendant is held responsible for (art 320 from former Code of Criminal procedure) by its provisions in the content of art 374, alignment 4, as it has been modified by Government Emergency Ordinance and introducing new ones, such as the guilty plea (art 478-488) under the circumstances of modifying GEO no. 18/2016 a special procedure meant to insure the judging of causes with celerity. Both procedures have a common component given by the guilt plea from the defendant, having an additional condition in the case of the guilty plea, besides the aforementioned one, which is the one of accepting the legal classification of the offence for which the criminal proceedings were commenced.

The two legal institutions ensure the compliance with the procedural guarantees of the right to a legal counsel of the defendant, sanctioning this one, taking place with a reduction of the sentence, under conditions stipulated by law.

Furthermore, by admitting the guilt and the legal classification of the offence by the defendant found guilty, in the two procedures also takes place a confirmation of the legality and compliance of the evidence submitted in the course of criminal proceedings.

Keywords: *simplified procedure, guilty plea, admittance of guilt, legal classification of offences, quality of the criminal proceedings.*

1. Introduction

1.1. Procedure of admitting the acts by the defendant.

The Romanian legislature has consolidated the new institution of admitting facts to be totally under the accused responsibility as it has been regulated and modified in the contents of art 374, Alignment 4 from the Criminal Procedure Code with reference to art 375 and 377 from the same Code. So, if in the art 374, alignment 4 exists the legal obligation for the president of the court in first instance to inform the defendant that he may request the trial by simplified procedure, in two other norms, of distinct nature there have been regulated procedure in the case of admittance of guilt, in art 375 and respectively judicial inquiry in the case of guilty plea, art 377. The guilty plea by the defendant only based on evidence gathered during criminal prosecution and based on documentary evidence brought by parties

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and by the injured party is constructed based upon a deep awareness process of the defendant that reflects upon the way in which criminal prosecution took place, the way in which legal provisions were obeyed during the administration of evidence by prosecutors, both those in favour and those against, the way in which the accused 'defendant expressed both requests and conclusions regarding the evidence presented.

In other words, when the defendant understood to request his/her judgment by simplified procedure he has accepted that the total admittance of deeds in his case is also a consequence of the prosecutor's activity in his case, confirming the abeyance of legal provisions in the case of evidence needed to prove the facts.

This request of the defendant for a total guilty plea of all his/her acts does not clear the judge from checking how evidence was administrated during the criminal prosecution , as far as its foundation is concerned since from a legal point of view they have been already undergone a judicial control from the preliminary chamber judge.

Therefore, if regarding the factual component, it is exclusively in the defendant's capacity to admit them, as far as legal classification it is concerned, the obligation belongs to the judge to assess over it, and when it is determined the need for changing it, whether ex officio, whether by the request of the prosecutor or parties, first to bring it into discussion and to draw the attention simultaneously to the accused that he has the right to request to leave the cause to the end.

1.2. The guilty plea procedure.

This procedure has been introduced into the new Criminal Procedure Act and modified afterwards in terms of specific provisions leading thus to a new retrial, in higher court, with respect to the retrial in higher court.

The specific nature of this institution is based on a negotiation form between the prosecutor's office and defendant resolved through an agreement whose object is strictly regulated by the content of art. 479 of the Criminal Procedure Code as it has been modified by Government Emergency Ordinance no.18/2016, namely the acknowledgement of the act and the acceptance of the legal classification for which the criminal proceedings were commenced and the manner and addresses the manner and length of the sentence as well as the way of enforcement of the sentence, the type of educational measure or as the case may be the solution to dismiss the penalty or the solution to postpone the penalty.

As opposed to the simplified declared procedure, which is based on the defendant's admittance of guilt, in the special declared procedure of the guilty plea, in addition to the admittance of guilt the defendant has to also agree with the legal classification of the offence that commenced the criminal proceeding, both being cumulative conditions.

2. Content

The procedure of pleading guilty by the defendant, as it was regulated at present in the Criminal Procedure Code, offers more dynamism to the criminal trial, as it benefits from increased quality, by swiftness and sensible judging of causes but also underlining the quality of criminal prosecution, respectively obeyance of legal provisions, but also the proper foundation of evidence means.

At the same time it is worth mentioning that the lawmaker allowed also the issue of admitting the facts and also requesting the judging of the cause by

simplified procedure and by authenticated document, by this aspect retruning and referring to the old regulation from the previous Criminal Code.

However, we believe that the change has occurred with the purpose of an improved efficiency of judging the cause, in its simplified procedure, when the accused finds himself unable objectively speaking to present himself in front of a judge.

As seen in practice in judicial court, Even if the cause is solved by simplified procedure, The sentence delivered is well documented and motivated by the judge, retaining as to fact or law, based on evidence from prosecutor's, analysing the judicial classification maintained, as well as fixing the individuality of the applied sanction with reduction of its limits under the provisions of art 396, align 10 from the Criminal Code, giving more efficient sense to the contents of art 374 align 4.

In the sense of the above mentioned, it exemplifies two cases settled by the High Court of Cassation and Justice at the first instance, where the simplified procedure was applied[1].

Thus, in first instance, the Supreme Court held that after the implementation of the provisions of Art. 374 par. 1 of the Criminal Procedure Code and the provisions of Art. 374 par. 4 of the same code, the defendant R.N. declared his intention to avail himself of this procedure by acknowledging the acts as described in the act of apprehension, requesting that the trial be based on evidence administered during the criminal investigation phase. In this respect, according to art. 375 Code of Criminal Procedure Code the defendant was made a statement, the court granting his request to be tried in the simplified procedure.

In the recitals of the sentence, the High Court essentially held that "in 2009, at the proposal and with the opinion of the deputy R.N. (Deputy in the Parliament of Romania for the legislature 2008-2012), R.C. (His daughter) was employed in his parliamentary office in the constituency no. 7 B, also in 2010, deputy R.N. has concluded a civil service contract in the same parliamentary office with his daughter, P)former R) S.

The High Court finds that the issue in fact presented in the indictment, also admitted by the defendant R.N. (Evidence not contested by the defendant), the whole evidence proving - beyond reasonable doubt - the existence of the acts committed by the defendant and his guilt for committing the offense of conflict of interest"

It was also reasoned that "the constitutive elements of the offense of conflict of interests are met. Thus, the actively qualified subject, respectively the civil servant who has the competence to carry out acts and / or to participate in decision-making. .. In order to achieve the material element of the offense there is no need for damage and only for the realization of a material benefit for himself / herself, husband / wife, which in this case has been achieved.

The daughter of the defendant R.N., called R.C. has earned a salary of 6391 lei during 19.10.2009-1.06.2010 on the basis of the individual labor contract no. 4924/09 and 5267 lei during 15.06.2010-01.04.2011 on the basis of civil contract 1436/2010.

Thus, the public money accesible to the defendant was directed to the members of his family, and due to this personal interest of patrimonial nature, it results that the legal condition is the non-fulfillment of the duties attributable to him as a member of

[1] Sentence no. 869 from 30th September 2014 of High Court of Cassation and Justice, remaining definitive by no appeal; Sentence nr. 950 from 27th October 2014 of High Court of Cassation and Justice remaining definitive by decision nr.14 from 9 th February 2015 of High Court of Cassation and Justice, Judicial Formation of 5 Judges.

the Parliament of Romania, in accordance with the principles underlying the exercise of public dignity.

The rule of incrimination does not includes that the material benefit to be unjust, but only that it has actually been obtained through a biased procedure. Thus, obtaining a material benefit is the condition for achieving the objective side of the offense provided by art. 253 [1] The previous criminal code, which does not convey to the act the character of an offense of damage, since the main strain of social relations protected by the law is the correct exercise of public authority by civil servants.

The facts of the defendant R.N. have created a state of danger regarding the social values protected by the law, regarding the functioning of the institutions, since the indirect patrimonial interest of the MP can influence the objectively fulfilling of the attributions, thus fulfilling the stipulation in the indictment rule.

In regards to the subjective side of the offense of conflict of interest results in the fraudulent intent of the defendant R.N. to act in the direct interest of his family, which has facilitated him to obtain material benefits from the budget of the Chamber of Deputies.

Thus, the case meets both the subjective aspect and the objective ones, the constitutive elements of the offense of conflict of interest provided by art. 253^1 previous Criminal Code, a text on the basis of which the defendant will be sentenced to imprisonment for 4 months, with the provisions of Art. 396 par. 10 Criminal Procedure Code and Art. 41 paragraph. 2 Criminal Code.

In regards to the method of execution of the punishment, it is considered that, in relation to the personal data of the defendant, the purpose of the punishment can be achieved without the execution of the sentence in detention, which is why it will order the conditional suspension of the execution of the sentence".

In the second cause, also conflict of interests, the High Court has retained that defendant K.K assited by chosen attorney, that he declared in front of the court that he request trial based just in evidence administrated during the criminal prosecution, admitting his facts as stipulated in the documents submitted to the court, but without accepting their judicial classifications, assessing that this aspect does not interfere with his ability to ask for simplified procedure trial.

Thus, for the case file the defendant filed a statement (also signed by his attorney) in which he made these remarks, underlining that he committed the act being convinced that it does not constitute an offence, the conviction being reinforced by the customary law existing in his activity area and confirmed by the circumstance that the legal interdiction occured later when the acts have ceased.

Along the same lines it has been pointed out in that extrajudicial statement that the defendant understood to file it to the case file in order to outline his procedural position- that his conviction of innocence has been reinforced also by the regulations of other states with democratic regime.

At the same time his hearing directly before the court, the defendant requested a time limit for filing documents, circumstantial evidence.

In view of the defendant's willingness to demand that the trial be conducted only on the basis of the evidence administered in the course of the prosecution and the documents filed in the file, in the context of the process of fully recognizing the facts detained in its task, as found and described in the indictment, as well as the fact that the High Court of Cassation and Justice - the Criminal Section did not identify any reason for which at the term of ... to reject the request for

simplified procedure, the judicial investigation here in this case was conducted according to art. 375 of Criminal Procedure Code - art. 377 par. 1 Criminal Procedure Code, with the consequence of applying art. 396 para. 10 Code of Criminal Procedure concerning the Settlement of Criminal Action against defendant K.K.

With a view to the delivered sentence, it was retained the issue in fact and law, the judicial classification was motivated, dismissing the invoked defence. Therefore, „contrary to the claims made by the defence regarding the so called lack of precision, predictability and foreseeable quality of criminal law, in the sense that at the date of the acts there was no legal interdicition on hiring family members in the Parliamnetary offices – The high Court of Cassation and justice finds the conflict of interest offence as stipulated in art 253 Former Criminal Code (legal text for incident mentioned) was introduced by Law 278/2006, and the interpreting of the incrimination text brings the conclusion that the acts of the accused falls under the scope of criminal illicit when the activity of a public clerk is related to personal interest by not acting in a transparent way, and not to abstain from decison making, with the purpose of gaining material benefits for any of the persons mentioned in the incrimination norm.

Neither the defense constructed on the lack of quality for the active subject of the criminal offence, that of public clerk, cannot be accepted in consideration to the fact that in the special status of MPs, the Constitutional Court has stated that "although the constitutional and legal status of MPs, as poeples representatives, is different from public clerks status, and different from other citizens in general ….but this status cannot be retained as being enough to accept a different legal treatment in report to other categories of individuals for which the law 176/2010 on integrity and public function is applied (to be consulted decision 279/2006 of CC, decision 81/27 February 2013. In the cause above mentioned the accused received a 2 year sentence in prison, by applying art 86 Criminal Code and art 5 Criminal Code, with application of complementary sentence and accessory penalty, being reduced to 1 year and 6 months, by applying art 81 from former Criminal Code and removing the complementary penalty applied initially, by course of appeal from accused that was accepted.

Unlike the admittance of guilt by the defendant in front of a judge, in first instance the guilt plea is a special procedure that has been recently introduced in the Romanian criminal procedure with incidence during criminal prosecution, based on a negotiation process between prosecutor and the defendant in limits explicitly provided by its object, in limits established by a preliminary notice and written by a prosecutor with a superior role in hierarchy. Admittance of guilt is under judicial control from the court instance, its sentence may be submitted under legal and regular remedies. Therefore, the procedure starts in the course of the criminal prosecution, the initiator of the agreement, being both the prosecutor and the defendant, the subject of cumulative conditions, namely the acknowledgment of the commission of the act and the acceptance of the legal classification for which the criminal proceedings were initiated, unlike the procedure in which recognition does not concern legal classification and the type and amount of the punishment, as well as its form of execution, namely the type of the educational measure, or, as the case may be, the solution to the application of punishment or postponement of punishment.

In the judicial practice, the application of this special procedure is increasingly applicable in view of the change in the sense that the guilty plea agreement can only be

concluded with regard to the offenses for which the law provides for the fines or imprisonment For 15 years. As with the simplified procedure, the consequence of the application of this procedure is that the defendant benefits from a reduction in punishment.

The scope of the offenses in which an agreement on the recognition of guilt can be concluded is widely extended, in the case of the High Court, either in the cases of jurisdiction at first instance or in the appeal, ranging from conflicts of interest under the conditions Old regulations, art. 253 1 of the Criminal Code, as a result of the more favorable criminal law, for abuse of office against public interests, provided by art. 248 Previous criminal code, favoring the offender, provided by art. 264 par. 1 Penal Code, False Intellectual Code provided by Art. 289 Penal Code, the offense of using in any way, directly or indirectly, information which is not intended to be advertised or to allow unauthorized persons access to such information for the purpose of obtaining for itself or for another undue advantage provided by art. 12 letter B of Law no. 78/2000, the driving on the public roads of a motor vehicle by a person who has an alcoholic admix of over 0.80 gr / l of pure alcohol in the blood provided by art. 87 para. 1 of GEO no. 195/2002 with the application of art. 5 Criminal Code.

Thus, as an example, in the agreements with which it was invested admitted, condemning the defendants to the punishments in the amounts and modalities of execution[2], either admitted in the appeal, as a result of the finding that the provisions of art. 478-481 Criminal Procedure Code that the penalties applied and the manner of execution is appropriate[3].

Conclusions

In the research carried out over the newly presented institutions, respectively the admission of facts by the accused and the special procedure of guilt plea, it has been noticed that these two have a real and efficient applicability during the criminal trial, offering a guarantee for the obeyance of right to defence, but as well of respecting principles such as contradiction, oral speech and finding the truth.

The existence of such procedures in the Romanian Code of Criminal Procedure ensures an alternative to the procedure of common law, that reflects the reality when the quality of criminal prosecution gives the possibility of guilty plea or/and judicial classification, reduction of sentence under conditions stipulated by law, ensuring the possibility of raising awareness of the consequence of a criminal act done.

The quality of the criminal trial in the simplified procedures presented can be found also within the contents of the decisions given, in which are examined not only legal provisions, but also the factual situation, the judicial classification and the analysis of observing the fulfillment, criteria that are needed for the individual sentence in each and ways of serving the sentence.

[2] Sentence no. 1049 from 4th December 2014 of High Court of Cassation and Justice, Criminal Section, remaining definitive by no appeal.

[3] Sentence no. 67 from 2nd February 2016 of High Court of Cassation and Justice, remaining definitive by no appeal; decision nr. 200/A from 3th June 2015 of High Court of Cassation and Justice, Criminal Section; decision nr. 53/A from 16 th February 2015 of High Court of Cassation and Justice, Criminal Section; decision nr. 201/A from 4 th June2015 of High Court of Cassation and Justice, Criminal Section.

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PLEA AGREEMENT DURING THE CRIMINAL PROSECUTION OF A CRIMINAL TRIAL

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Abstract

The Plea Agreement is one of the latest institutions and one of the special procedures introduced by the New Romanian Criminal Procedure Code.

The Romanian procedure law adopted it because the State wanted a reduced cost of the justice action; thus, the courts would have fewer trials and the procedures would be accelerated. This work wants to analyse the congruity of this procedure with the right to a fair trial.

Keywords: *agreement, recognition, guilt, prosecutor, trial.*

1. Introduction

The Romanian quick social and economic development has been constantly claiming the need for adjusting the judicial system to the contemporary reality, for a good, prompt and efficient justice action.

One of the important institutions introduced among the special procedures, regulated by Title 4, Chapter 1 of the Special Part of the New Criminal Procedure Code, is represented by the plea agreement.

It is considered special because it is regulated mainly by some norms, derogatory from the normal procedure, applicable unitarily in solving criminal cases.

The special derogatory character draws from aspects concerning the limits of the law court assignment, the object of the trial, the rules set for the trial whenever the instance is informed about such agreement.

Some states have been using this special practice for a long time now. For instance, in the United Kingdom of Great Britain, the first pieces of evidence of this procedure date since 1743, whereas in the USA from 1804.

This work wants to study the circumstances of signing this type of agreement, used only during the criminal investigating stage.

We are going to analyse the duties of both the criminal prosecutor and his hierarchically superior, and at the same time, the obligations of the accused person when accessing this procedure during the criminal investigation stage of a criminal case.

2. Authors and procedure initiation

According to art 478 paragraph (1) Criminal Procedure Code, the defendant and the prosecutor are the authors of the plea agreement.

This document can be signed either by the prosecutor who investigates the criminal case, according to art. 56 paragraph (3) Criminal Procedure Code, or the prosecutor

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who supervises the criminal investigation carried out by criminal investigating bodies.

Pursuant to art 82, Criminal Procedure Code, the defendant is the person against whom a criminal action has been started. As the law doesn't make the difference, the plea agreement can be signed by both a natural and legal person[1] representing the defendant.

It is worth mentioning that when a defendant is confronted with a criminal prosecution for having committed several crimes, he has got the possibility, provided the legal requirements are complied with, to reach an agreement regarding only some of these offences. The rest of criminal deeds, not included in the plea deal, are to be subjected to the regular legal procedure.

At the beginning, the underage defendant was not allowed to access this procedure, neither personally nor through a legal representative. Nowadays, such restriction is no longer in force but its validity depends on the clearly expressed agreement of the underage legal representative[2].

When there are several defendants in the case, it is possible that only some of them to express their acceptance for a plea bargain; in such case, each of them will have a separate agreement, without affecting the presumption of innocence of those who haven't consented to the deal.

The capacity to initiate the procedure is valid for both of its authors.

Article 108 paragraph (4) thesis I of the Criminal Procedure Code states that "the judicial body must inform the defendant about the possibility to reach a plea agreement during the criminal prosecution". The defendant is informed about it and his other rights and obligations in writing, under signature, before his first hearing; in case of incapacity or refusal to sign, a minutes shall be drawn up pursuant to art 199 Criminal Procedure Code.

If the procedure is initiated by the defendant, though the law doesn't mention the form, the jurisprudence accepts it either as a written demand addressed to the prosecutor or an oral request put down in a minutes by the criminal prosecuting bodies.

Nevertheless, it is necessary to underline the fact that appealing to such procedure is recognized and guaranteed as a right rather than an obligation for its authors. So, any of them have the right to choose whether to initiate it or to refuse its initiating action done by the other author, if there are reasons to believe it is not favourable, or legal provisions are not observed. When the procedure is announced by one author or is already begun, the judicial body doesn't have to notify it to the victim, the civil party or to the responsible plaintiff party.

3. The object of the plea agreement

According to article 479 Criminal Procedure Code[3] "the plea agreement represents the recognition of the offence and the charge, object of the criminal action, and also the way and the length of the punishment, together with the manner of application of the educative measure or, if it is the case, the solution to give up or postpone the punishment order."

It is important to stress the fact that compared to the procedure of guilt

[1] See N. Volonciu, A.S. Uzlău (coord.), *The New Criminal Procedure Code- commented*, 2nd edition, Hamangiu Publishing House, Bucharest, 2015, p. 1266.

[2] Paragraph (6) art. 478 Criminal Procedure Code has been amended by art II p. 118 of the Government Decision no 18/2016 on amending and completing Law no 286/2009 on Criminal Code, Law no 135/2010 on Criminal Procedure Code, also for completing art 31 paragraph (1) of Law no 304/2004 on judicial structure, Official Gazette No 38 /23.05. 2016.

[3] Amended by art II p 119 of Governmental Decision no 18/2016.

recognition, the plea agreement includes both recognition of the offence and the acceptance of the charge. Pursuant to art 482 letter g) Criminal Procedure Code, this recognition must be expressed as a clearly identified statement and not as a result of an interpretation of the defendant attitude as silent recognition (for instance, when the defendant understands to make use of his right to remain silent and not to cooperate with the judicial authorities).

Yet, nothing stops the defendant or his layer to ask for the change of the legal classification of the offence before the procedure begins.

The statement given by the defendant according to art 109 Criminal Procedure Code, and recorded according to art 110 Criminal Procedure Code, even when he admits his guilt and the legal classification at that particular time, but before the beginning of the plea bargain procedure, cannot be considered as guilt recognition in the spirit of art 479 Criminal Procedure Code, because it is not a proof of evidence that can be used against the defendant.

As for the punishment, in the absence of a clear distinction, both the main punishment (fine or prison) and the secondary one are to be taken into account.

About the kind of punishment, according to art 485 paragraph (1) letter a. Criminal Procedure Code, stating the solutions to be ruled by the Court, (related to the plea bargain), the parties, meaning the prosecutor and the defendant accompanied by his lawyer, can agree upon the prison punishment as liberty deprivation measure (with or without accessory punishment or complementary punishments) or upon the fine, by negotiating their length and sum, or upon the application manner for the suspension of probation.

The solution reached through agreement could be waiving the punishment or postponing its application.

Besides the observance of general terms for concluding the plea agreement, the prosecutor must verify the compliance with the provisions of art 80 Criminal Procedure Code in order to reach the solution of waving the punishment application.

When the negotiation focuses on the solution of postponing the punishment application, the prosecutor must also verify the observance of provisions of art 83 Criminal Code; after that, they will negotiate the number of days for unpaid labour for the community and the obligations stated by art 85 paragraph (2).

When negotiating the punishment suspension, it is necessary to register the fulfilment of provisions of art 91 Criminal Code, establishing a clear supervision term[4], the number of days of unpaid labour for community and which obligations, stated by art 93 paragraph(2), Criminal Code, are to be ruled.

The presence of these supplementary conditions has a direct influence on the maximum punishment length admitted in case of plea agreement[5].

We have to underline the fact that, besides the possible acceptance of the plea agreement for the underage defendants, its object can be made up by the form and manner of the applied educative measure, but it is clear that its length is not negotiated.

We can notice that safety measures are not negotiable. Yet, the Court has to rule also on them as based on art 487 letter a) Criminal Procedure Code, the sentence must contain also the mentions provided by art 404 Criminal Procedure Code, among them being the ones related the safety measures.

[4] Probation time is between 2-4 years, minimum the time of the ruled punishment.

[5] Waving the punishment can be ruled only for the crimes where the law provides maximum 5 year prison time and for punishment postponement, the law provided punishment must be less than 7 years.

4. Content provisions for the plea agreement

After analysing art 478 – 482 Criminal Procedure Code, we can see that there are some circumstances that must be collectively observed in order to reach a plea agreement.

Even from the start we have to say that such agreement is allowed only during the criminal prosecution stage. The solution seems to be justified by the reasons of its introduction and also by the fact that during the trial, the defendant can make use of the procedure of guilt recognition.

This circumstance is also fulfilled when the criminal prosecution is re-started pursuant to art 335 Criminal Procedure Code, art 341 paragraph (6) letter b. Criminal Procedure Code or art 341 paragraph (7) point 2 letter b) Criminal Procedure Code, but not when the criminal prosecution is restarted when the case is referred to the prosecuting body by the Judge of the Preliminary Chamber, according to art 334 Criminal Procedure Code.

The first condition, stated by art 480 paragraph (1)[6], envisages the maximum limit of the punishment provided by law, in the logic of art 187 Criminal Code: "the punishment provided by law which incriminates the committed offence, without considering the causes for its reduction or increase." This procedure can be started when the punishment provided by the law for the committed offence is maximum 15 years prison (as single punishment or alternatively with fine punishment) or a fine, without limitation of its quantity.

The law maker chose to refer to the degree of the deed abstract danger, with no consideration for committing an attempt, for the mitigating circumstances or the special cases of punishment reduction nor the aggravating circumstances (aggravating circumstances, continuous crime and recidivism after the enforcement).

We have to point out here the difference between the mitigated types of a crime and the special cases for punishment reduction. In the first case, the reference is made to the highest level mentioned by the text incriminating the deeds, related to the type form crime.

On the other hand, the special cases for punishment reduction don't have any influence over the possibility to reach a plea agreement related to their beneficiaries.

Art 480 paragraph (2) Criminal Procedure Code, introduces the condition that all evidence should result into sufficient data for the existence of a crime considered the cause of the beginning criminal prosecuting action and for the defendant guilt.

In case the procedure is initiated by the prosecutor, the evidence charging the defendant present at the file must observe the provisions of art 309 paragraph (1) Criminal Procedure Code[7], stating that "a criminal action is begun by the prosecutor, by order, during the criminal prosecution, when he finds that there are pieces of evidence proving that a person committed a crime and none of the special cases provided by art 16 paragraph (1) can be applied here". Therefore, the plea agreement is also blocked if one of the special cases of preventing the beginning or the exercise of the criminal action is enforced.

The reason of this term is the very special feature of this procedure and it represents a supplementary warranty for the observance of the presumption of innocence and of the right to an equitable trial, a real

[6] Punishment limit allowed in this matter was extended by art II p. 120 of the Gov Decision 18/2016.

[7] I. Neagu, M. Damaschin Treaty on Criminal Procedure. Special Part, *Universul Juridic* Publishing House, Bucharest, 2015, p. 472.

pertinence of the *in dubio pro reo* principle instituted by art 4 paragraph (2) Criminal Procedure Code.

During the trial stage, in the absence of the adversarial principle, there will be no further evidence produced nor shall be analyzed the ones employed during the criminal prosecution, considered sufficient to make up the Court opinion, beyond any reasonable doubt, regarding the existence of the crime and the defendant's guilt. It is therefore understood that for benefiting from such agreement, the defendant must accept that the judgment shall be made only based on the evidence employed during the criminal prosecution.

The prosecutor is the one that has to verify the observance of such condition. If the defendant express his will to have a plea bargain, and should the prosecutor finds that the provision of art 480 paragraph (2) Criminal Procedure Code is not complied with, he shall reject the demand by means of an order, according to art 286 Criminal Procedure Code. This order can be fought against pursuant tart 339 Criminal Procedure Code, but, in this case, the hierarchically superior prosecutor shall study only the lawfulness of the reasons of the rejection, with no appreciation on the opportunity to have a plea agreement. This shall be assessed only by the prosecutor, and therefore, the hierarchically superior prosecutor shall not begin or ask his subordinated prosecutor to begin the procedure.

Another controversial[8] condition, according to art 478 paragraph (2) and paragraph (4), Criminal Procedure Code, is represented by the necessity to get the previous approval of hierarchically superior prosecutor.

By means of a first approval, the hierarchically superior prosecutor decides the limits of the negotiations or even the solutions to avoid, whereas through the approval, subsequent to the negotiations, checks the observance of conditions imposed by law and by the previous approval for the plea agreement.

Here, the hierarchically superior prosecutor has a rather guiding role, whereas the final assessment is to be made by the prosecutor in charge with the criminal prosecution, as, enjoying the best position in analyzing the evidence, he is the only person responsible for the main ruling documents in the case.

By reconsidering the benefits given to the defendant who chooses to undergo this procedure by applying the provisions of paragraph (4) of art 480 Criminal Procedure Code, nowadays, the limits should not be between the maximum and the minimum line of the punishment provided by the special part of the Criminal Code or other special laws, but between the reduced limits by a third for the prison punishment or the corrective measures with deprivation of freedom, and a quarter for the fine punishment. Given the fact that, when negotiating, the prosecutor has to comply with the limits of the previous approval, he couldn't oversee this rule either.

After the negotiations, in order to preserve the balance with the procedure of informing the Court by means of indictment, when the hierarchically superior prosecutor verifies whether this action is complying with the law, during this special procedure, as an additional guaranty of lawfulness and of limits imposed by the previous approval, it is considered highly necessary to issue a new approval, as it is now that the agreement becomes good for producing effects, representing the act of informing the Court.

If the hierarchically superior prosecutor totally agrees with the

[8] See "Plea Agreement Procedure. Analysis." Public Ministry. Prosecutor's Office of the High Court of Justice and Cassation, April 7th 2014.

prosecutor's proposition, as responsible for the criminal prosecution (content, *de jure* and *de facto* motives), it is sufficient for him to express his approval directly on the plea agreement paper. Should the hierarchically superior prosecutor considers some amendments are necessary, due to different opinion on the agreement content, he shall draw up a reasoned order, offering *de jure* and *de facto* motives as merits of his decision. As the law doesn't provide such aspect, pursuant to provisions of art 304 paragraph (2) Criminal Procedure Code, the same way will be followed in case of rejected agreement.

If the plea agreement is rejected when being approved, either before or after the negotiations, the prosecutor shall go on with the criminal prosecution according to the usual procedure.

At the same time, the plea agreement must be the result of the negotiations carried out between the prosecutor and the defendant, who, according to art 480 paragraph (2) Thesis I Criminal Procedure Code, shall be accompanied by a lawyer, observing the provisions of art 91 paragraph 2) and art 92 paragraph 8) Criminal Procedure Code. Non compliance with this obligation leads to absolute annulment of the agreement pursuant to art 281 paragraph (1) letter f) Criminal Procedure Code, and the defendant has the right to invoke any time during the trial.

Negotiation is the key of this procedure and implies that both the prosecutor and the defendant make concessions while observing the law provisions.

As the law doesn't clearly describe the procedure, we conclude that the negotiations shall be held directly between the prosecutor and the defendant assisted by his lawyer, either through dialogue or written documents. It is certain that the direct dialogue is the clear way to obtain promptness.

Taking into account the powerful personal character of the agreement, ant that the punishment shall be enforced after the probable admissibility, It must be able to assure the prevention and correction purpose of the criminal code. Consequently, the prosecutor has to envisage the general individualizing criteria[9] stated by art 74 Criminal Code. Several aspects will be taken into consideration collectively: circumstances and the modus operandi, the means[10], danger risk for the property, type and seriousness of the result or other consequences of the crime[11], the crime motive and purpose, the crime type and repetitiveness, representing the criminal record of the defendant[12], his conduct after committing the crime and during the criminal process[13], education level, age, heath status, family and social situation[14].

The powerful personal character of the agreement is also pointed out by analysis of the subjective criteria.

On the other hand, the defendant also enjoys the possibility to draw the

[9] The analysis of the individualizing general criteria is not a judicial individualization, being the exclusive attribute of the Court.

[10] The following are to be analyzed: place and time of the crime together with the modus operandi and the means used in order to establish the danger risk of the author.

[11] It is important for the result crimes, for the study of the crime direct and indirect results.

[12] For instance, the absence of criminal record is a favorable element for the defendant whereas his perfection in a criminal field will lead to more severe punishment. Maybe, the time between the previous sentences and the moment of committing the new crime would be taken into consideration.

[13] It is important to see if there was any attempt to prevent the crime result, to restore the stolen goods, to hide the crime traces, to escape from criminal prosecution, to intimidate the witnesses etc.

[14] There will be an analysis of poor health state, family environment, entourage influence, psychological troubles (that don't impair judgment) etc.

prosecutor's attention on the favourable criteria.

If the defendant committed several crimes, he can express his interest in reaching an agreement for all or part of them. In this case, the analysis of the above mentioned conditions shall be exercised for each crime. When agreement are made concerning several committed crimes, the resulted punishment, according to art 39 paragraph (1) Criminal Code, shall be set by reference to the negotiated punishments.

5. Legal provisions on the plea agreement form and content

When the content of the plea agreement is approved by its authors, they will write it down. It is a form condition provided by art 481 paragraph (1) Criminal Procedure Code. In case of defendants who chose to follow this procedure, the prosecutor will not make up the indictment and the Court will receive the plea agreement directly.

This agreement shall contain as provided by art. 482 Criminal Procedure Code:

1. the date and place of signature;
2. last name, first name and capacity of its authors;
3. information on the defendant person, according to art 107 paragraph (1);
4. description of the deed object of the agreement;
5. legal classification and punishment provided by law;
6. evidence and evidence means;
7. express statement of the defendant admitting his guilt and his agreement with the legal classification which started the criminal action;
8. the type and the time (clearly mentioned, not by reference to two limits), and also the punishment application manner or the solution of waving to the punishment or the postponement of punishment application object of the agreement between the prosecutor and the defendant;
9. signatures of the prosecutor, defendant and his lawyer.

If there are several defendants in the case and if many of them or even all of them expressed their desire to reach a plea agreement and the prosecutor finds that the legal terms are complied with, he shall sign a separate agreement with everyone of them. Practically the negotiation has to be held separately, given its powerful personal character.

The specialized literature showed the necessity to present the defendant a copy of the agreement immediately after it was signed.

6. Conclusions

As we can see from the analysis of these legal provisions, the prosecutor is the representative of the general interests of the society, in charge with defending the lawful order and the citizens' rights and freedoms. Therefore, during the procedure, his role is to watch over the balance between the general and the particular interests, in other words, the balance between the opportunity of the procedure and the compliance of the legal provisions in order to have a valid agreement.

We consider this theme important and extremely useful given the fact that the prosecutor takes into account the defendant's will to cooperate for the criminal prosecution and also his position regarding his own crime.

Nevertheless, as we have already mentioned it, we are talking about a general interest as by using this plea agreement we have a fairly and expeditiously trial with fewer costs.

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FREEDOM OF EXPRESSION AND VIOLENCE AGAINST JOURNALISTS

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Abstract

This study will contain an analysis on the international and regional standards in the field of freedom of expression, as stipulated in the United Nations conventions and in the European Convention of Human Rights.

Further we will establish a link between the breach of the freedom of expression when cases of violence against journalists arise, especially tackling the impunity problem.

The paper will focus on the study of the ECtHR judgements regarding freedom of expression and cases of violence against journalists. Also, we will address the recent recommendations at the Council of Europe level.

Concluding, the study will attempt to express some recommendations in solving the problem of violence against journalists.

Keywords: *freedom of expression; journalists; violence; United Nations; Council of Europe; ECHR.*

1. Introduction

Freedom of expression can take many forms, encompassing verbal, artistic, and pshycal expression. Freedom of opinion and expression is the cornerstone of any democratic society. However, it is a freedom which, as history attests, has been, and is, compromised in a number of States[1].

The right to freedom of expression, guaranteed both at international level (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights) and regional level (Convention for the Protection of Human Rights), constitutes one of the essentials in a democratic society, ensuring, amongst others, the sound information of the citizens and, if proper implemented, an effective functioning of the rule of law.

So, from this perspective, safeguarding freedom of expression has an even more importance when coupled with the necessity to safeguard the integrity of the journalists and to protect them from cases of violence.

Of course, given the expansion of internet-based information, when referring to journalists, one should have in mind a larger interpretation of the notion, rather than the *stricto sensu* one. Thus, the term 'journalists' will include media workers and social media producers who produce significant amounts of public-interest journalism.

At Council of Europe (CoE) level, the term 'journalist' means any natural or legal person who is regularly or professionally engaged in the collection and dissemination

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[1] R. K.M. Smith, *Textbook on International Human Rights*, 5th edition (Oxford: Oxford University Press, 2012), 301.

of information to the public via any means of mass communication[2].

Also, ongoing technological developments have transformed the traditional media environment, as described, *inter alia*, in CM/Rec(2011)7 on a new notion of media[3], leading to new conceptions of media and new understandings of the evolving media ecosystem. Advances in information and communication technologies have made it easier for an increasingly broad and diverse range of actors to participate in public debate. Consequently, the European Court of Human Rights has repeatedly recognised that individuals, civil society organisations, whistle-blowers and academics, in addition to professional journalists and media, can all make valuable contributions to public debate, thereby playing a role similar or equivalent to that traditionally played by the institutionalised media and professional journalists[4].

2. Freedom of expression

2.1. International level

At international level, freedom of expression is provided for in art. 19 of the Universal Declaration of Human Rights (1948), which states that *everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*. Similarly, the International Covenant on Civil and Political Rights (1966) provides, in article 19 para.2 and 3, that *everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.*

2.2. Regional level

At regional level, freedom of expression is regulated in art. 10 from the Convention for the Protection of Human Rights (ECHR):

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are

[2] CoE, Committee of Ministers, Recommendation No R(2000)7 on the right of journalists not to disclose their sources of information, adopted 8 March 2000, accessed March 20, 2017, http://www.inter-justice.org/pdf/Sejal_Parmar_Protection_and_Safety_of_Journalists.pdf.

[3] CoE, Committee of Ministers, **Recommendation CM/Rec(2011)7 on a new notion of media,** adopted *21 September 2011*, accessed March 20, 2017, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0.

[4] CoE, Committee of Ministers, Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors**,** *adopted 13 April 2016, no. 9*, accessed March 20, 2017, https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016806415d9#_ftn1.

necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

2.3. Freedom of expression

In an impressive amount of judgments the European Court of Human Rights (ECtHR) has found that the national level of protection of the right to freedom of expression, media freedom and rights of journalists does not meet the requirements of Article 10 ECHR. The Court's case law has emphasized *that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment*, while restrictions and sanctions need a relevant, pertinent and sufficient motivation. An interference with free speech and media freedom can only be justified if there is a pressing social need and insofar as the interference is proportionate to the aim pursued[5].

Any interference with the right to freedom of expression of journalists and other media actors therefore has societal repercussions as it is also an interference with the right of others to receive information and ideas and an interference with public debate[6].

In a democratic system, the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence[7].

In ***Bucur and Toma v. Romania*** the Court considered that the general interest in the disclosure of information revealing illegal activities within the Romanian Intelligence Services (RIS) was so important in a democratic society that it prevailed over the interest in maintaining public confidence in that institution. The Court observed that the information about the illegal telecommunication surveillance of journalists, politicians and business men that had been disclosed to the press affected the democratic foundations of the State. Hence it concerned very important issues for the political debate in a democratic society, in which public opinion had a legitimate interest. The fact that the data and information at issue were classified as 'ultra-secret' was not a sufficient reason in this case to interfere with the whistleblower's right to divulge the information. The conviction of Bucur for the disclosure of information to the media about the illegal activities of RIS was considered as a violation of Article 10 ECHR[8].

2.4. Restrictions

It was noted that at first sight it is remarkable that precifically with respect to

[5] *D. Voorhoof, On the Road to more Transparency: Access to Information under Article 10 ECHR*, 2014, accessed March 20, 2017, http://journalism.cmpf.eui.eu/discussions/transparency-access-to-information-article-10-echr/.

[6] CoE, Committee of Ministers, *Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, adopted 13 April 2016, no. 2.*

[7] ECtHR, Grand Chamber, 12 February 2008, no. 14277/04, *Guja* v. *Moldova*, § 74. All the ECtHR judgements mentioned in this study are available on the website of the ECtHR - http://hudoc.echr.coe.int and were accessed in March 20, 2017.

[8] ECtHR 8 January 2013, no. 40238/02, *Bucur and Toma* v. *Romania*, in *D. Voorhoof, On the Road to more Transparency: Access to Information under Article 10 ECHR*. In its judgment the Court also relied on Resolution 1729(2010) of the Parliamentary Assembly of the Council of Europe on protecting whistleblowers.

the right to freedom of expression, to which Western democracies attach such great value, the restrictions are formulated more broadly than with respect to other rights and freedoms. However, in practice this broad formulation is of little impact[9].

Subject to paragraph 2 of Article 10 [of the European Convention on Human Rights], it is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'[10].

Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (…), provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued[11].

Note should be made that, the essential function of the press is always taken into account when an assessment is made whether in the given situation a restiriction of the freedom of expression is permissible or not[12].

Interference by public authority in exercising the rights provided for in Article 10 will only be valid and legal if it meets the requirements of paragraph 2 of Article 10: such interference was *prescribed by law*, motivated by one or more of the *legitimate aims* set out in that paragraph, and *necessary in a democratic society*.

Concluding there are 3 main conditions that have to be met in order to meet the requirements of paragraph 2 of Article 10:

- A measure is *prescribed by the law* if it has, both, basis in domestic law and the national law, and it has a certain quality, meaning that it must be accessible to the person concerned and foreseeable as to its effects[13].
- The interference must purse a *legitimate aim* which justifies the interference with its rights.
- Finally, the interference must be *necessary in a democratic society***.** As set forth in Article 10, this freedom is subject to exceptions. Such exceptions must, however, be construed strictly, and the need for any restrictions must be established convincingly, particularly where the nature of the speech is political rather than commercial. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was

[9] P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak (editors), *Theory and practice of the European Convention on Human Rights*, 4th edition (Antwerpen-Oxford: Intersentia, 2006), 793.

[10] ECtHR, 7 December 1976, *Handyside v. the United Kingdom*, §49.

[11] ECtHR, 6 July 2006, *Erbakan v. Turkey*, §56.

[12] P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak (editors), *Theory and practice of the European Convention on Human Rights*, 4th edition (Antwerpen-Oxford: Intersentia, 2006), 775.

[13] ECtHR, Grand Chamber, *Amann v. Switzerland*, no. 27798/95.

> "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts[14].

3. Violence against journalists and the 'chilling' effect

3.1. International level

Journalists play a particularly prominent role in society: when they are threatened, attacked or killed, information flows shrink and entire communities are cowed. Citizens are deprived of the necessary information to develop their own opinions and take informed decisions about their lives and development[15].

The safety of journalists and the struggle against impunity for their killers are essential to preserve the fundamental right to freedom of expression, guaranteed by Article 19 of the *Universal Declaration of Human Rights*. Freedom of expression is an individual right, for which no one should be killed, but it is also a collective right, which empowers populations through facilitating dialogue, participation and democracy, and thereby makes autonomous and sustainable development possible[16].

In July 2011, article 19 was the subject of the General Comment 34 by the Human Rights Committee, which stated that *States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19. Journalists are frequently subjected to such threats, intimidation and attacks because of their activities. So too are persons who engage in the gathering and an alysis of information on the human rights situation and who publish human rights-related reports, including judges and lawyers. All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted, and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress*[17].

Also, Resolution 29[18] condemns violence against journalists and calls upon

[14] ECtHR, 28 June 2001, *VgT Verein Gegen Tierfabriken v. Switzerland*, no. 24699/94, §66, 68.

[15] U.N., *Implementation Strategy 2013-2014 on U.N. Plan of Action on the safety of journalists and the issue of impunity*, 2, accessed March 20, 2017, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/official_documents/Implementation_Strategy_2013-2014_01.pdf.

[16] U.N., *Plan of Action on the safety of journalists and the issue of impunity*, 2012, 1, accessed March 20, 2017, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/official_documents/UN-Plan-on-Safety-Journalists_EN_UN-Logo.pdf.

[17] U.N., Human Rights Committee, *General comment No. 34. Article 19: Freedoms of opinion and expression*, 102nd session, Geneva, 11-29 July 2011, 12 September 2011, no. 23, accessed March 20, 2017, http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.

[18] U.N.E.S.C.O. (United Nations Educational, Scientific and Cultural Organization), General Conference, Twenty-ninth Session, Paris, 21 October to 12 November 1997, accessed March 20, 2017, http://unesdoc.unesco.org/images/0011/001102/110220E.pdf.

its Member States to uphold their obligation to prevent, investigate, prosecute and sentence those which are commiting crimes against journalists. More to the point, the legislation must provide that the persons responsible for offences against journalists discharging their professional duties or the media must be judged by civil and/or ordinary courts and that there should be no statute of limitations for crimes against persons when these are perpetrated to prevent the exercise of freedom of information and expression or when their purpose is the obstruction of justice[19].

Moreover, Human Rights Council condemned in the strongest terms all attacks and violence against journalists and expressed its concern that there was a growing threat to the safety of journalists posed by non-State actors[20].

While recognizing that investigating crimes against journalists remains the responsibility of Member States, the acts of violence and intimidation (including murder, abduction, hostage taking, harassment, intimidation and illegal arrest and detention) are becoming ever more frequent in a variety of contexts. Notably, the threat posed by non-state actors such as terrorist organizations and criminal enterprises is growing. This merits a careful, context sensitive consideration of the differing needs of journalists in conflict and non-conflict zones, as well as of the different legal instruments available to ensure their protection[21].

Impunity has remained the predominant trend, with few perpetrators of killings or attacks against journalists being brought to justice. Impunity refers to the effect of exemption from punishment of those who commit a crime. It thus points to a potential failure of judicial systems as well as the creation of an environment in which crimes against freedom of expression go unpunished, posing a serious threat to freedom of expression. The practice and expectation of impunity may further encourage violations of numerous human rights besides freedom of expression and press freedom, while also encouraging other forms of criminality. Physically silencing criticism, arbitrary arrests and detention, enforced disappearance, harassment and intimidation have often been aimed at silencing not only journalists, but also intimidating a population towards self-censorship[22].

In other words, impunity remains one of the greatest challenges to the safety of journalists around the world. As violence against and harassment of journalists goes unpunished, the problem persists and even increases. However, if real legal consequences exist, perpetrators may think twice before committing such acts. The problem of impunity for crimes committed against journalists is acute and enduring, and it must be addressed by all stakeholders - especially government and state

[19] U.N., *Implementation Strategy 2013-2014 on U.N. Plan of Action on the safety of journalists and the issue of impunity*, 24-25.

[20] U.N., *The UN Human Rights Council Resolution A/HRC/21/12 on the Safety of Journalists*, adopted by consensus in September 2012, in U.N., *Implementation Strategy 2013-2014 on U.N. Plan of Action on the safety of journalists and the issue of impunity*, 23.

See, also: *The Belgrade Declaration, 2004; The Medellin Declaration, 2007; The Carthage Declaration, 2012; The San Jose Declaration, 2013, on 'Safe to Speak: Securing Freedom of Expression in all Media' and The Paris Declaration, 2014, on 'Media Freedom for a Better Future: Shaping the Post-2015 Development Agenda'.*

[21] U.N., *Plan of Action on the safety of journalists and the issue of impunity*, 4.

[22] U.N.E.S.C.O., *World Trends in Freedom of Expression and Media Development*, 2014, 87, accessed March 20, 2017, http://unesdoc.unesco.org/images/0022/002270/227025e.pdf.

representatives – in order to have any hope of resolution[23].

The safety of journalists and question of avoiding impunity for acts of violence against them interacts, also, with other relevant provisions from the Universal Declaration of Human Rights, such as: the right to life (Article 2), the prohibition of torture (Article 3), the right to liberty and security (Article 5), the right to a fair trial (Article 6), no punishment without law (Article 7) and the right to an effective remedy (Article 13).

3.2. Regional level

It is alarming and unacceptable that journalists and other media actors in Europe are increasingly being threatened, harassed, subjected to surveillance, intimidated, arbitrarily deprived of their liberty, physically attacked, tortured and even killed because of their investigative work, opinions or reporting, particularly when their work focuses on the misuse of power, corruption, human rights violations, criminal activities, terrorism and fundamentalism. These abuses and crimes have been extensively documented in authoritative reports published by the media, non-governmental organisations and human rights defenders[24].

Protection of journalism and safety of journalists and other media actors must be organized into four pillars: prevention, protection, prosecution (including a specific focus on impunity) and promotion of information, education and awareness-raising:

- *Prevention:* Member States should put in place a comprehensive legislative framework that enables journalists and other media actors to contribute to public debate effectively and without fear. The legislative framework, including criminal law provisions dealing with the protection of the physical and moral integrity of the person, should be implemented in an effective manner, including through administrative mechanisms and by recognising the particular roles of journalists and other media actors in a democratic society[25].
- *Protection:* Legislation criminalising violence against journalists should be backed up by law enforcement machinery and redress mechanisms for victims (and their families) that are effective in practice. Clear and adequate provision should be made for effective injunctive and precautionary forms of interim protection for those who face threats of violence. State authorities have a duty to prevent or suppress offences against individuals when they know, or should have known, of the existence of a real and immediate risk to the life or physical integrity of these individuals from the criminal acts of a third party and to take measures within the scope of their powers which, judged reasonably, might be expected to avoid that risk. State officials and public figures should not undermine or attack the integrity of journalists and other media actors, nor should they require, coerce or pressurise, by way of violence, threats, financial penalties or inducements or other measures, journalists and other media actors to

[23] The International Women's Media Foundation, *An overview of the current challenges to the safety and protection of journalists*, 2016, 4, accessed March 20, 2017, https://www.iwmf.org/wp-content/uploads/2016/02/IWMFUNESCO-Paper.pdf.

[24] CoE, Committee of Ministers**,** *Recommendation CM/Rec(2016)4 of the Committee of Ministers to member Stateson the protection of journalism and safety of journalists and other media actors, recitals - no. 1.*

[25] CoE, Committee of Ministers, *Recommendation CM/Rec(2016)4 of the Committee of Ministers to member Stateson the protection of journalism and safety of journalists and other media actors, no. 2, 3.*

derogate from accepted journalistic standards and professional ethics by engaging in the dissemination of propaganda or disinformation. State officials and public figures should publicly and unequivocally condemn all instances of threats and violence against journalists and other media actors, irrespective of the source of those threats and acts of violence [26].

- *Prosecution:* Investigations must be effective in the sense that they are capable of leading to the establishment of the facts as well as the identification and eventually, if appropriate, punishment of those responsible. The authorities must take every reasonable step to collect all the evidence concerning the incident. The conclusions of the investigation must be based on thorough, objective and impartial analysis of all the relevant elements, including the establishment of whether there is a connection between the threats and violence against journalists and other media actors and the exercise of journalistic activities or contributing in similar ways to public debate. For an investigation to be effective, the persons responsible for, and who are carrying out, the investigation must be independent and impartial, in law and in practice. Any person or institution implicated in any way with a case must be excluded from any role in investigating it. Moreover, investigations should be carried out by specialised, designated units of relevant State authorities in which officials have been given adequate training in international human rights norms and safeguards[27].
- *Promotion of information, education and awareness raising on the issue of violence against journalists is extremely important, as it is aimed at underlining the necessity to respect the freedom of expression. Also,* training programmes should be organized, as well as putting in place a platform for cooperation between public institutions and civil society.

Regarding the **impunity** problem, it should be stated firmly that impunity represents the general failure of the functions of government and the rule of law.

In recent years a large number of cases of killings and attacks on journalists remain unsolved. The low rate of successful prosecution in cases involving journalists is in contrast with the much higher conviction rate recorded in cases of violent crime where the victim is a nonjournalist[28].

Impunity is a serious barrier to safeguarding a free press. The failure to properly investigate and prosecute crimes against journalists needs to be urgently addressed. By effectively prosecuting criminals, governments can decrease the number of future attacks[29].

In order for an investigation to be effective, it should respect the following essential requirements: adequacy, thoroughness, impartiality and

[26] CoE, Committee of Ministers, *Recommendation CM/Rec(2016)4 of the Committee of Ministers to member Stateson the protection of journalism and safety of journalists and other media actors, no. 8, 9, 15.*

[27] CoE, Committee of Ministers, *Recommendation CM/Rec(2016)4 of the Committee of Ministers to member Stateson the protection of journalism and safety of journalists and other media actors, no. 18-20.*

[28] O.S.C.E., Safety of journalists' guidebook, 2nd edition, 2014, 72-75, accessed March 20, 2017, http://www.osce.org/fom/118052?download=true.

[29] O.S.C.E. - *The OSCE representative on freedom of the media, safety of journalists. Why it matter*s, accessed March 20, 2017, accessed March 20, 2017, http://www.osce.org/fom/101983?download=true.

independence, promptness and public scrutiny[30].

When it occurs, impunity is caused or facilitated notably by the lack of diligent reaction of institutions or state agents to serious human rights violations (e.g. in relation with art. 2, 3, 4, 5 paragraph 1, 8 of the Convention). In these circumstances, faults might be observed within state institutions, as well as at each stage of the judicial or administrative proceedings[31].

Combating impunity requires that there be *an effective investigation* in cases of serious human rights violations, whether committed by state agents or private persons. This duty has an absolute character[32].

Where an arguable claim is made, or the authorities have reasonable grounds to suspect that a serious human rights violation has occurred, the authorities must commence an investigation on their own initiative. Although there is no right guaranteeing the prosecution or conviction of a particular person, prosecuting authorities must, where the facts warrant this, take the necessary steps to bring those who have committed serious human rights violations to justice. A decision either to refuse to initiate or to terminate investigations may be taken only by an independent and competent authority in accordance with the criteria of an effective investigation. It should be duly reasoned. Such decisions must be subject to appropriate scrutiny and be generally challengeable by means of a judicial process. Also, States should ensure the independence and impartiality of the judiciary in accordance with the principle of separation of powers. Proceedings should be concluded within a reasonable time. The sentences which are handed out should be effective, proportionate and appropriate to the offence committed. Domestic court judgments should be fully and speedily executed by the competent authorities[33].

Regarding the **positive obligations of the State**, the ECtHR has constantly held that public authorities have *positive* obligations inherent in an effect respect of the rights concerned. Consequently, for a real and effective exercise of certain freedoms the State's duty isn't only *not* to interfere, but also the State has the obligation to take measures of protection. In order to be in line with ECtHR case-law, such positive measures a fair balance has to be struck between the general interest of the community and the interests of the individual and, also, the obligation must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities[34].

On the positive obligations of the state which rise under article 10, the Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive (see, for

[30] CoE, Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations.*

[31] CoE, Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*, adopted on 30 March 2011 at the 1110th meeting of the Ministers Deputies, accessed March 20, 2017, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805cd111

[32] CoE, Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*.

[33] CoE, Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations.*

[34] See, for example, *Rees v. the United Kingdom*, 17 October 1986, §37, and *Osman v. the United Kingdom*, 8 October 1998, §116.

example, *mutatis mutandis*, *Observer and Guardian v. the United Kingdom*, §59, and *Informationsverein Lentia and Others v. Austria*, §38). Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor[35].

The concept of positive obligation assumes greater importance in relation to any violence or threats of violence directed by private persons against other private persons, such as the press, exercising free speech. In this sense, in the *Özgür Gündem v. Turkey* case, the Court *has held that, although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned. It has found that such obligations may arise under Article 8 and Article 11. Obligations to take steps to undertake effective investigations have also been found to accrue in the context of Article 2 and Article 3, while a positive obligation to take steps to protect life may also exist under Article 2. The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention*[36].

3.3. Case study: prohibition of torture

- ***Substantial limb.*** The safety of journalists regarding the acts of violence against them interacts, *inter alia*, with Article 3 of the ECHR regulating the principle of pohibitoion of torture.

Article 3 of the ECHR enshrines one of the basic values of the democratic societies whose core purpose is to protect a person's dignity and physical integrity – prohibition, in absolute and unqualified terms, of torture or inhuman or degrading treatment or punishment[37].

The unconditional terms of article 3 also mean that there can never, under the Convention or under international law, be a justification for acts which breach the article. In other words, there can be no factors which are treated by a domestic legal system as justification for resort to prohibited behaviour – not the behaviour of the victim, the pressure on the perpetrator to further an investigation or prevent a crime, any external circumstances or any other factor[38].

According to the well-established case-law of the Court, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity

[35] ECtHR, *Research Report. Positive obligations on member States under Article 10 to protect journalists and prevent impunity*, 2011, 4-5, accessed March 20, 2017, http://www.echr.coe.int/Documents/Research_report_article_10_ENG.pdf .

[36] ECtHR, *Özgür Gündem v. Turkey*, no. 23144/93, §42-43.

[37] Article 3 – Prohibition of torture.
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[38] A. Reidy, The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights. Human rights handbooks, No. 6, Directorate General of Human Rights, Council of Europe, 2002, 19, accessed March 20, 2017, http://echr.coe.int/NR/rdonlyres/0B190136-F756-4679-93EC-42EEBEAD50C3/0/DG2ENHRHAND062003.pdf.

is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. In order for a punishment or treatment associated with it to be *"inhuman"* or *"degrading"*, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment[39].

- From the ***procedural point of view***, where an individual raises an arguable claim that he has been seriously ill-treated in breach of article 3 of the Convention, the member state has an obligation to initiate a thorough, prompt, independent and effective investigation, which should be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible. This means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence etc. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or to identity the persons responsible will risk falling foul of this standard. For an effective investigation into alleged ill-treatment by state agents, such investigation should be independent. Thus, the investigation lacked independence where members of the same division or detachment as those implicated in the alleged ill-treatment were undertaking the investigation. The independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms[40].
- In *Najafli v. Azerbaijan*[41], a journalist had been beaten by the police while covering an unauthorised demonstration in Baku. The Court noted that the role of the press in imparting information and ideas on matters of public interest undoubtedly included reporting on opposition gatherings and demonstrations which was essential for the development of any democratic society. It found in particular that the physical ill-treatment by State agents of journalists carrying out their professional duties had seriously hampered the exercise of their right to receive and impart information. Irrespective of whether there had been any actual intention to interfere with Mr Najafli's journalistic activity, he had been subjected to unnecessary and excessive use of force, despite having made clear efforts to identify himself as a journalist at work. In conclusion, the Court found violations of Article 3 (prohibition of inhuman or degrading treatment) concerning Mr Najafli's ill-treatment, on the procedural limb of Article 3, concerning the investigation into his claim of ill-treatment and also of

[39] See, mutatis mutandis, ECtHR, 20 November 2012, Ghiurău v. Romania, §52-53.
[40] See, mutatis mutandis, ECtHR, 26 January 2006, Mikhenyev v. Russia, §107-108, 110.
[41] ECtHR, 2 October 2012, Najafli v. Azerbaijan, no. 2594/07.

Article 10 regarding freedom of expression[42].

3.4. Statistics

Pursuant to the International Press Institute, in the period since 2000, more than 900 journalists have been killed as a result of their professional activities. The number of violent attacks against journalists is rising. The increase of targeted killings against representatives of the critical media is particularly alarming. At the same time, the number of resolved cases is appallingly low – around 94% of reported cases are never resolved and perpetrators enjoy impunity[43].

Around 19 journalists were killed in Central & Eastern Europe in 2007-2012. As a comparison, only 3 journalists were killed in the same period in Western Europe & North America[44].

According to UNESCO data, less than one in ten killings of journalists have led to a conviction in the past period. The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has attributed the root cause of impunity to the lack of political will to pursue investigations[45].

While the commitment to protect freedom of the media is a noble goal, its implementation has not been successful so far. In the OSCE region, around 30 journalists are estimated to have been killed in the past five years alone. And that number is surpassed exponentially by those who were beaten or whose lives were threatened[46].

3.5. Cases of violence against journalists

- **Romania.** *Reporters Without Borders* invoked the freelance cameraman Christian Gesellmann's violent arrest by police officers while covering an anti-government demonstration in Bucharest on Wednesday 1 February 2017. The police hit Gesellmann and held him for several hours for refusing to delete or surrender the video he had shot of clashes between police officers and hooligans during the protest. Gesellmann was not clearly identified as a journalist and did not have a Romanian press card. But it would not have taken the police long to confirm that he was indeed a journalist, instead of detaining him and confiscating his video recording[47].
- **Croatia.** On 3 November 2010 a court convicted and sentenced six men for the murder of Ivo Pukanić, the director of the weekly Nacional and its marketing director Niko Franji. Both men were killed by a car bomb in 2008; it is hoped that those responsible for ordering the killings will also be brought to justice[48].
- **France.** In France, in January 2011, Michael Szames (reporter for *France 24*) was allegedly the victim of a

[42] See, CoE, Media coverage of protests and demonstratios. Thematic factsheet, February 2016, accessed March 20, 2017, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805a39cb

[43] Austria, *Safety of Journalists*, accessed March 20, 2017, http://www.austria.org/safety-of-journalists/.

[44] U.N.E.S.C.O., World Trends in Freedom of Expression and Media Development, 2014, 85.

[45] U.N.E.S.C.O., World Trends in Freedom of Expression and Media Development, 2014, 87.

[46] O.S.C.E., Protection of journalists from violence. Issue Paper, Strasbourg, 4 October 2011 CommDH/IssuePaper(2011)3, 10, accessed March 20, 2017, http://www.osce.org/fom/83569?download=true.

[47] Reporters without Borders, Romania: Bucharest police hit, arrest German cameraman at protest, accessed March 20, 2017, https://rsf.org/en/news/romania-bucharest-police-hit-arrest-german-cameraman-protest.

[48] O.S.C.E., Safety of journalists' guidebook, 2nd edition, 2014, 72-75.

violent attack. The reporter filed a complaint with the police accusing eight security staff of the National Front Party of having beaten and insulted him as he was covering a party congress[49].

- **Serbia.** The Independent Journalists' Association of Serbia (IJAS) said its records showed that as many as 128 assaults on journalists occurred since 2014: 27 of the assaults were physical. The stable trend of frequent physical and verbal attacks on media and journalists continued in the year behind us, as corroborated by IJAS data, according to which 69 journalists were assaulted in 2016: nine physically[50].

Several death threats have been sent to journalists at the investigative journalism portal insajder.net which is owned by broadcaster B92.The threats have been sent via email to several reporters over a week's time, between 14 and 22 March 2016. They have also been received by Insajder's editor-in-chief Brankica Stankovic and B92's editor-in-chief Veran Matic. Both have been under police protection for years due to serious threats. Due to a pending police investigation no details of the threats have been revealed, according to Veran Matic[51]. According to a reply from the Republic of Serbia provided by the Ministry of Interior (21 Nov 2016)[52], the Department of Criminal Police, Office for combating organized crime, filled criminal charges against persons in respect of whom there is reasonable suspicion of committing a criminal offence *endangering security* (art. 138 Criminal Code). The criminal offence was done by sending (from private e-mail address, via contact form on portal Insajder) several threatening messages to Ms Brankica Stankovic and to all employees of the portal Insajder, as well as threats to Mr Veran Matic.

In another case, the 27-year-old investigative journalist Ivan Ninić was attacked on 27 August 2015 in front of his home as he was locking his car in the parking lot. Two young men beat him with metal rods. The journalist suffered a hematoma under his eye, severe bruising to the thigh bone and an injury to the right shoulder. The incident, which has been condemned by all journalists' organisations in Serbia including the three IFJ/EFJ affiliates, the Association of Journalists of Serbia (UNS), the journalists' union of Serbia (SINOS) and the Independent Association of Journalists of Serbia (NUNS), has been reported to the police[53]. According to a reply from the Republic of Serbia provided by the Ministry of Interior (21 Nov 2015)[54], in assurance

[49] O.S.C.E., Protection of journalists from violence. Issue Paper, Strasbourg, 4 October 2011 CommDH/IssuePaper(2011)3, 11.

[50] Belgrade Center for Human Rights, Human Rights in Serbia 2016, Series Reports 28 (Belgrade: The Belgrade Center for Human Rights, 2017), 216.

[51] See CoE, Media freedom alerts, accessed March 20, 2017, https://www.coe.int/en/web/media-freedom/all-alerts/-/soj/alert/15675610. See, also Notable Cases of Journalists and Media Safety Violations, April 11, 2016, accessed March 20, 2017, http://www.slavkocuruvijafondacija.rs/en/notable-cases-of-journalists-and-media-safety-violations/.

[52] See Reply from the Republic of Serbia provided by the Ministry of Interior, https://rm.coe.int /CoERMPublicCommon SearchServices/DisplayDCTMContent?documentId=09000016806bf092, accessed March 20, 2017.

[53] See CoE, *Media freedom alerts*, accessed March 20, 2017, http://www.coe.int/en/web/media-freedom/all-alerts?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=2&p_p_state=normal&p_p_mode=view&p_p_ cacheability = cache LevelPage&p_p_col_id=column-4&p_p_col_count=1&_sojdashboard_WAR_coesojportlet_ alertPK= 12991225&_sojdashboard_WAR_coesojportletcmd=get_pdf_one&_sojdashboard_WAR_coesojportlet_selected Categories =11709576&_sojdashboard_WAR_oesojportlet_fulltext=1&_sojdashboard_WAR_coesojportlet_mvcPath=%2Fhtml%2 Fdashboard%2Fsearch_results.jsp&_sojdashboard_WAR_coesojportlet_yearOfIncident=0, accessed March 20, 2017.

[54] See CoE, *Media freedom alerts*, accessed March 20, 2017, https://rm.coe.int/CoERMPublic CommonSearchServices/Display DCTMContent? documentId= 090000168048 addb accessed March 20, 2017.

with the instructions of the Deputy to the First Public Prosecutor of Belgrade, the Belgrade Police Department is talking all necessary measures to identify and establish whereabouts of persons who attacked journalist Ivan Ninić.

- **Spain.** In January 2011, there was a case in Spain where Fernando Santiago, President of the Press Association of Cadiz, was brutally attacked in response to a newspaper article about the use of public funds to rescue Delphi, a struggling automobile parts company[55].

4. Conclusions

"It is a matter of trust". Trust is something you need to build, both with individuals and institutions - when the trust is broken, serious problems occur – resignations are given, media are covering the story, and the people responsible for the situation stay marked for a lifetime[56].

Impunity – meaning the the failure to bring perpetrators of human rights violations to justice – must be adressed as gives a sentiment of uncertainty and of failure to prserve the rule of law and freedom of expression.

To this sense, in evaluating the legal framework of a country, the main conclusion is that only a comprehensive approach can lead to an improvement of the cases of violence against journalists. By that we mean is of paramount importance to maintain an open dialogue between the institutions and the representatives of the journalist and civil society organisations.

Securing an effective implementation of the existing legal provisions by the states` institutions and the existence of an open and effective dialogue with the media organisations, civil society representatives, States and international organisations constitutes, in our opinion, the pillars that will result in the effective protection of journalists, thus ensuring the freedon of expression, as it was said[57] that the Court has repeatdly emphasized the vital role that freedom of expression, and the free press in particular, have to play in a democratic society.

The safety of journalists and the combating of impunity for crimes against their use of freedom of expression, can only be effectively addressed through a holistic approach: preventive, protective and pre-emptive measures, through to combating impunity and promoting a social culture which cherishes freedom of expression and press freedom[58].

All in all, the relevant institutions and stakeholders must be aware that the rationale is that the safety of journalists is an important prerequisite for achieving freedom of expression, democracy, social development and peace[59].

Although, the international and regional documents recommend that the crimes involving attacks against journalists

[55] O.S.C.E., *Protection of journalists from violence. Issue Paper*, Strasbourg, 4 October 2011 CommDH/IssuePaper(2011)3, 11.

[56] M. Ivanović, *Investigative Journalism and Corruption - A guide for more efficient reporting -, in Training Manual: Reporting on court processes pertaining to corruption and on investigative journalism*, Belgrade, 2015, accessed March 20, 2017, https://www.coe.int/t /dghl/ cooperation/ economiccrime /corruption/Publications/PACS-Serbia/Manual%20journalists%20eng.pdf.

[57] C. Ovey, R. White, Jacobs & White The European Convention on Human Rights, 4th edition (Oxford: Oxford University Press, 2006), 334.

[58] *U.N. Implementation Strategy 2013-2014 on U.N. Plan of Action on the safety of journalists and the issue of impunity*, 2.

[59] *U.N. Implementation Strategy 2013-2014 on U.N. Plan of Action on the safety of journalists and the issue of impunity*, 2.

must be designated as 'aggravated offences'[60], which may attract more severe penalties, and that no statute of limitations should apply to such crimes, we think that before amending the criminal framework, a country must try to tackle the problem of violences againt journalists using the existing legal framework, which usually is enough, if properly enforced, to ensure the punishment of those quilty of violences against journalists.

To this end, some possible solutions can be imagined, other than amending the legislation, but rather aiming at a proper implementation of current legal framework:

- There is a stringent need to effectively investigate murders and other serious violent crimes against journalists; investigations should be carried out promptly and efficiently and that the prosecutors and investigators must be independent, as well as trained and qualified for the job. No political interference should hinder them from doing their work[61].
- There is a need to facilitate capacity-building in state institutions, thus encouraging all the relevant stakeholders to fully respect and implement the existing legal provisions, as the only way of effectively ensuring the reality of a satisfactory level of protection ensured in cases of violence against journalists. To this sense, it was said that State authorities must advocate that the authorities make it their priority to carry out swift and effective investigations, sending a message to society that perpetrators and masterminds of violence against journalists will be efficiently brought to justice[62].
- For the judicial authorities (public prosecutor's office and the court system) is necessary to communicate to the general public, thus increasing the transparency (e.g. by posting on their websites) the evolution and the effectiveness of the investigation on murders and other serious violent crimes against journalists, which shall include the following, in the form of press statements: the fact that investigations respected the needs to be carried out promptly and efficiently; the final decision as given in a particular case by the court; the posting on the website (and periodic update) of the Statistics of cases of violence against journalists (no. of cases, no. of cases still under investigation, no. of solved cases, the criminal provision incident in the case (the type of crime committed against a journalist), if the case is linked or not with the responsible of a journalist.
- As State authorities, namely the law enforcement agencies and media need to jointly establish good practices that can increase the safety of members of the media[63], the publishing of Good practices is a way of levelling the implementation of the legal provisions on violence against journalists and ensuring the necessary transparency that a real content is provided by the national relevant

[60] See, for example, O.S.C.E., *Safety of journalists guidebook*, 2nd edition, 2014, 71-72.

[61] O.S.C.E., *Protection of journalists from violence. Issue Paper*, Strasbourg, 4 October 2011 CommDH /IssuePaper(2011)3, 4.

[62] O.S.C.E., *Vilnius Recommendations on Safety of Journalists*, 2011, accessed March 20, 2017, http://www.osce.org/cio /78522?download=true.

[63] See, *mutatis mutandis*, *OSCE, Vilnius Recommendations on Safety of Journalists*, 2011.

authorities as a way of addressing the violence against journalist issue.

- For the judicial authorities (public prosecutor's office and the court system) is necessary to organise trainings in order to emphasise and make them aware of the importance of bringing everyone responsible for violence against journalists to justice.
- State authorities must ensure that law enforcement agencies be given sufficient resources and expertise to carry out effective investigations in the particular field of the media and to develop practices that respect the legal rights of members of the media.[64]
- Only if evaluating the above solutions the conclusion is that a state does not have a proper and effective system of protecting the journalists of cases of violence, the two solutions amending the criminal legislation can be implemented:
  - crimes involving attacks against journalists must be designated as 'aggravated offences', which may attract more severe penalties,
  - no statute of limitations should apply to such crimes.

Of course, in this situation, also, there will be a pressing need to ensure effective mechanisms that can ensure the existence of investigations capable of leading to the establishment of the facts as well as the identification and eventually, if appropriate, punishment of those responsible.

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[64] O.S.C.E., *Vilnius Recommendations on Safety of Journalists*, 2011.

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OCCUPATIONAL THERAPY - POSSIBLE SOLUTION FOR PREVENTING THE BREACH OF CRIMINAL LAW AND SOCIALLY REINTEGRATING OFFENDERS

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Abstract

This paper aims at giving a brief overview on occupational therapy, a less known branch belonging to health science, which focuses on improving the cognitive, physical and motor skills within the individual. For its obvious benefits, one would like to propose to apply this treatment to criminally convicted individuals in order to better achieve their social reintegration. In this regard, occupational therapy can increase the offender's self esteem, so that, finally, his social reintegration could become successful. Therefore, current trends in occupational therapy are outlined and a short historical evolution of this branch of health science is also provided.

Keywords: *occupational therapy; therapy through work; reintegration of offenders; preventing criminal behaviour; overpopulated prisons*

1. Introduction. Outlining the Concept

The interest in the topic of occupational therapy in the field of criminal sciences lies in the very notion of the term 'criminal science'. As defined in the legal dictionary, 'the criminal law science is a branch of legal-criminal science which represents a system of knowledge expressed in concepts, theories, ideas intended to explain the need, purpose and tasks of criminal law, to establish the methods of investigation for legal and criminal phenomena, to develop legal means to prevent and combat crime by means of the criminal law[1].'

What is meant by occupational therapy derives from the words that compose it. Having an occupation means being involved, committed and really participating in a motivated manner. Therapy means being treated for an illness, disability, or handicap.

Occupational therapy is the art and science directing the patient into participating in certain activities to rebuild, strengthen or improve one's performance, to facilitate the acquisition of those skills and functions that are required for adaptation and productivity, as well as for the reduction or correction of the pathology, so as to maintain one's health status. The fundamental concern of occupational therapy is to maintain and develop a person's capacity to satisfactorily perform various activities for

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[1] legeaz.net/dictionar-juridic/stiinta-dreptului-penal-si-procesual-penal. See, as well, M. A. Hotca, *Manual de drept penal. Partea generală* - Criminal Law Textbook. The General Part, Universul Juridic Publishing House, Bucharest, 2017, p. 22-25.

oneself and others and to learn to control both oneself and the environment[2].

Occupational therapy or any other type of lucrative activity represents a means of expression, allowing the suffering person to transform into reality what one has seen, lived or imagined[3].

Occupational therapy activities involve thinking, planning, making assumptions and choices, so that, at the end of the activity, the disabled person would be proud to have created a useful object. This gives an empowering feeling, as well as a sense of achievement and self-confidence, helping to structure both the status and role of the person, who becomes socially acknowledged[4].

Occupational theory belongs to non-pharmacological treatment methods, applicable from pediatrics to geriatrics. Health, designed as a dynamic state, represents the expression of the real internal relations of the body with the environment, in order to achieve an active balance or, expressed otherwise, is the ability to respond to the changes that take place in the environment through appropriate adjustment.[5].

2. Occupational Theory: Brief Diachronic Evolution

One could trace the usage of therapy through activities and movement a long time ago, when the primitive human civilizations appeared. The Greeks believed that inactivity causes incapacity, whereas the Egyptians treated melancholy through music, games and recreational activities. One owes to Hippocrates the school of European medicine, named in Greek 'Asklepiades'. The Greeks built sanatoriums in selected areas near hot water springs that healed the sick; massages, exercises were born here, and, on mentally ill persons, the Greeks practised 'catharsis' in order to release them from the tension that affected their mental health. The Greeks found out that a particular type of climate and water may be effective in healing people. These findings are considered the starting point for the development of the occupational method as a type of therapy.

After the fall of the Roman Empire, in the 5th century AD, barbarian invasions dominated Europe. Therefore, medical science, arts and culture experienced stagnation up to the Renaissance (1200-1500), when they were again brought to light. During the Enlightenment (1700-1830), the question of having an occupation started being studied as possible therapy. During the 18th and 19th centuries, psychology, anatomy and physiology rapidly evolved, more specialized and nuanced treatments being provided. During the Second World War occupational therapy was widely acknowledged, although this method is credited to Brawn, a Scottish, who initiated this treatment (of having an occupation) at the end of 1830. At the end of the 19th century, occupational therapy became a known treatment.

[2] *Terapia ocupațională în psihologia clinică* – Occupational therapy in clinical psychology (www.fundatiagrigore.org).

[3] Șerban Dragoș, *Recuperarea cu ajutorul terapiei ocupaționale* – Recovering by means of occupational therapy (www. recuperaremedicala.com)

[4] Claudia Matei, *Ce este terapia ocupațională?* – What is occupational therapy? (http://www.helpautism.ro/terapie/ce-este-terapia-ocupationala).

[5] Raluca Hudorca, *Terapia ocupationala si ergoterapia* – Occupational therapy (http://biblioteca.regielive.ro).

3. Occupational Therapy as Medical Science

In the United States, the first physician to use the concept of moral and occupational therapy was Benjamin Rush, who was recommending exercise, work and music as part of the treatment for mental illnesses. Having an occupation became an occupational therapy in the early twentieth century.

In Adolf Meyer's opinion, mental imbalances were the result of dysfunctional habits. Consequently, treatments were structured as a symbiosis between fun activities and treatments through work which included productive activity, personal contact with an instructor (therapist), which was very important as, for the patient, it meant accumulation of experience.

In 1905, Susan E. Tracy discovered the benefits of having an occupation in reducing nervous tension and wrote the first treatise on occupational therapy, in which she described the activities chosen for each patient. She considered that the interpersonal relationship between the instructor and the patient represented an important element for the success of the treatment through occupational therapy.

In Herbert J. Hall's opinion, activities involving hands and mind represent an influential factor in maintaining the physical, mental and moral health of the individual in a community. Hall's studies are deemed to provide the first systematization on the importance of having an occupation as part of one's mental health.

Eleanor Clarke Slagle was a social worker who exhibited interest in the negative effects of inactivity characterizing mental patients in hospitals. In 1915, she organized the first professional school for occupational therapists in Chicago. The interdependence between physical and mental components accounted for identifying the essential elements necessary for achieving successful therapy, grading activities from simple to complex, focusing attention on a goal and accomplishing the goal. Among the methods used in the program, the following could be mentioned: manual activities, vocational and pre-industrial work, playing games, dancing and gymnastics.

William Rush Dunton, Jr. is considered the father of the profession involving occupational therapy. As a psychiatrist, he started using occupational therapy in 1895, as a treatment for the mentally ill patients.

According to George Edward Barton, occupational therapy is 'the science which trains and stimulates patients into developing activities so as to use their energy to achieve a beneficial therapeutic effect.'[6].

In the UK, occupational therapy was introduced in a psychiatric hospital in 1919, to provide care for the soldiers wounded in the First World War. In 1925, the first occupational therapist, named Margot Fulton, began her work in the field. In 1930, the first occupational therapy school was founded at the initiative of Dr. Casson, and, six years later, an occupational therapy department, as well as a training centre were founded.

In Spain, although occupational therapy is not defined as a profession, as a matter of fact, this therapy has been used in the form of recreational and occupational activities, in psychiatric hospitals. Starting with the 15th century, this method has been used in Valencia and Zaragoza. The moral treatment recommended by Pinel consisted of healing procedures such as offering words of advice for the soul and using gentle forms of address, complying with the internal

[6] http://html.rincondelvago.com/Teoría y Técnicas de la Terapia Ocupacional

regulations of the establishment, as well as using occupational therapy in the moral treatment. As for the hospital professional hierarchy, the occupational therapist was part of rehabilitation services. Therapists were also used in other domains, for example to deal with drug addicts and convicts in locked-up rooms.

In 1962, in Spain, the first course on occupational therapy was completed in the hospital unit which today is called 'Hospital de la Princesa', course which represented the basis for the future occupational therapy school. The goals of occupational therapy school are: to train specialized personnel who would meet specific requirements in order to obtain the title of occupational therapist; to organize postgraduate training courses in order to specialize and further train the already qualified personnel. As a result of the University Reform Act, occupational therapy was included in the field of health sciences[7].

4. Occupational Therapy and Criminal Sciences

In our opinion, the link between occupational therapy and the legal means to combat crime and to prevent this phenomenon is especially important, because offenders have a certain type of deviant personality, whose features could, at some point, signal and thus anticipate the possibility of them breaking the law.

According to criminal law regulations, the state is responsible for both preventing and combating crime, and the criminal sanction is applied after the criminal act is committed. Therefore, occupational theory, by means of any type of work, not only manual labour, could be more appropriate for the persons who have suffered criminal conviction, or who are prone to committing crimes.

Occupational therapy is closely linked to psychology because it is not possible for work therapy to produce positive effects beyond some coordinates describing personality traits of the person prone to committing criminal acts.

For this method to become effective in the field of criminal sciences, we consider that the state should focus more on the human personality, using psychological programs for testing students' behavior and personality, in order to prevent crime. In other words, it is necessary to assess any individual's behavior since childhood, as deviant elements can be found ever since this age. Later any deviant behavior turns into disharmonic personality, which, in case some normality limits are exceeded, may lead individuals to commit crimes.

In the past, in the period prior to the fall of the communist regime, such programs were used in Romania to test the future high school students' professional orientation, as well as their skills.

In our opinion, this kind of testing could shed some light on any individual's future development, because by establishing his professional skills and temperamental traits by specialized personnel, the adolescent / the young man is thus encouraged to pursue a profession for which he has inclinations and, at the same time, he would start thinking that both his family and acquaintances positively appreciate his choice, eventually gaining psychological comfort.

If we survey the reasons given by people who have committed crimes or who have broken the law in various forms, we would discover that these subjects always find some kind of justification that originate in their personality traits. Thus, the analysis

[7] Ibidem

of the reasons will undoubtedly lead us to highlight some disharmonious personality traits that originate in their behavior ever since childhood.

The role of psychologists in preventing or, subsequently, socially reintegrating convicted persons is important, because they can provide beneficial solutions regarding the social adaptation of the subjects who suffer from behavioral deficit.

By means of tests, specialists in psychology can predict the development of the individual considering his temperament, as well as the limits of his weaknesses and strengths. Thus, tenacity in achieving a goal, in case the upper limit is evinced, can turn into a weakness, as it delineates a purpose inconsistent with normality, i.e. tenacity can generate commission of offenses in order to achieve his goal.

If we analyzed violent offenders, we would easily see that before these people get to break the criminal law there are a series of signals that anticipate their deed. For example, those convicted of robbery would motivate the commission of the offence by the lack of appropriate living conditions: the lack of a job, the desire to earn money easily, the gang they belong to. Committing an offense or participating in committing it as part of a criminal group occurs after a thinking process, which ends up with taking a decision by means of which the criminal law is broken. We consider that this decision-making process really involves the individual personality traits: convenience, the desire to easily acquire financial means, lack of professional ambition, lack of self-esteem, contempt for social and moral rules. One could easily identify the characteristics of the antisocial personality disorder in many offenders; this type of antisocial behavior started in adolescence and, unfortunately, neither family nor school examined it thoroughly.

In our opinion, one type of personality disorder that could generate violent criminal offenses is dependent personality disorder. Individuals with these disharmonic traits develop addiction to some people, circumscribing their vital universe to the respective relationships. In practice there have been cases when persons, most often partners in a sentimental relationship, committed violent crimes in the event that his/her partner wanted to break up, because they could not cope with a changing situation. Most often, in their past, these individuals exhibited elements that could result in disharmonic personality: dependence on a teacher or a parent, fear of change.

The question that can be addressed refers to the policy the state could address in order to prevent the perpetration of crimes or to facilitate work reintegration of the offenders after the execution of sentences.

Definitely, a perfect solution does not exist, but the state can address certain policies to reduce crime rate, by reconsidering some existing projects.

Thus, we believe it would be useful to reintroduce student personality tests, as this would indicate the professional areas that adolescents could pursue in order to subsequently obtain satisfaction in their professional life.

Therefore, we consider that an effective method of preventing the commission of offenses is directing the individual, depending on his/ her personality, to an end that could give him/her dignity and satisfaction, to place the individual on a scale of values that he/she would appreciate. Also, programs by means of which these individuals could become aware of the importance of their position in society might prove useful as far as the common interests of their social group are concerned, depending on age. In this respect, the young generation should be determined,

by psychological techniques, to realize that the taking up an activity that matches personal skills will not only lead to group appreciation, but also to the formation of family life in the future, with partners who have both the same interests and the same standards.

We also believe that the education system is very important, in the sense that teachers should give special attention to students' behavioral changes. Admonishing students who do not comply with school discipline does not seem to be an effective method, because it turned out that the reaction of teenagers or young people is manifested by dislike of the teacher in question, or fear of repercussions, which can lead to truancy.

An older method, which may prove effective in this case, would be talking to a friend of the student in question, who would be directed and asked to identify the cause of behavior change. Once the cause has been identified, the teacher would contact parents of the student in question, requesting them to talk to their son/daughter and adopt a proper attitude attuned to their child's personality. Simultaneously, the teacher would entrust the student in question with organizational responsibilities, which would give him/her weight in his/her school group. The method of allocating responsibilities is also useful for adolescents or young people who develop an inferiority complex.

Another extremely important aspect is the one regarding prison conditions and the programs available in prisons, as imprisonment amplifies personality deviations; thus many cases which involve repeated offences could be explained. In the prison system, there are ongoing collective schemes in which offenders enroll not only because they need activities to spend their time on so as to correct certain disharmonic traits of their personality, but mainly because they are eager to reduce the length of their prison sentence. Therefore, in our opinion, individualized programs are more effective than collective ones, as, following discussions with the offender, psychologists could assess his/her skills and recommend integration in the group which shares the same interests.

As many other countries, Romania has initiated programs to prevent the incidence of criminal behavior, programs which could rehabilitate and socially reintegrate offenders. Thus, from 9 to 10 June 2017, Bacău Penitentiary and Secondary School no. 22 Bacău organized the third edition of the International Symposium on the topic 'Education - the main means of preserving the freedom of the soul in prison', in partnership with 'Vasile Alecsandri' University of Bacău, School Inspectorate Bacău, Bacău City Hall, TART Association, together with the National School for Penitentiary Officer Training Tg. Ocna and other institutions, but also with international partners: University of Chișinău - Faculty of Psychology and Pedagogy, Asociacion Cultural Euroaccion, Murcia, Spain, Istituto Istruzione Secondaria Superiore 'Paolo Frisia', Milan, Italy, Associazione Lotta alla Marginalita, Salerno, Italy, Vilnius Youth.

During this symposium, proposals focused on exchanging experience and best practices to improve the psycho-pedagogical approach in educational institutions, prisons and other educational centers, both in order to increase opportunities for rehabilitation and social reintegration of detainees and to reduce aggressiveness and aggressive behavior in the educational environment. Its specific objectives are: exchanging experience on the implementation of innovative educational, psychological and managerial approaches, identifiable in partner countries; exchanging best practices on improving educational approaches employed in prisons, in order to improve the self-image of the inmates who undergo

training so as to rehabilitate and reintegrate them into society; promoting cooperation between educational institutions and strengthening the European dimension in education[8].

5. Penitentiaries in Europe

According to the Council of Europe, Spain's network of prisons is considered among the most civilized in the world. Spanish prisons do not only represent the place where offenders are confined, but also the place where they could be reformed and later successfully reintegrated. Prisoners may benefit from professional training in specialized areas covered by agreements with industrial companies. Moreover, those who are incarcerated can attend university courses due to agreements concluded with higher education institutions. In prisons, inmates have access to individual bedrooms, infirmary, education, sports, courtyards, barber's, library, dining hall; the food is distributed according to special diets: a general diet, a diet for patients (low-salt, for individuals who should not eat salt; diet recommended for diabetics; diet for those suffering from allergies) a vegetarian diet, and another for Muslims[9].

As far as Romania is concerned, the European Court of Human Rights (ECHR) ruled in numerous cases concerning prison conditions in our country. A noteworthy aspect was that relating to prison overcrowding.

To some extent, one possible solution to prison overcrowding is cooperation among states. Thus, competent authorities may identify a state where crime rate is low and penitentiaries are not fully occupied. If such situation existed, the Romanian state could send offenders to prisons in other countries to execute their sentence against paying an amount which would represent the sum allocated for a convict in Romania. Hypothetically, a state holding unoccupied prison beds might be interested in getting some money from the Romanian state, as they could use it for the maintenance of that space.

A system similar to the one described above was adopted by Norway and Sweden, by agreement between the two countries. In Sweden, the authorities were forced to close four prisons and a center for detention, because the prison population was steadily declining. 'Norway understood that punishing a person by imprisonment and treating him as a waste of the society, by offering him the worst possible things generally results in embittering that person. So, this Scandinavian country began not only to invest in new modern detention facilities, but also to change the treatment of detainees. Inmates, regardless of the offence they committed, are treated with respect and, most importantly, are helped to reintegrate in society. Both Norway and the countries in Northern Europe have changed their approach. And the effects are seen, because firstly number of offenders dropped and secondly recidivism rate is below 40%, in some cases even below 20%, while the recidivism rate in the rest of Europe and in Romania exceeds 65 - 70%.'[10].

In Halden, as in any other prison in Norway, prisoners cannot just stay on their own in their room watching TV – although they have everything they could possibly need in the 12 square meter-cells they

[8] Press briefing, *Education - the main means of preserving the freedom of the soul in prison* - international symposium, www.comunicate.ro.

[9] Carlos Salas, according to www. idealista.com

[10] Nicoleta Andreescu, executive manager of APADOR – CH (The Association for the Defence of Human Rights in Romania – the Helsinki Committee), according to www.mediafax.ro

occupy individually – they are forced to choose between work and education. Thus, they can enroll in various courses such as chemistry, physics or philosophy, they may choose to specialize in one of the seven occupations for which the penitentiary offers diplomas (e.g. carpenter, mechanic, metal worker etc.), or they may even learn to play a musical instrument in one of three recording studios. 'Halden Prison is the place where luxury and harmony are at home'[11].

As far as the insertion into society of the offenders who executed their punishments is concerned, we consider that their professional future should be sketched while they are still serving time in prison. Thus, special emphasis should be placed on the aspect of obtaining a job in order to be able to sustain oneself. As the Romanian society is governed by the laws of the free market, and therefore, when it comes to jobs' supply and demand, the state should implement measures to encourage entrepreneurs who hire offenders who have executed their sentence, taking into account the company's profile as well as the skills of the person in question. This is how recidivism rate for criminal offences might be reduced: if there was less reluctance towards the persons with a criminal record, ex convicts could find a job and earn an honest living after leaving prison and they would not be tempted to break the law again. 'The punishment is that he is here. Some people must be imprisoned, but the main purpose of a prison should be to integrate them into society and bring them in a much better shape than they were when they came here,' said Nils Öberg, general manager of Swedish penitentiaries, in an interview with The Guardian.

In one of his research papers, Doran Larson, professor of English and creative writing at Hamilton College in New York, explains how Scandinavian prisons rehabilitate incarcerated people and manage thereby to turn the offender into a citizen well adapted to living in the community. Larson says that executing sentences in these 'human' prisons may be more effective than those served in conventional prisons, because they distract prisoner's attention from the bad deeds he has committed and which have brought him there. 'Imagine that you live knowing every minute of every day that this place is not your home, these people are not your family, your friends, your children, but, nevertheless, they help, support you and do not regard you as a criminal, but as a man who has made a mistake and can mend his ways. Nothing here feels unfair or unreasonable. It makes you realize that you committed a crime serious enough to be locked in here, and that now you are making some effort to turn over a new leaf' adds the American professor.

6. Conclusions

Occupational Therapy helps improve the performance of the human being, who thus becomes independent again, from an occupational perspective. This therapy can be applied in hospitals, specialized centres, mental health institutions, but also in or outside prisons and within probation services. Thus, applying occupational therapy on an offender (regardless of the nature of the deprivation or restriction of freedom provided by the sentence being served) can determine, firstly, an increase in self-esteem, confidence in one's own strength. The offender's achievements by performing various activities can improve the way in which he perceives himself. Self-esteem, optimism regarding one's own possibilities of expression may have the

[11] Gabriel Mihai, November 8, 2016, according to www.evs.ro

potential to facilitate the reintegration of an offender into the society that he harmed by committing the offense.

The example of the Scandinavian penitentiary system is enlightening and it should be implemented in the prison administration in Romania. To this end, the necessary legal framework should be created, and, more importantly, the appropriate solutions for the implementation of occupational therapy should be identified. In the absence of effective procedures by which the offender could be helped to return to society, law, no matter how good it were, it might lack content and purpose.

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OBSERVANCE OF THE FUNDAMENTAL RIGHTS OF CONVICTED INDIVIDUALS DURING THE RE-EDUCATION AND SOCIAL REINSERTION PROCESS

Dorian CHIRIȚĂ*

Abstract

The recent criminal justice reform brought by the entry into force of the new Criminal Code and the new Criminal Procedure Code carries forward the changes in approach with regard to sentence execution, introduced following the adoption of Law No. 275/2006 on the execution of sentences and the measures ordered by judicial bodies during the criminal trial. Having as a point of departure the joint standard set by Recommendation 2006/2 of the Commission of Ministers, this scientific paper is aimed at presenting the evolution of the Romanian legislative system in terms of sentence execution and the manner of regulation of the new institutions, including custodial educational measures that may be ordered for juvenile offenders, but also in terms of the positive obligations incumbent upon the institutions of the State involved in sentence enforcement and sentence execution supervision.

Keywords*: International and European recommendations transposed into national criminal legislation, organising custodial sentence execution, re-socialisation for convicted individuals, rights of convicts, execution of custodial educational measures, national strategy for social reinsertion of former convicts.*

1. Introduction

The overall national legal system and the laws governing the serving of criminal sentences cannot be approached in isolation. It is paramount to correlate them to the relevant European benchmarks and values.

This is actually the very reason for which the Romanian state undertook ample reforms in the matter of criminal law and criminal trial, but also in the field of sentence execution, the latter being started by the adoption of laws on the enforcement of sentences and measures ordered by judicial bodies during the criminal trial.

This legal science paper provides a significant contribution, by dealing distinctly and specifically (in relation to the common standard set by Recommendation 2006/2 of the Committee of Ministers) with the development of each legal institution in the matter of criminal sentences, the regulation of the new institutions, but also the positive obligations incumbent on the different national entities responsible for the enforcement and supervision of sentence execution.

Thus, this comparative research furthers the existing relevant literature, by carrying out a critical review of each principle set forth in Recommendation 2006/2 of the Committee of Ministers, and by presenting their integration in the national laws, indicating the level of internalisation of these guiding principles and pointing out

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specific challenges encountered in the process of integration.

On the other hand, this paper does not only provide a comparative legal iteration, but also a historic perspective of the relevant international and national values set forth by Resolutions no. 663C (XXIV) of 31 July 1957 and no. 2076 (LXII) of 13 May 1977, Recommendation R (87) 3 of the Committee of Ministers of the Council of Europe, Recommendation R (93) 6, Recommendation R (98) 7, Recommendation R (99) 22, Recommendations R (79) 14, R (82) 16 and R (79) 14, Recommendation R (2003) 23, Recommendation R (2003) 20 and Recommendation R (75) 25, Recommendation (2006) 2 and not only, at international level, as well as Law no. 275/2006, Law no. 253/2013, Law no. 254/2013, Criminal Code, Criminal Procedure Code, at national level. This paper explicitly illustrates the qualitative leap of the national law in the matter of sentence execution, but also areas that should be improved in the future.

2. Paper content

Adopted on 11 January 2006 by the Committee of Ministers during the 952nd meeting of Ministers' Deputies, the Recommendation of the Committee of Ministers to Member States on the European Prison Rules **(2006) 2 arises from constant international and European concerns with standardising minimum rules on the treatment of convicted prisoners, thus being included in a series of international documents of maximum relevance for defining the concept of social reaction to crime**.

The First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Geneva, in 1955, adopted Standard Minimum Rules for the Treatment of Prisoners, approved by the Economic and Social Council in its Resolutions no.663C (XXIV) of 31 July 1957 and no.2076 (LXII) of 13 May 1977. Recommendation R (87) 3 of the Committee of Ministers of the Council of Europe established the "European Prison Rules". These were followed by an series of recommendations on the rights of convicted prisoners and execution of sentences: Recommendation R (93) 6 on prison and criminological aspects of the control of transmissible diseases including HIV/AIDS and related health problems in prison, Recommendation R (98) 7 concerning the ethical and organisational aspects of health care in prison, Recommendation R (99) 22 concerning prison overcrowding and prison population inflation, as well as Recommendations R (79) 14 and R (82) 16 on release/leave from prisons, Recommendation R (2003) 23 on the management of life-sentence and other long-term prisoners, Recommendation R (2003) 20 on education in prisons, and Recommendation R (75) 25 on prison labour.

Recommendation **(2006) 2 on the European Prison Rules was one of the benchmarks for harmonising Romanian laws with international regulations in the matter. In the successive development of all the regulations covering the enforcement of custodial sentences, the** 107 Rules set forth by the Recommendation were considered alongside the above-mentioned international documents, and provided the foundation for a radical reform of the national sentence execution system.

This international instrument provided a premiere in collecting the rights of convicted prisoners in a veritable code of rules, and setting forth correlative obligations for the Member States to

implement the contents of such rules[1], of which the following should be recalled:

- All persons deprived of their liberty shall be treated with respect for their human rights.
- Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody.
- Prison conditions that infringe prisoners' human rights are not justified by lack of resources.
- Life in prison shall approximate as closely as possible the positive aspects of life in the community.
- All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.
- National law shall provide mechanisms for ensuring that these minimum requirements are not breached by the overcrowding of prisons.
- Prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons.
- Prison authorities shall ensure that prisoners are able to participate in elections, referenda and in other aspects of public life, in so far as their right to do so is not restricted by national law.
- While prisoners are being moved to or from a prison, or to other places such as court or hospital, they shall be exposed to public view as little as possible and proper safeguards shall be adopted to ensure their anonymity.
- Disciplinary procedures shall be mechanisms of last resort. Whenever possible, prison authorities shall use mechanisms of restoration and mediation to resolve disputes with and among prisoners. Only conduct likely to constitute a threat to good order, safety or security may be defined as a "disciplinary offence".

Representing the start of reforms in the matter, Law no. 275/2006 on the execution of sentences and measures ordered by judicial bodies during the criminal trial, in its Title I, reiterates the principles established by the Constitution of Romania and the European Convention on Human Rights (CEDO). Articles 1 to 5 state the principles of lawful detention of a person after conviction by a competent court; respect for the dignity of human beings; prohibition of subjecting convicted prisoners to torture, inhuman or degrading treatment or other ill-treatment; and prohibition of any forms of discrimination in the serving of sentences.

As a novelty in the field of sentence enforcement regulations, Law no. 275/2006 introduces the institution of the "judge delegated for the serving of custodial sentences", judge responsible for supervising and verifying the lawfulness of prison sentences and pre-trial custodial orders regulated by the previous Criminal Procedure Code.

Intended to regulate the enforcement of penal fines, supervision orders and other obligations imposed by courts on the grounds of the 1969 Criminal Code (in the case of supervised suspension of sentence serving provided for by Article 86^1 and subsequent), Titles II and III also include provisions on the responsibilities of the judge seconded to the criminal sentences enforcement unit of the enforcement court, but also on the work of the counsellors employed by the services for victim protection and social reinsertion of offenders. The effective organisation of the serving of custodial sentences is regulated under Title IV that, in 9 chapters, lays down

[1] Ioan Chiş, Alexandru Bogdan Chiş – *Executarea sancţiunilor penale,* Universul Juridic Publishing House, 2015, p.361.

rules on sentence serving regimes; detention conditions; rights and obligations of convicted prisoners; labour carried out by convicted prisoners; educational, therapy, psychological counselling, social assistance, school and training activities in which detained convicts participate during their term in prison; rewards that may be granted and sanctions for breaches of rules; conditional release; documents prepared by the prison administration.

Pursuing correlation with the provisions of Law no. 301/2004 on the Criminal Code (a bill that was adopted on 28.06.2004 and published in the Official Journal of Romania no. 575/2004 la 29.06.2004, but that never came into force), Law no. 275/2006 envisaged reconsidering the criminal policies, such as to abandon the repressive approach to punishments in favour to an educational one, based on the need for social reinsertion and education of convicted prisoners. This was the first instance (Cap. II, Articles 18-24) when four regimes for the serving of custodial sentences were identified, defined by a progressive or regressive system, as applicable, whereby convicts may be relocated to a different regime, depending on their behaviour during detention, thus: maximum security, closed, semi-open and open prison regimes. The differences between the prison regimes are defined by the detention conditions; limitation of inmates' freedom of movement; conditions of working; and participating in educational, cultural, therapy, psychological counselling and social assistance activities. A board for individualisation of sentences set up in each prison was tasked with determining the detention regimes and the judge seconded for supervision of custodial sentences was given the authority to change the regime at any time to a more or less severe one, as applicable, depending on the conduct of the convicted prisoner. The measures ordered by the judge may be appealed against with the court of jurisdiction in the area where the prison is located.

By transposing Rules **14-18 of Recommendation (2006) 2,** Chapter III of Title IV of Law no. 275/2006 regulates the detention conditions, namely reception, accommodation, clothing and nutrition, strictly defining the cases when, in order to prevent a real and present danger, detainees may be physically restrained. Thus, in compliance with the above-mentioned international standards and rules, Article 37 positively prohibits chaining of prison inmates, providing that this measure may only be taken in exceptional cases, when no other means is available for removing the risk, by prior approval of the prison director. Furthermore, the prison management is required to communicate immediately to the delegate judge any use and cessation of use of any means of constraint, detailing the facts that led to such use.

A novelty is Article 31 (4) of the Law prohibiting the transfer of underage individuals serving educational or custodial sentences to any prisons and, in the latter case, to adult prisons, for longer than 5 days, this provision being compliant with Rule **no. 11 of Rec. 2006 (2)** and set forth both for the purpose of preventing juveniles being placed in environments that may impair their social rehabilitation process and for ensuring continuity in the education of juveniles who participate in schooling or vocational qualification programmes.

Article 34 also introduces an element of novelty, by regulating the dress code of convicted prisoners [in compliance with Rule **20 1-3 of Rec. 2006 (2)** and the UN Prison Rules], thus eliminating the mandatory wearing of prison clothes and envisaging the provision of detention conditions approximating as close as possible the life of free individuals and transposing into the Law Principle no. 5

stated in the Preamble of Rec. (2006) 2. Thus, the Law provides that, during their imprisonment, the convicts are to wear civil clothes, irrespective of the detention regime and, in case they do not have personal clothes, such will be provided free of charge by the prison administration.

Moreover, by transposing Rules 24 and 29 of Rec. (2006) 2, the provisions of Chapter IV of Title IV recognise the rights of persons serving prison sentences to express their opinions and religious beliefs, to information, correspondence, telephone calls, to receive visits and goods, the right to health care, diplomatic assistance for foreign nationals, and the right to marriage. Articles 38-39 instate a system of guarantees for observance of these rights, by providing the right to complain to the delegated judge about any breach of rights and to appeal the latter's decisions with the court of jurisdiction of the place of detention. The same Articles also impose on the prison administrators the positive obligations of taking the required measures to ensure that these rights are exercised in full. The procedure for petitioning the delegated judge (Article 38 (3-4) involves the mandatory hearing of the convicted prisoner, but also the possibility to hear any person that may provide data and information required for determining the truth.

Article 46 (5) provides that, in case convicted prisoners lack the necessary money, the costs of petitioning national courts, international organisations whose jurisdiction is recognised in Romania, or legal advice and non-governmental organisations active in the field of human rights is to be covered by the prison administration. For the purpose of avoiding any interference of the prison administrators with the right to correspondence, Article 45 (4) lays down explicit and limitative situations when mail may be opened or withheld, with rules that are similar with those applicable for free individuals, namely, only when reasonable cause exists to suspect that an offence was committed and only based on a written and reasoned order issued by the delegated judge, the convict being notified in writing as soon as such measure was ordered.

Given that, according to the 1969 Criminal Code, labour is a main component of offenders' social rehabilitation, Chapter V of Title IV establishes a new regime for the work of convicted prisoners, such as to harmonise the legal provisions with Rules 26 1-15 of Recommendation (2006) 2. The general provisions on work carried out in detention facilities (Article 57) instate the principle that such work is remunerated, except for housekeeping work required in the prison and work carried out in case of calamities. The subsequent articles detail the working conditions, exclusively based on the agreement of the inmate, the duration of the working day, working regime, payment, distribution of income due to inmates, health and safety at work rules and forms of social assistance available in case of work capacity loss caused by work accident or professional illness occurring during imprisonment (Reg. 26.14). Another novelty ensuing from the above-mentioned Recommendation is the assimilation of educational, qualification, training or retraining activities with effectively carrying out work. Article 57 (10) provides that such work is to be remunerated. The regulations governing vocational training provide that such programmes are to be delivered based on curricula developed jointly by the administration of each prison together with the National Employment Agency or its territorial branches, with the programmes being adapted to the inmates' preferences and aptitudes. In order to facilitate social reinsertion of convicts, Article 66 (1) provides that the certificate of completion of a training programme should not mention

that the training programme was completed whilst in detention.

According to Rule 26 (8) of Rec. (2006) 2 – providing that though any financial profit generated for the penitentiary can be valuable for raising standards and improving the quality of training, yet the interests of the prisoners should not be subordinated to that purpose – Article 15 (6) of the Law provides that the income obtained by detained convicts from their work is to be used for improving the conditions of detention.

Regarding the distribution of earnings, the percentage due to the prisoner was increased to 40% compared to the previous regulation (Law no. 23/1969), of which 75% can be used by the prisoner during his/her imprisonment and 25% is deposited in a savings account on his/her name and is to be handed over to them on release, including any interest due. Article 60 (2) transposes Rule 105.5 and provides that, in the case of a sentenced prisoner who was also ordered to pay some form of reparations that were not covered before his/her reception in the prison, 50% of the 40% share of earnings due to him/her for the work done during detention will be used for providing reparations to the damaged party.

In the light of the principle of lawfulness of sentence execution, Chapter VII of Title IV provides for a new system of rewarding convicted prisoners that demonstrate good behaviour and diligence in work or educational activities. Such rewards include assignment of responsibilities in educational programmes, lifting of previous sanctions, extra rights to visits and packages, awards or leave from prison for maximum 5 to 10 days, as applicable. At the same time, in compliance with Rules 56-60 of Rec. 2006/2, the punishable disciplinary offences were explicitly listed, with the specific determination that any such punishment cannot limit the prisoners' right to defence, petitioning, correspondence, health care, food, light and daily outside walk. Also, collective and corporal punishments or the use of instruments of restraint or of any from of degrading or humiliating treatments are explicitly prohibited as punishments for disciplinary offences. Article 74 provides guarantees against arbitrary punishments: the convicted prisoner is entitled to challenge the punishment decided by the disciplinary board by petitioning the delegated judge. Such petition procedure must include the hearing of the convicted prisoner and the decision of the judge may be appealed against with the court of justice of jurisdiction in the area of the prison.

Title V of Law 275/2006 transposes the Rules laid down in Part VII of Rec. 2006/2 (on untried prisoners) and includes rules on the enforcement of custodial remand orders differentiated by trial stages: in preventive detention and arrest centres subordinated to the Ministry of Administration and Internal Affairs, in the case of custodial orders issued during the criminal investigation, or in preventive arrest centres or in special sections of prisons – both subordinated to the National Prison Administration. These articles also state that the above-mentioned provisions on detention conditions, rights and obligations of convicted prisoners, work, educational and cultural activities, therapy, psychological counselling, social assistance, rewards (except for prison leave and disciplinary punishments) also apply to untried prisoners.

The coming into force on February 1st 2014 of Law no. 286/2009 on the Criminal Code and of Law no. 135/2010 on the Criminal Procedure Code caused material changes in the matter of prison sentence enforcement and required the improvement of the legal framework established by Law no. 275/2006 which, being focused on

execution of prison sentences, did not correspond to the circumstances created the introduction of the new criminal law or criminal trial institutions.

Law no. 254/2013 regarding the execution of sentences and custodial measures ordered by the court during the criminal trial appended the substantive and procedural law rules comprised in the two new Codes, detailing the manner of implementing such for achieving the judicial purposes of social rehabilitation of convicted adults or underage individuals, preventing reoffending, ensuring good conduct of the criminal trial by preventing the suspect from absconding from the criminal investigation or trial.

Similarly to Law no. 275/2006, Title I reiterates the principles of lawful imprisonment – respect for human dignity, prohibition of torture, inhumane or degrading treatments or other ill-treatments, prohibition of discrimination in the serving of prison sentences – enshrined both in the Constitution and in the New Criminal Procedure Code, with the new regulation (Article 7) additionally stating – in compliance with ECoHR and Rule 2 of Rec. 2006/2 – that inmates shall exercise all the civil and political rights except those taken away from them in compliance with the law by the decision sentencing them, as well as those rights that cannot be exercised or are limited inherently by the status of being imprisoned or for reasons related to the safety of the prison facilities.

The institution of the judge delegated for the execution of custodial sentences is now redesigned and redefined under the title "judge for supervision of deprival of liberty" in Title II, Articles 8 - 9 of Law no. 254/2013, such judge being assigned to supervising and verifying the lawfulness in the execution of sentences. By the listing of all such judge's responsibilities, a number of practical difficulties were removed that existed in the implementation of the previous rules on sentence execution (mainly separation of administrative duties from administrative-jurisdictional ones). The law-maker's decision to strengthen the institution of the supervision judge was based on the need to effectively control the execution of prison sentences, with the new regulations introduced in Article 9 on the designation of stand-ins, seconded court clerks and the imperative obligation imposed on the detention facility management to provide the amenities required for these activities, as well as any necessary information or documents, establishing such judges' functional independence. The resolutions of the delegated judge – now enforceable – and the written orders issued in compliance with the prison law under the procedure applicable in cases where inmates refuse food are mandatory for the prison director or the head of the pre-trial detention and arrest centre.

In addition, the above-mentioned provisions state that, in carrying out his/her judicial duties, the judge for supervision of deprival of liberty may hear any person, request information or documents from the detention facility management, carry out on site checks, and has access to the personal file of the prisoner, records and any other documents required for discharging his/her duties.

A separate chapter is dedicated to regulations on safety in prisons. Articles 15-21 impose both safety measures and provide for the assessment of individuals (in compliance with Rule 52 of Rec. 2006/2) on admission to the detention facility, in order to determine the risk they may pose to the community, in case of breakout, and to the safety of the other inmates, prison facility staff, visitors or to themselves. In the light of the same recommendations, clear, imperative and explicit rules are laid down on the use of restraint instruments and

antiterrorist and specialised control applicable to all persons and luggage they carry, but also to any vehicles that gain access to the prison. The prisoners' body search is explicitly regulated, with clear distinction between body search, external body examination and internal body examination, with a special focus on the intrusive character of this measure, Article 19 (5) providing that examination can only be carried out by medical staff, as also provided by Rule 54.6 of Rec. 2006/2.

In compliance with Rule 69 1-3 of Rec. 2006/2, Article 21 of the Law provides that only the prison guarding staff and that carrying out escort missions outside the prison facilities, in the cases and under the terms provided by law, are permitted to carry fire arms. The carrying and use of fire arms or other non-lethal weapons in the detention facilities is prohibited, except in critical incidents explicitly defined in the Rules of Implementation approved by the Minister of Justice.

Article 23 provides for the possibility to protect inmates who intend to injure themselves or commit suicide, injure another person, destroy goods or cause serious disorder, in that the possibility is provided for such prisoners to be accommodated individually, in a specially designated and fitted room. During the accommodation in such a protection room, the prisoner at risk of harming him/herself or committing suicide is to be monitored by medical staff, receive psychological counselling and be kept under permanent video surveillance, but ensuring that human dignity is respected at all times. When using restraint instruments or weapons and when temporarily accommodating the prisoner in the protection room and keeping him/her under video surveillance, it is mandatory that the judge for supervision of deprival of liberty be notified in writing accordingly.

Intended to regulate the prison sentence serving regimes, Chapter III of Law no. 254 reiterates the four prison regimes provided for by Law no.275/2006, namely maximum security, closed, semi-open and open, the novelty being the possibility to instate a certain regime on a provisional basis (Article 33) for a short period of time, after the completion of quarantine, and only if the prison regime was not determined during the quarantine. The effective sentence serving regime is decided by a board, based on criteria explicitly stipulated in the Rules for Implementation, namely: the duration of the sentence; risk levels of the convict; age and health status; good or bad conduct of the convict, including in previous detention terms; identified needs and abilities of the convict required for his/her inclusion in educational programmes; convict's needs for psychological and social assistance; and his/her willingness to work and participate in educational, cultural, therapeutic, psychological counselling and social assistance, moral-religious, schooling and vocational training activities and programmes.

In terms of dealing with any petition filed by a convicted prisoner or the prison management against a resolution of the supervision judge, a new procedure is established under the jurisdiction of the local court where the prison is located. The convicted prisoner only appears in court if and when summoned by the judges (in such case, he/she is also heard) and legal advice is not mandatory. When a prosecutor and a representative of the prison administration participate in the court session, they make claims and submissions.

Also, as an exceptional measure, it is provided that prisoners may be included in an imprisonment regime more or less severe than that associated with the duration of the prison term, taking into account the nature of

the crime and the manner it was committed, the convicted prisoner's personality and behaviour until de determination of the prison regime.

Another novelty is the provision for a social rehabilitation programme adapted to each prisoner, accompanying the imprisonment regime and being a manner of individualising the regime of prison sentences (Articles 41 and 42). This means that each individual prisoner should participate in educational, cultural, therapy, counselling and social assistance, schooling, vocational training and work activities depending on his/her prison term, conduct, personality, risk, age, health, identified needs and capacity for social reinsertion.

Chapter IV of Law no. 254/2013 represents a real progress in approximating Rules nos. **14-18 of Rec. (2006) 2,** by detailing the basic requirements applicable for admission to the prison; quarantine and observation period; rules for transportation of prisoners; imprisonment of convicted persons from special categories; release, transfer, accommodation, clothing and food; refusal of food; and documents to be drawn up by the prison administrators in the case of deceased prisoners. According to the above-mentioned rules, Article 43 contains a new provision on the minimal measures required on admission to the prison, namely: detailed body search; making a list of personal belongings; general clinical examination with findings entered in the medical record; fingerprinting that are kept in hard copy on the personal record of the prisoner and stored in electronic format in the national fingerprint match database; photographing for records; and interviewing to ascertain the immediate needs of the convicted person. The law text pays special attention to persons who do not speak or understand Romanian or to persons with disabilities.

Regarding the transfer of convicted prisoners, Article 45 (8) reiterates the previous provision that prohibited the transfer to prisons for more than 10 days of juveniles serving a sentence of internment in an educational or detention centre.

Another novelty are the regulations on the nutrition of convicted prisoners (Article 50), requiring the administration of the detention facility to provide adequate conditions for the cooking, distribution and serving of food, in compliance with the food hygiene regulations, depending on the age, health status, kind of work done, and in observance of the religious beliefs declared by the prisoner in a sworn statement.

The rights and obligations of convicted prisoners, stipulated in Chapter V, to a large extent take over the provisions of the previous Law no. 275/2006, but clarify the matter of legal advice, which should be provided on any legal issue, the room and facilities necessary to consult a lawyer being provided, in observance of confidentiality but under visual monitoring. Furthermore, the provisions on medical care and examination carry forward most of the previous regulations, the new aspects covering convicted prisoners with serious mental disorders, who are to be placed in special psychiatry wards [Article 73 (7)]. These provisions were introduced based on Rules 47 and 12 of Rec. 2006/2, but also following the visit reports of the European Committee for Prevention of Torture, which found that a significant number of prisoners show signs of mental conditions.

The matter of work by convicted prisoners – detailed in Chapter VI – did not undergo substantial changes compared to the previous Act. The new provisions include the possibility for prisoners to carry out voluntary or community work, thus making better use of the prisoners' interest for working, taking into account that work is one of the most important social rehabilitation factors. The distribution of the money earned by convicted prisoners for

their work is the same as in the previous regulation, with only the share that can be used by the prisoner during imprisonments being changed from 75% to 90%. Also, based on the transposition of Rule no. 105.5, Article 60 (2) of Law no. 275/2006 was maintained, which provides that, when the convicted prisoner was also ordered to provide reparations that were not covered before his/her reception in the prison, 50% of the 40% share of earnings due to him/her for the work done during detention is used for providing reparations to the damaged party.

Educational, psychological and social assistance activities, school education, higher education and vocational training of convicted prisoners are all detailed in chapter VII that includes specific rules on the conditions for the provision of such activities, but also distinct rules on the status of disabled convicts. Rules are set forth for the carrying out of a multidisciplinary educational, psychological and social assessment of each convicted prisoner at the time of their admittance into the prison. This assessment informs the development of a personal educational and therapy evaluation and intervention plan, including the activities recommended in relation to the prison regime and sentence serving route.

Chapter VIII presents a new approach to parole (conditional release), emphasizing its optional character. Besides the requirements set forth in the previous regulation, when considering a parole, the board takes into account the prison regime to which the convicted prisoner was allocated and his/her reparation of any civil liabilities ordered in the sentence, except where the prisoner demonstrates that he/she had absolutely no means of meeting such obligations.

The enforcement of educational prison sentences applied to juveniles is regulated in Title V and is required by the reform of the system of criminal punishments introduced by the New Criminal and Criminal Procedure Codes.

The execution of prison sentences is to be carried out in special juvenile rehabilitation facilities or in educational and detention centres set up by the reorganisation of minors and youth prisons and re-education centres.

In the case of underage interned in detention centres, two types of sentence serving regimes are provided: open and closed. The decision is the responsibility of a board in which a probation counsellor, and a representative of the General Department for Social Assistance and Child Protection of the County Council or the Local Council, as applicable, may participate. After the convicted juvenile has served a quarter of the sentence, the board is tasked with reviewing the conduct of the candidate and his/her efforts towards social reintegration.

With a view to the social rehabilitation of the underage, the law provides that, 3 months before the end of the term, the persons serving educational sentences under open regime may be accommodated in specially designated facilities, where they will carry out self-managing tasks under the direct supervision of designated personnel form the centre.

In the case of internment in an educational centre, unlike in a detention facility, the execution regime is the same for all inmates, and the individualisation of the regime – in terms of deciding educational, psychological and social assistance provided to each convicted person – is the responsibility of a purposely established Educational Board. The board membership includes the centre director, centre deputy director for education and psycho-social support, the case educator, primary teacher or form teacher, a psychologist, a social worker, and the head of the supervision, records and allocation of rights for interned

persons. Also, a number of guest members may be invited: a probation officer and a representative of the General Department for Social Assistance and Child Protection of the County Council or the Local Council. A board with a similar membership is set up in each detention centre and is responsible for determining, individualising and changing the internment regime.

Irrespective of the type or custodial educational sentence being served, the regime applicable to convicted minors is aimed at providing them with assistance, protection, education and development of their vocational skills, with a view to their social rehabilitation, so that the provisions governing their rights and obligations during internment (Articles 161-170) focus on social reinsertion, psycho-social support, school education and vocational training activities and programmes. Moreover, the regulations on disciplinary offences take into account the specific obligations and interdictions applicable to convicted juveniles, namely to attend school up to completing compulsory education and to participate in vocational training programmes and in other activities provided by the centre, for the benefit of social reintegration. To an equal extent, the adopted reward system includes specific regulations for minors, with a new rule providing for: 24 hours leave of absence in the town where the centre is located; weekend leave to the town of domicile; family leave during school holydays for up to 15 days, but not more than 45 days per year; participation in camps or field trips organised by the centre alone or in partnership with other organisations.

The development of the regulations on the enforcement of custodial educational sentences was based on a number of international instruments[2], namely United Nations Convention on the Rights of the Child, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, United Nations Standard Minimum Rules for Non-custodial Measures (Tokio Rules), United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Recommendation 87 (20) of the Committee of Ministers on social reactions to juvenile delinquency.

Starting from the international and European regulations in the matter of human rights and, in particular, the rights of children – to which Romania is a party – the criminal justice reform does not end with the adoption of specific provisions on the serving of sentences.

Bearing in mind that "the current regulations do not make full and systematic reference to cooperation and complementarily aspects in the provision of support to persons serving custodial sentences by the prison staff, probation officers or representatives of other public agencies, associations and organisations involved in the provision of post-imprisonment support", the National Strategy for the social reintegration of persons deprived of liberty 2015-2019[3] identified the need for the criminal justice policies to develop a framework for the cooperation and synergy between public agencies, associations and organisations involved in then provision of post-imprisonment assistance, alongside with defining clear responsibilities of the social stakeholders.

The three objectives laid down in the National Implementation Plan, as a tool for the implementation of the Strategy cover:

- institutional capacity and institutional development in the field of social reintegration of inmates and persons who served custodial sentences, by the training of

[2] Recitals of Draft Law no. 254/2013.

[3] G.D. no. 389/2015, published in the Official Journal no. 389 of 27 May 2015.

the staff involved, development of the institutional infrastructure, improving the regulatory framework and promoting amendments to the laws;

– developing educational programs, psychological support and social assistance in detention, by providing education, psychological and social support to persons deprived of liberty, and raising public awareness on the issue of social reintegration of the inmates;

– facilitating post-prison assistance at systemic level, by ensuring continuity of intervention for people who executed custodial sentences, developing partnerships with public institutions, associations and non-governmental organisations and local communities, in order to facilitate the social reintegration of persons who executed custodial sentences; developing inter-institutional procedures concerning the responsibilities of the stakeholders in the social reintegration of persons who served custodial sentences; aking over cases and providing post-prison support.

3. Conclusions

The numerous recommendations issued by the Council of Europe in the matter of execution of sentences underline the need for the Member States to take legal and administrative measures aimed at maintaining the necessary balance between the need to protect public order, on the one hand, and the crucial requirement to consider the social reinsertion needs of offenders, on then other hand.

In the light of these recommendations, it is my opinion that the social reintegration of persons deprived of liberty is a complex process that starts at the time the conviction sentence becomes final and continues, from the admission of the convict at the detention facility until the term in prison is served or deemed to have been served, but also subsequently, through the various types of support provided by the society to the former convict.

Thus, within these time milestones, the role of the prison system is not only to provide the guarding, escorting, supervision and enforcement of detention regime, but also to prepare the prisoners for post-imprisonment life, the prison administrators being required to permanently evaluate the educational, psychological and social support needs of the inmates, to individualise and plan their sentence serving route, by organising and delivering school education, vocational training, educational, psychological and social assistance programmes so that, at the end of the prison term, to accomplish the educational function of the prison term or custodial educational measure.

Designed as a tool for improving the European Prison Rules of 1987, Recommendation (2006) 2 is a true code of requirements regulating all the aspects related to the management of detention facilities, with a special focus on observance of fundamental rights and all other rights that have not been explicitly taken away by the sentencing decision or that are obviously incompatible with the status of imprisonment. The rules included in the above-mentioned Recommendation are not intended to lay down an exemplary system of operations, but rather codify a minimal standard the provision of which should be of real concern in any modern and progressive judicial systems.

The approximation into the national laws (by the successive adoption of Laws nos. 275/2006 and 254/2013) of the system of rules established by Recommendation (2006) 2 does not mark the end of the prison system reform. Improving the prison system efficiency requires the continued promotion of criminal justice policies aimed at improving the legal-regulatory framework,

the development of cooperation and synergy between public agencies, associations and non-governmental organisations involved in the provision of post-imprisonment support, at adapting and improving the prison staff training system and at intensifying international cooperation with the prison systems of the other Member States.

This paper draws attention to the need to continue the process of correlating the national to European laws, to maintain the efforts in this direction, for the purpose of raising the quality of national laws on the serving of prison sentences, with the ultimate outcome of improving the protection of convicted prisoners' rights.

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