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EFFECT OF LABOUR LAW REGULATION ON THE EMPLOYMENT RELATIONS BASED ON THE CONNECTION BETWEEN SOCIAL RIGHTS AND LABOUR MARKET

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Abstract

In the world of employment, we can find several aspects that have effect on the labour market. Labour market cannot be independent from the legal regulation of employment; moreover – according to the tendencies – labour market processes basically define the role of labour law. A fundamental difference can be observed between the approach of Anglo-Saxon countries and researchers and the viewpoint of the continental law systems. In this paper the emphasized question is analysed through these two different approaches according to the following premise: the Anglo-Saxon legal thinking defining the current development of labour law bears significant differences related to the labour law regulation – which means the direct regulation of labour market – and to the legal guarantees behind employment as well. From the viewpoint of the labour market two main questions are examined in this paper: on the one hand, the expected and necessary level and method of public intervention in connection with social rights, and on the other hand the deepness of the intervention of labour law into the social relations driven by the market.

Keywords: *reflexive labour law, human capital, flexicurity, ability-theory, soft law tools.*

In our study, we undertook to collect, systematize and collide the regulatory issues that essentially determine the labour law science today. In our view, individual authors and viewpoints can react separately to the different parts of social and economic processes, however, they are only partial solutions without revealing their relations. The criticism is based on the scorching results. In our study, we tried to solve the collisions by interpreting economic, labour and social law views jointly. The dual view of co-authorship has helped us to revise our own ideas again and again, or to draw conclusions side by side or even against each other. The aim of our work is to widen labour law researches which are full of debates and dilemmas by combining the ones processing side by side, and at the same time to enrich our own research work with new methods and ideas. These new theories separately try to break through the rigid

[*] This paper was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences. Associate professor, PhD. dr. habil., at the Faculty of Law, vice rector for educational development and quality insurance, University of Miskolc (e-mail: civnora@uni-miskolc.hu).

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framework of the legal regulation and find solutions to the problems outlined. Our opinion is that although they have different starting bases, perspectives and suggest different solutions, they can be combined based on their common goal. The curve of our analysis is provided by these connection points. Accordingly, we divided our study into sections by grouping the results of the individual areas and maintained the interoperability between the theories by keeping the references between the points. We are planning to justify our hypothesis by providing our conclusions or to detect the lack of a reasonable relationship.

1. Changes in labour law regulations and labour market needs

Labour law does not only appear in the context of employment relations through legislation since the parties' agreement in this area is of decisive importance. Legal regulations beyond *hard law* - or we can call them *soft law* - have many forms in labour law that are widespread in Anglo-Saxon legal thinking. In general, both in the case of Anglo-Saxon and continental jurisdictions, we can start from self-regulation mechanisms within the work organization, organizational patterns, or from the organizational culture itself. In addition, stimuli arriving from outside the organization and the employment management tools required by competition can also be grouped here. In defining the content of the employment relationships, the principle of contractual freedom gains an increasing role, which strengthens the enforcement of *the partnership principle* in labour law. This also means that in the employment relationship based on Fordist traditions, the extensive right of instruction, control and supervision, which characterizes the employer, softens. This softening can be observed in certain atypical working relations, such as teleworking and outworking.

The enforcement of partner relationships and the need for dispositivity emerged in a labour market environment in which people change work places more frequently, work relationships for a definite period of time, seasonal work and labour hire are more frequent. Many people have become self-employed, the working time is changing flexibly, the nature of the work has become more diverse and flexible. The economic environment has also changed since we live in a knowledge-based society, and the economy must keep up with technological innovations and changing consumer demands. Employers must respond promptly to changes in tastes and create a work organization that can adapt effectively and quickly to the changing needs. Thus, the question may rightly arise: *is it still the responsibility of the law to assure workplace safety, or has time gone beyond that* and it rather has to protect income and employability?[1] The response of labour law regulation was the application of

[1] About labour law changes see for example: Deakin, S.–Morris, G. S.: *Labour Law*, 6th Edition. Hart Publishing. Oxford and Portland, Oregon, 2012, 30–37., 131–190.; Deakin, S.–Wilkinson, F.: *The Law of the Labour Market. Industrialisation. Employment and Legal Evolution.* Oxford University Press, Oxford, 2005; Blainpain, R.–Hendricks, F.: *European Labour Law*. Kluwer Law International, The Netherlands, 2010; Veneziani, B.: The Employment Relationship. In: Hepple, B.–Veneziani, B. (eds.): *The Transformation of Labour Law in Europe. A Comparative Study of 15 Countries 1945-2004.* Hart Publishing, Oxford and Portland, Oregon, 2009; Deakin, S.: The Contribution of Labour Law to Economic and Human Development. In: Davidov, G.–Langille, B. (szerk.): *The Idea of Labour law.* Oxford University Press, Oxford, 2011, 156–178; Freedland, M.–Countouris, N.: The Legal Characterization of Personal Work Relations and the Idea of Labour Law. In: Davidov, G.–Langille, B. (eds.): *The Idea of Labour law*. Oxford University Press, Oxford, 2011, 190–208.

the concept of 'flexicurity'[2]. *Flexicurity* is a social and labour market programme, one element of which is the nature of labour law regulation. Auer and Gazier differentiate four programmes: flexibility, flexicurity, transition labour market and ability programmes[3]. In the flexicurity programme, flexible measures should be followed by security measures, which are tools from beyond the actual labour law regulation. Thus, a more relaxed employment protection system should be supported by an active labour market policy, a strong job search support system and a sustainable social care system[4].

In addition to flexibility, an important topic of this paper is the analysis of the regulatory way and level of security. All this means the intensity of legal guarantees in a legal relationship which is still motivating for a flexible employer to keep the legal relationship under labour law.

The question of flexicurity, however, involves *dealing with the problems of vulnerable groups*, which basically means two challenges for labour law: creating, if necessary, rules protecting employment and enforcing them. To justify this hypothesis, the present study intends to designate the boundaries by the joint interpretation of the theory emphasising guarantees or that of the priority of the market.

Social exclusion relates to many groups who are unable to take advantage of the labour market and therefore, in their case, the legislator aims to increase the employment rate by means of macroeconomic policy.

In the case of the vulnerable group, such as pregnant women, child-raising parents, disabled people, women and young workers, the enjoyment of economic and social rights requires a strong protection from labour law while market conditions demand less stringent legislation from the legislator. It seems that the provision of social rights by the state is outlined in conflicting interests from the employer in the labour market regulation. This can be traced back to the traditional roles of the employer and employee and their positions. Moreover, we must not ignore that the position of the classical employee is significantly different from that of self-employed or atypical workers[5].

[2] About the concept of *flexicurity* see for example: Wilthagen, T.: Flexicurity: A New Paradigm for *Labour Market Policy Reform?* Berlin: WZB Discussion Paper FS I, 1998, 98–202; Ashiagbor, D.: 'Flexibility' and 'adaptability' in the EU employment strategy. In: Collins, H.–Davies, P.–Rideout, R. (eds.): *Legal Regulation of the Employment Relation*, London/Dordrecht: Kluwer Law International, 2000, 373–401; Wilthagen, T.–Tros, F.: The concept of 'flexicurity': a new approach to regulating employment and labour markets, *European Review of Labour and Research*, 2004/2, 166–186.

[3] Auer, P.– Gazier B.: Social and labour market reforms: four agendas. In: Rogowski, R.–Salais, R.–Whiteside, N. (eds.): Transforming European Employment Policy. Labour Market Transitions and the Promotion of Capability. Edward Elgar, Cheltenham, UK, Northampton, Ma, USA, 2011, 33–37. These reforms, with the exception of a capability-based reform, contain programs affecting labour market policies at micro- and macro level. They are aimed at the management of unemployment, low wages, inequality and low employment rates.

[4] See more about this: Auer, P.–Gazier, B.: i. m., 33–37; Guideline 21 of the Integrated Guidelines for growth and jobs for the period 2005-2008: „Promote flexibility, combined with employment security and reduce labour market segmentation, having due regard to the role of social partners." https://2007-2013.espa.gr/elibrary/integrated_guidelines_Growth_Jobs_en.pdf (2017.02.15.); Similarly: Guideline 7 of the Europe 2020 Integrated Guidelines for economic and employment policies of the Member States and of the Union. http://ec.europa.eu/eu2020/pdf/Brochure%20Integrated%20Guidelines.pdf (2017.02.15.).

[5] The dilemma is based on the classical *worker-employee* problem, arising from the conceptual differences and uncertainties that appear in the national and international literature, which therefore results in uncertainty regarding the role of labour law. See for example: Countouris, N.: *The Changing Law of the Employment Relationship*. Ashgate Publishing, Aldershot, 2007; Freedland, M.: *The personal employment contract*. Oxford University Press,

In today's labour market regulation, *new regulatory techniques* are needed, too, as opposed to the previous hierarchy- and instruction-based system. This all follows directly from the principle of partnership. Such techniques are for example, tax incentives for employees and self-employed workers, the operation of employment pension schemes, shareholding of workers, temporary subsidies to business organizations if they employ long-term jobseekers.

The new information and consultation mechanisms that favour partner relations between the employer and the employees' community are also needed because of the changed labour market needs.

Human rights struggles, among others the enforcement of social rights and globalization, which gained strength from the second half of the 20th century, have a major impact on the directions of labour law regulations. The outcomes of human rights emerge as a bastion from the whole labour law regulation, for example, equality, the free choice of work and occupation, and the right to social security[6].

2. Reflexivity of labour law regulation and significance of skills

The question arises whether throughout these changes is it really only labour law regulations which interfere in the social and economic processes? Isn't it rather that labour law regulation, in a continuous *interaction* with the economic and social environment surrounding it, follows the labour market processes, responding to these processes subsequently? It cannot be neglected that the regulations of branches and fields of law are mostly shaped by problems of legal relevance created by life, of course, depending on (legal) political decisions. Labour law regulation, besides transforming its own rules in a self-reflexive way, responds to the social, economic, and thus labour market processes, too.

The issue we are discussing therefore concerns the reflexivity of labour law regulation. The term *reflexive labour law* was first used by *Rogowski* and *Wilthagen* in 1994. According to the theory, the legal system has to be considered as an autonomous system, similarly to the political and economic systems. The common feature of the three subsystems is that they all have to protect their own institutions. By separating law, politics and the market, a decentralized social structure is created, in which the power is divided among the autonomous, but interrelated institutions. The autonomy of the legal system is a precondition for the rule of law and the objective administration of justice. It would not be appropriate to separate the legal system from its external environment. If the legal system were to lose its independence, it would simply become an expression of political power. At the same

Oxford, 2003; Gyulavári T.: *A szürke állomány. Gazdaságilag függő munkavégzés a munkaviszony és az önfoglalkoztatás határán. (The Gray Stock. Economically Dependent Work on the Boundaries of Employment and Self-employment.)* Pázmány Press, Budapest, 2014; Kiss Gy.: A munkavállalóhoz hasonló jogállású személy problematikája az Európai Unióban és e jogállás szabályozásának hiánya a Munka Törvénykönyvében. *Jogtudományi Közlöny*, (The Problem of a Person with a Status Similar to That of a Worker in the European Union and the Lack of Regulation of this Status in the Labour Code. *Jurisprudence Gazette*. 2013/1, 1–14., Bankó Z.: *Az atipikus munkajogviszonyok.* (*Atypical labour relations.*) Dialóg Campus Kiadó, Budapest–Pécs, 2010.

[6] About the challenges of labour law, see: Collins, H.–Ewing, K. D.–McColgan, A.: *Labour Law*. Cambridge University Press, Cambridge, 2012, 38–44. See also: Rogowski, R.–Salais, R.–Whiteside, N. (eds.): *Transforming European Employment Policy – Labour Market Transitions and the Promotion of Capability*. Edward Elgar Publishing, Cheltenham, 2011, 229–242; Owens, R.: The Future of the Law of Work. A Review Essay of Labour Law in an Era of Globalization: Transformative Practices and Possibilities. *Adelaide Law Review*, 2002/23, 345–373.

time, if we were to separate the law from other social subsystems, we would impede social impacts, which would thus less guarantee its effectiveness. This is particularly true in the case of labour law, which is assessed through its social and economic effects. Therefore, we can regard it as self-reflexive and self-sustaining. *It is closed regarding its organisation, though open in a cognitive way.* Organizational closeness refers to the fact that law creates law, namely, it is able to reproduce itself on the basis of the feedback of its inner operation. Cognitive openness means that the system is building from external signals. Therefore, law, politics and the economy interact with each other. According to this reflexive legal theory, there is a certain degree of interaction among the systems, however, this does not mean that law, politics or the economy are completely open to the impacts of other systems[7].

Consequently, we can state that law uses indirect control techniques to influence, which is its self-regulation and self-reflexion. Legal regulations give us little information about how the actors of another system receive them, therefore it is necessary to understand the legal context of social sciences besides analysing internal processes. *After its example, the European labour law and the labour law of the Member States can be interpreted in a reflexive way, too.* All this can also be traced in the development of the European social policy and social rights closely linked to the European labour law. Since in the European Union, the goals of employment and social policy complement and fulfil each other. The example of a reflexive labour law regulation is the Open Method of Coordination (OMC), launched by the European Council in Lisbon in March 2000[8]. Subsequently, the OMC was incorporated into the Employment Strategy, and it

[7] About reflexive labour legislation, see: Wilthagen, T.–Rogowski, R. (eds.): *Reflexive Labour Law. Studies in Industrial Relations and Employment Regulation*. Kluwer, Deventer, Boston, 1994; Wilthagen, T.–Rogowski, R.: Reflexive Labour Law. An introduction. In: Wilthagen, T.–Rogowski, R. (eds.): *Reflexive Labour Law. Studies in Industrial Relations and Employment Regulation*. Kluwer, Deventer, Boston, 1994; ROGOWSKI, R.: Industrial Relations, Labour Conflict Resolution and Reflexive Labour Law. In: Wilthagen, T.–Rogowski, R. (eds.): *Reflexive Labour Law. Studies in Industrial Relations and Employment Regulation*. Kluwer, Deventer, Boston, 1994; WILTHAGEN, T.: Reflexive Rationality in the Regulation of Occupational Health and Safety. In: Wilthagen, T.–Rogowski, R. (eds.): *Reflexive Labour Law. Studies in Industrial Relations and Employment Regulation.* Kluwer, Deventer, Boston, 1994; ARTHURS, H.: Corporate Self-Regulation: Political Economy, State Regulation and Reflexive Labour Law. In: Bercusson, B.–Estlund, C. (eds.): *Regulating Labour Law in the Wake of Globalisation. New Challenges, New Institutions.* Hart Publishing, Oxford and Portland, Oregon, 2007, 19–36. Barnard, C.–Deakin, S.–Gillian, S. M.: *The Future of Labour Law*. Liber Amicorum Hepple, B. QC, Hart Publishing, Oxford and Portland Oregon, 2004; Craig, J. D. R.–Lynk, S. M. (eds.): *Globalization and the future of Labour Law*. Cambridge University Press, Cambridge, 2006.

[8] See: Trubek, D.–Trubek, L.: Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination. *European Law Journal, Review of European Law in Context*, 2005/3, 343–364; DEHOUSSE, R.: *The Open Method of Coordination*: *A New Policy Paradigm?* Paper presented at the First Pan-European Conference on European Union Politics "The Politics of European Integration: Academic Acquis and Future Challenges." Bordeaux, 26-28 September 2002. http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.538.1209&rep=rep1&type=pdf (2017.04.21.); Hajdú J.: *Az Európai Unió szociális joga – különös tekintettel a szociális biztonsági koordinációra /Social law in the European Union – Social security coordination*. JATEPress, Szeged, 2008, 7–9; GYULAVÁRI T.: Európai Szociálpolitikai Menetrend. *Esély*, 2001/5, 92–109; COM(2000) 379 final Social policy agenda. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions; COM(2008) 412 final Renewed Social Agenda: Opportunities, Access and Solidarity in the 21st century Europe. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; Bercusson, B.: *European Labour Law*. Cambridge University Press, Cambridge, 2009, 168–198.

provided a completely new direction - based on non-legal mechanism - for policy forming and implementation. However, since it was introduced in many areas, *the coordination of the coordination* was needed in 2003. A wider involvement of actors was introduced at Member State levels and economic, employment and social open coordination mechanisms were linked to enhance mutual efficiency. The results of the anti-unemployment campaign, *the employment and economic trends, and the reforms of the open coordination mechanism traced within the social policy, too,* led to *the interconnection of social and economic processes*. Thus, national action plans were made integrated in the fields of social exclusion, pension schemes and health care, and became known as Joint Social Protection Report from 2007. Certainly, the OMC has become a determining tool for EU policy-making[9].

Reflexive labour law legislation has a major role in developing a social policy in which as many people live well as possible according to their abilities and enjoy social rights in full. In addition to *Freedland* and *Countouris*, *Deakin* and *Rogowski* refer to *Sen* and *Nussbaum*'s ability theory, too, and they link all this to the labour market (see Sen's theory in point 3)[10]. Labour law is aimed at not only balancing the imbalance between the parties. It also has to be one of the aims of the labour law to promote the principle of autonomy and equality in work, to ensure decent living and to assure social rights by extending individual capacity. This theory goes beyond the boundaries of the labour contract and applies to the working man and human rights form the limits of employment relationship. It gives more room to collective bargaining and thus to the principle of partner relationship in labour law. Thus, the relationship related to the labour law and the market formulated by *Deakin* can logically be deduced, too. Furthermore, the necessity of human resource management and the presence of non-labour law regulations provided by it can be justified easier.

Among the constitutional aspects of the rule of law, the fact that fundamental principles and fundamental rights enshrined in the constitution respecting international human rights and fundamental freedoms directly determine the frameworks and constituents of legislation is of primary importance[11]. This effect obviously does not only have to prevail within the framework of constitutional legislation, but also in the full legal system of each country. The limitation of the guarantees from material point of view will balance the enforcement of market demands with the system of the protection of fundamental rights[12]. On the basis of the liberal labour law approach, this creates an automatic equilibrium situation, because if the level of labour law protection is alleviated, the role of the protection of fundamental rights is strengthened.

[9] Deakin, S.–Rogowski, R.: i. m., 230–238.

[10] Nussbaum, M.: *Sex and Social Justice.* Oxford University Press, Oxford, 1999, 41-42. About the relationship of the market and ability-theory see: Deakin, S.: Social Rights and the Market. An evolutionary Perspective. In: Burchell, B.–Deakin, S.–Michie, J.–Rubery, J. (eds.): *Systems of Production. Markets, organisations and performance.* Routledge, London, New York, 2005, 75–88; Deakin, S.–Rogowski, r.: Reflexive labour law, capabilities and the future of social Europe. In: Rogowski, R.–Salais, R.–Whiteside, N. (eds.): *Transforming European Employment Policy. Labour Market Transitions and the Promotion of Capability*. Edward Elgar, Cheltenham, UK, Northampton, MA, USA, 2011, 229–254.

[11] Ádám A.: Az emberi és állampolgári jogok jellegéről és korlátairól. / *The Nature and Limits of Human and Civil Rights. Jogtudományi Közlöny*, (Jurisprudence Gazette), 1993/11–12, 409–421.

[12] The system of fundamental rights and their collision is comprehensively covered by the monographic analysis of the following work: Kiss Gy.: *Alapjogok kollíziója a munkajogban.* / *The Collision of Fundamental Rights in the Labour Law*. Justis Bt., Pécs, 2010.

The evaluation of politics and institutions is thus determined by their ability to fulfil the individual's abilities. For this reason, those who have been left out of the labour market for a long time or who are threatened to lose their jobs have the right to claim concerning the functioning of the labour market why they have no access to paid work. Therefore, labour law has not only the role of reducing the risk of exclusion, but also that of increasing the freedom of mankind through labour relations. For the well-being of an individual depends not only on his physical ability but also on the economic and social environment surrounding him. The legal system either helps or frustrates individuals in achieving their goals. The ability-based approach for understanding the relationship between the legal system and the market (labour market) is based on three assumptions:

On the one hand, the market is not an automatic mechanism, as it is supported by institutions with different functions. The legal regulation has its role here, too, since it can transform the operation of the market. This is the key to the co-development and interaction between the legal system and the economy.

On the other hand, the freedom of choice of individuals in the labour market also depends on how well the institutions can develop their skills. That is, access to the market is not only a negative freedom of the individual, but also a real ability to enjoy the economic and social rights recognized by the legal system.

Thirdly, in order to ensure the effective co-development of economic and legal institutions, a reflexive and learning-centred regulatory and governmental concept is needed. Namely, we must learn from coordination problems through the diversity of living models[13].

Deakin and *Rogowski* believe that in the Supiot report, the very issue arose that is how the labour law can be re-regulated in a way that it can cope with the market and organizational environment. Supiot did *not regard the rigidity of the Fordist model and the appearance of new technologies* as the motive for the change we mentioned. *In addition to these, he highlighted* the challenges of loss of income due to unemployment, disease and aging, and problems arising from the inequality of dependent relations. *Collective labour law institutions were incapable of providing effective protection to workers.* The main reason for this is that social and economic rights[14] were based on institutions that were built on stable employment. His proposal was a labour law reform that looked beyond employment and linked protection not only to employment, but it also went beyond it and used new regulatory techniques and policy initiatives. This included introducing labour market membership / status instead of employee status and social drawing rights, which would also allow lifelong learning resources to be used[15]. We will return to this topic when analysing the labour market judgment of labour law in the works of other authors[16]. This conception is entirely consistent with the ability-based approach. All this contributes to making the labour market more flexible by introducing more and more reforms in national rules that were based on the reconciliation of work and family life, and in the absence of

[13] Ádám A.: i. m., 238–241.

[14] About the development of economic and social rights see: Kaufmann, C.: *Globalisation and Labour Rights. The Conflict between Core Labour Rights and International Economic Law*. Hart Publishing, Oxford and Portland, Oregon, 2007.

[15] See in more details: European Commission: *Transformation of labour and future of labour law in Europe*. Final report. June 1998, p. 23–24.

[16] Arthurs, H. W.: *Labour Law after Labour*. Osgood CLPE Research Paper 2011/5, 12–29.

employment, the payment of social security contributions gave individuals a sense of security. Legal instruments can thus be suitable solutions reflecting not only labour market needs but also the benefits of employees even in the absence of an agreement by the parties. However, the appropriate legal instruments can be expected not primarily from the framework of hard legal solutions but from the more easily or 'unnoticedly' formulated field of soft law. For example, in the European Union, the OMC helped to launch the process, which adopted soft law guidelines instead of hard law regulations. Let us just think about parental leave, fixed-term and part-time directives. Reflexive elements appeared in this regulation, too, as the collective bargaining and the possibilities of flexible implementation played a major role in the drafting of the directives. The purpose of the directives was based on the principle of equal treatment, the reconciliation of work and private life and the more flexible employment relationship[17].

The rreflexive labour law regulation puts the emphasis from the problem of deregulation on the interaction and co-development of the functioning of the market and the legal system. The normalization of atypical working conditions is thus placed in another context and it strengthens the need for a social and employment policy where institutions allow everyone to enjoy economic and social rights and achieve their individual goals. For its realization determines the effectiveness of economic and legal institutions.

3. Human capital in the relationship between labour and social legislation and the labour market

The above described new role of labour law is largely related to *the human resource management approach in economics*, which represents employees as human capital, thereby associating economic rationality with labour law legal protection. However, this role of legal protection cannot only be found in the social law guarantee scheme of the labour law but also in economic theories that reflect market considerations. The importance of human capital in economics has also been gradually overwhelmed with a moral dimension. The most prominent representative of this approach is *Sen*. His theory can be studied from a number of perspectives, such as the dimension of social protection, the relationship between the law-market-society subsystems and the relations of the labour market. The means of labour and social legislation provide the framework for labour market regulation. Those explained relating to the reflexive labour law regulation gain a specific meaning in this chapter.

In this context, *Sen* stated that economic development cannot be measured only by economic indicators, but it is necessary to integrate aspects other than economic indicators into the considerations determining development, i.e. the scope of economic operators needs to be expanded.[18] One of its decisive elements is the power of human capital - namely, the freedom of people to act - which *must be interpreted as an economic factor in relation to the market*, too[19]. However, to increase the role of human capital, it is essential to take into account the labour and social legal instruments, as this is the (legal)

[17] Deakin, S.–Rogowski, R.: i. m., 241–243.

[18] Kun, A.: *A munkajogi megfelelés ösztönzésének újszerű jogi eszközei.* / *New Legal Instruments for Encouraging Labour Law Compliance.* L'Harmattan-KRE, Budapest, 2014, 44–45. [Hereinafter referred to as: Kun (2014)].

[19] Sen, A: Work and rights. ILO. *International Labour Review*, 2000/2, 119–129.

environment that determines the scope of the labour market actors. On the one hand, the employer's possibilities, and on the other hand, the guarantees to protect the employee. Thus, we get to the point again that the balanced functioning of the labour market *can be ensured by the balance of labour and social law*, so maintaining that balance is necessary in the development of law. In *Sen's* view, for example, economic opportunities, political freedom, social benefits, guarantees of transparency and security of life are to be considered in their context and by their collective enforcement individuals are to become active promoters of change, not just passive recipients of benefits[20]. Namely, this is how the guarantees of development can be realized. In this context, social needs also appear as an indispensable condition for development and thus they become a part of the general needs of economic operators.

As we have already mentioned, this viewpoint is not capable of introducing substantive legal solutions by rigid rules (by *hard law*) because that way the ability to adapt quickly and flexibly would come to an end, which is why it is necessary to take such a view into account. *Market considerations can become aspects of employment primarily by means of tools beyond labour law*, which, on the one hand, represent the appearance of a variety of compliance incentives, a kind of *soft law* self-regulation methods.[21] On the other hand, through the tools developed by human resource management, by means of the demands for suitable labour law regulation and the need for flexibility and contractual freedom, namely, by efforts made in order to weaken the labour law and to reduce the level of the social protection they can be in the limelight of the labour law. Answers to these questions belong no longer to the field of economics, but to that of law[22] and, in particular, they cause dilemma to the labour law since the relationship between the law and the economy is a constantly changing system of relations. For this reason, the goal is not the creation of a single equilibrium position but the development of the legal regulation which ensures continuous development causes the dilemma of the labour law.

Accordingly, the study of the relationship between the labour market and the labour law has become a research field within the science of labour law, therefore we referred to the relation between the changes in labour law regulations and labour market demands under section 1. In the Anglo-Saxon area, researchers are in a better position because the rigidity of statutory law in many cases does not bind them. However, the relationship between the labour market and labour law needs to be analysed even if it is accepted. *Deakin* examined in detail the role of labour law in market growth, i.e. the integration of human capital considerations into labour law. Accordingly, he grouped the market-driven role of the labour law into market-restricting, market-correcting and

[20] Sen, A.: *A fejlődés mint szabadság*. / *Development as Freedom.* Európa Könyvkiadó / Europa Publishing House, Budapest, 2003, 11.

[21] Alhambra, M. A. Garcia-Muñoz–Haar, B. P. Ter–KUN, A.: Soft On The Inside; Hard for The Outside: An Analysis Of The Legal Nature Of New Forms Of International Labour Law. *The International Journal of Comparative Labour Law and Industrial Relations*, 2011/4, 337–363.

[22] About the role of soft law see in detail: Blutman, L.: In the Trap of a Legal Metaphor: International Soft Law. *The International and Comparative Law Quarterly*, Vol. 59, 3/2010. 605–624; KUN A.: A puha jog (soft law) szerepe és hatákonysága a munkajogban – Az új Munka Törvénykönyve apropóján. (The Role of Soft Law and Its Effectiveness in Labour Law – With Regard to the New Labour Code) In: Kartona Klára–Szalai Ákos (szerk.): Hatékony-e a Magyar jog? (Is Hungarian Law Effective?) Budapest, Pázmány Press, 2013, 83–115.

market-creating functions[23]. It is possible to build this relationship with tools within and beyond labour law, but it must also be added that any self-regulatory mechanism can gain space in the system of legally binding legal sources if it is needed. Recognizing this process - together with the independent development path of labour law - regardless of the theoretical starting point, we must take into consideration that this will mean a post-reflection as a result of current processes. The Hungarian labour law defines as an essential path of self-regulation, for example, that any agreement between the parties can be assumed as a contractual form, furthermore, in the case of a larger group of employees, this agreement is also formulated by law in the form of a collective agreement. As an employer-controlled regulatory process, we can point out the creation of *internal rules*, which is already recognized by the Hungarian law as an actual labour law act[24]. The role of labour law is *simply the shifting of employment issues from the level of individual interests to community interests, and thus to the normative regulatory area*[25]. The current trends in labour law are based on the results of these aforementioned searches, i.e. they are looking for the answer for the question of what the role of labour law can be from the aspect of serving the needs of the labour market sensitive to economic development. This issue must be examined in the context of this study, as it also involves the question of the level of legal protection in employment relationships. As we have drawn up from several angles, the strength of *Sen*'s economic theory is that it raises human capital and economic development to the level of a fundamental right, a protected value. This point of view is so embedded in the science of labour law that, as *Attila Kun* also highlights[26] –*Langille*, based directly on *Sen*'s views, regards human resources as a moral basis for labour law development[27]. In such an environment, the assessment of employees is transformed regardless of legal regulation. It is not difficult to imagine that, irrespective of the level of social protection, the value of human resources is reflected in the rights granted to employees, in establishing the framework of the employment relationship, and in determining the content of the employment contract. Nevertheless, the *Sen* theory and the *soft law* solutions are not suitable for establishing the protection of all actors in the labour market without legal guarantees. For the starting point is the concept of human capital. However, an employee who does not have such a high level of 'value' in the labour market can only be placed in a similarly protected position in the case of labour law protection. In our opinion, however, it is not necessarily labour law, or not just labour law that can overcome these disadvantages, since through the priority management of the principle of equal treatment or the application of active tools of employment policy, the law undertakes to formulate a comprehensive – beyond labour law- solution by means of social and labour

[23] Deakin, S.: The Contribution of Labour Law to Economic and Human Development in: Davidov, Guy–Langille, Brian (eds.): *The Idea of Labour Law*. Oxford Press, New York, 2011, 156–159.

[24] See Article 17 of Act I of 2012 on the Labour Code (Mt.), which names the employer's code among legal declarations.

[25] *Hepple* formulates similarly: „Labour law stems from the idea of the subordination of the individual worker to the capitalist enterprise…" Idézi: DEAKIN, S.–MORRIS, G. S.: *Labour Law (5th edition).* Hart Publishing, Oxford and Portland, Oregon, 2009. See original source: Hepple, B. (ed.): *The Making of Labour Law in Europe.* Mansell, London, 1986, Introduction, 11.

[26] Kun, A (2014): i. m., 45.

[27] Langille, B.: Labour Law's Theory of Justice. In: Davidov, G.–Langille, B. (eds.): *The Idea of Labour Law*. Oxford University Press, New York, 2011. 112; Hasonló célokat fogalmaz meg Vosko – Vosko, Leah F.: Out of the shadow? In: Davidov, G.–Langille, B. (eds.): i. m., 368.

market programmes (see flexicurity concept).

The science of labour law therefore needs to examine whether *labour law is a legal instrument for economic regulation or a guarantee that creates a brake*. This dilemma defines the work of theoretical professionals working in the field of labour law today. The problem is where to place labour law regulation on the scale between the two extreme points of view and at which point it is necessary for the law to interfere with the functioning of the market. The designation of this cannot be decided on the basis of scientific theories, but responding to the labour market processes; it depends on the sensitivity of each legal system and its creators and users. In this context, *Arthurs* attempts to make suggestions in the direction that labour law cannot be limited to the legal status of employees under the employment relationship [28] while also suggesting that labour law is itself a guarantee system and thus the function of labour law is to ensure the necessary guarantees for the employees. Though fundamentally inconsistent, more conservative approaches reflecting continental legal concepts – see for example, the viewpoint of *Weiss*, who takes a stand in favour of direct legislation regarding the aims and methodology of labour law [29] – also recognize the need to renew labour law in order to make regulatory instruments more efficient[30] So, on the whole, we can conclude concerning this issue that, following the continental legal approach, even those arguing for the classical *hard law* do not averse to the renewal of labour law, however, they consider it necessary to fix the legal framework of labour market processes as a guarantee, namely to protect employees in a weaker position on the basis of unequal power.

To put it simply, the question can also be defined as whether there is a direct regulatory role for labour law, or it just has to provide legal framework or guarantees for employment. In both alternatives, we can acknowledge the guarantee position of labour law, which can be renewed just as the labour law itself. This also arises from the self-reflexive nature of labour law regulation, which in this respect can be justified by the need for renewal due to changing needs arising from the characteristics of the labour market.

The specific relationship between labour law actors cannot be disregarded when assessing the question, since the relationship between the employee and the employer, which is basically an unbalanced hierarchical relation through the right of instruction, also determines the realistic level of flexible adaptation. An example of this is *Bellace*'s analysis, who also re-examined the human right assessment of labour law in the light of international conventions and the EU law. From his summary, it can be seen that employers' and employees' interests are opposing regarding this issue[31]. Therefore, *the level of the impact of labour market processes places the regulatory role of labour law into a different position.* The protection of employees justifies the granting of labour law guarantees, not just framework, and moreover, it means raising it to a higher level if we also accept the direct regulatory role of labour law. On the other hand, in the position of employers who are exposed to

[28] Arthurs, Harry W.: *Labour Law after Labour*. Osgood CLPE Research Paper, 2011/5, 12–29.

[29] Weiss, M: Re-Inventing Labour Law. In: Davidov, G.–Langille, B. (eds.): i. m., 43–57.

[30] Howe, J: The Broad Idea of Labour Law. In: Davidov, G.–Langille, B. (eds.): i. m., 299–300.

[31] Bellace, J.: Who Defines the Meaning of Human Rights at Work? In: Ales, E.–Senatori, I. (eds.): *The Transnational Dimension of Labour Relations. A new order in the Making?* Collana Fondanzione Marco Biagi, G. Giappichelli Editore, Torino, 2013, 111–135.

labour market processes and work in constantly changing conditions, the recognition of fundamental rights is often questionable[32], consequently the direct regulatory role of labour law is to be minimized.

From the previous issue the following problem is adequately followed: deciding whether the direction of legislation must be in line with market needs or should it be a higher-level approach. There is also a great number of standpoints in labour law concerning this matter. *Researchers approaching from a more conservative, continental point of view* [33] clearly want to make labour law independent from economic expectations, viewing their close interdependence as a loss of the position of the labour law. To justify their view, *representatives of more modern standpoints* primarily rely on Anglo-Saxon law, which basically attributes a different role to substantive law, and they expressly recognize that the content of labour law is dictated by the market. Here we refer to the reflexive nature of labour law. According to *Deakin*'s approach, the outcome of labour market trends and changes basically determines the closely related labour law.[34] Furthermore - as we have repeatedly referred to - it appears in the labour law literature that some authors extend the scope of labour law, too, so for example, *Vosko* argues that the full spectrum of labour market relations is aimed at by the labour law, without limiting the scope to the segment of employment relating to employment relations[35]. *Mitchell* and *Arup* even define labour law as a "labour market law" on this basis[36]. This difference is reflected in the choice of the regulation level and in the adoption of the aforementioned soft law solutions as substitutes for statutory law, which is not yet mature in the labour law literature.

Starting from the assumption that *soft law* tools can integrate new elements, even in a way acceptable for human resource management trends, into employment relations in the absence of specific norms, too, then the question arises whether the regulatory direction of soft law would be more appropriate than legislation tailored according to market needs. This issue has an entirely different role in Anglo-Saxon law than in continental jurisdiction. According to the former, this basically depends on a resolution, while in the case of continental legal systems, the problem of law enforcement and legal protection is immediately raised in relation to the question. The statutory law thinking in the case of continental legal systems also means that we are prepared for the case where enforcement is required. Namely, the issues governed by the law are regarded safer, and they represent a higher level of legal protection for law enforcement as compared to voluntary legislation and law application. From this point of view, regulation cannot be completely shifted towards *soft law*, as it can jeopardize the legitimacy of individual labour law. Beside the current functioning of the economy, the vulnerability of the labour market players is very strong, so even the circle of general employees may not be left alone by labour law and we have not yet mentioned the need to protect disadvantaged employees in the labour market. In our opinion, the strengthening of the level of the responsibility of economic operators precedes the development of responsible activities of companies (CSR - Corporate

[32] *Bellace* formulates employers' concerns regarding the right to strike. See: BELLACE, J.: i. m., 111–135.
[33] For example, Rolf Birk and Tamas Prugberger.
[34] Deakin, S.–Morris, G.: i. m., 2.
[35] Vosko, Leah F.: i. m., 368.
[36] Quote: Idézi: KUN A. (2014): i. m., 21.

Social Responsibility). Those who lead this path may be able to assure guarantees through self-regulation, however, in the case of those who lag behind on this path (primarily the SME sector or those who do not deal with this because of the lack of relevance of the PR value) the preservation of labour law guarantees is justified now at statutory law level, too. The law-forming role of *soft law* in continental law appears in its hard law-forming power[37]. Or, as the *Fenwick-Novitz* co-authors point out, the significance of modern regulation methods is that they intend to respond to the weaknesses of traditional regulatory modes in an innovative way[38]. The same can be said of the success of the open coordination mechanism, which can respond flexibly and relatively quickly to current needs. However, the open coordination mechanism cannot serve as a solution to the challenges of legislation at a national level.

4. Closing thoughts

Overall, it can be concluded that labour law and social protection systems can be judged uniformly, which cannot disregard economic development. While the primary objective regarding social protection is to increase the protection against economic vulnerability and to provide a guarantee for living at subsistence level, the main demands concerning the development of labour law are to increase flexibility and decision-making autonomy of the parties and to decrease the level of legal regulation. At first glance, the two procedures have contradictory directions. In the present study, however, we have attempted to show that this contradiction is only apparent. For the new focus of labour law development is human capital, which is a value that requires fundamental rights protection and at the same time it is also the key to economic development. Thus, the guarantees of protecting this human value must be provided by labour law in order to promote economic development, (too). This is, however, not only a matter of labour law regulation, but also that of labour market regulation, and it is related to the desire of the area of social law to reduce employees' vulnerability through fundamental rights protection. Ideally, this dual demand - though from a different perspective - leads to the same result regarding the labour market.

It is also safe to say that the legal framework for labour market processes has gone beyond the dimension of employment. The labour market space to which labour legislation can be extended has expanded horizontally. This labour market is influenced by the changes in the economy and society, which increasingly calls for need for a regulatory framework of the labour market to be filled with direct labour law legislation, the content of which shall be filled with hard law tools and – through their effects on hard law - *soft law* tools. Keeping security is still needed, and one way of renewing the guarantee instruments of labour market is to combine these tools. This also means that in defining the legal framework of the labour market, the balance between labour law and social legislation can give employees security. Reducing the level of protection can only be imagined if fundamental constitutional rights are respected. If we accept that the source of the seemingly contradictory employers' and

[37] *Attila Kun* reveals depths even beyond this. See: Kun A. (2014): i. m. However, these aspects are beyond the scope of the main issues examined in this study.

[38] Quote: Kun A. (2014): i. m., 21. See original source: Fenwick, C.–Novitz, t.: Conclusion: Regulation to Protect Workers' Human Rights. In: Fenwick, C.–Novitz, T. (eds.): *Human Rights at Work.* Hart Publishing, Oxford and Portland, Oregon, 2010, 605.

employees' interests is the human being, it seems reasonable to achieve a reduction in the level of protection with respect to general personality rights in order to enjoy the fullest possible economic and social rights.

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THE POSIBILITY OF THE DEBTOR TO REQUEST PUBLIC JUDICIAL ASSISTANCE IN THE FORM OF BAIL EXEMPTION OR REDUCTION DURING A PROVISIONAL SUSPENSION OF THE FORCED EXECUTION CASE

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Abstract

The situation is becoming more and more common nowadays. A debtor, lacking in sufficient fonds, is forced to request public judicial assistance from the Court so that he may be exempted from the obligation of paying bail during a provisional suspension of the forced execution case. The article shall focus on the applicability of Article 6 of the E.C.H.R., on the national provisions and on whether or not they may allow such a request to be analysed by the Court and not be rendered inadmissible. Some practitioners have viewed this possibility as inadmissible in accordance to our national legislation. In their view, no legal text allows the debtor to request this type of aid and no legal means are offered to regulate this type of legal problem. Others have granted public judicial assistance after careful consideration of the economic situation of the debtor, in regard to the fact that his right to a fair trial extends even to this particular situation. By not granting him the opportunity to present his arguments at this stage of the trial due to a lack of funds, a sort of discrimination may be generated in favour of the debtors who can financially afford to present their case as opposed to those who cannot. The article shall thus carefully ponder the interests and obligations of the parties involved in the trial so as to establish some useful conclusions or good practices regarding the issue at hand.

Keywords: *public judicial assistance, bail exemption, provisional suspension, forced execution, Court's role.*

1. Introduction

1.1. What matter does the paper cover?

The paper deals with the situation of a forced execution of a legal title. The debtor considers that his creditor is not entitled to execute the title and thus calls upon the court to suspend the execution. However, the timing is not financially acceptable for the debtor. He is unable to pay bail, despite the obligation as laid out in Article 719 par. 7 of the Civil Procedural Code[1] and thus his request to suspend the execution cannot be analysed by the court. Thus, some debtors have chosen to employ the use of Emergency Ordinance no. 51/2008, soliciting public judicial assistance in the form of the exception or reduction of the bail fees. The effect of this request means placing the judge into a situation of not being able to establish the legal text that may address this particular issue.

The main objective of the study is to come accros an acceptable solution for this legal difficulty, one which may provide the legal subjects with a means of establishing both a predictable and accessible course of

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[1] Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Journal of Romania no. 247 of April 10, 2015.

action as laid out in the jurisprudence of the European Court of Human Rights.

1.2. Why is the studied matter important?

The studied matter is very important because there are a great number of cases regarding a provisional suspension of the execution of the title in which the debtor has invoked the right to be exempted from bail or at least it's reduction. Finding a balance between his interests and the interests of the creditor is of the utmost importance, and the courts are obligated to balance the two so as to reach an equitable solution. In doing so, potential infringements of Article 6 of the European Convention of Human Rights[2] may be avoided, thus allowing for a lawful trial and a proper analysis of the merits of the suspension request.

1.3. How does the author intend to answer to this matter?

After a proper analysis of the applicable legal texts, and a further study of the opinion of nationally renowned authors, some key insights regarding the issue may be found. Thus, a future consensus may be reached between both the courts and the other legal subjects, so as to avoid inconsistencies in the jurisprudence of the courts, which have generated tremendous inequalities in the past. The European Court of Human Rights jurisprudence shall also be the subject of scrutiny, in order to retain the conventional standard applicable in this legal situation and thus align the potential solution to the rigours of European values regarding the civil rights of the individual.

1.4. What is the relation between the paper and the already existent specialized literature?

Despite the evident importance, there are only a few analyses regarding the proper course of action which is to be employed in order to solve the legal problems which stem from the application of Emergency Ordinance no. 51/2008 in this particular situation. The merits of each opinion expressed by the studied authors shall receive the proper attention, in enabling the article to establish acceptable solutions which may be easily implemented in practice.

2. The legal applicable texts and European Court of Human Rights rullings

2.1. The Civil procedural Code

Firstly, our national Civil Procedural Code[3] outlines in Article no. 719 the legal framework regarding the suspension procedure of the forced execution: " *Until the appeal to the enforcement or other enforcement request has been resolved at the request of the interested party and only for good reasons, the competent court may suspend execution. Suspension may be requested with the challenge of execution or separate request.*

(2) In order to order the suspension, the person who requests it must give a preliminary bail, calculated at the value of the object of the appeal, as follows:…

(6) On the request for suspension, the court shall, in all cases, pronounce by conclusion, even before the time limit set for

[2] European Convention on Human Rights: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

[3] Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Journal of Romania no. 247 of April 10, 2015.

the examination of the appeal. The parties will always be quoted, and the conclusion may be appealed separately, only on appeal or, if it is delivered by the court of appeal, only on appeal, within 5 days of pronouncement for the present part, or from the communication for the missing one.

(7) If there is an emergency and if, in the cases provided in paragraph (2) and paragraph (3), the bail was paid, the court may order, by concluding and without summoning the parties, the provisional suspension of the execution until the settlement of the request for suspension. The decission is not subject to any appeal. The bail referred to in this paragraph shall remain unavailable even if the application for interim suspension is rejected and is deductible from the final bail, as the case may be…"

The law has sought to establish a general rule regading the issue at hand, by obligating the debtor to forfeit a fixed sum of money in order to protect the interests of the creditor. The fonds are to remain unavailable so as to serve four purposes, in accordance with Article no. 720 of Civil Procedural Code: " *If the appeal is rejected, the claimant may be ordered to* ***pay damages for infringements caused by delay of execution****, and when the contestation was* ***conducted in bad faith****, he will also be liable* ***to pay a fine from 1,000 lei to 7,000*** *lei … When the appeal was dismissed, the sum representing the bail will remain unavailable, and will serve* ***to cover the receivables shown in par. (3)*** *or* ***those established by the enforceable title****, as the case may be, in which case the bailiff will be notified and the receipt for the payment of this amount.* "

2.2. Emergency Ordinance no. 51/2008

Article 1 of the Emergency Ordinance no. 51/2008[4] points out the main objective of the law: " Judicial public assistance is that form of State assistance **aimed at ensuring the right to a fair trial and guaranteeing equal access to justice**, for the realization of legitimate rights or interests by judicial process, including the enforcement of judgments or other enforceable titles ".

The forms in which the scope may be attained are laid out in Article no. 4 -" Any natural person may solicit the provision of public legal aid under this Emergency Ordinance in the event that he or she **can not afford the costs of a trial** or those involving legal advice to defend a right or legitimate interest in the law, **without jeopardizing his or her family's maintenance**. " and in Article no. 6 :" Public judicial assistance **may be granted in the following forms:…**(d) **exemptions, reductions, staggered payments or deferrals from the payment of legal fees provided for by law**, including those due at the forced execution stage. ".

As it can be easily noticed, the list of possible methods of soliciting the aid of the state in order to avoid " ***jeopardizing his or her family's maintenance*** " is an exhaustive one. No other requests can be made, should the natural person wish to invoke these legal texts. **There are no express provisions regarding the exemption or reduction of bail fees.**

2.3. European Court of Human Rights rulling in the case of Weissman and Others v. Romania- 63945/00 [2006]

The conventional standard is indicated at par. no. 37[5] and reads as follows: " the

[4] Emergency Ordinance no. 51/2008, published in the Official Journal of Romania no. 327 of April 25, 2008.
[5] European Court of Human Rights, *Weissman and Others v. Romania* - 63945/00 [2006].

amount of the fees, assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed his or her right of access to a court or whether, on account of the amount of fees payable, the very essence of the right of access to a court has been impaired " thus leading the Court to concur that " the State failed to strike a fair balance between, on the one hand, its interest in recovering the costs of proceedings and, on the other, the applicants' interest in having their claims examined by the courts."

There are cases in which the debtor bases his request of bail exemption or reduction on the Emergency Ordinance no. 51/2008, Article 6 of the European Convention on Human Rights or on the jurisprudence of European Court of Human Rights.

2.3. European Court of Human Rights ruling in the case of Iosif and Others v. Romania- 10443/03 [2006]

The conventional standard is indicated at par. No. 60[6] and reads as follows:" The Court observes that the obligation imposed on the applicants to pay an **extremely high sum of money to enable them to bring an action was deprived of the opportunity to obtain an examination of the substance of the case** and, consequently, of their right of access to a court. Moreover, it notes that the Constitutional Court, which has been notified in another case with an exception to the unconstitutionality of the legal provision on the establishment of the value of the bail, decided that it was not in compliance with the Constitution ".

3. The interpretation of the courts and legal authors

3.1. The opinion of the Courts

Most of the cases in which the matter at hand has been brought before the courts, the solution was to repeal the request as inadmissible, given the fact that no legal framework has been provided in order to regulate this type of situation.

With an almost overwhelming majority, the request has been repelled, with the mention of the possibility for the applicant to subject it to a re-examination by another judge, in accordance with article no. 43[7] par. 4 :" *Against the conclusion, interested parties may file a review request within 5 days of the date of the communication of the conclusion. The request is exempt from stamp duty.*".

The opinion can be subjected to criticism, given the fact that since the request was deemed as inadmissible in the first place, it is evident that the review itself is inadmissible. Despite this, some judges indicate a means of appealing an initial decision that is not mentioned in any legal text.

Other judges[8] base their analysis on the European Court of Human Rights conventional standard previously indicated, interpreting it in such a way that a reduction or exemption be granted in order to avoid an infringement to the right of the debtor to a fair trial. The precarious economic situation of the debtor is invoked to justify the measure, given the fact that the request may be the only chance that he shall have to temporarily suspend the execution before a proper analysis can be made regarding the opportunity of suspension in accordance

[6] European Court of Human Rights, *Iosif and Others v. Romania* - 10443/03 [2006].
[7] Emergency Ordinance no. 80/2013, published in the Official Journal of Romania no. 392 of June 29, 2013
[8] https://www.luju.ro/static/files/2013/octombrie/09/madularescu_ghica_Incheieri_26.09.2013-dosar_37103.pdf

with article no. 719 par. 1 of the Civil Procedural Code.

3.2. The opinion of the legal authors

Some legal authors have expressed the idea that it is mandatory for the courts to perform the analysis of the request, since it is not inadmissible. "*It is clear that the courts can not refuse to hear claims for reduction or exemption from bail. On the contrary, they have to analyze on the merits such requests, assessing, in particular, whether they are founded or not. In this approach, the courts will consider various criteria, such as: the amount of the bail, the income of the party, the stage of the procedure, the purpose of the tax, the proportionality of the interference for that purpose, the procedural guarantees granted to the party, the foreseeability of the tax.*"[9]

Other legal authors, in recently analysing the jurisprudence of the European Court of Human Rights have stated that "the Court's reasoning shows that Article 6 of the Convention is applicable, under certain conditions, also to those procedures referred to by the Court of Justice, that is to say those procedures which do not directly address the substance of civil rights and obligations (such as, for example, with the proceedings for suspension of enforced execution, discussed in the present case, other procedures such as the presidential orders or the precautionary measures, etc[10])".

Another prominent author[11] has stated that the analysis of the conditions needed to temporarily suspend the execution of the title is more formal, and that a more thorough one is to be carried out later on. This is indicative of the fact that the request usually is subjected to a proper inquiry only during the debate during the normal suspension request, as stated in Article no. 719 par. 1 of the Civil Procedural Code.

The matter has been further treated in other works. Another problem has been identified by an author[12], in the sense that the judge who has already expressed his opinion regarding the necessity of the provisory suspension may be incompatible to decide on the suspension request until the first instance court's decision.

4. The interpretation of the author

Firstly, upon a proper analysis of the European Court of Human Rights jurisprudence, one can note that article 719 par. 7, in its present form has never been the subject of any criticism.

Also, the Constitutional Court of Romania has never stated that this legal text may be unconstitutional. Neither the interpretation of Emergency Ordinance no. 51/2008 in the sense that such a request is inadmissible.

Thus, at this moment, until further notice, the provisions and their interpretation are valid in the opinion of the two Courts.

[9] Marinela Cioroabă, Florin Radu, "*Despre reducerea cautiunii sau scutirea de la plata acesteia in materia suspendarii executarii silite*", https://www.juridice.ro/126524/despre-reducerea-cautiunii-sau-scutirea-de-la-plata-acesteia-in-materia-suspendarii-executarii-silite.html [last access on 27.02.2018].

[10] Claudiu Drăgușin, "*Aplicabilitatea art. 6 CEDO în privința cererilor de suspendare a executării silite, în special sub aspectul scutirii / reducerii / eşalonării sumelor stabilite cu titlu de cauţiune - decizia de inadmisibilitate în cauza S.C. Eco Invest S.R.L. şi Ilie Bolmadar c. României*", http://www.hotararicedo.ro/index.php/news/2017/01/aplicabilitatea-art-6-cedo-cererilor-suspendare-a-executarii-silite-scutirii-reducerii-esalonarii-cautiune-inadmisibilitate-sc-eco-invest-srl-ilie-bolmadar-c-romaniei [last access 27.02.2018].

[11] Răducan, Gabriela et Dinu, Mădălina (2016), „*Fişe de procedură civilă*" [Civil Procedure Charts], Hamangiu Publishing House, Bucharest, p. 387.

[12] Boroi, G. (ed.), (2013), "*Noul Cod de Procedură Civilă Comentat*" [The Commented New Civil Procedural Code], vol. 2, Hamangiu Publishing House, Bucharest, p. 213.

However, the interpretation can be justfully criticised up to one point.

Should the judge establish a bail obligation for the debtor based on improper calculations, the debtor, under article 6 of the Europeean Convention on Human Rights should be allowed to subject the calculations to a proper re-examination by another of his colleagues. Despite the fact that our national legislation does not specify such a means, challenging the calculations should be allowed. Repealing such a request as inadmissible *prima facie* can be viewed as an infringement on the right to a fair trial of the debtor.

However, subjecting the request for public judicial assistance to an analysis in terms of the economic situation of the debtor in justifying a potential reduction or exemption of the fee can lead to an infringement of the rights of the creditor.

In the European Court of Human Rights case of Weissman against Romania, the impediment for the applicant was regarding the legal fees which would should have been paid to the state. Indeed, the margin of appreciation of the state in this regard may be reduced in **order to allow a private individual to present his case before the court**. Should he win, the costs shall be supported by the opposing party. Should he loose, the state may regain the sum, under the provisions of the article 19 par. 2 of the Emergency Ordinance no. 51/2008.

In the European Court of Human Rights case of Iosif against Romania, the impediment for the applicant was regarding the bail which had to be paid in order to be able to **challenge the legality of the forced execution**, in order to defend himself against the creditor. Not being able to present his defence due to a financial impossibility was justly viewed by the European Court of Human Rights as an infringement to the applicant's right to a fair trial.

However, the situation analised in the article deals only with the obligation to pay bail **in order to temporarily suspend the execution**. The amount of bail can in some cases prove rather burdensome for any individual. Despite this, the debtor is able to present his defences before the court regarding the legality of the execution itself. The failure to pay the bail fees can not constitute an impediment in exercising this legal right.

The greatest dangers which may arise from the impossibility of provisionally suspending the execution can stem from the sale of the property of the debtor at the price well bellow the market. Should he successfully contest the execution, he may request the return of his property, in accordance with article 723 par. 1 of the Civil Procedural Code[13]: "*In all cases where the enforceable title or enforcement itself is annuled, the person concerned has the right to return the enforcement by re-establishing the previous situation. The enforcement costs for the acts performed remain with the creditor*." He may also request the difference between the actual value of the goods and what the adjudicating third party paid for them, in accordance with article 1349 of the Civil Code since the fault for an unlawfull execution belongs to the creditor.

Thus, the risks involved for the debtor which may arise from not paying the bail fees are less problematic that in the past when the old legislation obligated him to pay them in order to be able to **annul the execution itself**.

Another important matter that is relevant to the subject at hand is to weigh in these risks with the ones created for the creditor should the request be admitted.

[13] Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Journal of Romania no. 247 of April 10, 2015.

Firstly, should the request for bail reduction or exemption be accepted by the judge, the imminent danger may arise from the deprivation of the creditor of the sums of money needed to fulfil one of four purposes stated in article 720 of the Civil Procedural Code: " ***pay damages for infringements caused by delay of execution****, and when the contestation was* ***conducted in bad faith****, he will also be liable* ***to pay a fine from 1,000 lei to 7,000*** *lei When the appeal was dismissed, the sum representing the bail will remain unavailable, and will serve* ***to cover the receivables shown in par. (3)*** *or* ***those established by the enforceable title****,* "[14].

No doubt these specific provisions have been drafted in order to ensure certain rights for the creditor, so that he may satisfy his claim.

To infringe upon them, by limiting his capability to satisfy his claim, to prolong the moment of execution, just because the other party is unable to support the financial burden of paying the bail fees, is by itself an infringement on the creditor's right to property.

Should a hypothetical claim be made before the European Court of Human Rights by the creditor in which he would raise these arguments, soon after it would be established that both Article no. 6 and Article no. 1 of Protocol no. 1 are applicable. The analysis would then concentrate on whether or not the measure was in accordance with the national provisions.

Most certainly, the European Court of Human Rights would not be able to find a legal provision that could regulate the benefit created for the debtor and limit the right of the creditor to benefit from the sums paid as bail fees. "*The principle of lawfulness also presupposes that the applicable provisions of domestic law be sufficiently accessible, precise and foreseeable in their application* "[15]. Since there are no legal texts which may allow for the judge to grant such a request, there can be no discussion regarding the *accessible, precise and foreseeable* conditions for the text in order to justify the measure.

Thus, the evident conclusion would be that a violation of the rights of the creditor protected by Article 1 of Protocol 1 and Article no. 6 of the Europeean Convention on Human Rights has taken place. And the analysis would not even reach the point of verifying whether or not a fair balance has been maintained between the interests of the debtor and those of the creditor.

The state, which enjoyes a large margin of appreciation in this respect in regulating the conditions needed to solicit the temporary suspension, has established the obligation to pay the bail fees.

To interpret the legal texts in order to justify such a measure by the judge, under the umbrella of the necessity to respect the debtor's right to a fair trial is erroneous and unlawfull.

It would also create a difficult situation for the creditor, who after the efforts of obtaining the executory title, has to support the risks of the postponed execution, without the scenario ever even been regulated by law.

Moreover, the analysis of the European Court of Human Rights jurisprudence as previously laid has yielded the fact that the obligation to pay the bail fees by the debtor beforehand, should he solicit the temporary suspension of the execution, has never been viewed as problematic in the case law.

[14] Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Journal of Romania no. 247 of April 10, 2015.

[15] European Court of Human Rights, *Dickmann and Gion v. Romania*, 10346/03 and 10893/04 [2017].

5. Conclusions

5.1. Summary of the main outcomes

There is no doubt that there are some who view the solution of granting the request of bail exemption or reduction as equitable and in complete accordance with the highest values promoted by the European Court of Human Rights.

Indeed, the aid for the debtor is evident, as he needs merely to prove his precarious financial situation in order to present to the court his arguments.

However, there are other interests involved which require a most careful analysis on whether or not to proceed with this course of action.

Given the arguments previously presented, the necessity to ensure the rights of the creditor, as granted to him by the state, should prevent any legal *contra legem* interpretations in order to avoid any violations of Article no. 6 or Article no. 1 of Protocol 1 to the Europeean Convention on Human Rights. The state has specifically established this safeguard for him, in order to discourage further impediments to this right to execute his title.

Since he has already reached the point where he is obligated to call upon the coercive force of the state because the debtor has failed to fulfil his obligations, to reach an equitable outcome would mean for the judge to refrain from granting the debtor's request.

5.2. The expected impact of the research outcomes

The aim of the article is to endeavour to shed light on the subject, in order to aid the reader to circumvent potential difficulties in deciding on the matter.

Also, it is also hoped to spread the idea of potential *de lege ferenda* sollutions in the form of explicitly mentioning in the provisions of *Emergency Ordinance no. 51/2008* that it is not applicable in this particular situation.

5.3. Suggestions for further research work.

Given the fact that the European Court of Human Rights can sometimes radically change its views, such as in the case of Micallef v. Malta of 2009, further research could potentially follow the case law of the Court, in identifying future instances in which the legal texts mentioned in the article have been subjected to an analysis.

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USUCAPTION AS A MEANS OF ACQUIRING THE OWNERSHIP TITLE

Ciprian Raul ROMIȚAN*

Abstract

According to the Civil Code in force, the ownership title may be acquired, according to law, by convention, legal or testamentary inheritance, accession, usucaption, as effect of the good-faith possession in case of movable assets and fruits, by occupation, tradition, as well as by court decision, when it is not conveyancing by itself. Moreover, according to the law, the ownership title may also be acquired by to the effect of an administrative act, and the law may further regulate other means of acquiring the ownership title.

Therefore, the usucaption is that modality of acquiring the ownership title and other main real rights by exercising an uninterrupted possession over an asset, within the term and under the conditions provided for by the legislation in force.

In Romanian modern law, referred to as acquisitive prescription, usucaption was first regulated in the Civil Code adopted on 1864, which stipulated two types, i.e.: short-term usucaption, of 10 to 20 years and long-term usucaption, of 30 years.

The institution of usucaption is justified, in relation to the situation of the owner, as the need for stability of the situations and of the legal relations imposes, at a certain time and subject to compliance with certain conditions provided for by the law, the acknowledgment of certain legal effects to the long appearance of property, until transforming a situation de facto in a situation de jure. Concurrently, as the courts also considered, in justifying the institution of usucaption one cannot put aside the situation of the former owner, meaning that, indirectly, the usucaption is also a sanction against the former owner's passivity, who waived his own good and has not been interested in it for a long time, leaving it in the possession of another person who behaved as owner or as holder of another main real right.

Depending on the nature of the asset susceptible of usucaption, the usucaption may be of two main types: immovable usucaption and movable usucaption. In its turn, immovable usucaption may be extra-tabular immovable usucaption and immovable tabular usucaption.

As one will establish during the study, the extra-tabular usucaption operates in favor of the holder of the asset representing the subject of an ownership title over an immovable asset that was not registered with the land register, tabular immovable usucaption operates in the favor of a person who is registered in the land register as the rightful onwer of a key immovable property right, only if the registration was maded without "legitimate grounds".

Keywords: *usucapio, right of ownership, possession, real estate usucapio, movable assets usucapio.*

1. Introduction

The article presents the usucapio as a modality of acquiring the right of ownership and other main real rights by exercising an uninterrupted possession over an asset, within the term and under the conditions provided for by the legislation in force. It should be mentioned that were taken into consideration the relevant dispositions of the

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Civil Code and the most important jurisprudence in the field.

2. Content

2.1. Means of Acquiring the Ownership Title

If in the 1864 Civil Code[1], the listing of the means to acquire the ownership title was *imprecise* and *incomplete*[2], being often criticized for the conflict it generated to the rules and principles of law[3], in the Civil code in force[4], art.557 with the marginal title "*Acquiring the Ownership Title*" orders, under paragraph (1), in a more rigorous and clearer systematization, that "*The ownership title may be acquired according to the law, by convention, legal or testamentary inheritance, accession, **usucaption**, as an effect of the good-faith possession in the case of movable assets and of the fruit thereof, through occupation, Traditio, as well as by court order, if it involves property transfer as such*" (our emphasis). Moreover, according to the law, the ownership title may also be acquired by to the effect of an administrative act (paragraph 2), and the law may further regulate other means of acquiring the ownership title paragraph (3).

At the same time, according to art. 557(4), except for certain situations stipulated under the law, in the case of fixed assets, the ownership title is acquired by registration with the real estate register, in compliance with the provisions in art.888 of the Civil Code[5]. According to art. 56(1) of the Law no.71/2011 on the enforcement of the new Civil Code, the provisions in art. 557 (4) only apply after the completion of the of cadaster works for each administrative-territorial unit and the opening, upon request or *ex-officio*, of the real estate registers for the respective properties, according to the provisions in Law no. 7/1996 on cadaster and real estate publicity, republished, as amended and supplemented[6].

It should be mentioned that usucaption should not be mistaken for occupation[7],

[1] Published with the Official Journal no. 271 of 4 December 1864, no. 7 (suppl.) of 12 January 1865, no. 8 (suppl.) of 13 January 1865, no. 8 (suppl.) of 13 January 1865, no. 8 (suppl.) of 14 January 1865, no. 11 (suppl.) of 16 January 1865, no. 13 (suppl.) of 19 January 1865.

[2] For details, see Corneliu Bîrsan, *Civil Law. Key Real Property Rights in the New Civil Code*, Hamangiu Publishing House, Bucharest, 2013, p. 353.

[3] Claudia Vișoiu, *Usucaption Procedure. Regulated by the 1864 Civil Code, Law Decree no. 115/1938 and by the New Civil Code*, Hamangiu Publishing House, Bucharest, 2011, p. 9.

[4] Law no. 287/2009 regarding the New Civil Code, published with the Official Journal of Romania, Part I, no. 511 of 24 July 2009. The Civil Code came into force on 1 October 2011, according to the Law no. 71/2011 regarding the enforcement of Law no. 287/2009 on the Civil Code, published with the Official Journal of Romania, Part I, no. 409 of 10 June 2011 (hereinafter referred to as Official Journal).

[5] Art.888 of the Civil Code stipulates that the entry of the acquisition of an ownership title with the real estate publicity register is carried out "*on the basis of the authenticated notary document, of the final court order, of the heir certificate or on the basis of any other document issued by the administrative bodies, if so stipulated under the law.*"

[6] Published with the Official Journal of Romania, Part I no. 459 of 25 June 2015. For a detailed review of the usucaption regulation, see Adrian Stoică, Anthony Murphy, *Review of Usucaption as regulated under the New Civil Code,* in "Dreptul" Journal no. 7/2016, p. 66-76.

[7] According to art. 941 of the Civil Code, "*(1) The holders of an asset pertaining to no one becomes the owner of the respective asset, by occupation, as of the date on which they came into the possession of the same, but only if such coming into possession abides by the legal provisions. (2) Stray assets are abandoned movable and fixed assets, as well as assets that, through their very nature, do not have an owner, such as wild animals, fish and living aquatic resources in natural fish habitats, forest fruit, spontaneous flora edible mushrooms, medicinal and aromatic plants and other such. (3) Movable assets of very low value or extensively damaged that are left in a public area, including on a public road or on public transportation means, are regarded as abandoned assets*".

regulated by art.941 of the Civil Code, and which is another primary means of acquiring title, even though the two institutions are similar, since they both are effects of possession.

2.2. Acquiring the Onwership Title through Usucaption

2.2.1. Preliminary Remarks and Notion

Usucaption, "this benevolent tribute of the law before this status quo-possession"[8], was first mentioned in Romanian Laws of the XII Tables (lex duodecim tabularum) of 449 BC and it was defined as "usus autoritas fundi biennium, ceterarum rerum annuus est usus", which imposed an ownership period of two years in the case of fixed assets and of one year in the case of movable assets[9].

In Romanian modern law, referred to as *acquisitive prescription*[10], *usucaption* was first regulated in the Civil Code adopted on 1864, which stipulated two types, i.e.: *short-term usucaption*, of 10 to 20 years (art.1895) and *long-term usucaption* (*logissimi temporis*), of 30 years (art.1890).

In the Civil Code enforced on 1 October 2011, usucaption, which the editors of the 1804 French Civil Code described as "*the most necessary for social order of all civil law institutions*"[11], is legally regulated in Book III (*On Assets*), Title VIII (*Possession*), Chapter III (*Effects of Possession*), where a number of 8 articles are dedicated to it (art.928-934 and art.939).

Usucaption is defined as "the means of acquiring the onwership title and other key property rights by exerting uninterrupted possession over an asset, within the term and under the conditions stipulated in the laws in force"[12]. Other opinions describe usucaption as "a means of acquiring the key property rights through the possession of assets representing their subject throughout the period stipulated under the law and through the positive exertion of the right of option with regards to the usucaption, as a discretionary option"[13], or "a means of acquiring the ownership title or other property rights concerning a certain asset, through the uninterrupted possession of the respective asset for the period set under the law"[14].

Usucaption, as a means of acquiring key property rights[15], has a complex structure reuniting the stricto sensu legal fact

[8] For details, see Philippe Jestaz, *Prescription et possession en droit français des biens*, Recueil Dalloz-Sirey, 1984, Chronique, 5e Cahier, p. 27, *apud* Eugen Roșioru, *Usucaption in Romanian Civil Law*, Hamangiu Publishing House, Bucharest, 2008, p.1.

[9] Eugen Roșioru, *op.cit*., p. 7.

[10] The Calimach Code, compiled by Christian Flechtenmacher and Anania Cuzanos, with the contribution of Andronache Donici, Damaschin Bojincă and of other jurists of the time, passed in 1817, regulated "*usucaption*" (art. 1907) distinctly from "*extinctive prescription*" – "*loss of a right*" (art. 1906), even though the two phrases are equivalent. See Eugen Roșioru, *op.cit*., p. 5-6.

[11] See the Recitals to the title "*De la prescription*", in Marcel Planoil, Georges Ripert, *Droit civil français*, t. III: *Les Biens*, Librairie Générale de Droit et Jurisprudence, 2nd issue, Paris, 1952, p. 697, *apud* Ana Boar, *Certain Aspects Regarding the New Regulation of Usucaption in the New Civil Code,* in "Studia Universitatis Babeș-Bolyai, Jurisprudentia", no. 4/2013, p. 9.

[12] Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *Civil Law Course. Key Property Rights*, 2nd issue, revisited and supplemented, Hamangiu Publishing House, Bucharest, 2013, p. 272.

[13] Valeriu Stoica, *Civil Law. Key Property Rights*, 3rd issue, C.H. Beck Publishing House, Bucharest, 2017, p. 363.

[14] Corneliu Bîrsan, *op.cit*. (2013), p.385.

[15] The High Court of Cassation and Justice, 1st Civil Division, Decision no.123 of 19 January 2017 passed in closed session, available at www.csj.ro [last access on 04.02.2018].

of possession with all the determinations imposed under the law and a unilateral legal act, i.e., the manifect will of the person interested in acquiring a certain key material right[16]. It may be stated that usucaption, as a manner of acquiring key property rights, encompasses possession. In other words, "possession is an element of usucaption"[17].

Usucaption also is a primary means of acquiring property, but, at the same time, as the law courts have also statuated, in justifying the usucaption institution, the former owner status cannot be disregarded, in that usucaption indirectly also is a sanction against the passive attitude of the former owner who relinquishe its asset and left it unattended for a long period of time, leaving it in the possession of another person who behaved as the owner or holder of a different key material right[18]. Moreover, as Professor Corneliu Bîrsan also appreciated, usucaption "concerns a legitimate general interest purpose, meant to favor legal security, by paralyzing the possible action for recovery of possession lodged by the actual owner"[19].

2.2.2. General Scope

Even though in everyday activity it is stated that assets are acquired through usucaption, in reality, usucaption allows for the acquiry of the ownership title and of other key property titles over the assets representing the subject of these rights, such as: usufruct, superficies, and servitudes. In so far as easements are concerned, according to art.763 of the Civil Code, tabular usucaption allows for the acquiring of all types of servitude, whereas extra-abular usucaption only allows for the acquiring of positive servitudes[20]. Moreover, according to art.928 of the Civil Code, the holder may acquire the ownership title over the possessed asset or, as applicable, the ownership title over its fruit. Receivables may not be the subject of usucaption[21].

Usucaption may not apply in the case of public property fixed assets because both the Constitution of Romania, in art.136 (4)[22], and other regulations, such as the provisions in art.120 (2) of the Local Public Administration Law no.215/2001, republished[23], in art.5 (2) of the Law

[16] For details, see Corneliu Bîrsan, *op.cit*., p. 386 and the following, Valeriu Stoica, *op.cit*., p. 361 and the following.

[17] Valeriu Stoica, *The Right of Option Regarding Usucaption*, in "Dreptul" Journal, no. 4/2006, p. 47.

[18] See the High Court of Cassation and Justice, Panel of Judges for the settlement of certain legal matters, Decision no.24 of 3 April 2017, published with the Official Journal no. 474 of 23 June 2017; the High Court of Cassation and Justice, Civil and Intellectual Property Division, Decision no. 2550 of 31 March 2005 *apud* Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *op.cit*., p. 272.

[19] ECHR, Grand Chamber, Decision of 30 August 2007, passed in the case of J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd vs. United Kingdom, §74, unpublished, www.echr.coe.int, *apud* Corneliu Bîrsan, *Civil Law. Key Real Property Rights in the New Civil Code,* 3rd issue, revisited and updated, Hamangiu Publishing House, Bucharest, 2017, p. 385.

[20] For details, see Irina Sferdian, *Servitude Usucaption in the New Civil Code*, in "Revista română de științe juridice" Journal, no. 1/2015, p. 59-71.

[21] Also see Rodica Peptan, *Usucaption in the New Civil Code*, in "Dreptul" Journal, p. 12-13. For information on the regulation of usucaption in other law systems, see Dan Teodorescu, *Scope of Usucaption in the Austrian Law System*, in "Studia Universitatis Babeș-Bolyai, Jurisprudentia", no. 4/2009, accessible at https://studia.law.ubbcluj.ro/articol/316 [last access on 06.02.2018].

[22] According to art. 136 (4) of the Constitution of Romania, "*Public property assets are inalienable. According to the organic law, their administration may be assigned to the public companies or institutions or they may be granted under concession or leased; moreover, they may also be granted for free use to public utility units*".

[23] Republished in the Official Journal no. 621 of 18 July 2006 and rectified in the Official Journal no. 776 of 13 September 2006, where the texts were renumbered.

no.18/1991 on the Land Fund[24], stipulate that the assets that belong to the public or administrative-territorial unit domain are "inalienable, imprescriptible and unattachable". It should be further mentioned that fixed assets belonging to the state or administrative-territorial unit public property are "*imprescriptible both extinctively and acquisitively*"[25].

2.3. Types of Usucaption in the Civil Code System in Force

Depending on the nature of the asset susceptible of usucaption, the usucaption may be of two main types: *immovable usucaption* (art.930-934) and *movable usucaption* (art.939). In its turn, immovable usucaption may be *extra-tabular immovable usucaption and immovable tabular usucaption.*

2.3.1. Extra-tabular Immovable Usucaption

According to art.930(1) of the Civil Code, with the marginal title "*extra-tabular usucaption*", the ownership title over an immovable asset and its dismemberments may be entered with the land register, on the grounds of the usucaption, in favor of the party holding possession over the same for 10 years, if:

a) the owner entered with the land register is deceased or if the owner was a legal entity that ceased to exist;
b) the ownership waiver was entered with the land register;
c) the property was not entered in any land register.

In all cases, according to the provisions in pargraph (2) of the same article, the usucapant may only acquire the right if the land register entry application was submitted before a third party entered its own application for the registration of the title in its favor, on the basis of legitimate grounds, during or even after the elapse of the usucaption term[26].

According to art. 932(1) of the Civil Code, in the cases stipulated under art. 930(1)(a) and (b), the usucaption term only starts lapsing after the decease or, as applicable, the cessation of the legal existence of the owner, respectively after the entry of the property waiver application, even if the entry into possession occurred at a prior date. In other words, in the case stipulated in art.930(1)(a) of the Civil Code, the 10-year term starts lapsing as follows: as of the possession commencement date, if the usucapant starts exerting the possession over the property prior to the decease of the physical person or, as applicable, the cessation of the existence of the legal person entered as owner in the land register; as of the decease or existence cessation date of the owner entered with the land register, if the usucapant started exerting possession prior to the decease or cessation of existence.

Moroever, in the case stipulated in art. 930(1)(b) of the Civil Code, the 10-year term shall start lapsing: as of th entry date of the property waiver, if the entry into possession occurred prior to or even on this date; as of the possession commencement date, if the usucapant started exerting possession subsequent to the entry of the property waiver.

With regards to the situation stipulated in art. 930(1) (c) of the Civil Code, the 10-

[24] Republished in the Official Journal no. 299 of 4 November 1997.
[25] Corneliu Bîrsan, *op.cit.* (2017), p. 386.
[26] For further information, please see Valeriu Stoica, *The Discretionary Right of Extra-Tabular Immovable Usucaption*, in "Revista română de drept privat" Journal, no. 3/2013, p. 9-23.

year term starts lapsing as of the possession commencement date[27].

However, as it also follows from the review of art. 930(2) of the Civil Code, for the three cases of extra-tabular usucaption, it is not sufficient to only exert useful possession, but, instead, it is mandatory that the usucapant submits the land register application before a third party enters its own application for the registration of the title in its favor, on the basis of legitimate grounds, during or even after the elapse of the usucaption term[28].

Pursuant to the above, it may be stated that in order to acquire a key property title by extra-tabular usucaption, certain conditions must be fulfilled, i.e.: the possession over the asset must extent over 10 years; the possession must be useful, i.e., untainted, because, according to art.922(1) of the Civil Code, it is only the useful possession that is able to produce legal effects[29] and the last condition is that the usucapant enter is title registration application in its favor before a third party enters its own title registration application, on the basis of legal grounds, during or even after the lapse of the usucaption term[30].

Finally, the specialized literature defines extra-tabular usucaption as "the means of acquiring the private property right or a dismemberment of this right over a fixed asset by exerting the property title over such asset for 10 years, according to the legal provisions"[31].

2.3.2. Tabular Immovable Usucaption

According to art. 931(1) of the Civil Code, "The rights of the person who was registered, without due grounds, with the land register as owner of an asset or holder of a different property right, may no longer be challenged if the person registered in good-faith possessed the immovable asset for 5 years as of the entry of the registration application, if the possession was not tainted". Moreover, paragraph (2) of the same article stipulates that "it is sufficient that the good-faith exists upon the entry of the registration application and upon the entry into possession"[32].

Starting from these provisions, Professor Corneliu Bîrsan has defined tabular immovable usucaption as "*the means of acquiring a key property right over an immovable asset through the exertion, by the person registered in the land register without legitimate grounds as the holder of*

[27] Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *op.cit*., p. 230.

[28] Also see Sergiu I. Stănilă, *Exceptions from the Constitutive Nature of the Land Register Entry. Inheritance. Usucaption*, in "Revista română de științe juridice", no. 1/2013, p. 200-209.

[29] According to art. 922 of the Civil Code, "*(1) Except for the situations stipulated under the law, only useful possession may produce legal effects. (2) Discontinuous, disturbed or clandestine possession is not regarded as useful. Until proven differently, possession is presumed useful*". Also see Bujorel Florea, Civil Law. Key Property Rights, "Universul Juridic" Publishing House, Bucharest, 2011, p. 173.

[30] See Eugen Chelaru, *Civil Law. Key Real Property Rights in the New Civil Code,* 4th issue, "C.H. Beck" Publishing House, Bucharest, 2013, p. 437.

[31] Corneliu Bîrsan, *op.cit*. (2017), p. 403.

[32] The provisions in art. 931 of the Civil Code on immovable usucaption only apply if the possession started after the enforcement date thereof. For the cases in which the possession started prior to this date, the provisions regarding usucaption in force as on the posession start date shall apply. Concerning the properties for which, upon the possession start date, prior to the enforcement of the Civil Code, no land registers were open, the provisions regarding usucaption in the 1864 Civil Code shall continue to apply (see art. 82 of the Law no. 71/2011).

the right, of untainted and good-faith possession for 5 years"[33].

A review of the legal text (art.931 of the Civil Code) reveals that in order for tabular usucaption to operate, the following preconditions must be observed[34]:

- a real estate property right must be registered with the land register, without any legitimate grounds;
- the registered individual must have exerted useful possession over the asset representing the subject of the immovable property, i.e., the property must be untainted and in good-faith;
- the possession must extend for at least 5 years.

Generally, the phrase "without legitimate grounds" used in art. 931(1) of the Civil Code, as shown by Professor Valeriu Stoica, designates "*an invalid acquisition title, because it is affected by a cause of absolute nullity and which, in most cases, emanates from the actual owner, and from a non dominus*"[35].

Good-faith means "*the mistaken belief of the holder that he acquired the asset from the actual owner*". Good-faith must exist, according to the provisions in art. 931(2) of the Civil Code, upon the entry of the registration application and upon the entry into possession. The fact that the holder subsequently realized the error is of no relevance (*mala fides superveniens non impedit usucapionem)*[36].

The ownership title is acquired on the basis of the title entered with the land register, the acquisition time being the date of the application for the entry of the right with the land register[37].

2.3.3. Movable Usucaption

The possibility to acquire a movable asset by usucaption is, for the first time, regulated in the Romanian civil law[38]. Thus, according to art.939 of the Civil Code, "The person possessing another person's asset for 10 years, under other conditions than the ones stipulated herein, may acquire the ownership title, on the grounds of usucaption. The provisions in art. 932(2), art. 933 and 934 shall duly apply". Pursuant to the review of the aforementioned text, it may be noted that this actually is a subsidiary means, applicable to the holder who cannot invoke good-faith possession as a means of acquiring the ownership title over the asset.

Hence, movable usucaption may be invoked only if the following conditions are observed:

- the possession exerted by the holder must be useful, i.e., untainted. All taints shall suspend the course of the usucaption, in which case the provisions in art. 932(2) of the Civil Code shall apply, according to which "The tainting of possession suspend the course of the usucaption";

[33] Corneliu Bîrsan, *op.cit*. (2017), p. 406. For a review of tabular usucaption, see Marian Nicolae, *Tabular Usucaption in the New Civil Code. Material and Transitory (Intertemporal*) *Law Aspects*, in "Dreptul" Journal, no. 3/2013, p. 13-48.

[34] Regarding these preconditions, please see Valeriu Stoica, *op.cit*. (2017), p. 395; Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *op.cit*., p.232; Corneliu Bîrsan, op.cit. (2017); Eugen Chelaru, *op.cit*., p.436-437; Iosif Robi Urs, Petruța Elena Ispas, *Civil Law. Theory of Property Rights*, 2nd issue, revisited and supplemented, "Hamangiu" Publishing House, Bucharest, 2015, p. 165-166; Cristian Jora, *Civil Law. Property Rights in the New Civil Code*, "Universul Juridic" Publishing House, Bucharest, 2012, p. 290.

[35] For details, see Valeriu Stoica, *op.cit.* (2017), p. 394-395.

[36] Ion P. Filipescu, Andrei I. Filipescu, *Civil Law. Ownership Title and Other Property Rights*, "Universul Juridic" Publishing House, Bucharest, 2006, p. 320.

[37] Valeriu Stoica, *op.cit.* (2017), p.395.

[38] Iosif Robi Urs, Petruța Elena Ispas, *op.cit*., p.166.

– the holder must possess the asset for 10 years, whether it is in good- or ill-faith[39].

As professor Gabriel Boroi & Co have shown[40], in "*the absence of explicit legal provisions, we only have to admit that movable usucaption does not apply retroactively, hence, the holder becomes an owner as of the elapse of the 10-year term, and not as of the possession commencement date*".

3. Conclusions

At the end of this research, it may be concluded that usucaption is a means of acquiring key property rights, but not a primary one of acquiring the ownership, which is why it is appreciated that it is the most necessary civil law institution, useful for social order, seeking a legitimate, general interest purpose, meant to favor legal safety.

Moreover, it may be noted that while *extra-tabular usucaption* operates in favor of the holder of the asset representing the subject of an ownership title over an immovable asset that was not registered with the land register, *tabular immovable usucaption* operates in the favor of a person who is registered in the land register as the rightful onwer of a key immovable property right, only if the registration was maded without "legitimate grounds".

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[39] See Corneliu Bîrsan, *op.cit.* (2017), Valeriu Stoica, *op.cit.*, 2017, p. 396; Eugen Chelaru, *op.cit*., p. 441; Iosif Robi Urs, Petruța Elena Ispas, *op.cit*., p. 166.

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RULINGS OF THE NATIONAL COURTS FOLLOWING THE CURIA DECISION IN CASE C-186/16, *ANDRICIUC AND OTHERS VS BANCA ROMANEASCA*

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Abstract

The CJEU's judgment in Andriciuc and Others vs Banca Românească Case C-186/16 that came in September 2017 is an addition to a growing body of case law on procedural obstacles to consumer protection under Directive 93/13/EEC. According to the Court, a contractual term must be drafted in plain intelligible language, the information obligations should be performed by the bank in a manner to make the well-informed and reasonably observant and circumspect consumer aware of both possibility of a rise or fall in the value of the foreign currency and also enabling estimation of the significant economic consequences of repayment of the loan in the same currency as the currency in which the loan was taken out.

Following a succession of consumer-friendly preliminary rulings from European Court of Justice (Case C-26/13, Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt and Case C-186/16 Andriciuc and Others v Banca Românească, bank customers across the European Union are increasingly taking their banks to court. However, there are still a lot of provisions in the national legislations which made the judicial review of unfair contract terms difficult and reveals the limits of consumer protection under Directive 93/13. Also, we focus on the powers of the national court when dealing with a term considered to be unfair (civil) courts and the availability of legal remedies in ensuring the effectiveness of the Directive.

Although the CJEU provides interpretation of EU law, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. The ruling issued by the Court of Justice of the European Union (CJUE) in the Andriciuc versus Banca Românească case represents a great advantage for some of the European debtors.

In this paper, we intend to examine, starting from the theory of abusive clauses and referring to the jurisprudence of the European Court of Justice in the matter, to what extent it is possible that under Council Directive 93/13 / EEC of 5 April 1993 on unfair terms in consumer contracts and the national laws of the various Member States to order "freeze of the exchange rate" or conversion of the currency of the credit into domestic currency

Keywords: *unfair terms in consumer contracts; plain intelligible language in consumer contracts; significant imbalance in the parties rights and obligations arising under the contract; case C-186/16 Andriciuc and Others v Banca Românească; case C-26/13, Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank.*

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1. Introduction

The problem of foreign exchange loans in Romania, as well as in other European Countries, is well known. Banks have been miss selling this kind of loans, especially in Swiss Francs (CHF), to European families with a terrible impact in their economy.

The European Court of Justice ruled on 20th of September 2107 that lenders must be frank with borrowers about the economic consequences of foreign-currency loans. "When a financial institution grants a loan denominated in a foreign currency, it must provide the borrower with sufficient information to enable him to take a prudent and well-informed decision."

A preliminary ruling was requested in a proceeding between Mrs Ruxandra Paula Andriciuc and 68 other consumers with Swiss francs loans and Banca Românească SA ('the Bank'). Ruxandra Paula Andriciuc and 68 other borrowers brought the underlying challenge in the District Court of Bihor, Romania, with regard to loans they obtained in Swiss francs from Banca Românească about a decade ago.

In 2007 and 2008, Mrs Ruxandra Paula Andriciuc and other persons who received their income in Romanian lei (RON) took out loans denominated in Swiss francs (CHF) with the Romanian bank Banca Românească in order to purchase immoveable property, finance other loans, or meet their personal needs. According to the loan agreements concluded between the parties, the borrowers were obliged to make the monthly loan repayments in CHF and they accepted to bear the risk related to possible fluctuations in the exchange rate between the RON and the CHF. In the event that the borrowers failed to repay their loans, the contracts allowed Banca Romaneasca to debit their accounts and carry out any currency conversion where necessary, using that day's exchange rate.

Mrs Andriciuc and the other borrowers claim in their lawsuit that the contracts were unfair, saying the Swiss franc fluctuates significantly against the Romanian leu, and that the bank failed to fully explain the exchange risk despite its foresight about the exchange rate. The exchange rate changed considerably, at enormous cost to the borrowers. Between mid-2007 and mid-2011, the lei's value halved against the Swiss frank.

The main argument put forward by the borrowers was that, „at the time of conclusion of the contract the bank presented its product in a biased manner, only pointing out the benefits to the borrowers without highlighting the potential risks and the likelihood of those risks occurring. According to the borrowers, in the light of the bank's practice, the disputed term must be regarded as being unfair."

Judgment C-186/16 was issued on the request of the Appellate Court in Oradea (Romania) for a preliminary ruling, in which the Romanian court asked several questions regarding the scope of banks' obligation to inform clients about the exchange rate risk in foreign currency loans, from the perspective of the Directive 93/13/EEC on unfair terms in consumer contracts.

The Court of Justice ruled in case C-186/16 "that financial institutions must provide borrowers with adequate information to enable them to take well-informed and prudent decisions and should at least encompass the impact on installments of a severe depreciation of the legal tender of the member state in which a borrower is domiciled and of an increase of the foreign interest rate."

If the contract terms were clear is a question that the Romanian court must examine.

In addition, the CJEU took the view that, when determining the existence of an uneven position of contracting parties, the circumstance whether a bank, at the moment of entering into the contract, had certain knowledge on the facts that could affect the performance of contractual obligations has to be taken into account as well.

"First, the borrower must be clearly informed of that fact that, by concluding a loan agreement denominated in a foreign currency he is exposing himself to a certain foreign exchange risk which will, potentially, be difficult to bear in the event of a fall in the value of the currency in which he receives his income," the court said in a statement about the ruling. "Second, the financial institution must explain the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency, particularly where the consumer borrower does not receive his income in that currency."

If the bank has not fulfilled those obligations, the national court must determine whether the bank acted in bad faith and if the parties to the contract are imbalanced.

"That assessment must be made by reference to the time of conclusion of the contract concerned, taking account of the expertise and knowledge of the bank, in the present case the bank, as far as concerns the possible variations in the rate of exchange and the inherent risks in contracting a loan in a foreign currency," the court's statement says[1].

But for the consumers in this case the legal battle is far from over. Having ruled on this point of law, the ECJ handed the case back to the Romanian courts to determine whether the Romanian bank has met these criteria, because the Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

With this ruling the CJEU has created a very wide space for examining clauses which established the liability to repay the loans in foreign currencies. Namely, as a result of the subject judgment, if it is determined that a bank did not inform its client about possible risks, but emphasized only the advantages when entering into the contract, the subject term may be declared unfair, and consequently null, i.e. without legal effect.

The number of individuals in Romania with Swiss franc loans declined to 37,907 at the end of the first quarter of 2017, half as compared to 2014, before the franc grew strongly against the Romanian leu. At the end of 2014 there were 74,849 francs debtors. Credits in Swiss francs are mainly directed to the population - 98% and 5.3 billion lei respectively. In March 2017, banks had 12,252 mortgage loans and 12,458 mortgage-backed consumer loans denominated in Swiss francs. As a result of the negotiation between debtors in Swiss francs and banks, 37,586 consumers accepted the conversion of the loans from Swiss francs to leu. In front of the Romanian courts are a few thousand consumers asking the declarations that the term according to which the loan must be repaid in CHF, regardless of the potential losses that those borrowers might sustain on account of the exchange rate risk, is an unfair term which is not binding on them in accordance with the provisions of Directive 93/13/EEC[2] on unfair terms in consumer contracts.

[1] https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170103en.pdf.
[2] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993L0013.

2. Content

In C-186/16 case, examining the aspects of the knowledge of average consumers and banks' obligations towards them, the European Court of Justice establishes that contractual terms regarding the denomination of a consumer loan in a foreign currency and the requirement the loan to be paid back in the same currency are core terms of the loan agreement. They are seen as defining the 'main subject matter of the contract' (par. 38). This implies that this contractual clauses are not subject to the unfairness test, provided the terms were transparent.

Curia's decision distinguishes between consumer loan agreements denominated in foreign currency which have to be paid back in the same currency (like in current case), and the loan contracts where the monthly installments only have been indexed to foreign currencies, which means that the repayment occurs in local currency and its rate is calculated on the basis of the exchange rate of foreign currency (para. 39-40):

"39 It is true that the Court held in paragraph 59 of the judgment of 30 April 2014, Kásler and Káslerné Rábai (C-26/13, EU:C:2014:282) that the 'main subject matter of the contract' covers a term incorporated in a loan agreement denominated in a foreign currency concluded between a seller or supplier and a consumer which was not individually negotiated, pursuant to which the selling rate of exchange of that currency applies for the calculation of the loan repayments, only if it is established, which is for the national court to ascertain, that that term lays down an essential obligation of that agreement which, as such, characterizes it.

40 However, as the referring court also pointed out, in the case which gave rise to the judgment of 30 April 2014, Kásler and Káslerné Rábai (C-26/13, EU:C:2014:282), the loans, although denominated in foreign currency, had to be repaid in the national currency according to the selling rate of exchange applied by the bank, whereas in the case in the main proceedings, the loans must be repaid in the same foreign currency as that in which they were issued. As the Advocate General observes, in point 51 of his Opinion, loan agreements indexed to foreign currencies cannot be treated in the same way as loan agreements in foreign currencies, such as those at issue in the main proceedings.). In the second case, the term describing the repayment mechanism could be classified as an ancillary contractual term, and, therefore, subject to the unfairness test. The same cannot be said of the term setting an obligation to repay the loan in the same (foreign) currency:

"...the fact that a loan must be repaid in a certain currency relates, in principle, not to an ancillary repayment arrangement, but to very nature of the debtor's obligation, thereby constituting an essential element of a loan agreement." (par. 38)

Consumers in Andriciuc case did not, therefore, enjoyed the protection of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, because, Oradea Court of appeal, in Decision 370/2017 28.11.2017 rendered in file no. 1713/111/2014 that the plaintiffs couldn't prove that the contractual term was non-transparent (not written in plain and intelligible language):

"Although the court finds that the defendant has not proved that it has informed the plaintiffs of the actual consequences of the reimbursement clause, the court of appeal considers that this lack of information is not such as to lead to the absolute nullity of the clause, because an informed average consumer knows that the currency in which it was borrowed is subject to a currency risk, unless it could retain bad faith of the defendant that the lender was

aware that there will be a significant depreciation of the national currency, a currency shock, sufficient to break the contractual balance between the parties. In this regard, it should be noted that, as stated above, the clause providing for the repayment of a loan in a foreign currency is the contractual transposition of the principle of monetary nominalism regulated by Art. 1578 Civil code, which in a credit agreement is naturally implicit, even in the absence of a contractual clause in this respect. Foreign currency credit agreements are not characterized by the usual imbalance in consumer contracts caused by the consumer's lack of information or differences in negotiating power, but by an imbalance generated by the attribution of currency risk to the consumer because the bank always receives the currency in which the credit was granted, irrespective of the intrinsic value of the foreign currency in which the credit is denominated, but the consumer who earns the income in another currency, in case of devaluation of it against the currency of the credit, has to submit an additional financial effort to obtain the necessary resources for repayment. Although a certain level of informational asymmetry can be identified between the bank and the consumer even in the case of foreign currency loans, the information held by the bank does not allow it to anticipate the shock events and consumer ignorance no longer plays the same role in the equilibrium contractual imbalance. Forex fluctuations are not only abnormal but are quite typical and predictable, but if course variations can be anticipated, their meaning and magnitude can not be anticipated. The unpredictability of foreign exchange fluctuations must also be related to the different degrees of currency exoticism, but irrespective of the status of the foreign currency on the credit market, currency shocks are generally unpredictable events not only for the consumer but also for the bank."

The Oradea Court of Appeal continues: "Even if one could have anticipated a certain increase in the exchange rate, as existed in previous periods, when there were variations in the course, without these being excessive, from the evidence administered does not result that the defendant could have anticipated the extent of the increase exchange rate CHF/ Leu in the period following the granting of the loans. It was identified only after the economic crisis and after the outbreak of currency shocks into the true size, the problems caused by foreign currency lending, both the recommendation of the ESRB / 2011 and the 2014/17 / EU Directive following them. Even though, as is apparent from the recitals of Directive 2014/17 / EU[3], it was noted that there was an irresponsible behavior of market participants this aspect is not likely to leads to the conclusion that the bank, at the time of the granting of the loans, knew or could have known or anticipate the subsequent currency shock."

This reasoning follows also from the European Court of Justice in judgement for a for a preliminary ruling in case C-186/16, Ruxandra Paula Andriciuc and Others v Banca Românească SA, and invoking the European Systematic Risk Board's Recommendation ESRB/2011/1 of 1 September 2011 which specified risks to consumers of lending in foreign currencies (par. 49): "49 In the present case, as regards loans in currencies like those at issue in the main proceedings, it must be noted, as the European Systematic Risk Board stated in its Recommendation ESRB/2011/1 of 21 September 2011 on lending in foreign

[3] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property.

currencies (OJ 2011 C 342, p. 1)[4], that financial institutions must provide borrowers with adequate information to enable them to take well-informed and prudent decisions and should at least encompass the impact on instalments of a severe depreciation of the legal tender of the Member State in which a borrower is domiciled and of an increase of the foreign interest rate (Recommendation A — Risk awareness of borrowers, paragraph 1)."

The Oradea Court concludes: "The Court of Appeal does not dispute that, as a result of the explosive growth of the Swiss franc, the execution the credit agreements would not have become overly burdensome for the applicants, both from the point of view of the financial effort that they must make to pay the rates, as well with regard to the balance of credits, most of plaintiffs are likely to be in a situation where, while paying rates nearly 10 years, the remaining balance in lei equivalent is equal to or even higher than the credit equivalent in RON at the time it was granted, but, as it showed both the court of first instance and the Romanian Constitutional Court by decision no. 62/2017[5], these issues are not likely to lead to nullity of clauses, but could call into question contractually solidarism and adjusting the contract by applying the unpredictability, not covered by the object of case."

The German Federal Court in Karlsruhe (Bundesgerichtshof – BGH is the highest court of civil and criminal jurisdiction in Germany) in case XI ZR 152/17, decided on 19 December 2017 with a judgment in favor of the borrower. Notwithstanding the fact that in a concrete lawsuit it is not about a consumer, who has special protection, the German Federal Court has ruled that the explanatory duty of the bank in terms of foreign currency loans must include specific weaknesses and risks of such a product.

In Spain, the Supreme Court, Civil Chamber, in Ruling no. 608/2017 tof November 15, 2017, which considered that a multi-currency clause did not exceed transparency control. "43.- The lack of transparency of the clauses relating to the denomination in foreign currency of the loan and the equivalence in Euros of the repayment instalments and of the capital pending amortisation, is not innocuous for the consumer but causes a serious imbalance, going against the requirements of good faith, since, by not knowing the serious risks involved in contracting the loan, they could not compare the offer of the multicurrency mortgage loan with those of other loans, or with the option of maintaining the loans already granted and that were cancelled through the multicurrency loan, which generated new expenses for the borrowers, the payment of which came from the amount obtained with the new loan. The economic situation of the borrowers worsened severely when the risk of fluctuation materialised, such that not only the periodic instalment payments increased drastically, but the Euro equivalence of the capital pending amortisation increased instead of decreasing while they were paying regular instalments, which was detrimental to them when the bank exercised its power to terminate the loan early and demand the capital pending amortisation in a foreclosure process, which turned out to be superior to the amount they had received from the lender when arranging the loan."

[4] https://www.esrb.europa.eu/pub/pdf/recommendations/2011/ESRB_2011_1.en.pdf.

[5] Decizia no. 62/2017 referitoare la admiterea obiecției de neconstituționalitate a dispozițiilor Legii pentru completarea Ordonanței de urgență a Guvernului no. 50/2010 privind contractele de credit pentru consumatori, text published in the Official Journal of Romania no. 161 03 March 2017.

51. - No matter how much Barclays alleges the difference between the loan object of this appeal and the one which is the subject of the main proceedings in respect of which the questions were referred giving rise to the judgments of the CJEU, and in particular the STJUE of the Andriciuc case, requires the denomination in a given monetary unit of the amounts stipulated in the pecuniary obligations, which is an inherent requirement of monetary obligations.

There is no problem of separability of the invalid content from the loan contract.

55. - This substitution of a contractual regime is possible when it comes to avoiding the total nullity of the contract in which the unfair clauses are contained, so as not to harm the consumer, since, otherwise, the purpose of the Directive on unfair clauses would be contravened.

This was stated by the CJEU in the judgment of 30 April 2014 (Kásler and Káslerné Rábai case, C-26/13), paragraphs 76 to 85.

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AT A CROSSROADS: THE CASE OF "PATHOLOGICAL ARBITRATION CLAUSES" WHICH DETERMINE A JURISDICTIONAL FIGHT

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Abstract

The so-called 'pathological arbitration clauses' are ambiguously drafted arbitration agreements which disrupt the setting in motion of an arbitration proceeding. A particular situation is the case where parties refer both to the jurisdiction of the arbitration tribunals and to that of the domestic courts in their contracts, without giving further detail. Such agreements may be interpreted in different ways and they currently cause controversy among several theorists and practitioners. However, in recent years the arbitration tribunals strive to maintain the validity of the defective arbitration clauses by preferring an interpretation which gives effect to the clauses over one which does not. Our paper briefly examines this kind of defective arbitration clauses and the solutions provided by doctrinaires and courts. In the end, we assess the issue and attempt to establish the parties' true intention in order 'to remedy' the pathology.

Keywords: *pathological arbitration clauses, defective arbitration agreements, defective clauses, arbitration problems, jurisdictional fight.*

1. Introduction

The *'pathology'* of arbitration clauses is, unfortunately, an "evergreen" phenomenon. It is neither new nor uncommon for law practitioners to encounter hypotheses when parties insert ill-drafted arbitration agreements which generate confusion surrounding the setting in motion of an arbitration proceeding. The ambiguity of such contractual terms is rarely intentional. It is true that in certain hypotheses the contractual party who drafts the arbitration clause voluntarily refers to equivoque arbitration procedures or to the jurisdiction of domestic courts in order to discourage the other party to follow the arbitration path. However, in most cases, parties do not act in bad faith. Instead, they usually lack basic knowledge for drafting contractual terms and do not incorporate the arbitration agreements generally recommended by international arbitration courts.

In my opinion, which may be slightly different to the ones of other law theorists, *'pathological arbitration clauses'* are not to be confused with null or void clauses. The latter are terms that deviate from one or more of the validity conditions.

Being accepted as a distinct agreement, separate from the underlying agreement[1], the arbitration clause must comply with the essential validity requirements of any contract. Under

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[1] See Article 550 paragraph (2) of the Romanian Code of Civil Procedure (Law no. 134/2010 regarding the Romanian Code of Civil Procedure, as republished in the Romanian Official Journal no. 247/2015 and last amended on March 24th, 2017).

Romanian law[2], a contract is valid when the parties have the required capacity to conclude it, their consent is freely and validly expressed, respectively the agreement has a specific and lawful subject, a legal and moral aim and a proper form.

Furthermore, any arbitration clause concluded under Romanian law shall comply with the following additional validity requirements:

a) The contracting parties shall have full exercise of their rights[3];
b) The potential litigation considered by the arbitration clause shall be arbitrable[4];
c) The agreement to arbitrate must be concluded in written form[5].

In most cases, *"pathological arbitration clauses"* are valid agreements, which comply with all the legal requirements highlighted above, but their wording is faulty, and they may lead to legal effects other than the ones envisaged by parties at the time of conclusion of the contract.

Stricto sensu, from a practitioners' perspective[6], "pathological arbitration clauses" are defective arbitration agreements of the following types:

a) Clauses where the agreement to arbitrate is absent or equivoque;
b) Clauses which are not clear in terms of the rules to be followed in the event of arbitration;
c) Ambiguous arbitration agreements that do not clearly designate the place of arbitration or the arbitrators;
d) Arbitration agreements that name arbitrators who are now deceased, incapable or refuse to act;
e) Agreements that provide unreasonably short deadlines in the arbitration procedure;
f) Arbitration clauses which contain various internal contradictions *etc.*

Among these kinds of ill-drafted terms, one of the most encountered "pathological clauses" are the so-called *"optional arbitration agreements"*[7] where parties are allowed to choose between an arbitration tribunal and a domestic court of law for settling a potential dispute.

The current paper briefly covers the issue of *"pathological optional arbitration agreements"*, due to the wide variety of interpretation problems they raise in practice.

This matter is not new to doctrinaries. Actually, the term *"pathological clauses"* ("clauses pathologiques") was introduced 44 years ago by a French law theorist named

[2] See Article 1179 of the Romanian Civil Code (Law no. 287/2009 regarding the Civil Code, as republished in the Romanian Official Journal no. 505/2011 and last amended on March 24th, 2017).

[3] See Article 542 of the Romanian Code of Civil Procedure.

[4] See Article 1112 of the Romanian Code of Civil Procedure.

[5] See Article 548 paragraph (1) of the Romanian Code of Civil Procedure.

[6] From a theoreticians' perspective, see Jacques Beguin, Michel Menjucq, *Droit du commerce international (International Trade Law)*, Lexis Nexis Publishing House, Paris, 2011, p. 1092 and Nigel Blackaby, Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, Oxford University Press, New York, 2009, p. 146-149.

[7] To a certain extent, the phrase `optional arbitration agreements`is inaccurate. Actually, either party has the option to choose between arbitration or ordinary courts when the other party is pasive. Under these considerations, theorists proposed a different term for describing such clauses, respectively *`non-mandatory arbitration agreements`* (*E.g.* see Gary B. Born, *International Commercial Arbitration, Volume I. International Arbitration Agreements*, Wolters Kluwer International, 2014, p. 789). However, I consider that the latter descriptive phrase is not the appropriate one for describing the defective agreements envisaged by this article because it also designates other types of ill-drafted clauses, such as hypotheses where parties provide that they *`may`*resort to arbitration in case of litigation, not being bound by their arbtration agreement.

Frédéric Eisemann[8]. There is also a rich jurisprudence related to this legal phenomenon. However, the issue still determines many controversies in practice and is not sufficiently debated in the Romanian legal literature.

The aims of this article are to raise awareness on defective arbitration agreements in order to limit the common occurrence of improper drafting and, respectively, to provide remedies for the *"pathology"* of *"optional arbitration clauses"*, being inspired by international doctrine and case law.

2. The Pathology of Optional Arbitration Clauses

2.1. General Remarks

Both law theorists and practitioners expressed various opinions concerning the hypothesis of ill-drafted *"optional arbitration agreements"*.

Among the most frequently encountered types of *"pathologies"*, I have considered the following to be examined by the current article:

a) The case where parties incorporated two jurisdiction clauses with different provisions, respectively: *(i)* an arbitration clause according to which all disputes arising under it shall be settled by an arbitration tribunal and *(ii)* a jurisdiction clause which established that all litigation shall be solved exclusively by a particular domestic court or courts.
b) The hypothesis where parties referred to both the jurisdiction of a particular arbitration tribunal and the one of national courts within the same clause, without giving priority to any of them;
c) The situation where parties incorporated an alternative jurisdiction clause which stipulates that in the event of litigation they shall submit it to arbitration or to national courts.

In all three cases the contracting parties refer both to arbitration and to the jurisdiction of national courts without giving priority to one or another. In such cases, arbitrators have the task to determine the parties' true intention. Commonlly, courts are in favour of saving to the arbitration agreement. However, sometimes the contradiction is so flagrant, that the respective clause or clauses are held void[9].

In the following sections I have grouped the main doctrinary and jurisprudential orientations into three categories, namely:

I. Opinions in favour of arbitration, according to which the claimant has the right to choose between the two types of jurisdiction;
II. Opinions which favour the exclusive competence of ordinary courts of law in case of ambiguity;
III. Opinions which consider that both jurisdiction clauses should be held ineffective.

[8] See Frédéric Eisemann, *"La clause d'arbitrage pathologique"*, published in Commercial Arbitration Essays in Memoriam Eugenio Minoli, Unione Tipografico-editrice Torinese, Torino, 1974. According to Frédéric Eisemann, back then honorary Secretary General of the International Chamber of Commerce from Paris, the term `pathological arbitration clauses` designates arbitration agreements that contain defects which may disrupt the smooth progress of the arbitration procedure.

[9] Emmanuel Gaillard, John Savage (ed.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Citic Publishing House, 2003, p. 270.

2.2. Opinions in Favour of Arbitration

At present, a number of courts from many jurisdictions, including Romania, favour the enforceability of arbitration agreements by using the principle of effective interpretation provided by Article 4.5 of the 2016 UNIDROIT Principles[10].

The principle was also incorporated in the Romanian Civil Code[11]. According to Article 1268 paragraph (3), clauses shall be interpreted so as to be effective, rather than not to give any effect[12].

In Romania, under an extensive doctrinary interpretation[13], it was held that if parties did not intend to submit their dispute to be settled through arbitration, they would have ignored any possibility of solving the litigation by an arbitration court. By considering the hypothesis of arbitration, both parties expressed a *"stronger consent"* in favour of arbitration than the one according to which any litigation falls under the competence of ordinary courts jurisdiction. The latter is, nonetheless, implied in the absence of an arbitration agreement.

Romanian courts also provided an extensive interpretation, in line with the one expressed by Romanian doctrine. In one case[14], the court established that in the presence of an alternative arbitration clause with the following content: *"Any disagreement between parties concerning the execution of the current contract shall be settled amiably. In the event that is not possible, the litigation shall be solved by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania or by a competent court, in accordance with the Romanian law"*, the non-competence defence raised by the defendant is overruled. The court grounded its decision on the principle of effective interpretation and the rule which states that a contract shall be interpreted according to the common intention of the parties, both provided by the Romanian Civil Code. Furthermore, the tribunal stated that by not giving effect to the arbitration agreement, the settlement of the dispute will be unjustifiably delayed and the parties' right to a speedy trial will be violated. Thus, the court decided that the claimant was entitled to resort to arbitration without seeking the subsequent consent of the defendant.

[10] The Principles of International Commercial Contracts (hereinafter reffered to as `the UNIDROIT Principles` is a document elaborated under the auspices of the International Institute for the Unification of Private Law which intends to help harmonize international commercial contracts law. The last edition of this code of contractual practices was last published in 2016. According to Article 4.5 of the UNIDROIT Principles 2016, *"Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect"*.

[11] Law no. 287/2009 regarding the Civil Code, published in the Romanian Official Journal no. 409/2011.

[12] For a detailed presentation of this principle, see Dragoş-Alexandru Sitaru, *Dreptul comerţului international. Tratat.Partea Generală (International Trade Law. General Part)*, Universul Juridic Publishing House, Bucharest, 2017, p. 534-535.

[13] See Viorel Roş, *Arbitrajul comercial internaţional (International Commercial Arbitration)*, Regia Autonomă Monitorul Oficial Publishing House, Bucharest, 2000, p. 158.

[14] See the Bucharest Court of Appeals (Curtea de Apel Bucharest), Judgement of April 24th, 2002 from Case File no. 390/2001, in Mesagerul economic, a publication of the Chamber of Commerce and Industry of Romania, no. 32 from August 11th, 2002 *apud* Giorgiana Dănăilă, *Procedura arbitrală în litigiile comerciale interne (Arbitration Procedure in Domestic Commercial Litigation)*, Universul Juridic Publishing House, Bucharest, 2006, p. 97. Similarly, see the reasoning of the Bucharest Court of Appeals in Award no. 144 of September 28th, 1999 from Case File no. 92/1998.

In another relevant case[15], a Romanian arbitral court decided that when the parties established that potential disputes arising from their contracts shall be resolved either by an arbitral tribunal, either by an ordinary court, then the claimant gains the right to choose between the two jurisdictions in the event of litigation.

A similar approach is found in a more recent arbitral award[16]. The court held that the alternative feature of the "optional arbitration agreement" means that any party is allowed to designate the competent court. The claimant's option does not need to be validated by the defendant, so if he filed a petition for legal action at the Bucharest Court of Arbitration, then the respective arbitral tribunal becomes competent to settle the dispute. Likewise[17], when the parties incorporated an alternative jurisdiction clause without establishing any criterion concerning the priority of competence, the right to choose between jurisdictions belongs to the claimant.

Another arbitral court[18] explained that by requiring a separate agreement in case the arbitration clause does not specify who has the right to choose between the two jurisdictions and does not impose certain conditions for the exercise of the respective right would be the equivalent of rendering the arbitration clause ineffective. Once the claimant submitted the case to an arbitral tribunal, the arbitration clause became valid.

Otherwise, if the action was filed to an ordinary court of law, then the latter would become competent to settle the dispute between the contracting parties[19].

The Romanian courts' interpretation is also encountered in foreign jurisdictions.

In the United States of America there is an extensive case law regarding this legal issue. Under the Federal Arbitration Act (hereinafter abbreviated as *"the U.S. F.A.A."*)[20], courts generally gave effect to "optional arbitration agreements" by stating that they permit either party to initiate the

[15] See the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Award no. 124 from July 22nd, 1999. Similarly, see the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Award no. 145 from December 27th, 1996. Both decisions are published in excerpt in *Jurisprudența Comercială Arbitrală (Arbitral Commercial Jurisprudence) 1953-2000*, edited by the Chamber of Commerce and Industry of Romania, Bucharest, 2002, p. 10.

[16] See the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Arbitral Award no. 283 from November 25th, 2009, published in Vanda Anamaria Vlasov, *Arbitrajul comercial. Jurisprudență arbitrală 2007-2009. Practică judiciară (Commercial Arbitration. Arbitral Jurisprudence 2007-2009. Judicial Practice)*, Hamangiu Publishing House, Bucharest, 2010, p. 8-9.

[17] See the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Arbitral Award no. 21 from February 7th, 2008, published in Vanda Anamaria Vlasov, *op.cit.*, p. 9-10. For a similar point of view, see the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Arbitral Award no. 233 from November 16th, 2007, published in Vanda Anamaria Vlasov, *op.cit.*, p. 10-11.

[18] See the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Arbitral Award no. 274/2006 from Case File no. 116/2006, published in the Romanian Journal of Arbitration (Revista Română de Arbitraj) no. 4 (8), October-December 2008, edited by the Chamber of Commerce and Industry of Romania, Rentrop & Straton Publishing House, Bucharest, p. 45-46.

[19] See, for instance, the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Arbitral Award no. 250/2007 from Case File no. 236/2007, published in the Romanian Journal of Arbitration (Revista Română de Arbitraj) no. 3 (7), July-September 2008, edited by the Chamber of Commerce and Industry of Romania, Rentrop & Straton Publishing House, Bucharest, p. 64-65.

[20] The United States Arbitration Act, more commonly referred to as the Federal Arbitration Act or FAA, was first enacted on February 12th, 1925 and is currently part of the Code of Laws of the United States of America, the official compilation and codification of the general and permanent federal statutes of the United States (Title 9, Section 1-14).

arbitration procedure, which afterwards becomes mandatory for both parties[21].

The English courts usually adopted a similar point of view. In a case[22] where parties incorporated, in two different articles of their contract, an arbitration agreement and a clause which provided for the exclusive jurisdiction of the English courts, the High Court maintained the arbitration clause by ruling that *"the reference to English courts applied only to incidents arising during the conduct of the arbitration"*.

French courts were also *in favorem validitatis* of the arbitration agreement.

According to the Paris Tribunal of First Instance[23], an equivoque arbitration clause shall be interpreted by considering that if the parties did not want to settle their potential disputes through an arbitration procedure, then they would have refrained from mentioning the possibility of arbitration by incorporating an arbitration clause in their contract. By doing so, they understood that they shall submit, on a prioritary basis, any disputes arising from their contract to the arbitral tribunal.

In another case[24], the Paris Court of Appeals held that in contracts containing an "optional arbitration clause", the jurisdiction clause which attributes the competence of ordinary courts of law is subordinated to the arbitration agreement and is inserted by parties *"to cover the eventuality that the arbitral tribunal is unable to rule"*.

Another example is given by the jurisprudence of the International Court of Arbitration attached to the International Chamber of Commerce from Paris (hereinafter referred to as *"ICC Arbitration Court"*). In an award[25] made by this arbitration tribunal, a clause which stipulated that *"an arbitral tribunal sitting in Algiers would resolve disputes in first and last instance"* and a second clause which stated that *"in last instance"* the Algerian courts have exclusive jurisdiction was interpreted as meaning that the arbitration agreement is effective and the latter provision refers *"only to the recourse available under Algerian law against awards made in Algeria"*.

2.3. Opinions That Favour the Exclusive Competence of Ordinary Courts

There are, however, cases where "pathological arbitration agreements" were considered optional, in the sense that the ordinary courts of law became competent in case of ambiguity and the parties were required to arbitrate only when they subsequently concluded a separate agreement to arbitrate.

In Romania, there were law theorists[26] who stated that according to its "normal

[21] See Gary B. Born, *op. cit.*, p. 789.

[22] See the English High Court of Justice, *Case Paul Smith Ltd. v. H&S International Holding Inc*. (1991), in XIX Y.B. Com. Arb. 725 (1994) *apud* Emmanuel Gaillard, John Savage (ed.), *op. cit*., p. 271.

[23] See the Paris Tribunal of First Instance (TGI Paris), Decision from February 1st, 1979, *Techniques de l'ingenieur*, in Revue d'Arbitrage no. 101, 1980 *apud* Emmanuel Gaillard, John Savage (ed.), *op. cit*., p. 270-271.

[24] See the Paris Court of Appeals, Decision from November 29th, 1991, *Case Distribution Chardonnet v. Fiat Auto France*, in Revue d'Arbitrage no. 617 (1993) *apud* Emmanuel Gaillard, John Savage (ed.), *op. cit*., p. 271. Similarly, see the French Cour of Cassation, *Case Brigif v. ITM-Entreprises*, in Revue d'Arbitrage no 544 (1997), with the comments of Daniel Cohen, in *Arbitrage et groupes de contrats*, *apud* Emmanuel Gaillard, John Savage (ed.), *op. cit*., p. 271.

[25] See ICC Arbitration Case No. 6866 of 1992, published in the ICC Bulletin, Vol. 8, No. 2, 1997, available online at *htttp://library.iccwbo.org/dr-awards.htm* [last access on April 4th, 2018].

[26] See Octavian Căpățână, *Convenția arbitrală deficitară (Defective Arbitration Agreement)*, in Revista de drept comercial (Commercial Law Journal) no. 12/1999 *apud* Viorel Roș, *op. cit.*, p. 158.

meaning" the optional contractual clause puts the arbitration tribunals and ordinary courts on an equal footing. The exercise of the right to choose between the two jurisdictions is, nonetheless, subordinated to the subsequent agreement to arbitrate that shall be concluded by the two contracting parties.

In the Romanian jurisprudence there was a case[27] concerning the interpretation of an arbitration agreement incorporated into a contract which stipulated that *"all potential litigation between parties shall be solved amiably; otherwise, the litigation shall be settled by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania or by an ordinary court"*.

The claimant submitted a dispute related to the underlying contract to the arbitration tribunal, but the defendant alleged that the parties are not bound to arbitration unless they conclude a subsequent agreement to arbitrate. The court agreed with the defendant by reasoning that, by using the conjunction *"or"*, the contracting parties did not establish a clear hierarchy between arbitration and the ordinary procedure. It ended by stating that the exercise of the option is subordinated to the subsequent consent of the two parties. Thus, this consent not being obtained, the agreement to arbitrate is not held effective.

In my opinion, such interpretations are in flagrant contradiction with the principle *in favorem validitatis* of the arbitration agreement. When parties referred even marginally to arbitration, they took into account the possibility of arbitration at the moment they concluded the underlying contract. If these agreements were meant only to establish the parties' duty to negotiate the settlement of their potential dispute through arbitration in the future, then these contractual terms would be ineffective, not serving any purpose.

2.4. Opinions Which State That Both Jurisdiction Clauses Should Be Held Ineffective

These opinions are rather isolated, being rarely encountered in practice. However, there were cases when both jurisdiction clauses were considered ineffective.

For instance, there was a French court[28] which held that the arbitration agreement, which expresses the will of the contracting parties to give the arbitrators the power to settle their dispute, clearly excludes the intervention of the state judge. Thus, the respective clause is certainly in contradiction with the clause conferring jurisdiction to the Paris Commercial Court. Consequently, the disputed jurisdiction clauses are irreconciliable and shall be deemed not written. Pursuant to the rules of civil procedure law, the litigation was placed within the jurisdiction of the commercial court of the place where the defendant had its headquarters.

In another interesting case[29], the ICC Arbitral tribunal considered that by means of a clause incorporated in their contract, the parties wanted to *"preserve"* an alternative that allows them to choose between a consular and an arbitral jurisdiction. However, if there is any doubt related to the content of the respective jurisdiction clause, it shall be interpreted *contra proferentem*. In

[27] See Bucharest Court of Appeals, Judgement no. 179 from November 15th, 1999 in Case File no. 250/1998, not published, available in excerpt in Giorgiana Dănăilă, *op.cit.*, p. 96.

[28] See *Case Epoux Saadi v. Huan*, C. Paris, November 22nd, 2000, in Alexis Mourre (ed.), *Les Cahiers de l'Arbitrage (Arbitration Notebooks)*, Gazette Du Palais, edition Juillet 2002, p. 294.

[29] See Partial Judgment from 2006 from ICC File no. 13921, in Charles Kaplan, Alexis Mourre (ed.), *The Paris Journal of International Arbitration (Les Cahiers de l'Arbitrage)*, L.G.D.J. Publishing House, Paris, May 2010, p. 91-93.

this hypothesis, the arbitration agreement drafted by the claimant being ambiguous, the arbitral tribunal considered it was not competent to settle the respective dispute.

3. Conclusions

To sum up, this paper presents the issue of *"pathological"* clauses where the contracting parties refer both to the jurisdiction of arbitration tribunals and national courts without giving priority to one or another.

Doctrinaries and practitioners expressed several opinions concerning the hypothesis of such defective agreements, which can be grouped into three categories, namely:

I. Opinions in favour of arbitration, according to which the claimant has the right to choose between the two types of jurisdiction;
II. Opinions which favour the exclusive competence of ordinary courts of law in case of ambiguity;
III. Opinions which consider that both jurisdiction clauses should be held ineffective.

Each category has many followers. However, the opinions which are in favour of arbitration are the dominant ones, while the opinions that held the jurisdiction clauses ineffective are rather isolated.

I rally with the first category. In my opinion, there are three main principles that shall be observed when interpreting any *"pathological"* arbitration agreement.

Firstly, courts need to establish the genuine intention of parties at the moment they drafted the respective agreement. In order to achieve that, they need to examine all relevant circumstances, including the ones provided by Article 4.3 of 2016 UNIDROIT Principles, especially the preliminary negotiations between parties, their practices and conduct subsequent to the conclusion of the contract. By doing so, practice showed me that this would reveal previous actions which may give us valuable hints that parties wanted to submit their potential disputes to arbitration.

Secondly, if the true intention cannot be accurately established, the arbitration agreement shall be always interpreted *in favorem validitatis*. If parties referred to arbitration in their contracts, it would be irrational to consider that they did not take into account the possibility to resort to arbitration in case of a potential dispute at the moment of conclusion of the respective contracts. Parties incorporate clauses in their contracts with the will to make them effective.

Thirdly, this kind of jurisdiction clauses is generally encountered in commercial contracts. When interpreting commercial law rules we need to be flexible and to observe the principle of celerity. By refusing to recognise the competence of the arbitration tribunal that was appointed by the claimant, the procedure length is considerably increased, which is contrary to the parties' right to a speedy trial. Therefore, the claimant shall have the right to choose between the two jurisdictions given to him as option.

In the end, I hope this paper raises awareness on the phenomenon of *"pathological optional arbitration agreements"*, which are rarely discussed by theorists, even if they are commonly encountered in practice, and it serves as an inspiration for future research on this issue, by considering a more extensive jurisprudential approach.

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SYSTEMATIC THINKING ABOUT EMPLOYEE STATUS

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Abstract

Over the past decades, the international and European policy debate has focused on who is considered to be an employee and what kind of workers are covered by the protection of employees, i.e. the extension of the scope of labour law There is a deep-set problem lying behind this global thinking. The application of the principle of equal treatment in private law encompasses a lot of tension. Private law including labour law is confronted with human and constitutional rights when vulnerable groups, like women, the elderly, parents, persons with disabilities are integrated into the labour market. In labour law human and constitutional rights make freedom of contract, being more limited than civil law, seek further compromises. In labour law, there is a clear conflict between the prohibition of discrimination, the freedom of contract and the freedom of provision provided by property law. In the event that labour law regulation is left alone and is not considered systematically, conflict can result in controversial legislative solutions.

Keywords: *labour law regulation, flexicurity, social and labour market program, equality rights, integration policy, personal scope of labour law and labour protection, employee status, labour-market status.*

1. The significance of the system and its dilemma

"*The system is nothing but parts or elements making up a whole or a combination of those parts or elements - like the hierarchy of the ecosystem is made up of atoms, molecules, cells, and organs, organisms. The system is sustained during a continuous change of elements - e.g. organs in the course of cell replacement, societies in the course of the birth and death of their members. System laws can also be applied to spiritual phenomena. Gears will make up a tower clock to a certain degree of order, the letters will become texts to a certain degree of order and coherence of legal norms can have two types of image: a set and a system. A set is the mere co-existence of the elements .... A system of organised order goes beyond a setlike state ...*"[1] I quote Miklós Szabó from the Introduction to Law and State Science. The question is whether employee status or employee quality can be placed in a broader context. The goal is to create a general concept that allows to map the structure of employee existence that is operative, objective, truthful, and is rational. A complex concept of employee status can also be seen as the result of a construction work in legal dogmatics, in which it is important that the construction can be exerciseable.

The question then arises as to how uniformly labour market can be treated, if it

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[1] Miklós Szabó: Legal System (Jogrendszer). In: Miklós Szabó (ed.): *Introduction into the Jurisprudence and Political Sciences. (Bevezetés a jog-és államtudományokba*), Bíbor Kiadó, Miskolc, 2006, p. 109-110.

can be treated uniformly. If so, can a complex understanding of employee status treat the players in the labour force uniformly?

Compared to civil law, in labour law, due to state interference in the interest of the weaker party, contractual freedom of the parties is subject to more restriction - despite the fact that Act I of 2012 on the Labour Code (LC) aims to strengthen freedom, by derogating from the rules of the Labour Code, it makes *bilateral disposivity* a general rule.

In labour law, the freedom of contract being more restrictive than in civil law is violated by limiting the freedom of choice, for example in quota regulations[2]. This conflict at the level of labour law regulation can be barely resolved in case of some vulnerable groups, like persons with disabilities[3]. This is particularly true when labour law regulation is *left alone* waiting for the solution to resolve the conflict.

In labour law, therefore, the restriction as a *legal fact* at the conclusion of the employment contract and its *legal effect* during the full employment relationship applies due to the increased need of the vulnerable employee to protect working time, rest, wages, derogation from the employment contract, termination of employment, even in the case of an incapacitated employee, even in the case of liability for damages. *Freedom of choice* conflicts with *restriction of choice*, which then affects the content of the entire legal relationship.

The problem is even more complicated because the policy of equal opportunities regarding the various vulnerable employees is *heterogeneous*, so are the regulatory solutions for potential employees with some protected characteristics, be it gender, age, race, religion, political belief or disability. The principle of non-discrimination, preference and reasonable adjustments *have come to life*, and have not taken the usual forms of private law - dispositivity - but are principles of *strict compliance*.

Thus, in order to be able to apply the principle of equal treatment in a private law and in particular in a labour law context, it is necessary to find the way and build a mindset that may go beyond the labour law regulation framework, but the constitutional and human rights principles can still be applied within private law dogmatics. As a result, *a new system and new approach* will be developed. For my part, I am trying to contribute to this by the complex concept of employee status.

By extending the scope of the personal scope and / or that of the protection institutions, the current EU and international policy debate on the renewal of labour law is conducive, while by reducing defence regulation it is contrary to the application of equal treatment in labour law context. The future of labour law regulation is defined by several directions today, two of which are highlighted here:

I. the *extension* of the personal scope of labour law status and / or labour law protection,
II. the *flexible and secure* nature of labour law regulation taking into account the (dual) interest system of employees and employers[4].

[2] According to the quota regulation prescribed in Act CXCI of 2011 § 23 Sec. 1. the employer is obliged to pay rehabilitation contribution fee if the number of employees surpasses 25 and 5% of the employees are not employees with changed working capacity.

[3] Attila Menyhárd: Challenges in the Recent Private Law Dogmatic. (Kihívások a mai magánjogi dogmatikában.) In: Miklós Szabó (ed): Legal Dogmatic and Theory. (Jogdogmatika és jogelmélet), Bíbor Kiadó, Miskolc, 2007. 291-307. He writes on the releasing character of constitutional rights on pages 300-303.

[4] The employee status was a hot issue on the ILO Conference of Future of Work in Genova, 3-5 July 2017.

These directions determine not only labour law, but in a broader sense also *the future of work and workforce*.

2. The extension of the personal scope of labour law status and / or labour law protection

What does the *protection system* mean? Mapping of the structure of being an employee and examining employee quality are directly related to the functioning of the labour law protection system. By labour law protection system, I mean all the rules and institutions regarding employee's protection. These create labour law and, in a sense, social law security for an employee. Examining the question, however, sets up a trap I have always tried to avoid in my research. Namely, I cannot mix the goals of labour law with those of social law. Since labour law is the law of the private sector, it cannot take over the duties of social law, the care-centeredness of the social welfare system cannot be imposed on it. By protecting the weaker party, however, labour law presents social law aspects of equal opportunities rules regarding *women, persons caring for children and persons with disabilities*. Moreover, not only labour law has social law implications, but employee status also has a *social side* to it.

Labour law protection system is defined within and outside the legal system: within the legal system horizontally and vertically, outside the legal system by external - economic and social - circumstances.

By *horizontal* definition, I mean the particularities of the legal relationship that raise the question how labour law is related to civil law. Its *vertical* determination is inherent in constitutional law that is pervasive throughout the legal system, in other words it lies in fundamental rights. Both horizontal and vertical determinism can be captured in its history. Besides this and at the same time, the demand for or the renunciation of labour law protection regulation are constantly changing, reflecting economic and social changes and expectations.

At the same time, given the changing personal scope of labour law, the decision who is covered by labour law protection legislation in parallel to or irrespective of the extension of the employee nature is a question of legal policy and leads to a double and triple model of legal statuses in Europe[5].

Thus, the extension or even the exclusion of the personal scope of labour law is aimed at what group of employees labour law legislation wishes to extend labour law regulation to. Separately or even at the same time, the extension of the scope of (certain) labour law protection institutions, which leads to the concept of *a person with a status similar to an employee*.

This is beneficial for disadvantaged groups (vulnerable groups), as they are mostly those who work in atypical employment relationships, doing dependent work and thus the extension of employee

[5] See more: Nicola Countouris: *The Changing Law of the Employment Relationship. Comparative Analyses in the European Context*. Hampshire, Burlington, Ashgate Publishing Company. 2007. 57-59.; Paul Davies – Mark Freedland: *Labour Markets, Welfare and the Personal Scope of Employment Law*. *Comparative Labour Law & Policy Journal*. 1999-2000. Vol. 21. p. 237-238.; A.C.L. Davies: *Perspectives on Labour Law*. Cambridge. Cambridge University Press. 2009. 77-96.; Simon Deakin – Gilian S. Morris: Labour Law. 6th edition. Oxford and Portland, Oregon, Hart Publishing. 2012. 172-182.; Simon Deakin: *The many Futures of the Employment Contract*. ESCR Centre for Business Research. University of Cambridge, Working Paper No. 191. 2000. 5-8. on the definition of the employee from the employer's perspective see: Gábor Mélypataki: Definition of employee in the Hungarian and German Law from the Employer's Perspective (A munkavállaló fogalma a magyar és a német jogban a munkáltató szempontjából). Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica Tomus. Volume 30. Issue 2. Miskolc, Miskolc University Press. 2012. 521-540.

status and the related protection system means safer working conditions for them being employed part-time, for a fixed-term or as outworkers. In this respect, labour law legislation aiming at the normalization of atypical employment in Europe, including in Hungary, also helps to comply with the principle of equal treatment. Thus, the *inclusion* of part-time, fixed-term and outworking employment *in a labour law regulation* has facilitated the representation of vulnerable groups in employment relationship.

This protection would have been strengthened if, in accordance with the draft, the Labour Code had extended the application of employment law (leave, notice period, severance pay, liability provisions) to persons with a status similar to an employee.

Labour law regulations in Europe, however, are changing dynamically, their rules are loosening, becoming more flexible in line with the changes in labour market requirements and consumer demand. One of the driving principles of the labour market policy and based on this that of labour law regulation changes is the concept of *flexicurity*, which the general justification of the Labour Code also refers to. Apart from the economic driving force for change, human rights and equal opportunities policy are also serious regulatory factors which, as I have mentioned, are imperative to follow[6].

If we consider the process from vulnerable groups' point of view, on the one hand labour law rules are loosening providing less protection for the employee. From the employee's point of view the rules relating to the termination of an employment relationship or the liability for damages are changing unfavourably. Of course, this is beneficial to the employer. As an Anglo-American influence (*Freedland, Counturis*) the process is considered to be a mutual risk taken by the employer and employee. In my opinion, mutual risk is taken by partners, co-ordinated parties, and it is not to be discussed in labour law regulation.

On the other hand, this trend is sharply opposed by integration policy, which also affects labour law rules. Combating social exclusion cannot be want of protection regulation. Thus, it seems that equal rights and integration policies as social factors strongly deter labour law from becoming more flexible, since the integration of vulnerable groups requires protection regulation.

The question then arises, however, whether protection can only be given under labour law rules. The answer is clearly "No". Protection regulation can also be implemented by *flexicurity* as a *social and labour market program* and the relating transit labour market program through a system of social security, job search and rehabilitation services.

This approach to protection thus contributes to the creating protection not only for employees but also *workers.*

It is therefore clear that, when applying the principle of equal treatment, the status of vulnerable and disadvantaged groups is a wider employment issue. *Employability* includes employment rehabilitation, labour safety, employment policy, education policy, labour inspection rules and measures, job search support system, active labour market policy and the operation of a sustainable social care system.

[6] Auer Peter – Gazier Bernard: Social and labour market reforms: four agendas. In: Ralf Rogowski – Robert Salais – Noel Whiteside (ed.): *Transforming European Employment Policy. Labour Market Transitions and the Promotion of Capability.* Edward Elgar, Cheltenham, UK, Northampton, Ma, USA, 2011. p. 34-36. Auer and Gazier present flexicurity as a social and labour market program such as the flexibility, capability, and transitional labour market. This approach is holistic based on systematic thinking.

The *Hungarian reality* of social and labour market programs means a special country-specific social and labour market model and strategy. One of the elements of this is the nature of labour law regulation, in which achieving the balance of flexibility and security is a major issue. The balance implies a degree of legal guarantees in a legal relationship that is still motivating for an employer requiring flexibility to maintain the legal relationship within the labour law framework.

In such a consistent labour market program, I believe that the applicability of human and constitutional rights in the labour law environment can be more successful, that is employee status must be viewed in a complex way.

The broad concept of employee status draws attention to the fact that the aim of labour law is not just to balance the imbalance between the parties. Among the goals of labour law there must also be one that, *through the extension of individual capacity, promotes the principle of autonomy and equality in work and ensures a decent living.*

With this, social and labour market programs have led us to the broad concept of employee status.

In labour law, *individual self-determination* is realized through the labour contract and the will of two subject positions of labour law[7], so it is fundamental to define the scope of the subjects of the obligation, which implies that it has become a cardinal problem of labour law[8]. The dogmatic questions of employee status are of paramount importance as they are the basis and the starting point of labour law enforcement.

The Labour Code provides for subjects of employment relationships and the concept of employment contract. This wording, however, fails to handle the participants of the labour market, if not uniformly but more uniformly[9].

I believe, however, that work performed according to contract by the able-bodied and disadvantaged groups, in particular those with disabilities goes beyond the provisions of the Labour Code, and there is a broader concept of employee status, which is a set of personal and environmental factors in a *legal, economic and social sense*. As the success of

[7] Not only the individuals of the obligation but also the realization of their will is in the focus.

[8] György Kiss: *Collision of Constitutional Rights in Labour Law*. (*Alapjogok kollíziója a munkajogban)*. Academic Thesis (Akadémiai Doktori Értekezés), Pécs, 2006. 249., 253., 258. In printed version György Kiss: *Collision of Constitutional Rights in Labour Law. (Alapjogok kollíziója a munkajogban).* Pécs, Justus Tanácsadó Bt., 2010. See more: György Kiss: Labour Law (Munkajog). Osiris, Budapest, 2005. 104. In the literature there is a concept which prescribes the determinants of the labour relationship through the definition of the employee (Labour law is the special law of employees). György Kiss: Labour Law, 116.

[9] § 32 of the Labour Code says: The parties to an employment relationship are the employer and the employee.
§ 33 says: Employer' means any person having the capacity to perform legal acts who is party to employment contracts with employees.
§ 42 (1) of the Labour Code says: An employment relationship is deemed established by entering into an employment contract.
(2) Under an employment contract:
a) the employee is required to work as instructed by the employer;
b) the employer is required to provide work for the employee and to pay wages.
§ 34 (1) Employee' means any natural person who works under an employment contract.
(2) Employees must be at least sixteen years of age. By way of derogation from the above, any person of at least fifteen years of age receiving full-time school education may enter into an employment relationship during school holidays.
§ 21 (5) Legal statements on behalf of incompetent persons shall be made by the legal representatives.

employment is not only determined by the individual's state of health and abilities, but also the economic and labour market conditions, the labour law and adult protection regulations responding to them: the development and capacity of the education and training system, the operation of the social care system, including the access to rehabilitation services and benefit policy.

If the goal is to integrate more people into the labour market, legislation must apply a *holistic approach* and realize that integration into the labour market is not only a labour law, but also a broader employment, rehabilitation, education and adult protection issue. Labour market integration also has a very strong fundamental rights aspect.

Complex thinking about employee status fits in with the EU objective and goal of state achieving higher employment and productivity[10].

The renewability of labour law is now also shown by the extent to which the rules following economic changes *can be extended* to vulnerable groups, and how legislation is trying to meet the economic and social expectations of labour law regulation.

3. The social side of employee status

The social side of employee status can be interpreted from several aspects.

When examining the social side, one can speak about the *social aspects of labour law regulation*. Social rules of labour law include, for example, the protection of pregnant women, child-raising parents, the elderly, the blind, young employees and persons with disabilities. In fact, labour law, as an area of law, and the indefinability of the subject matter of the service and in connection to this the employer's right of instruction and control regarding the implementation of the work, is inherent in the protective character, which is why the infiltration of the social and public law norms into the regulation has always been felt. Social nature can be said to originate from protection itself, the protection of the employee.

However, since employment is not merely a labour law issue but also an employment and employment policy one, the social side of the status also includes the *occupational safety rules on employees belonging to vulnerable groups*.

It is important to point out that social nature in no way implies taking over the rules of social law. Labour law is the law of the private sector, *according to Deakin* it has a market-restricting function based on regulations to protect dependent subjects, or a market-correction one to loosen it, or a cross-over, market-constituting function[11].

On the other hand, the regulatory area of social law that is linked to an insurance relationship, namely unemployment and

[10] See Title IX and X of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT (last visited: 30.01.2018.) The commentary of the Labour Code also refers to Article XII of the Hungarian Fundamental Act, which says: (1) Everyone shall have the right to freely choose his or her job or profession, and the freedom to conduct a business. Everyone shall have a duty to contribute to the enrichment of the community through his or her work, performed according to his or her abilities and faculties. (2) Hungary shall endeavour to ensure the possibility of employment to everyone who is able and willing to work.

In the focus of the Green Paper it also stands how sustainable development can be reached by more and better jobs. Modernization of labour law plays a key role in the success of adjustment to the changing environment on behalf of the employees and companies. See more: Green Paper Modernising labour law to meet the challenges of the 21 st century, Brussels, 22.11.2006 COM(2006) 708 final.

[11] See more: Simon Deakin – Gilian S. Morris: *Labour Law. 6th edition*. Oxford and Portland, Oregon, Hart Publishing, 2012. p. 30-37; 131-190.

social security, is closely linked to labour law. Thus, the social side of employee status includes the employment relationships and similar relationships *the social security rules as well as rules on the support to jobseekers*.

Within the social security rules, an important point of contact for employee status is the rules on rehabilitation. In rehabilitation legislation, *rehabilitation services* and setting up a *system for providing help in returning to the labour market* are of utmost importance for employee status. All this is covered by an employment motivating and employer incentive policy, which is a matter of employment policy.

The changed forms of working arrangements, the new technological and scientific results of the 21st century create a feeling of *insecurity* and *worry* in the employees. Labour market is the ring of the private sector, where even the able-bodied workers can make their way in life only with great confidence and serious professional knowledge. This environment poses challenges to the institution of rehabilitation, including occupational rehabilitation. Since those who want to succeed in the open labour market today must have the following features: advanced interpersonal skills, abilities to work in a team, to identify and solve problems, to continue learning, to renew, and to internalise new technologies.

Ongoing *adaptation* to work has become the key to successful employment. All of the above features contribute to this flexibility. Employees are increasingly affected by career approaches in the 21st century. In addition, the subject undergoing rehabilitation needs to face the challenge of accepting that his/her past abilities have changed, and s/he has to process it psychosocially, as well[12].

Labour ethics has also changed. While earlier hard work, honesty, and integrity were important, today, changes discourage employees to get emotionally attached to their workplace and they seek external motivations, such as leisure activities and family. It implies that work is not necessarily the determining building block of personality.[13]

Occupational rehabilitation and *assessment* must also adjust to this. It implies that paper-based assessment is no longer sufficient, it is necessary to *simulate employment situations*. To this end it is necessary for the assessor to be aware of the trends in labour market. This implies cooperation with employment offices. Assessment should therefore use the holistic approach mentioned above and integrate the client's emotions as the subjects undergoing rehabilitation generally have lower self-esteem and less self-confidence. Predictability would be important for the subjects undergoing rehabilitation, but the current employment culture does not require long-term engagement[14].

Thus, tension exists not only in labour law regulation, but also in the framework of rehabilitation. While rehabilitation needs to adapt to the changing employer structure, employee attitudes and work arrangements, the subjects undergoing rehabilitation seem to be lagging behind. It implies that rehabilitation must be fundamentally aligned with the changing economic and social environment, and labour market services must be organized in a competition approach, and must also provide services tailored to the client's specific needs.

[12] Murray B. – Heron R.: Placement of Job-Seekers with Disabilities. Elements of an Effective Service. International Labour Organisation, 2003, 3-4.; Holmes J.: *Vocational Rehabilitation.* Blackwell Publishing, Oxford, 2007. 7-9.

[13] Murray B. – Heron R. (2007) 4.

[14] Murray B. – Heron R. (2007) 5.

4. Difficulties in equal treatment in Hungarian labour law through the example of persons with disabilities

In the following, I wish to illustrate the contradictory nature of the employment of persons with disabilities in Hungarian labour law satisfying market demands, thus picturing the difficulties of transposing equality rules into contractual relations.

First of all, I highlight the terminological confusion, which is far from being the mistake of the Labour Code, but rather an inconsistency in legislation and law enforcement over decades[15]. The Labour Code contains provisions for persons with disabilities, receiving rehabilitation treatment and incapacitated workers. All this makes the application of labour law provisions confusing[16].

Pursuant to Article 53 (3) of the Labour Code, derogation the employment contract is limited in the case of a person receiving rehabilitation treatment.

Pursuant to Article 66 (7) of the Labour Code, the regulations protecting the notice of termination has been significantly reduced compared to both the old Labour Code of 1992 and the previous regulations. Earlier among the prohibitions of termination there was a rule regarding a person receiving a rehabilitation benefit, according to which the employer should not terminate an employment relationship by ordinary dismissal for a person receiving a rehabilitation benefit under a separate law during the period of incapacity to work[17]. The Labour Code currently provides for a restriction on termination within the scope of the termination by notice in the case of a person receiving a rehabilitation treatment and rehabilitation allowance, in accordance with Article 91 of the former Labour Code. That is, the restriction is not on the termination by notice in general, but *on termination on the grounds of health-related reasons*. The prohibition on termination was abolished, and the protection against termination is provided for as a restriction on a termination by notice. That is, restriction does not apply to each reason of dismissal.

[15] See more on the employment issue of disabled people in the Reports of the Hungarian Commissioner of Fundamental Rights: accession into the labour market in AJBH-2618/2012., the working circumstances and completion of the policy 'reasonable accommodation' in AJBH-5360/2012., education system for the efficient employment in AJBH-4832/2012.

[16] On the issue of definitions in the Hungarian legislation see: JAKAB NÓRA – HOFFMAN ISTVÁN – KÖNCZEI GYÖRGY: Rehabilitation of people with disabilities in Hungary: Questions and Results in Labour Law and Social Law, *ZEITSCHRIFT FUR AUSLAENDISCHES UND INTERNATIONALES ARBEITS- UND SOZIALRECHT* 31:(1) p. 23-44. 2017.

Employees with changed working abilities are people with physical and mental disability, or whose chance for the maintenance of the workplace and being employed has been decreased because of their disability. The concept of employee with changed working abilities refers to people who have already been/worked on the labour market. (However, in the meantime, their working abilities *changed* i.e., became *reduced*). On the other hand, definition of people with changed working abilities can be also found in § 2 of Act No. CXCI of 2011 (in force since January 1st, 2012) on the Services of People with Changed Working Abilities.

The definition of a disabled person is laid down in § 4 of Act No. XXVI of 1998 on the Rights and Equalizing Opportunities of Persons with Disabilities. This definition is closed to the WHO definition of 2002. Persons with mental or physical disability are included in the definition of employee with changed working abilities, but there is a considerable part of disabled people who are not covered. Therefore, not all the legal provisions can be applied for disabled people, which may be applied for employees with changed working abilities. Some disabled people belong to the term "employee with changed working abilities", but e.g., people with intellectual and psychosocial disabilities mainly do not (they are very rarely employed). Therefore, they are invisible not only in the Hungarian legislation mostly, but also in the data collection. It is so, because many questionnaires refer to employees with changed working ability.

[17] Act XXII of 1992 § 90. Sec. (1) g) (Former Labour Code being in force till 30 June of 2012)

In my opinion, with minimal content the restriction on termination by notice limited to the person receiving rehabilitation allowance fits into the tendency of labour law that tends to weaken excessively employee centric regulation while maintaining legal relationships within the framework of the employment relationship.

Those receiving rehabilitation allowance and those with disabilities are entitled to additional leave.

The Labour Code regulates the work of an *incapacitated employee* as non-standard legal relationship together with persons with disabilities and persons with reduced working capacity.

The notion of an incapacitated employee involves the intellectually and psychosocially (mentally, psychically) disabled people's rights to work.

It is interesting why this new category of employees is included in the Labour Code. In Article 39 of 2011 the Constitutional Court adopted a decision on adult incapacitated persons employed in employment or other legal status on 30 May 2011. The Constitutional Court stated in its decision that the Parliament had established an unconstitutional omission by failing to create the statutory conditions and guarantees of the employment of adult incapacitated persons employed in employment or other legal status. The Constitutional Court therefore called upon the Parliament to perform its legislative task by 31 December 2011.

It is to be welcomed that Article 212 of the Labour Code establishes the basic principles of employment for incapacitated persons[18].

Employing incapacitated persons includes the following specialties: job descriptions are more detailed, health aptitude tests cover all the duties of the post, work is monitored continuously, occupational safety rules are enforced more vigorously, provisions pertaining to young workers are applied but they cannot be obliged to pay special or general damages (Article 141 of the Labour Code). When employing an "incapacitated" employee, however, law enforcement and hence the employer are left to themselves by legislation.

In the case of the employment of incapacitated persons, collective labour law institutions, interest representatives and support persons have a very important role. By the 2011 legislation and the re-transformation of the rehabilitation system, the recipients of rehabilitation services are not the incapacitated employees, as they are mostly those who do not have an insured status. While in the case of employment-based rehabilitation, the Labour Code is applied, employment does not take place in the primary labour market as opposed to employing an incapacitated person, which does, without being involved in the rehabilitation system[19].

The work of an incapacitated employee is a standard example of the fact

[18] Labour Code § 212 on the incapacitated employees
(1) Incapacitated employees or employees whose legal capacity has been partially limited having regard to employment may conclude employment relationships only for jobs which they are capable to handle on a stable and continuous basis in the light of their medical condition.
(2) The functions of the employee's job shall be determined by definition of the related responsibilities in detail. The employee's medical examination shall cover the employee's ability to handle the functions of the job.
(3) The employee's work shall be supervised continuously so as to ensure that the requirements of occupational safety and health are satisfied.
(4) The provisions pertaining to young employees shall apply to employees, with the proviso that they may not be compelled to pay compensation for damages or restitution.

[19] Such as Act CXCI of 2011 on the Services of People with Changed Working Abilities and Government Order 327 of 2011 (29. Dec.) on the Procedural Rules of Services of People with Changed Working Abilities.

that employee status is a condition for cooperation of subsystems. Regrettably, this subject-matter will only become a subject of rehabilitation if it is already in the labour market. Under the current rehabilitation rules, an incapacitated employee cannot enter the rehabilitation system before the first job, without this, however, effective employment is unimaginable.

An incapacitated employee, as a type of employment relationship, is listed as a foreign body in Chapter XV of the Labour Code. Employment of an incapacitated worker is conceivable in a regulatory system the creation of which is not only a task of labour law regulation. In labour law regulation, primary labour market is not about potential rehabilitation, training, mentoring of an incapacitated employee, and the supporter when taking a legal act.

But the employee status of an incapacitated employee is called into question even more so when we think about what an employee should be like today. Today's employee is firm, flexible, quickly adapts to changes and is always able to renew. The Hungarian labour law regulation strengthens the principle of partnerships, as the parties may derogate from the non-cogent provisions in the employment contract and the collective agreement as recorded in the Labour Code. The significance of individual and collective self-governments thus increases.

Persons with disabilities, however, without a support network, are unlikely to determine the working conditions if they can find employment at all.

5. Overcoming the employee status?

At the same time, it is worth considering that the future of work is not only about the protection of the employee, but also that of the *worker* in general. This approach, however, goes beyond the broad concept of employee status. *Deakin* and *Rogowski* and *Supiot* did not regard the rigidity of the Fordist model and the appearance of new technologies as the driving force of change. They highlighted the challenge to address unemployment, illness and aging due to loss of income, and the problems arising from the inequality of dependence. Collective labour law institutions were unable to provide effective protection for employees. The main reason for this is that social and economic rights[20] are based on institutions that were built on stable employment. Supiot's proposal was a labour law reform which looks *beyond employment* and in which protection is not only connected to an employment relationship but reaches beyond by new regulatory techniques and policy initiatives. This includes the substitution of employment status with labour force membership/status and also *social drawing rights*, which would also allow lifelong learning resources to be used[21]. This idea nicely fits into a social and labour market program. This will contribute to making the labour market more flexible by introducing more and more reforms into national legislation that are based on the reconciliation of work and family life and, in the absence of employment, social security contributions provide social security for the

[20] On the development of economic and social rights see: Kaufmann, C.: *Globalisation and Labour Rights. The Conflict between Core Labour Rights and International Economic Law*. Hart Publishing, Oxford and Portland, Oregon, 2007.

[21] See more: *European Commission 1998: Transformation of labour and future of labour law in Europe.* Final Report, June 1998. 212-217. sections. About the effect of social rights upon the labour market see Simon Deakin: *Social Rights and the Market. An evolutionary Perspective*. In: Burchell, B. – Deakin, S. – Michie, J. – Rubery, J. (ed.): Systems of Production. Markets, organisations and performance. Routledge, London and New York, 2005. 75-88.

individual, and lifelong learning strategy shortens transition times between two jobs[22].

An excellent example of the labour force membership is the Article 5 of Act LXXX of 1997 on the eligibility for social security benefits, in which the Hungarian State clearly establishes the right to social security for insured persons. The concept of eligibility for social security benefits covers a wider layer of workers. However, it is not about the extension of the scope of employment institutions but a matter of drawing social rights outside of employment.

In addition to labour force membership, I must mention the personal employment profile. A worker's personal employment profile assumes several work relationships in parallel and consecutively, as nowadays it is very rare for someone to spend one's entire work at a workplace. There are a number of work-related statuses attached to it temporarily or permanently. Thus, when a potential worker has a disability, is a woman, has a child, it further shades one's work, one is likely to drift towards precarious forms of employment. Besides one's talents, participation in the labour market is determined by the labour market regulatory activity of the state, the availability of employment policy instruments and services of social security. In the latter case, it is important to define services to a degree that helps the integration into the labour market. We can complement the concept of labour force membership with one more aspect. Beyond social security, the state's activities to organize social benefits and the resulting commitments are also very important. This goes beyond the social security system and applies to the entire adult protection regulation. Within this regulation, it is essential to organize the assistance-type care in such a way that does not lead to a social policy trapped in assistance, "weaning off work". We must see, however, that the employment of disadvantaged persons in this new concept is fundamentally the same as the situation of an able person.

6. Conclusion

The question then arises as to how uniformly labour market can be treated, if it can be treated uniformly. If so, can a complex understanding of employee status treat the players in the labour force uniformly? I believe that labour market *cannot be treated* uniformly, but one can strive for a more uniform treatment using a well-thought-out concept. This can help to solve the application of human and constitutional rights in private law, and it can lead legislation to broaden the social rights related to participation in the labour market *going beyond* the scope of labour law.

The whole of Hungarian labour law regulation and the underlying employment contract is aimed at balancing the interests of the parties, which is influenced by countless external circumstances and has a number of protected features. Current labour law regulation will only be able to provide the community with the full service and can be an adequate, reasonable, economically correct, legal-ethical part of *labour turnover*, if it is part of a labour market program where employment adopts a *holistic* approach.

When thinking about employee status, the aim is to organize or combine the components to create a coherent whole. In this system, a change in employee quality or a need for labour law protection does not

[22] This process was encouraged in the European Union by *open method of coordination* (OMC). See more: Deakin S. –Rogowski R.: Reflexive labour law, capabilities and the future of social Europe. In: Rogowski, R. – Salais, R. – Whiteside, N. (ed.) Transforming European Employment Policy. Labour Market Transitions and the Promotion of Capability. Edward Elgar, Cheltenham, UK, Northampton, MA, USA, 2011. 241-243.

shake the pillars of the system. The goal is to ensure that coherency is reached not through a coexistence of the components but in a *system of organised order*. This helps avoid contradictions that can be clearly demonstrated during the employment of persons with disabilities.

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SEVERAL ISSUES ON TAXATION OF THE SHARING ECONOMY BUSINESS MODEL, WITH SPECIAL REGARD TO THE HUNGARIAN REGULATION[1]

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Abstract

Sharing economic models and services will gain more and more importance in economic life and will grow even more dynamically in the future. These business models are transforming consumer habits through technological advances and creating a serious competition for the traditional sector.

The new models are challenging the legal regulation, as some of their business benefits stem from market deregulation, especially in the area of taxation. In order not to encourage the expansion of the gray economy, these companies should look for solutions in tax law that do not impose administrative burdens on the operation of these types of businesses but force them to fulfill their tax obligations.

This article describes the tax issues that arise in this area and introduces regulatory alternatives, particularly highlighting the Hungarian regulation.

Keywords: *taxation, tax law, sharing economy, financial regulation.*

1. Introductory thoughts

Social and economic changes create new innovative solutions to which legal regulation and financial regulation in particular, must respond. Particularly there is a rapid development in the technology sector, through which consumer and community habits are transformed and are changing. Younger generations not only organize their lives on the Internet, but also use it to communicate, buy, educate, access literature.

In welfare states, increased consumption and consumption demands of the new entrants are becoming more and more problematic for mankind, that is, for how long the Earth's resources are enough to meet hyper-consumption needs. The literature also reviews the consumer society with sufficient criticism. This is the consumption of disposable things, including not only the packaging material, but also the production models that replace and discard objects in the field of durable consumer goods. The other problem is the use of less-used goods, that is, the purchased goods are rarely used, while technically and technologically obsolete. Out-of-resources tools become too expensive for the economy. But here is the hedonistic over-

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consumption, quick recollection of resources. This generates environmental, social and political problems. All of these problems and changes in consumer demand together result the spread of the sharing economy, which is also becoming a new sector of the economy.

The literature analysis shows how social and economic influences contributed to the development of the model[1]. Due to the spread of advanced digital platforms and devices, access is via an online platform, so demand and supply can be interconnected, allowing fast communication both in space and time. Also, the low prizes, which are due to the low transaction costs, are also playing an important role compared to the traditional business model. Economic rationality was also a determining factor. By utilizing unused or less-used assets, asset owners get revenue that helps to reduce the high financial burden on the asset. Nevertheless, the asset owner can get extra income without additional investment, either with secondary, ancillary activities. Users will only pay for their actual use. An environmentally conscious consumption model and personal interaction, a community experience, induced an important change. Shared, community consumption is more environmentally conscious and more sustainable as it is based on more effective use of existing tools. By the growth of the globalization, product and service offerings appear on online markets, and as a result of the urbanization demand and supply are getting closer together. Changes in the economic crisis and consumption patterns have also contributed to the process. With the economic crisis, consumers turned their attention to cheaper solutions, as more consumers had to face more difficult financial circumstances. On the other hand, in the area of consumption habits, the dynamic development of online shopping can be observed, which also means the diversity and variation of the supply side[2].

2. The sharing economy model and its areas

As a result of the habits of economic life, changed market conditions, confidence in traditional economic structures and the emergence of technological innovations, we can witness the emergence of the increasingly influential sharing-based models[3]. As regards the definition of sharing economy, it can be stated that an unified Hungarian definition does not exist yet, it can be done by illustrating the main features of the phenomenon. In the absence of a concept, a sharing-based model, a sharing economy or access-based business model is characterized by a systematic and rational use of resources, more accurately, a modell where the access is made an online web platform or through a mobile application. In this model, consumers do not purchase products, services, and products based on service, but obtain them only on an "on-demand" basis[4]. The Commission of the European Union defined this concept as the term sharing economy refers to a business model in which activities are facilitated by

[1] Nagy Zoltán, *A közösségi gazdaság (Sharing economy) és pénzügyi szabályozása (The financial law regulation of the sharing economy business model)* - http://www.uni-miskolc.hu/~microcad/publikaciok/2016/E_feliratozva/E_7_Nagy_Zoltan.pdf [last access on 14.03.2017].

[2] *Idem.*

[3] Juho Hamari, Mimmi Sjöklint, Antti Ukkonen: *The Sharing Economy: Why People Participate in Collaborative Consumption*, Journal of the association for information science and technology, 2015 - http://onlinelibrary.wiley.com/doi/10.1002/asi.23552/abstract [last access on 27.03.2017].

[4] Nagy Zoltán, *op.cit.*

cooperation platforms that create an open access market for the temporary use of goods and services often provided by private individuals[5]. It was estimated that the sharing economy would receive EU revenue of EUR 3.6 billion in 2015 from the cooperation platforms operating in the following five key sectors: accommodation (short term rental), transportation, household services, professional and technical services, and community finances[6]. The development of the model was stimulated by several factors, such as the development of information technology, economic rationality and changed consumption habits. The economy that divides our consumption patterns into a continuous transformation is about a more rational use of our knowledge, property, time and space, and its fundamentals are nothing but online communities[7].

2. The development of information technology, the emergence of digital platforms

The "information explosion", "electronic revolution" in the last decades of the XX century can be compared to the industrial-technical revolution of the XIX. century. The statement is undoubtedly true, as regards the impact on the interaction of the people living in the consumer society. The cardinal difference, however, is that, as long as the Industrial Revolution triumphed for nearly two centuries of continuous change, the information explosion itself reached the same in nearly two decades. As a consequence, the so-called information society is gradually being built and realized as the widespread use of computer tools and the direct production of information can be considered as the pillar of this realization[8]. Although the Earth's population has always done sharing-based activities (eg leasing), this economic trend has gained enormous importance with the development of digital technology, the emergence and spread of digital platforms and devices. As a result of technological advances, a sharing-based model allows access to tools and services on an on-demand basis to be more accurately scaled on time and to dynamically link demand and supply. In our opinion the sharing-based economic model's most remarkable advantage and characteristic at the same time is the fact that it provides a rational use of resources. The consumer who is using the platform is not forced to buy the product, on the other hand the owner of the product retains the ownership of the service during the provision of the service, makes an ad hoc profit that would only be obtained for other legal transactions (eg lease).

By leaving behind the tendencies of the XX. century, we can say that ownership and possession do not have such an existential and emotional essence, more and more people think that possession has an increased burden, which is the time-

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Agenda for the Community Economy dated February 2016, http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations/hu/renditions/pdf [last access on 22.02.2017]. Participants in the Community economy may be divided into three categories: (i) ("private individuals") or professional service providers ("professional service providers") providing services, resources, time and/or skill; (ii) all of these users, and (iii) intermediaries who establish, through an online platform, a link between service providers and users and facilitate the transaction ("collaboration platforms").

[6] Communications from the Commission tothe European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2016., p. 1-3.

[7] Berkovics Dalma, A hozzáférés ereje. TEDxYouth@Budapest előadás, (The power of access. TEDxYouth @ Budapest performance) 2013.

[8] Pázmándi K., Verebics J., E-jog,HvgOrac Kiadó, 2012, p. 17-24.

consuming choice, maintenance, repair costs. Furthermore, here we can talk about not only rationality but also sustainable consumption, which implies the application of unused goods[9]. Changed consumer behaviors have helped to create new solutions. As a result of the urbanization and globalization, demand and supply are close to each other, we can acquire a traveling partner within minutes, practice rental rights on the neighbor's household device, and listen to the music playlist created by a platform user at the other end of the world[10]. And not only this possibility but also the need for it is increased, as the popularity of personal interaction among the consumers of the 2010s was also included, which also indicates the prosperity of the relationship to ownership. The real change in attitude in the last phase of the evolutionary development of sharing may mean that people realize that they do not have to possess the objects to meet their needs: it is enough to reach them wherever and whenever they can use them[11]. Nevertheless, almost a decade after the global economic crisis, consumer attitudes can be felt, which is reflected in the selection of services and products from the point of view of saving. E-commerce provides the most common[12] alternative to this behavior and attitude[13].

All of these factors force the development of a different business model. As for companies operating on the sharing economy model basis, we can distinguish between consumer-to-consumer (c2c) and business-to-consumer (b2c) business models. In the c2c model, the consumer and service provider reach each other through an IT platform of a company, as interacting with each other we can cosider them as almost equal partners. However, in the b2c model, the service provider is not separated from the company, so the company itself is the one that creates a platform for share-based business services. More and more traditional companies (BMW-DriveNow, Car2Go, MOL Bubi, MOL Limo) deliver their products through this new b2c business model to consumers by creating a revenue-generating alternative[14]. This behavior is, according to the our opinion, proactively able to bring the traditional and market-based "new players" closer thereby eliminating market tensions that may even lead to the complete disappearance of new models (see Uber Hungary Ltd.'s withdrawal from Hungary).

3. Regulatory problems arising from the operation of the model.

While innovation is undoubtedly a motor of competition, the sharing economics companies face many problems. In the absence of regulation, the sector can be regarded economically gray from the aspect of taxation. The goal we think is that all legislators need to keep in mind the "whitening" of the sector. It is a globally observable problem that can cause the anger of all traditional operators to bear that the participants in the new model bear lower costs and administrative burdens, thus

[9] Osztovics A., Kőszegi Á., Nagy B., Damjanovics B., 2016.

[10] Botsmann, Rogers, *What's mine is yours – the rise of collaborative consumption*, Harper-Collins, 2010 - https://www.ezonomics.com/ing_international_surveys/sharing_economy_2015/ [last access on 28.03.2017].

[11] Botsmann, Rogers, *op.cit.*, 2015.

[12] http://www.kutatocentrum.hu/hirek/2015/cikk-302/5-bol-4-netezo-vasarol-online [last access on 28.03.2018].

[13] Nagy Zoltán, *op.cit.*, p. 2-3.

[14] Osztovics A., Kőszegi Á., Nagy B., Damjanovics B., 2016.

gaining a competitive edge[15]. It would seem easy to extend the personal scope, but in our view, this would destroy the very essence of the model, and would deprive consumers of the benefits that brought the model to life. However, absolute banning is also unreasonable as companies may look for "legal loopholes". Sharing operators are subject to tax rules as well. This includes rules on personal income tax, corporation tax and value added tax. Hidden employment also raises tax problems[16]. Hidden work involves the production processes and services for money that are not registered by the state, but from the aspects of any other respects counts legal. Here is a mention of the phenomenon of tax denial. There are several motifs and forms of tax denial in the broad sense: "tax avoidance", tax evasion and fiscal fraud. Their common characteristic is that the taxpayer or their group acts contrary to the ideas of taxpayers. However, the legal assessment of the three phenomena is quite different. Therefore, in the present case, we will only focus more on the phenomenon of tax evasion. Tax evasion, as opposed to tax evasion and avoidance, is a violation of the tax liability by illegal means. It should be pointed out that the statistical surveys of conduct on criminal prosecution do not give a fairly good picture as there is a very high percentage of the latency in this area[17]. In addition to this problem, there are a number of other problems, such as difficulties in identifying taxpayers and taxable income, lack of information on service providers, aggressive tax exacerbation in the digital sector, different taxation practices across the EU and inadequate exchange of information. However, in order to ensure a level playing field between the same service providers, the European Commission draw attention of the Member States to the revision of tax rules[18].

Finally, we also have to face the problems that we can address by multidisciplinary examination of the model. That is, if the legislator undertakes to regulate share-based business models, it must be examined not only from the point of view of tax law, financial law, but (completeness) also liability for damages, health insurance, consumer protection and labor law. The currently feedback-based evaluation system is far from being suitable for achieving that goal. The European Union also draws the attention of the Member States to the establishment of a balanced approach to ensure that recipients enjoy a high level of protection against unfair commercial practices[19].

Summing up the above, the state, and then the legislator to whiten the sector and promote regulation, while at the same time maintaining the model, we must primarily take the following steps in our view:

[15] Daniel E. Rauch, David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 2016 - https://www.law.gmu.edu/assets/files/publications/working_papers/1501.pdf [last access on 14.03.2017].

[16] Lackó M., Semjén A., Fazekas M., Tóth I. J., *Rejtett gazdaság, rejtett foglalkoztatottság: kutatási eredmények és kormányzati politikák a nemzetközi és hazai irodalom tükrében, MTA Közgazdaságtudományi Intézet, Műhelytanulmányok MT-DP-2008/7* (Hidden Economy, Hidden Employment: Research Outcomes and Government Policies in the Mirror of International and Hungarian Literature, MTA Institute of Economics, Worksheets *MT-DP-2008/7*) - https://www.researchgate.net/publication/242266109_Rejtett_gazdasag_rejtett_foglalkoztatottsag_kutatasi_eredmenyek_es_kormanyzati_politikak_a_nemzetkozi_es_hazai_irodalom_tukreben [last access on 14.03.2017].

[17] Földes Gábor, Pénzügyi jog, Osiris Kiadó, 2007., 81.

[18] Lackó M., Semjén A., Fazekas M, Tóth I.J., 2008.

[19] Christopher Koopman, Matthew Mitchell, Adam Thierer, *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, The Journal of Business, Entrepreneurship and Law, 2015/2 - https://www.mercatus.org/system/files/Koopman-Sharing-Economy.pdf [last access on 14.03.2017].

- Modification the structure and level of contribution, contribution drafting
- Reduction of administrative burdens
- More effective control behavior
- Government campaign[20]

4. Hungarian regulatory solutions in the transportation sector

First of all, it is important to examine the operating modes of in question. On the one hand, we can talk about the so-called *car-sharing* form in which a community-owned means of transport - usually car use - takes place for a fixed period of time. In addition, we can narrow the circle to the fact that is one or two hours, or the more frequent 1-2 days of exercise is the practice of quasi rental rights. Secondly, it necessary to mention the ride-sharing form, which is nothing more than a way for passengers of traveling together by a car. The driver of the vehicle shares his vehicle with passengers who wish to travel on the same route.

Finally, there is the ride-sourcing solution. For this method, a freight transfer is carried out, that is, an IT-based transport service is used by consumers through a mobile application. Most of the drivers carry out their service with a motor vehicle owned by them. However, the provision of such services for the purpose of gaining income may also be carried out as an ancillary activity, which is not a negligible circumstance in terms of tax law. Some service providers are only economic operators that use IT support to organize their carriers (see Taxify), while others also use dynamic pricing for that purpose (see Uber)[21] .

Not only did the company achieve great success at local level. In addition to the figures in the introduction, I would like to highlight the results of a study on the subject that in 2015, according to the most recent data, the company has reached $ 68 billion, ranking first in the list of the most successful start-up businesses in the world[22]. The Hungarian subsidiary of the company was registered as Uber Hungary Ltd. in 2013, and it withdrew from the Hungarian market after one and a half years of successes.

For each taxation issue, it is necessary to examine whether the activity is covered by the tax rule. Regarding the scope of personality, that is, whether the Act on VAT[23] is essentially applicable to Uber's drivers, the following should be emphasized. According to the VAT Act, an enterprise in another Member States including a passenger transport service provision, which is related to a mobile is subject to the law. EU rules are based on the differentiation of the terms "trader" and "consumer". A trader's "person acting for purposes relating to commercial, industrial, craft or professional activities"; the person acting for the consumer"[24] for the purposes of his commercial, business, craft or professional activities" [25]. Applying the aforementioned legislation in the light of the foregoing is therefore possible if the platform is used by

[20] Lackó M., Semjén A., Fazekas M, Tóth I., J.,2008.

[21] Földes Dávid, Dr. Csiszár Csaba, *Az autonóm városi személyközlekedés hatásai (The effects of the urban passenger transport)* - http://kitt.uni-obuda.hu/mmaws/2016/pages/program/papers/Paper_15_F%C3%B6ldes_Csisz%C3%A1r_IFFK%202016.pdf [last access on 17.04.2017].

[22] Scott Austin, Chris Canipe. Sarah Slobin, *The Billion Dollar Startup Club*, Wall Street Journal 2014- http://www.panoramic.com/wp-content/uploads/2015/03/The-Billion-Dollar-Startup-Club.pdf [last access on 27.03.2017].

[23] Act CXXVII. of 2007 on Turnover Tax, paragraphs 5-24.

[24] Article 2 (b) of Directive 2005/29 / EC (Unfair Commercial Practices Directive).

[25] Article 2 (b) of Directive 2005/29 / EC.

a trader to commit himself to the commercial activity. However, the question remains to be solved on the basis of which a possible dispute may arise between persons whose one is a trader who does not qualify as a trader for the purpose of providing a commercial activity to another non-trader. And what are the conditions under which an activity can be considered to be a commercial activity? According to the Commission's guidelines on the Community economy the following aspect should be took into account: the frequency of services, the profit target and the level of business turnover.[26] The activity of a company (natural or legal person) carrying out a passenger service on its own behalf and at a risk as a business is taxable and can only be done by using a tax number[27].

A taxable person is a legal person, an organization who owns an economic business, irrespective of its place, purpose and result[28]. Economic activity[29] is the pursuit of an activity on a business or permanent basis or on a regular basis when it is directed towards or results in the attainment of the consideration and is carried out in an independent manner. Accordingly, an enterprise which carries out passenger transport services through a mobile application for the purpose of satisfying passenger transport requirements is a compulsory VAT activity. Thus, the taxable nature of the service provided is not affected by the fact that the passenger's demand for services and the service provider who offers passenger transport servise are met by a mobile application.

A taxpayer who is taxed under the general rules must declare it if he intends to establish a commercial relationship with a taxable person in another Member State[30]. A commercial relationship is also the provision of a service related to the use of a mobile application where the service provider establishes a commercial relationship with a taxable person in another Member State[31].

The activities carried out by Uber drivers[32], like cab drivers, must be carried out as entrepreneurs, which can be done as a private entrepreneur or in a joint venture. If the driver carries out the provision of a service as a private enterpreneur, the provisons of Act CXLVII of 2012 on Taxes on Subsidiary Enterprises and the Small Business Tax Act or Act CXVII of 1995 on Personal Income Tax. (hereinafter referred to as “the Szja Act”) shall be fulfilled. For persons providing passenger services, it is more sensible to choose a tax-payer for this type of private entrepreneur, since if he does not work in full-time, he has to pay an item of HUF 25,000 per month, compared with a monthly tax of HUF 50,000 in case of a full-time activity. It is to be noted that the independence of tax revenue also applies to this business form, taking into account the maximum revenue threshold. In the case where the taxpayer chooses tax-based taxation, his income can be determined by two methods. One is flat-rate taxation, while the other is taxation based on itemized

[26] Communications from the Commission.
[27] Act CL. of 2017 on the Rules of Taxation, paragraph 1-7.
[28] Act CXXVII. of 2007 on Turnover Tax, paragraph 5, section 1.
[29] Act CXXVII. of 2007 on Turnover Tax, paragraph 6.
[30] Act CL. of 2017 on the Rules of Taxation, paragraph 22., section 1e.
[31] Information on the tax liabilities of the "UBER driver", 2016, https://www.nav.gov.hu/data/cms393278/Tajekoztato_az_UBER_sofor_adokotelezettsegeirol_2.pdf [last access on 2017.02.17].
[32] The most important rules of the VAT system to be fulfilled by the taxpayers who are subject to the general rules as regards their intra-Community acquisitions of goods, their use of services, their supply of goods and services https://nav.gov.hu/data/cms280503/29._fuzet____Az_altalanos_szabalyok_sz._adozok_Kozossegen_beluli_termekbeszerzese_2013.pdf [last access on 2017.04.02].

accounting. It is preferable to choose a flat-rate taxation. With this option you can live up to an annual income of 15 million forints[33]. You will then have to pay 15% of your personal income tax after 20% of your income. In addition, it should be noted that 25% of the income of the supplementary activity have to be paid 15% personal income tax[34]. The concept of supplementary activity is governed by the provisions of Act LXXX of 1997 on Social Security Beneficiaries and Private Pension Beneficiaries and the Coverage of these Services. (abbreviated as Tbj. in Hungarian).

According to the civil law in force, business associations are companies with legal personality, which are established with the financial contribution of the members, in which the members share a profit and jointly bear the loss.[35] For the taxation of domestic companies, except for the special taxation possibilities, the provisions of the corporate tax law[36] are applicable. The corporate tax base is the "profit before tax" for a resident taxpayer and a foreign entrepreneur taking into account the rules on reducing and increasing the profit before tax. It should be noted that the costs, expenses incurred by the use, maintenance and operation of an used car for the benefit of the company are considered to be certain costs incurred in the course of a passenger business.[37] In the event that a general partnership, a limited partnership or a limited liability company is established for the continuation of that activity have only private members, it may also choose to impose its tax liability on the basis of the simplified entrepreneurial tax rules. In accordance with the Act XLIII of 2002 on simplified entrepreneurial tax, (hereafter Act Eva), taxpayers who have an annual income of less than HUF 30 million, together with VAT – in order to simplify their accounting obligations and reduce their tax burden – can choose the simplified entrepreneurial taxation.

The Commission considered it important to point out in its guidance that Member States should strive to impose proportionate obligations and to ensure a level playing field. Companies offering similar services should apply similar taxation requirements*: public information in connection with the tax liability, attention from tax authorities, guidelines and enhancing transparency through online information*[38].

In addition, it is important to highlight the professional specifications that actually resulted the getaway of Uber Hungary Ltd. from Hungary. The main reason was the amendment of the Article 9 of the Act XLI of 2012 on Passenger Services[39]. The Hungarian government has imposed dispatch service requirements as defined in the Decree for service providers (Uber

[33] Act CXVII of 1995 on Personal Income Tax, paragraph 53, section 1b.
[34] Act CXVII of 1995 on Personal Income Tax paragpragh 53., section 1c.
[35] Act V. of 2013 on Civil Code of Hungary paragraph 3:88, section 1.
[36] Act LXXXI. of 1996. on Corporate Income Tax.
[37] Act LXXXI. of 1996. on Corporate Income Tax, paragraph 6, section 1.
[38] Communications from the Commission.
[39] Act XLI. of 2012 on passenger transport paragraph 12/B. section (1) The transport authority shall order the temporary unavailability of the data published through the electronic communications network (hereinafter referred to as "electronic data"), made accessible by the operator of the service, to the provision or delivery of a commercially-based passenger transport service directly or indirectly through the presentation of the steps required to take advantage of it, promotes those that do not meet the requirements set out in the Government Decree on dispatcher service or stand-alone dispatch service. (2) The unavailability of electronic data pursuant to paragraph (1) may be made if the decision of the competent authority imposes a fine for the lack of a dispatcher license defined in the Government's decree and the fined person continues to do the unauthorized activity.

drivers). In case of non-comliance these requirements, the authority orders blocking for 365 days and is inspected by the National Media and Infocommunications Authority[40]. The amount of the fine can range up to 50,000-200,000 HUF[41].

As outlined above, the current legal environment perfectly covers the share-baased economy model as well. However, as shown by the withdrawal of Uber Hungary Kft. From Hungary, it would be a desirable legislative method to introduce provisions that are capable of maintaining the benefits of the model, while alleviating the economic and social tension between the traditional passenger transport sector and the sharing economy[42].

Conclusions

There are different examples of tax legislation in international practice. It is certain that new technology solutions will cause the legislator many obstacles on a number of serious issues in order to change the traditional regulatory framework with the solutions that can be applied to sharing economic models. One such solution would be that the service provider pay directly instead of the service provider. Another solution may be an individual agreement with the service provider on tax payment. A third option, followed by Hungary, introduces the relevant industry standards. However, this latter solution may impose a burden on the service provider which may impede the service or providers assume the risk of tax evasion. It is therefore clear that it is not easy to resolve this issue. By tax law gives preference to a sharing economy modell, it will have a competitive disadvantage for other sector players. The right solution would be to redesign taxation and industry regulation in the traditional sectors by taking into account the needs of the new model.

A good example is the example of Estonia which, in our opinion, should be followed by those countries that strive to reduce the tension between businesses and tax authorities in the sharing economy. The Member State intends to simplify the tax returns with the cooperation including car sharing platforms as well. Transactions between the provider of the service and the consumer are recorded in the cooperation platform, which then only transmits the important (from the aspect of taxation) information and data to the authorities for tax purposes. The authorities then fill the tax payment form. It is easy. The basic idea is to help taxpayers to meet their tax obligation with the lowest possible expense. In our opinion, legislation will be waiting for in the coming years. Rather, it is conceivable that traditional service providers are forced to innovate the sharing economic model, as it can be observed in the domestic cab market.

With the introduction of the Taxify mobile application, Hungary has taken a step forward in responding to changed consumer behavior and market conditions, but has taken a step backwards to regulate the sharing community economy at the same time. As indicated earlier, it proves to be a proactive solution when a company operating in a traditional economic model is expanding its operating profile with a Community economic model. An excellent example of this is MOL Limo[43], a community passenger transport innovation created by MOL. This initiation is welcome.

[40] Act XLI. of 2012 on passenger transport paragraph 12/B section 3.
[41] Act XLI. of 2012 on passenger transport paragraph 12/B section 4.
[42] João E. Gata, *The Sharing Economy, Competition and Regulation*, Competition Policy International, 2015.
[43] https://www.mollimo.hu.

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LEGAL BASIS AND "TRASVERSAL" INTERPRETATION OF THE ULTIMATE REFORMS OF THE EUROPEAN UNION JURISDICTIONAL SYSTEM

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Abstract

The present work focuses on the analysis of the latest reform of the EU jurisprudential system which started in 2011 and has been completed on March 2018. The purpose of the analysis is to interpret the need for these reforms, the time needed, the reasons and the effectiveness they will have for the next few years. Obviously, the analysis is based on the articles of the Lisbon Treaty and the rich jurisprudence offered up until now to interpret and better understand the division of competences and the new dispute system of the Union.

Keywords: *CJEU, Treaty of Lisbon, Reg. 2015/2422, Specialized courts, division of powers, judges' doubling, art. 51 of the Statute of CJEU.*

1. Introduction

On March 26, 2018, the Court of Justice of the European Union (CJEU) filed a request, pursuant to art. 281[1], second sub-paragraph, of the Treaty of Functioning of the European Union (TFEU) aimed at modifying Protocol no. 3 of its Statute. Recipients of the request are, of course, the co-legislators of the European Union, namely the European Parliament (EP) and the Council that should adopt the proposed Regulation according to the ordinary legislative procedure referred to in art. 294 TFEU. According to the President of the CJEU, to the President of the EP, this question is based on three main axes consisting, first, in transferring to the General Court (EGC) (former Tribunal for First Instance) the power in principle to give judgment, at first instance, on actions for failure to fulfill obligations based on Articles 108, paragraph 2[2], 258 and 259 TFUE[3], secondly, in attributing to the CJEU the treatment of actions for annulment[4] linked to the failure to properly implement a judgment pronounced by the latter under Article 260 TFEU and, thirdly, to institute a prior

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[1] S. Van Der Jeught, *Le traitè de Lisbonne et la Cour de justice de l'Union europèenne*, in Journal de Droit Europèen, 2009, p. 294. J.V. Louis, *La "reforme" du statut de la Cour*, in Cahier de droit europèen, 2011, p. 10.

[2] A. Sinnaeve, *States aid procedures: Developments since the entry into force of the proceural regulation*, in Common Market Law Review, 2007.

[3] R. Barents, *The Court of Justice after the Treaty of Lisbon*, in Common Market Law Review, 2010, p. 710. C. Barnard, S. Peers, *European Union law*, Oxford University Press, 2017, p. 586.

[4] J. Sladič, *Rules on procedural time-limits for initiating an action fro annulment before the Court of Justice of the EU: Lesser-known questions of admissibility*, in The Law & Practice of International Courts and Tribunals, 2016, p. 154.

admission procedure for certain categories of appeals. Furthermore, the application contains a proposal for terminological coordination. The CJEU's request for justice fits into the context of the changes already made in 2015 and 2016[5] to the judicial architecture of the European Union.

2. The legal basis of the CJEU's request

The CJEU's request is based on articles 256, par. 1, and 281, second sub-paragraph, TFEU, as well as article 106 bis, par. 1 of the Treaty establishing the European Atomic Energy Community (EAEC)[6].

Article 256, par. 1, TFEU establishes, in order, (i) which are the competences of the EU EGC, (ii) the Statute of the CJEU can provide that the EGC is competent for other categories of appeals and (iii) the decisions of the EGC itself can be appealed to the CJEU. This provision does not in fact constitute the operative and procedural legal basis of the request presented by the CJEU, but only the provision which refers to the Statute of the CJEU for the attribution of powers to the EGC for other categories of appeals.

Article 281, second sub-paragraph, TFEU is the appropriate legal basis for the adoption of a Regulation which makes changes to the Statute of the CJEU[7]. As is well known, it is a peculiarity of the European Union Treaties to allow certain modifications of primary law (Treaties and Protocols) through the adoption of deeds that are formally of secondary law[8]. Although it is questionable whether this right is left to the legislator of the Union, it is clear that it greatly facilitates the reforms deemed appropriate of some parts of primary law, avoiding recourse to the complex procedure for revising the Treaties referred to in art. 48 TUE[9].

Article 281, sub-paragraph 2, TFEU also constitutes an exception to the power of legislative initiative normally held by the European Commission (EC), since the CJEU may also make a request in the event of amendments to its Statute. However, the provision contained in the same norm of a prior opinion of the EC which allows the EU legislator to have more objective, even technical, elements at his disposal seems

[5] See Regulation (EU, Euratom) 2015/2422 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 (GUUE, L 341/14) and Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants. Article 3 of Regulation no. 2015/2422 also provides that by December 26, 2020, the CJEU shall establish, with the help of an external consultant, a report on the functioning of the EGC, addressed to the EP, the Council and the EC. This report will focus in particular on the efficiency of the EGC and on the use of resources allocated to it, on the effectiveness of doubling the judges and on the appropriateness of setting up specialized sections and/or introducing other structural changes. In particular, with reference to the future appointments of the judges of the EGC, the Union legislators have been asked to consider the issue of gender balance, considered "of fundamental importance" (recital 11 of Regulation No. 2015/2422) and pursued with a progressive modification of the EGC partial renewal system (through a revision of article 9 of the Statute), in such a way as to bring the governments of the Member States to propose two judges simultaneously, in order to favor the choice of a woman and a man.

[6] F. Jacobs, *The Court of Justice in the twenty-first century*, in A. Rosas, E. Levits, Y. Bot, (eds), *The Court of Justice and the construction of Europe. Analysis and perspectives on sixty years of case-law*, Springer Publishing House, 2013, p. 53.

[7] D. Sarmiento, *The reform of the General Court: An exercise in minimalist (but radical) institutional reform*, in Cambridge Yearbook of European Legal Studies, 2017, p. 239.

[8] M. Cremona, C. Kilpatrick, *EU legal acts challenges and transformations*, Oxford University Press, 2018, p. 99, 146, 162, 174, 188, 192, 201.

[9] Seems different the nature of art. 257 TFUE.

appropriate and useful to us. In this regard, it could be argued that perhaps a proposal from the EC, rather than a request from the CJEU, could sometimes be considered more appropriate to the presentation of reforms that are relevant, even before the functioning of the CJEU as the Institution of the Union, all actors of european judicial proceedings, namely, Member States, other Institutions and bodies of the Union, natural and legal persons[10]. Naturally, this assessment is discretionary and it is completely physiological that the CJEU considers that it must use, if the conditions are met, the powers conferred by the Treaties also on the legislative initiative[11].

With this clarification, it must be emphasized that, in any case, under the terms of the provision in question, the role of the EC is not negligible: it intervenes on the basis of the consultation envisaged therein and its opinion must be taken into consideration, as well as the opinion of the CJEU must be in the case of a proposal presented by the EC. The logic of the provision in question requires that this opinion must necessarily be examined by the EU legislature in order to legislate also in the light of the elements and considerations that are exposed to it. In other words, the art. 281, second sub-paragraph, TFEU allows all the Institutions of the Union directly concerned (the co-legislators, the EP and the Council, the EC, having regard to its specific role in the legal order of the Union, and the CJEU) be involved in the legislative procedure, albeit in different ways[12].

The last rule indicated as a legal basis in the preamble of the request presented by CJEU, art. 106 bis, par. 1, of the EAEC, contains a simple reference also to the articles 256 and 281 TFEU (among others), articles which, consequently, apply to the EAEC Treaty[13].

The draft amendment of the Protocol n. 3 presented by the CJEU is subject to the control procedures on the application of the principles of subsidiarity[14] and

[10] M. Derlén, J. Lindholm, *The Court of Justice of the European Union: Multidisciplinary perspectives*, Bloomsbury Publishing House, 2018. W. Frenz, *Handbuch Europarecht*, vol. 2, Springer Publishing House, 2013.

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[12] R. Geiger, D.E. Khan, M. Kotzur, *EUV/AEUV*, C.H. Beck Publishing House, 2016. A. Haratsch, C. Koenig, M. Pechstein, *Europarecht*, C.H. Beck Publishing House, 2016. M. Herdegan, *Europarecht*, C.H. Beck Publishing House, 2015.

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proportionality[15], foreseen by Protocol n. 29. Consequently, the request by the CJEU must also, in principle, be justified taking into account compliance with subsidiarity and proportionality and the CJEU and, where appropriate, the EC must take into account any opinion of the national Parliaments or each room of one of these Parliaments. The legal bases of the CJEU's request correspond, mutatis mutandis to the logic of the choice made by the Union legislator for the adoption of the Regulations of 2015 and 2016 and containing the amendments to the Statute of the CJEU. Therefore, no problem should arise in this regard at the different stages of the legislative procedure[16].

3. Division of competences in the context of the Union dispute

The current system of judicial protection of the European Union does not correspond, as regards its architecture, to the plan outlined by the "constituent" with the Treaty of Nice and only "touched up" from the lexical point of view in Lisbon[17]. Finally, par. 3 of art. (today) 256 TFEU has foreseen the possible transfer of the preliminary ruling to the EGC, "in specific matters determined by the statute"[18]: where such a transfer occurred, (also) with respect to the decisions of the EGC would operate the mentioned review institute and the EGC itself it could decide to refer the case back to the CJEU if it considered that it "requires a decision of principle that could jeopardize the unity or coherence of EU law"[19]. This

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[18] K.D. Broberg, N. Fenger, *Le renvoi prèjudiciel à la Cour de justice de l'Union europèenne*, Larcier Publishing House, 2013. M. Broberg, N. Fenger, *Preliminary references to the European Court of Justice*, Oxford University Press, 2014, p. 309.

[19] See the following cases: C-59/09, *Hasbro* of 10 July 2009; T-485/08P, *P. Lafili v. European Commission* of 2 July 2010; C-27/09, *Republic of France v. People's Mojahedin Organization of Iran* of 21 December 2011; C-522/09P, *Ferrero v. OHM* of 24 March 2011; C-201/09P and C-216/P, *Arcelor Mittal Luxembourg v. European Commission* of 29 March 2011; C-369/09P, *Polska Sp. z.o.o. and others v. European Commission* of 24 March 2011. See also F. Clausen, *Les moyena d'ordre public devant la Cour de Justice de 'Union europèenne*, Bruylant Publishing House, 2018, p. 134, C. Naômé, *Le*

opportunity will inevitably require a reflection on the possible consequences of this innovation in relation with national jurisdictions, especially the supreme ones and about the need to guarantee or not a second degree of judgment on the decisions made by the EGC for a preliminary ruling, beyond the forecast of the review as proposed by art. 256 TFEU. Most likely, the reflection on the need to ensure the efficient functioning of the Union's jurisdictions, and especially of the jurisdiction for preliminary rulings, will require a broader rethinking of the whole system of legal protection of the Union, capable of going beyond mere logic of transfer of jurisdiction, although appreciable and asphyxiated in terms of the durability of the solution. And this rethinking can not in our opinion, not involve the role of national judges, in a perspective of which there is now traced in the pending of article 19, par. 1, sub-paragraph 2 of the TEU.

Thus, in the jurisdiction of the summit request of the judicial system (also), the appeals pursuant to art. 263 and 265 TFEU promoted by the Institutions and also, as not expressly provided for by art. (today) 256 TFEU (neither article 51 of the Statute), proceedings for breach pursuant to art. 258-260 TFUE[20].

Furthermore, art. 256 TFEU (today) provides that the general jurisdiction of the EGC is delimited with respect to the disputes given to the specialized Courts established pursuant to art. 257 TFEU (at the time Article 225A EC): the only specialized EGC created by the Council decision of 2 November 2004 was the European Union Civil Service Tribunal (EUCST)[21], which was given the power to ascertain, at first instance, disputes between the Union and its agents, pursuant to art. 270 TFEU (today) (then Article 236 EC)[22]. The decisions of this judge could be challenged (only for legal reasons) before the EGC[23], whose rulings-in turn-could be re-examined in the (exceptional) cases in which-on the basis of the provisions of art. 256, par. 2, TFEU-could seriously undermine the unity or consistency of Union law[24].

Broadly speaking, EU law disputes include jurisdictional powers, so to speak, "traditional" and jurisdictional powers *sui generis*, specific to the Union's legal system[25].

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[24] A. Huyue Zhang, *The faceless court*, in University of Pennsylvania Journal of International Law, 2016.

[25] A. Alemanno, L. Pech, *Thinking justice outside the docket: A critical assessment of the reform of the EU's Court system*, in Common Market Law Review, 2017, p. 129-176. E. Guinchard, M.-P. Granger (a cura di), *The*

Traditional litigation includes, firstly, direct, administrative, annulment and inadequate appeals, against acts or abstentions to pronounce on the Institutions, bodies or bodies of the Union, as well as some special appeals; secondly, the European civil service dispute, concerning the disputes between the Union and its agents and, thirdly, a civil-related litigation[26] concerning, on the one hand, contracts regarding the Union containing an arbitration clause[27] devotes jurisdiction to the EU judicature and, secondly, non-contractual liability for damages caused by the institutions and agents of the Union. The *sui generis* litigation concerns, first of all, the preliminary rulings on the interpretation of the Treaties and on the validity and interpretation of the acts carried out by the institutions, bodies or bodies of the Union, pursuant to art. 267 TFEU[28], secondly, the actions for failure to fulfill obligations of Member States to obligations deriving from EU law and, thirdly, certain types of inter-institutional redress or concerning certain institutions of the Union or bodies of such bodies Institutions.

The current system of division of competences between the two jurisdictions is decidedly complex and is based on the combined provisions of art. 256 TFEU and art. 51 of the Statute[29]. Article 256 TFEU confers on the EGC a general jurisdiction, at first instance, to deal with direct appeals (for annulment, in the event of failure, for contractual and extra-contractual responsibility and relating to the public function), except for those that the Statute assigns to a specialized EGC or reserve to the CJEU.

The same rule also provides for the jurisdiction of the EGC as a judge of the appeal concerning the decisions of any specialized Court established under the art. 257 TFEU, as was the EGC of the civil service, as well as the jurisdiction to hear preliminary rulings on matters specifications determined by the articles of the Statute.

In order to ensure unity and consistency in the judicial application of Union law, the same provision provides, first, for the EGC to refer the case to the CJEU and, second, that the decisions issued by the EGC for a preliminary ruling[30] can exceptionally be re-examined by the CJEU, in accordance with the provisions of the articles of the Statute.

Article 51 of the Statute, notwithstanding art. 256 TFEU, subtracts from the competence of the EGC certain direct appeals, especially of inter-institutional nature.

On the other hand, the CJEU, in addition to examining the appeal concerning

new EU judiciary, Wolters Kluwer Publishing House, 2018. M.P. Granger, E. Guinchard, *Introduction: The dos and don'ts of judicial reform in the European Union*, in E. Guinchard, M.-P. Granger (a cura di), *The new EU judiciary*, *op. cit.*, p. 1. A. Albors-Llorens, *The Court of Justice in the aftermath of judicial reform*, in E. Guinchard, M.-P. GRANGER (a cura di), *The new EU judiciary*, *op. cit.*, p. 123. L. COUTRON, *The changes to the general Court*, in E. Guinchard, M.P. Granger (a cura di), *The new EU judiciary*, *op. cit.*, p. 143. R. Schütze, T. TRIDIMAS, *Oxford principles of European Union law*, Oxford University Press, 2018.

[26] W. Hakenberg, *The Civil Service Tribunal of the European Union: A model to follow as a specialised Court?*, in E. Guinchard, M.P. Granger (eds.), *The new EU Judiciary. An analysis of current judicial reforms*, *op. cit.*, p. 162.

[27] P. Stone, *Stone on private international law in the European Union*, E. Elgar Publishing House, 2018.

[28] N. Wahl, L. Prete, *The gatekeepers of Article 267 TFEU: On jurisdiction and admissibility of references for preliminary rulings*, in Common Market Law Review, 2018, p. 52.

[29] G. Conway, *The limits of legal reasoning and the European Court of Justice*, Cambridge University Press, 2012.

[30] The CJEU delivered four judgments in review procedures, see C-197/09, *M v. EMEA* of 17 December 2009; C-334/12 RX, *Rèexamen Arango Jaramillo and others v. EIB* of 12 July 2012; C-579/12 RX-II, *Reèxamen Commission v. Strack* of 11 December 2012; C-417/14 RX-II, *Reèxamen Missir Mamachi di Lusignano v. European Commission* of 9 September 2014.

all the rulings of the EGC (article 256, paragraph 1, second subparagraph, TFEU), retains exclusive jurisdiction over the preliminary reference procedure (article 267 TFEU), considered the "keystone" of the Union's judicial system. Furthermore, it retains some exclusive powers in the first and only degree, and in particular the actions for infringement (articles 258-260 TFEU), some direct actions, for annulment (article 263 TFEU)[31] or inadequacy (article 265 TFEU), of a constitutional or inter-institutional nature.

First of all, it has to do with (article 51, par.1 of the Statute), the actions brought by the Member States, on the one hand, against acts or an abstention by the EC in relation to enhanced cooperation, pursuant to art. 331, par. 1, TFEU[32] and, secondly, against an act or abstention to be pronounced by the EP and the Council, even jointly. However, the appeals concerning the acts adopted by the Council in the matter of state aid pursuant to art. 108 (2), third sub-paragraph, TFEU, concerning trade defense measures pursuant to art. 207 TFEU, in particular the anti-dumping Regulations, and with regard to implementing acts pursuant to art. 291, par. 1, TFEU, in the ambit of the so-called "comitology"[33].

As a matter of curiosity, it is useful to point out that are left to the EGC, despite their constitutional, political and inter-institutional nature, the appeals of Member States and of the institutions of the Union against possible acts or an abstention to the European Council, as well as the appeals proposed by the Committee of the Regions in defense of its prerogatives.

The current division of powers between the EGC and the CJEU is the result of an evolutionary process begun with the establishment of the EGC. The latter, at the time of its institution through Decision 88/591[34], was born as a special judge, first *ratione materiae*, competent to know in the first instance the actions brought by the agents of the Institutions of the Union in matters of public function and natural persons and juridical in matters of competition, then *ratione personae*, competent to know of all the direct appeals presented by natural and juridical persons, thus becoming a "judge of individuals" starting from the Treaty of Nice of 2001, entered into force in 2003, until to the Treaty of Lisbon and to today, the EGC becomes a "common law judge", competent at first instance for most of the direct appeals, leaving the CJEU the role of CJEU supreme[35] (in which case the EGC becomes the judge of second degree, according to the provisions of article 256, paragraph 1, TFEU) and, secondly, from the competences reserved to the CJEU by the Statute[36]. The EGC is invested with a generalized, first-level jurisdiction, for most of the direct judgments and therefore acts as a "judge of the fact", i.e. as a judicial body to which the discussion of complex factual matters is devolved. On the other hand, the CJEU, in addition to the jurisdiction over the appeal of

[31] R. Barents, *The Court of Justice after the Treaty of Lisbon*, in Common Market Law Review, 2010, p. 710.

[32] D. Liakopoulos, *Art. 331 TFUE*, in Herzog, Campbell, Zagel, *Smit & Herzog on the law of the European Union*, LexisNexis Publishing House, 2018.

[33] S. HOBE, *Europarecht*, C.H. Beck Publishing House, 2014. M. Horspool, M. Humpreys, M. Wells-Greco, *European Union law*, Oxford University Press, 2018. J. Lecheler, C.F. Gunde, H. Germelmann, *Europarecht*, C.H. Beck Publishing House, 2015.

[34] V. Tomljenović, N. Bobiroga-Vukorati, V. Butorac Malnar, I. Runda, *European Union competition and State rules: Public and private enforcement*, Springer Publishing House, 2017.

[35] A. Tizzano, P. Iannuccelli, *Prèmiers applications de la procèdure de "rèexamen" devant la Cour de justice de l'Union europèenne*, in Diritto dell'Unione Europea, 2010, p. 682.

[36] K. Lenaerts, European Union procedural law, Oxford University Press, 2014, p. 41-42.

the decisions of the EGC, maintains, at first and only degree, constitutional competences, such as the questions referred, in the context of which it exercises a "nomofilattico" function, and some direct appeals concerning constitutional and inter-institutional disputes. In particular, the CJEU pursues, as its principal mission, that of ensuring the uniform interpretation of Union law[37].

4. Doubling of the number of judges of the EGC and lack of new specialized Courts

At the end of a long and very vigorous legislative process (the original CJEU request to increase the number of judges of the EGC by twelve), the EP and the Council agreed to double EGC members: in view of the substantial inability of the national governments to agree on the method of "dividing" between them a number of judges inferior to that of the Member States (whether it was a draw or rotation between States, the meritocratic choice of candidates to ensure a balanced geographical representation and demographic of the member countries or, again, of a system similar to that which operates for the advocates general, six of which are permanently attributed to the so-called large states and five of which "rotate" among the remaining twenty-two member States), the only viable path to overcome the (presumed or real) difficulties related to the EGC dispute (first of all, the excessive workload and the excessive outcome of the proceedings, as well as the constant increase in the variety of subjects and the technical complexity of the cases to be dealt with) was that of duplicating, as anticipated, the staff of this court order, attributing a second judge to each Member State[38]. This solution was reached with the only modification of the Statute of the CJEU, at the request of the same CJEU, in accordance with the rules of art. 281 TFEU and, therefore, without the need to resort to a revision of the Treaties pursuant to art. 48 TEU, but on the basis of a (simpler) resolution by the EP and the Council, as mentioned, which have adopted, by an ordinary legislative procedure, Regulation (EU, EAEC) 2015/2422[39]. It should be noted, incidentally, that similar procedure is required for the creation of new specialized courts pursuant to art. 257 TFEU and should be followed to transfer the preliminary ruling competence to the EGC pursuant to article 256, par. 3, TFEU (which, as seen, refers to the transfer in "matters determined by the Statute", which can also be modified in this case pursuant to ex article 281 TFEU by ordinary legislative procedure).

Thus, after four years from the original proposal of 2011, the Regulation in question has doubled the number of EGC judges in three phases. The modified art. 48 Statute provides, in fact, (i) the appointment of twelve additional judges from the date of

[37] K. Lenaerts, I. Maselis, K. Gutman, *European Union procedural law*, Oxford University Press, 2014, p. 303.

[38] F. Dehousse, *The reform of the EU Courts (I): The need of a management approach*, in Egmont Paper, n. 53, December 2011. R. Rousselot, *Tribunal: Une réforme du statut de la Cour de justice de l'Union européenne en demi-teinte*, in European Papers, 2016, p. 275. A. Alemanno, L. Pech, *Thinking justice outside the docket: A critical assessment of the reform of the EU's Court system*, in Common Market Law Review, 2017, p. 130. C. Friedrich, *Les vicissitudes de la juridiction européenne: une réforme confisquée par la Cour de justice*, in Revue de Droit de l'Union Europèenne, 2017, p. 114. M.P. Granger, E. Guinchard, *Introduction: The dos and don'ts of judicial reform in the European Union*, *op. cit.* L. Coutron, *The changes to the general Court*, in E. Guinchard, M.P. Granger (eds.), *The new EU judiciary*, *op. cit*.

[39] V. Constantinesco, *La reforma del Tribunal General de la Uniòn Europea*, in Teoria y Realidad Constitucional, 2017, p. 552.

entry into force of the regulation itself (i.e. December 25, 2015); (ii) the entry into operation of seven other judges from 1 September 2016 (in conjunction with what should have been the partial renewal of the EUCST, which is actually "absorbed" in the EGC, in the sense that the seven Member States that had a judge of their nationality in office at the time of the dissolution of the EUCST obtained the second judge to the EGC on this date); (iii) a composition of the EGC equivalent to two judges per Member State from 1 September 2019 (concurrent with the partial renewal of that court request)[40]. To complete the three phases-with the exit of the United Kingdom (which will not identify its second judge, and whose judge in office on the date of Brexit will cease to function) and in the absence of new Member States entrances-the number of judges it should therefore be fifty-four.

Lastly, the choice of doubling instead of specialization was justified by the same reasons of effectiveness, urgency, flexibility and coherence that justified the original proposal to increase twelve units. Economic reasons have also led to this, deeming the increase in the number of judges *de facto* less expensive than the support for costs related to compensation for damages for those who, affected by the unreasonable duration of the proceedings in which they were involved, had initiated an action of non-contractual liability of the Union pursuant to art. 268 TFEU. To be sure, this type of litigation has not "exploded" as it was feared and the first (few) decisions of the EGC that have ascertained this responsibility[41] are the subject of appeal before the CJEU, which is not said to confirm the amount of compensation imposed by the judge of first treatment.

It will undoubtedly be interesting to verify what the CJEU's attitude will be in this regard; and it will be equally interesting to check whether-against the failure to create specialized courts and the increased competence of the EGC-there will be a progressive specialization within it. Indications in this last sense could already be contained in the report that the CJEU, with the help of an external consultant, is called to present-pursuant to art. 3 of the aforementioned Regulation 2015/242-by 26 December 2020. This is a report (addressed to the EP, the Council and the EC) on the functioning of the EGC, which will have to focus on "the efficiency of the EGC, the necessity and the effectiveness of the increase in the number of judges (...), the use and efficiency of resources and the establishment of further specialized sections and/or other structural changes"[42] and which may lead to the presentation of new legislative requests to amend the Statute accordingly.

[40] It is interesting to note what was stated in recital n. 10 of Regulation 2015/2422, according to which "in order to guarantee the effectiveness in terms of costs, this circumstance [the doubling] should not involve the recruitment of additional referendums nor of other support staff. Internal reorganization measures within the institution should ensure efficient use of existing human resources, which should be the same for all judges, without prejudice to the decisions of the EGC regarding its internal organization".

[41] See the following cases T-577/14, *Gascogne Sack Deutschland and Gascogne v. European Union* of 10 January 2017, T-479/14, *Kendrion v. European Union* of 1st February 2017, T-40/15, *ASPLA and Armando Álvarez v. European Union* of 17 February 2017, T-673/15, *Guardian Europe Sàrl v. European Commission and CJEU* of 7 June 2017, T-725/14, *Aalberts Industries NV v. European Union* of 1st February 2017. R. Schütze, T. Tridimas, *Oxford principles of European Union law, op. cit.*, A. Kaczrowska-Ireland, *European Union law*, Routledge Publishing House, 2016, p. 517. E. Berry, J. Homewood, B. Bogusz, *Complete European Union law: Text, cases and materials*, Oxford University Press, 2017, p. 342.

[42] Öberg, M. Aliand, P. Sabouret, *On specialisation of Chambers at the General Court*, in M. Derlén, J. Lindholm (eds.), *The Court of Justice of the European Union: Multidisciplinary perspectives*, Hart Publishing, 2018.

5. Failure to transfer the preliminary ruling to the EGC

The decision to increase the number of EGC judges instead of creating specialized courts seems to justify (if not in some way impose and, therefore, to presage) the subsequent choice not to transfer the jurisdiction to the judge (now again) of first treatment[43]. Not going along the road of the creation of the Courts specialized in matters that, in fact, could (if not) be the same in which the jurisdiction for preliminary ruling would have been transferred to the EGC (so as to recognize them respectively in the last and in only one line), the choice of not proceeding with such a result seems to be consequential ("related"-also in the drawing of Treaty of Nice) transfer. To transfer the sole jurisdiction for a preliminary ruling to the non-creation of specialized Courts would imply that the EGC would have such jurisdiction over matters in which it would be invested in direct actions at first instance, with subsequent appeals to the CJEU and the risk of conflicting decisions. This can be overcome by recourse to the institute for review (or the referral of the judgment from EGC to CJEU pursuant to article 256, paragraph 3, TFEU)[44] or by suspension of the proceedings before the EGC pending the decision of the CJEU; but with solutions that are not efficient with a view to ensuring effective and timely judicial protection[45]. The report submitted by the CJEU on 14 December 2017 does not address the interrelation between the two amendments in question and merely considers that, at least for the time being, it is not appropriate to transfer the jurisdiction to the EGC for a preliminary ruling on several grounds, one of which-the one based on the risk of confusion that would be created for national jurisdictions, which could be discouraged by the preliminary reference-already enucleated in the proposal of March 2011 aimed at the increase of twelve units of the judges of EGC[46].

The CJEU, before explaining the reasons that led it to exclude the necessity (for the moment) of the transfer of preliminary rulings, highlights the diversity of the current context with respect to that which led the constituent in Nice to envisage this transfer[47]. It is not excluded, however,

[43] M. Derlén, J. Lindolm, *The Court of Justice of the European Union: Multidisicplinary perspectives, op. cit.*, p. 125.

[44] G. Vandersanden, *Renvoi prèjudiciel en droit europèen*, Bruylant Publishing House, 2013. A. Turmo, *L'autoritè de la chose jugèe en droit de l'Union europèenne*, Bruylant Publishing House, 2017. E. Neframi, *Renvoi prèjudiciel et marge d'apprèciation du juge national*, Larcier Publishing House, 2015.

[45] J. Azizi, *Opportunities and limits for the transfer of preliminary reference proceedings to the Court of First Instance*, in I. Pernice, J. Kokott, C. Saunders (eds.), *The future of the european judicial system in a comparative perspective*, Nomos Publishing House, 2006, p. 242. K. Lenaerts, *The unity of European Law and the overload of the ECJ-The system of preliminary rulings revisited*, in I. Pernice, J. Kokott, C. Saunders (eds.), *The future of the european judicial system in a comparative perspective*, *op. cit.*, p. 212. K. Lenaerts, *The rule of law and the coherence of the judicial system of the European Union*, in Common Market Law Review, 2007, p. 1265. M. Broberg, N. Fenger, *Preliminary references to the European Court of Justice*, Oxford University Press, 2014. P. Craig, *UK, EU and global administrative law: Foundation and challenges*, Cambridge University Press, 2015. T. Von Danwitz, *The rule of law in the recent jurisprudence of the ECJ*, in Fordham International Law Journal, 2014, p. 1316.

[46] N. Bermejo Guttierez, *La reforma del Tribunal General de la Unión europea*, in Almacén de Derecho, 17 May 2016.

[47] See the following cases C-245/09 *Omalet NV v. Rijksdienst voor sociale Zekerheid* of 22 December 2010, C-268/15, *Ullens de Schooten and Rezabek v. Belgium* of 20 September 2011, C-250/08, *European Commission v Kingdom of Belgium* of 1st December 2011, C-601/14, *European Commission v. Italy* of 11 October 2016, C-313/12, *Giuseppa Romeo v. Regione Siciliana* of 7 November 2013, para. 26, C-583/10, *United States of America v. C. Nolan* of 18 October 2012, paras. 47 and 48, C-488/13, *Parva Investitsionna Banka and others v. "Ear Proparti*

that in the face of an increase in the competences of the Union-and consequently in areas in which the "European" legislator intervenes (the example of the European Public Prosecutor's Office) and the complexity (as well as the number) of the questions raised-it is necessary to reflect on the appropriateness of a partial transfer of jurisdiction to the EGC for a preliminary ruling. The first disadvantage that the CJEU cites to justify the non-transfer consists in the difficulty of identifying with sufficient precision matters to be devolved to the preliminary ruling competence of the EGC. You could think of technical subjects (the report mentions: customs, tariffs, social security and indirect taxation)-but you could also add subjects that the EGC deals with predominantly, such as intellectual property litigation-and focus the top management body on essential subjects (citizenship, internal market, SLSG, economic and monetary integration). But the CJEU shows how often the border is not clearly traceable and how, even behind apparently technical and circumscribed issues, we can hide transversal and principled issues. It should not be forgotten that, to remedy situations of this kind (which could undermine the confidence of the national courts in the CJEU), one could resort to the institute of postponement or, at the limit, to that of the ex art. 256, par. 3, TFEU. But CJEU believes that often only at a late stage could the EGC be aware of the constitutional relevance of the matter submitted to it and/or the fact that it could undermine the unity and consistency of Union law and the postponement to that. This would imply a significant lengthening of the procedure, whereby national courts could give up on making a reference for a preliminary ruling, thus frustrating the useful effect of the protection mechanism which is at the heart of the judicial architecture of the Union. Alongside this profile of "disincentive" of the referral[48], the CJEU points out that the review, which is certainly possible, albeit subject to restrictive conditions, is not a useful tool to resolve any divergences between the EGC and CJEU[49]; and how in no way does a distortion of the institute appear to ensure a review of all decisions of the EGC (which would otherwise deprive the transfer of its benefits, both in terms of easing the workload of the CJEU, and in terms of effectiveness and duration of the preliminary ruling procedures). Another drawback identified by the CJEU to justify the inappropriateness of the transfer of the preliminary ruling consists in the fact that the EGC has always been the judge of direct actions and as such it may have difficulty handling references which have a

Development-v nesastoyatelnost" AD e Sindik na "Ear Proparti Development-v nesastoyatelnost" AD of 9 September 2014, para. 30, C-246/14, *De Bellis and others v. Istituto Nazionale di Previdenza per i Dipendenti dell'Amminsitrazione Pubblica (Inpdap)* of 15 October 2014, C-692/15 to C-694/5, *Security services Srl and others v. Ministero dell'Interno and others* of 12 May 2016, paras. 29-31, C-303/16, *Solar Electric Martinique v. Ministre des inances et des Compted publics* of 19 October 2017, paras. 25 and 26, C-281/15, *Sahyouni v. Raya Mamish* of 12 May 2017, paras. 28-3. However, the possibility for the referring court to pose a new question and give further clarification remains open. See, e.g. with regard to that later case, a follow up case, in which AG Saugmandsgaard Øe delivered his opinion considering that the connecting factor is given (opinion delivered in case C-372/16, *Sahyouni* of 14 September 2017). V.P. Neamt, *Member States liability for judicial error resulting in breaches of European Union law*, in Journal of Legal Studies, 2016, p. 66. S. Peers, *European Union justice and home affairs law*, Oxford University Press, 2016. S. Weatherill, *Law and values in the European Union*, Oxford University Press, 2016, p. 32. A. ROSAS, L. Armati, *European Union constitutional law: An introduction*, Hart Publishing, 2018. S.I. Sánchez, *Purely internal situations and the limits of European Union law a consolidated case labor, a notion to be abandoned?*, in European Constitutional Law Review, 2018, p. 8.

[48] T-40/15, *Plàsticos Españoles, SA (ASPLA) and Armando Álvarez v. European Union* of 17 February 2017.

[49] B. Waegenbaur, *Court of Justice of the EU*, C.H. Beck Publishing House, 2012.

profoundly different nature and are characterized by the presence of many parts and for the use of all (!) the (in truth, more- if they were to participate more states) official languages during the procedure. It is not sufficient that the possibility of compromising the values of unity or the consistency of European Union law is considered to exist, instead requiring the presence of "serious risks" of violating these values. And always from a restrictive point of view, it must be considered that the existence of conditions for re-examination is object of a double evaluation and with effect at the end of this procedure, jeopardizing the unity or the coherence of the Union law, including the constraint of the referring court.

Moreover, the CJEU highlights the organizational differences between the functioning of the proceedings before the apical judge, where the preliminary reference is submitted to a preliminary examination before the general meeting, before being entrusted to a formation judging on the basis of its complexity, and that before the EGC, where the cases are directly attributed by the President of the section to a judge rapporteur. In our opinion, these differences can be surpassed by a modification of the EGC[50], procedural regulation, and it is certain that it is not difficult for this judicial request to get used to a different management of certain types of cases brought before it: the justification of the CJEU therefore appears (at least) under this unconvincing profile. Finally, the CJEU points out that the transfer is not at all opportune in this historical moment, in consideration of the fact that the EGC is reorganizing its working method in the face of the increase in judges (and the number of cases to be decided) and that the reform launched in 2015 is still in progress and has not yet clearly given all its fruits. According to the CJEU, it is therefore preferable to await the settlement of the "extended" EGC and only later to re-evaluate the possibility of transfer, even in the face (as mentioned) of the evolution (in terms of number and type) of the preliminary rulings submitted to it in the next years.

6. Implementation profiles: Critiques and doubts

The project under examination proposes three types of modifications to the Statute, two concerning the division of jurisdiction over direct actions and a third the system of appeals before the CJEU. They are flanked by "terminological coordination" interventions aimed at eliminating the lexical inconsistencies between the language used in the TFEU after Lisbon and the one (still) used in the Statute[51].

The first change request concerns art. 51 of the Statute and, consequently, the subsequent art. 61. The CJEU proposes to add a second paragraph to art. 51, so as to confer on the EGC the competence "to know, at first instance, the appeals based on the articles 108, paragraph 2, second sub-paragraph, 258 or 259 TFEU, except for what concerns the appeals based on one of these the last two provisions, actions for the purpose of establishing the failure of a Member State to fulfill its obligations under the TEU, Title V of the third part of the TFEU or an act adopted on the basis of that

[50] K. Lenaerts, P. Van Nuffel, R. Bray, N. Cambien, *European Union law*, Sweet & Maxwell Publishing House, 2014. F. Martucci, *Droit de l'Union européenne*, Dalloz Publishing House, 2017.

[51] Case C-284/16, *Slowakische Republik v. Achmea BV* of 6 March 2018, par. 37.

title"[52]. It is also expected that when "the case requires a decision of principle or when exceptional circumstances justify it, the EGC, either *ex officio* or at the request of a party, may refer the case to the CJEU for justice to be decided by the latter. The application referred to in the preceding sub-paragraph shall be presented, as the case may be, in the application initiating the proceedings or within two months of being notified to the defendant"[53].

In article 61 of the Statute the CJEU proposes, therefore, to add a last sub-paragraph, according to which, by way of derogation from the general rule fixed in the first sub-paragraph of the disposition, "the CJEU examines all the relevant elements in fact and in law and final decision on the dispute when it accepts an appeal against an EGC decision rendered pursuant to article 51, par. 2, of the present Statute"[54].

The transfer in question is justified primarily because of the similarity between the infringement procedures and the other direct actions that already fall within the competence of the EGC and by virtue of the fact that such procedures often require a broad assessment of complex facts that certain it could be well done (also) by the EGC. It is precisely in this regard that we can question whether the burden of proof on the part of the EC to demonstrate the existence of the state breach could become more stringent, considering that the EGC is the judge of the fact *par excellence*. And even if, in view of the particular complexity of the facts or difficulties in law of the case brought before the EGC, it could decide to directly attribute the case to a college composed of five judges instead of three and to make more frequent use (to date there are only five cases, all of which date back) of the "collaboration" of Advocate General. As is known, this judicial request is not permanently assisted by this figure, who nevertheless can perform the function conferred by the Treaty also in proceedings before it pursuant to the provisions of art. 254 TFEU, and specified in articles 3, 30 and 31 of the rules of procedure of the EGC, which, upon the occurrence of the circumstances mentioned, allow for a decision of the plenary conference and subsequent designation by the President that each judge, except the president, vice president and presidents of section of the EGC, may perform the functions of Advocate General in a given case.

With regard to the change request under consideration, what absolutely can not be ignored is the fact that the "material" criterion that the CJEU uses to exclude the possibility of transferring the preliminary ruling to the EGC given the difficulty of enucleating a net line of demarcation between the competences of the two judicial instances is "recovered" to define the division of jurisdiction regarding the infringement procedures. The competence of the EGC would become, in fact, general, only for the infringement procedures concerning aid pursuant to art. 108 TFEU. For appeals promoted pursuant to art. 258 and 259 TFEU, however, there is a considerable limitation of the transfer; significant and, at the same time, lacking in the revision of the statutory provision when compared with the explanations contained in the explanatory report of the proposal. In fact, while the new art. 51, par. 2, of the Statute provides for the maintenance of the competence of the CJEU for cases of

[52] B. Wagenbaur, *Court of Justice of the European Union. Commentary on statute and Rules of procedure*, C.H. Beck Publishing House, 2013.

[53] P. Craig, *The Lisbon Treaty: Law, politics and Treaty reform*, Oxford University Press, 2010, p. 139.

[54] S.K. Schmidt, *The European Court of Justice and the policy process. The shadow of case law*, Oxford University Press, 2018.

violation of obligations established by the TEU or by the provisions of Title VI TFEU related to the SLSG (or by acts adopted in this context) are indicated among the procedures which must remain CJEU (or anyway, among the hypotheses of derogation of the "formally generalized" transfer to the EGC) also the defaults concerning the rules of the Charter of the Fundamental Rights of the European Union (CFREU)[55].

Why this hypothesis is not clearly included in the text of the new art. 51, par. 2, of the Statute? Moreover, the violation of a provision of CFREU could be detected in any (or almost) infringement procedure (action for infringement) in which, more specifically, the violation of obligations under secondary legislation rules[56] (also) different from those implementation of Title VI TFEU (with respect to which the competence of the CJEU is already set up in the abstract). Is the violation of a CFREU rule sufficient to attribute jurisdiction to the CJEU? Likewise, the violation-in combination with other obligations-of the principle of loyalty cooperation[57] in art. 4, par. 3, TEU, would it also be appropriate in itself to derogate from the transfer of jurisdiction to the EGC? And again, why not leave to the CJEU also the competence on the infringements which consist in the violation of a general principle of Union law? Indeed, there does not seem to be any appropriate reason to justify a difference in treatment between the violation of the rules of the TEU and CFREU, on the one hand, and of the general principles, on the other hand[58].

However, in the face of these limitations/exceptions, justified by the "constitutional nature" of the offense or the urgency of coming to a decision (urgency that conflicts with the double degree of judgment that would be established in the face of such a transfer), how many proceedings actually be attributed to the EGC (also in view of the relatively small number of infringement proceedings referred to annually by the CJEU)?

The same question arises, "strengthened", following the examination of the second part of the art. 51, par. 2, on the basis of which, as seen, where a decision of principle or in the presence of exceptional circumstances is necessary, the EGC, either *ex officio* or at the request of a party, may refer the case to the CJEU. A mechanism similar to that envisaged by art. 256, par. 3, TFEU as regards the postponement of the decision on a preliminary question, even if in this case it is accepted that the party (EC or Member State, respectively in the appeal

[55] B. Wagenbaur, *Court of Justice of the European Union. Commentary on statute and Rules of procedure, op. cit*.

[56] V. Kronenberger, M.T. D'alessio, V. Placco (eds.), *De Rome à Lisbonne: Les juridictions de l'Union européenne à la croisée des chemins. Hommage en l'honneur de P. Mengozzi*, Brill Publishing House, 2013, p. 107 and 117. K. Lenaerts, J. A. Gutiérrez-Fons, *The place of the Charter in the EU Constitutional edifice*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford University Press, 2014, p. 1560-1568. S. Peers, T. Hervey, J. Kenner, *The European Union Charter of fundamental rights: A commentary*, C.H. Beck, Hart Publishing, Nomos Publishing Houses, 2014. S. De Vries, U. Bernitz, S. Weatherill, *The European Union Charter of fundamental rights as a binding instrument: Five years old and growing*, Bloomsburry Publishing, 2015. H. Andersson, *Dawn raids under challenge: Due process aspects on the European Commission's dawn raid practices*, Hart Publishing, 2018.

[57] M. Klamert, *The principle of loyalty in European Union law*, Oxford University Press, 2014. G. De Baere, *European Union loyalty as a good faith*, in International & Comparative Law Quarterly, 2015, p. 818. T. Horsley, *Reflections on the role of the Court of justice as a "motor" of european integration: Legal limits to judicial lawmaking*, in Common Market Law Review, 2013, p. 932.

[58] S. Vogenauer, S. Weatherill, *General principles of law. European and comparative perspectives*, Hart Publishing, 2017, p. 138.

or in the defense) may also request such a reference.

The exceptional circumstance is declined "in particular" in "urgency". This is certainly not an exhaustive indication, other exceptional circumstances may arise, although the wording may appear to be excessively vague and the risk, therefore, is that of covering too much or perhaps too little, based on discretionary decisions by the EGC that are not syndicated. The exceptional circumstances also seem to include that in which the question (and, possibly, on a question closely linked to that) before the EGC in the context of an action for infringement pays a preliminary question of interpretation before the CJEU. These are not frequent cases, but the practice before the CJEU shows that they are there. And although a formal meeting of the cases is not possible, since they are different in nature and the rules of the proceedings arise from a reference for a preliminary ruling and a direct appeal, it is precisely the practice mentioned that the CJEU has pursued similar causes in parallel and has issued sentence on the same day[59]. In the case of devolution of jurisdiction over infractions to the EGC, it would be appropriate-if not necessary-that they be decided by the CJEU, invested substantially in the same (or closely related) issue with a preliminary reference for interpretation. It would also seem appropriate that this hypothesis of referral (compulsory) should be expressly configured as an autonomous hypothesis in the text of the new art. 51, par. 2, of the Statute. One could therefore also question the appropriateness (or necessity) of proceeding also (or alternatively) to an integration of art. 54, sub-paragraph 3, of the Statute. As is known, it regulates the hypothesis of suspension and declination of jurisdiction by EGC or CJEU in the case of "connection" of causes, but in its current formulation it seems to legitimize only a suspension of the procedure by the EGC in case of a similar problem interpretative subject to the scrutiny of the CJEU. Finally, again with regard to the "material" division of responsibilities between the two judicial authorities, it can be pointed out that the causes pursuant to art. 260, par. 3, TFEU may be less relevant (on a constitutional level) of cases ex art. 258 and 259 TFEU devolved to the EGC (as of today there is still no ruling issued by the CJEU on the basis of this provision and, therefore, it may be early to evaluate the possible transfer of jurisdiction to the EGC). It seems clear, however, that the basic choice of the CJEU is to maintain exclusively the power to impose fines on the Member States, perhaps also in view of the fact that the latter would be unwilling to be sanctioned by the judge of first cure[60].

Going to the second modification requested by the CJEU, it consists in the

[59] See the following cases C-429/02, *Bacardi France SAS* of 13 July 2004, C-262/02, *European Commission v. Republic of France* of 13 June 2004, C-158/04 and C-159/04, *Alfa Vita Vassilopoulos and Carrefour Marinopoulos* of 14 September 2006, C-82/05, *European Commission v. Hellenic Republic* of 14 September 2006, C-76/05, *H. Schwarz and Gootjes-Schwarz v. Finanzamt Bergisch Gladbach* of 11 September 2007, C-318/05, *European Commission v. Federal Republic of Germany* of 11 September 2007. See also R. De La Feria, S. Voenaner, *Prohibition of abuse of law: A new general principle of European Union law?*, Hart Publishing, 2011. C. Barnard, *The substantive law of the European Union: The four freedoms*, Oxford University Press, 2016, p. 91. C. Janssens, *The principle of mutual recognition in European Union law*, Oxford University Press, 2013, p. 45. E. Cloots, *National identity in European Union law*, Oxford University Press, 2015, p. 116. L. Gruszgzynski, W. Werner, *Deference in international Courts and Tribunals: Standard of review and margin of appreciation*, Oxford University Press, 2014, p. 43. L. Azoulai, *The question of competence in the European Union*, Oxford University Press, 2014, p. 169.

[60] S.K. Schmidt, R.N. Kelemen, *The power of the European Court of Justice*, Routledge Publishing House, 2013.

introduction of a further (compared to those already provided for in article 51 of the Statute) derogation from the general jurisdiction of the first instance of the EGC. In fact, the modification of par. 1 of this article, reserving the appeals pursuant to ex art. 263 TFEU: "proposed by a Member State against a EC act concerning the failure to properly implement a sentence pronounced by the CJEU"[61] ex art. 260, par. 2 or par. 3, TFUE.

This is a modification that had been discussed within the CJEU-although never formalized-a few years ago, on the basis of indications given by the same top management body in the jurisdiction. In fact, although these are infrequent assumptions (to date there are a few cases[62]), it may happen that a Member State challenges the requests made by the EC in execution of a CJEU ruling imposing a pecuniary sanction pursuant to art. 260, par. 2, TFEU (to date, as mentioned, there are still no judgments issued under article 260, paragraph 3, TFEU, but only a dozen pending proceedings[63]) and that the EC decision on the quantum due is, in fact, the subject of appeal before the EU judicature. On the basis of the current division of competences, an action for annulment must be brought by the Member State before the EGC; but it is inappropriate for this judge (albeit in the first instance) to assess the execution of the sentence of "condemnation" and the payment of the amount defined by the CJEU with respect to a certain failure by the same found: it, in fact, would risk invading the exclusive competence of the CJEU in this field and it is therefore more appropriate that the assessment in question be reserved (in one degree) to the top judicial body of the system. Finally, as regards the third amendment proposed by the CJEU, it concerns the introduction of a "preventive procedure for admission of appeals"[64], which are destined to increase as a consequence of the restoration of the jurisdiction at first instance for disputes in public employment, as well as the increase in the number of judges in that instance and, therefore, in the decisions taken by the latter.

The filtering mechanism is not generalized, i.e. it does not concern all the *pourvois* that, in any matter and with respect to any type of direct appeal, could be established before the CJEU, but only the

[61] H. Andersson, *Dawn raids under challenge: Due process aspects on the European Commission's dawn raid practices*, *op. cit*.

[62] See the following cases T-33/09, *Portuguese Republic v. European Commission* of 29 March 2011, C-292/11 P, *European Commission v. Portuguese Republic* of 15 January 2014, T-810/14, *Portuguese Republic v. European Commission* of 27 June 2016, T-139/06, *French Republic v. European Commission* of 19 October 2011, T-733/15, *Portuguese Republic v. European Commission* of 28 March 2017, T-268/13, *Italian Republic v. European Commission* of 21 October 2014, T-122/14, *Italian Republic v. European Commission* of 9 June 2016, T-147/16, *Italian Republic v. European Commission* of 28 November 2016. See also A. Jakab, D. Jochenov, *The enforcement of European Union laws and values: Ensuring Member States compliance*, Oxford University Press, 2017. D.A.O. Edward, R. Lane, *Edward and Lane on European Union law*, E. Elgar Publishing, 2013. M. Hedemann-Robinson, *Enforcement of European Union environmental law: Legal issues and challenges*, ed. Routledge, 2015, p. 195, 256. QC. Kelyn BACON, *European Union law of State aid*, Oxford University Press, 2017, p. 12.

[63] See the following cases C-569/17, *European Commission v. Spain* of 27 September 2017, C-27/18, *European Commission v. Republic of Bulgaria* of 1st June 2018, C-61/18, *European Commission v. Republic of Bulgaria* of 4 June 2018, C-77/18, *European Commission v. Republic of Austria*, in progress, C-164/18, *European Commission v. Republic of Spain*, in progress, C-165/18, *European Commission v. Spain*, in progress, C-188/18, *European Commission v. Republic of Slovenia* of 12 March 2018, C-207/18, *European Commission v. Spain*, in progress; C-511/16, *European Commission v. Luxembourg* of 6 March 2017; C-381/17, *European Commission v. Republic of Croatia* of 28 March 2018.

[64] R. Schütze, *European Union law*, Cambridge University Press, 2015.

disputes that have already been examined by "an independent administrative authority", that is to say, the cases which benefited from an administrative appeal before being brought before the EGC. This is done, reads the explanatory memorandum of the proposal "in particular, for decisions taken on trade marks of European Union Intellectual Property Office (EUIPO)[65], where Boards of Appeals exist, but also for decisions of different Union agencies equipped with administrative appeals bodies, such as Community Plant Variety Office (CPVO) or the European Chemicals Agency (ECHA)"[66]. In fact it is not a comprehensive list, the articulated cogent of the change using the remainder generically-as anticipated-the expression "independent administrative authority", which could also raise some "identifying" problem. The decisions in question have been the subject of a double check of legitimacy and the CJEU is ruling, in fact, in the third instance, in cases where, as practice shows, many appeals are dismissed as manifestly inadmissible or manifestly unfounded, despite the fact that due to their education, using significant resources. According to the CJEU, therefore, the introduction of such a mechanism is very opportune, with the provision of a new art. 58 bis of the Statute, according to which-in compliance with the procedures to be specified in the Procedural Regulation-the appeal is admitted when "it raises, in whole or in part, an important issue for the unit, the coherence the development of the right of the Union"[67]. It is up to the opposing party to demonstrate, with a special deed attached to the appeal, their interest in a ruling by the CJEU in consideration of the reasons mentioned above and to an *ad hoc* section of the CJEU to verify the existence of these conditions-as happens (ed) to the review (where however the request is presented by the first Advocate General and not by the party, but also in this case the top management intervening after two degrees of judgment, those held before the EUCST first, and the EGC, then). The appeal can be admitted even only partially (in this case, as in the case of full admission, it will be notified to the other parties to the dispute); the decision to refuse will have to be motivated and will make the decision of the EGC final[68].

Certainly it will be interesting to verify if the introduction of such a screening mechanism is only the first step of a longer path aimed at extending a preliminary filter to all the appeals, possibly on the model of the leave to appeal outlined in 1999 (together with the idea a possible filter of references for preliminary rulings, based on the criteria of novelty, complexity and

[65] In particular see the following cases C-619/15P, *P Mocek, Wenta, KAJMAN irma Handlomo-Usługowo-Produkcyjna v. EUIPO* of 21 June 2016, C-639/15 P, *Gat Microencapsulation v. EUIPO* of 26 May 2016, C-35/16 *P, Matratzen Concord v. EUIPO* of 28 April 2016, C-41/16 P, *Min Liu v. EUIPO* of 8 June 2016, C-43/16 *P, Copernicus-Trademarks v. EUIPO* of 14 June 2016, C-63/16, *Actega Terra v. EUIPO* of 24 May 2016, C-77/16 P, *Hewlett Packard Development Company v. EUIPO* of 26 May 2016, C-87/16 P, *Kenzo Tsujimoto v. EUIPO* of 21 June 2016, C-94/16 P, *LTJ Diffusion v. EUIPO* of 15 June 2016, *C-272/16 P, Tayto Group v. EUIPO* of 27 October 2016, C-285/16 P, *Grupo Bimbo v. EUIPO* of 13 October 2016, C-313/16 P, *Medis v. EUIPO* of 19 October 2016; C-351/16 P, *100% Capri Italia v. EUIPO* of 10 November 2016, C-361/16 P, *Franmax UAB v. EUIPO* of 8 November 2016, C-653/15 P, *Carsten Bopp v. EUIPO* of 7 April 2016, C-88/16 P, *European Dynamics v. Entreprise commune européenne pour ITER et le développement de l'énergie de fusion (Fusion for Energy)* of 7 July 2016.

[66] M. Cremona, C. Kilpatrick, *EU legal acts challenges and transformations, op. cit*.

[67] N. Besewer, *Investment protection in the European Union*, Nomos, Dike Verlag Publishing Houses, 2017, p. 125. F. Wollenschlager, *Fundamental rights regimes in the European Union. Contouring their spheres* in, Y. Nakanishi, *Contemporary issues in human rights law*, Springer Publishing House, 2018, p. 24.

[68] R. Schütze, *European Union law, op. cit.*, p. 382.

importance of the issues raised) in the discussion paper on the future of the European Union's judicial system. The latter document provided that the appeal request could be justified, as well as in the event of a risk of prejudice to the uniformity and consistency of EU law, to the importance of the appeal "for the development of european law", but also for that "of the protection of individual rights", and that it was up to the CJEU to select the *pourvois* to be admitted, examining justified requests for authorization to appeal. This system differs from the one proposed today in the new art. 58 bis of the Statute, but it is not excluded that if you opt for a generalized filtering mechanism, you would end up accepting a solution modeled on the proposal just briefly recalled, which seems best able to meet the needs of efficiency and procedural economy[69]. It is a system that, if you remember, would not in any way violate the principle of due process in its right to a double degree of judgment, which in fact-beyond criminal matters-is not a general principle to be guaranteed always and in any case[70] (as the same jurisdictional system as the original Community also demonstrated for appeals promoted by natural and legal persons and as still today confirms the fact that-although these are appeals promoted by institutional subjects-there are still cases in which the CJEU judges first and only degree).

7. A "transversal" interpretation and the future of the European Union's judicial system

The draft reform in question undoubtedly poses fewer "political" problems than those that led to the doubling of the number of EGC judges and therefore seems to be able to affirm that it should be able to be approved more quickly. At that point, the jurisdictional architecture of the Union would be really distorted with respect to the sketch drawn in Nice, as already art. 225 EC (now Article 256 TFEU), in par. 1, finally, that the articles of association may provide that the EGC is competent for categories of (direct) appeals in the first part of the rule and other than the jurisdiction in preliminary rulings, which is addressed by par. 3 of the same forecast. In any case, it should still be in line with-or at least not prejudice-at least two of the three objectives set out by the Group of Experts set up by the EC in 1999 to propose reforms to the Union's judicial system, in particular to ensure that maintaining uniformity and consistency of EU law and safeguarding the judicial protection afforded to citizens, Member States and institutions, and ensuring that the quality of the process is not undermined. On the contrary, not a few doubts arise-at least in relation to the first of the planned reforms-with regard to the third of the objectives identified by the Group of Experts, consisting of reducing the timing of decisions, possibly strengthening their impact in national laws.

If the project in question can be read as a positive signal to the extent that it reinforces the role (and the perception itself)

[69] A.T. Thiele, *Europäisches Prozessrecht Verfahrensrecht vor dem Gerichtshof der Europäischen Union*, C.H. Beck Publishing House, 2014.

[70] See the following cases C-69/10, *Brahim Samba Diouf v. Ministre du travail, de l'Empoi et de l'Immigration* of 28 July 2011, par. 69, C-169/14, *Juan Carlos Sánchez Morcillo and Marìa del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria SA* of 17 July 2014, par. 36, C-464/13 and C-465/13, *Europäische Schule München v. Silvana Oberto and Barbara O'Leary* of 11 March 2015. S. Weatherill, *Principles and practice in European Union sports law*, Oxford University Press, 2017.

of the CJEU as a (almost exclusively) "constitutional" (and) judge of the preliminary reference, it raises some doubts about effectiveness of the infringement procedure in a short time. And it seems then to be able to explain not so much in light of the need to reduce the workload of the CJEU-to retain the only (or almost) references for preliminary rulings-but to give new work to today's forty-seven (rectius, forty-six, as seen), and in the near future (as a result of the Brexit) fifty-four, judges of the EGC, thus confirming the need for their ("sweaty") doubling.

However, even the numbers of the infringement procedures instituted before the CJEU and those that it has decided in recent years have doubts about the real necessity of the reform (or at least reflect on its premature nature), even in the face of the number of causes that would continue to be judged by the apex judge in virtue of the exceptions dictated by the new art. 51, par. 1 of the Statute and the hypothesis of "postponement" of the exercise of the competence from the EGC to the CJEU. And, what is worse, in view of the fact that the "generalized" referral of jurisdiction to the EGC risks reducing the deterrent effectiveness of the infringement procedure, in contrast to the changes that have always been made to it (and to the studies that followed over the years with the aim of finding solutions that would increase their deterrence, indeed, and certainly not reduce it). In fact, the jurisdiction entrusted to the EGC in first instance implies an overall extension of the procedure, the judgments adopted by it being able to be challenged and, therefore, of further scrutiny by the CJEU. It is true that the non-compliance is always crystallized at the expiry of the deadline set in the reasoned opinion, but the State would feel "free" to remain in default longer (or at least that risk is particularly high), until the decision of the CJEU. The disincentive seems to be the circumstance that the appeal does not normally have a suspensive effect and, therefore, the fact that the State should in any case eliminate the infringement already from the moment of its verification by the EGC. Just as it would serve, in our opinion, the corrective-referred to the aforementioned modification of the art. 61 of the Statute-for which the CJEU, in the *pourvoi*, would decide definitively without referring to the EGC: this because two degrees of judgment still require longer times than a single proceeding. Furthermore, the reduction in deterrence would also be found with respect to the possible launch of the second infringement procedure pursuant to art. 260, par. 2, TFEU, also postponed over time, not long-term-noting the fact that the coefficient of duration of the default to calculate the lump sum would in any case be determined in relation to a later time period.

It also can not go unnoticed as this temporal expansion of the procedure would have negative repercussions also on individuals (natural and legal persons): consider, for all, the jurisprudence on the responsibility of the State for violation of EU law which considers proven to be serious and manifest of the violation in the presence of a ruling to ascertain the non-compliance or preliminary ruling (which also identifies the non-compliance of national law with the law of the Union being interpreted)[71]. Evidently, the longer it takes for the EU judge to ascertain the fault of the State, the harder it will be for the individual affected by the breach to prove the most difficult of the three conditions laid down by the

[71] See the joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte Factortame and others* of 5 March 1996, par. 57. A. Łazowski, S. Blockmans, *Research handbook on European Union Institutions law*, E. Elgar Publishing, 2016.

Luxembourg court to obtain compensation for the damage suffered, precisely) the serious and manifest violation.

Even this last observation makes it clear that the Member States, on the other hand, should instead welcome the amendment in question, gaining time before it comes to a definitive assessment of the infringement (whose "faults", even at the level of internal politics, they may perhaps be leaning against the previous or subsequent Government).

In this perspective, if the aim should be to not see reduced the deterrence of the infringement procedure, little meaning would have really generalized, without exceptions and without possible referrals to the CJEU, the competence of the EGC, because in a greater number of cases we would find the negative effects tested. One might rather ask why not to ban the appeals of the decisions issued by the EGC, issued at the end of the infringement procedure. The States would hardly accept to be judged in first and only degree by the EGC, but because to assure them a double degree of judgment in a procedure that historically has never contemplated it and that, as seen, is not indispensable from the point of view of respect of fundamental rights, not being a criminal matter?[72]

Perhaps, to enhance the role of the EGC (and ensure a workload appropriate to all judges, once it is in full ranks) and avoid an almost systematic appeal of its decisions with a consequent increase (rather than reduction) of the load of the CJEU (which at least formally seems a ratio underlying the reform)[73], one could then at least envisage a system of filtering the appeals (also) with respect to the rulings of the EGC issued at the outcome of the infringement procedures. The eligibility criteria may be the same or similar to those envisaged by the reform project as regards the postponement of the jurisdiction from the EGC to the CJEU (which in fact coincides with the hypotheses in which article 256, paragraph 3, TFEU provides for a deferral of the preliminary ruling by the trial judge to the CJEU), and in particular the need to make decisions on matters of principle, or constitutional significance, and to ensure the unity and coherence of Union law. It is recalled that the draft reform of the Statute is currently being examined by the EP and the Council and that the position of the EC, called to provide an opinion pursuant to art. 281 TFEU and whose observations have always played an important role in the statutory changes[74].

Waiting to know the developments of the legislative process, it seems opportune still a brief reflection on the sidelines of the proposal in question, concerning a further modification of the art. 51 of the Statute, also (as the second proposed reform today to be examined by the legislator) discussed internally at CJEU a few years ago, but never formalized. This is a revision aimed at granting the CJEU first and only instance the jurisdiction over damages actions (pursuant to article 268 TFEU)[75] caused by one of the jurisdictions of the CJEU for violation of the

[72] See the conclusions in case C-526/08, *European Commission v. Grand Duchy of Luxembourg of 28 January 2010*, par. 33. P. CRAIG, G. DE BÚRCA, *European Union law: Text, cases and materials*, Oxford University Press, 2015.

[73] M. Cohen, *Judges or hostages? The bureaucratisation of the Court of Justice of the European Union and the European Court of Human Rights*, in B. Davis, F. Nicola (eds.), *European law stories*, Cambridge University Press, 2017.

[74] H. Von Der Groeben, J. Schwarze, A. Hatje (eds.), *Europäisches Unionsrecht*, ed. Nomos, 2015.

[75] I.N. Militaru, *An action for damages before the Court o Justice of the European Union*, in International Journal of Academic Research in Economics and Management Sciences, 2013, p. 195. K. GUTMAN, *The evolution of the*

principle of reasonable duration of the process. Although the practice has shown that these are marginal cases, since the cases now filed before the EGC due to an unlawful judicial request (although in different composition) are very limited, it is indeed reasonable that the CJEU decided not to submit to the EP. It is in fact quite clear that the current system of division of competences has proved to be absolutely unsatisfactory from the point of view of compliance with the reasonable period of judgment: almost four years after the introduction of compensation actions before the EGC, appeals are still pending before the CJEU.

8. Conclusions

In conclusion, we can say that the modification in question, on the other hand, in the face of a single degree of judgment, would allow us to obtain compensation more quickly, satisfying requirements of procedural economy[76] and impartiality (full) of the judicial body[77]. Of course such impartiality could be "cracked" again where the offense was challenged at the CJEU rather than at the EGC. Since it is not conceivable that the control of the CJEU's work is left to the primary care court, it could not re-propose the current operational solution for the EGC, namely the assessment of the responsibility of the CJEU by a different judicial section the offense is charged[78]. It is true, however, that the cases in which the infringement of the reasonable duration of the trial could be held responsible (exclusively) for the CJEU seem to be very limited. This does not seem to be foreseeable in the proceedings arising from a preliminary reference, given the increasingly reduced (and not further compressible) times in which the CJEU comes to a decision, even if it does not resort to the accelerated procedure or the urgent preliminary ruling procedure, nor does it resolve the case with an order pursuant to art. 99 RP CG, but operate according to the "ordinary" rules of the preliminary ruling procedure[79]. In direct actions the CJEU has jurisdiction in the first and only degree (today still in all infringement procedures and) with regard to inter-institutional conflicts and appeals promoted by the Member States according to the specifications set forth in art. 51 of the Statute: with respect to this dispute, it does not seem possible to establish an action of non-contractual liability brought by an Institution or, indeed, by a Member State against the Union (assuming that the matter is resolved on a different plan from the strictly legal one)[80]. The same could be said

acton for damages against the European Union and its place in the system of judicial protection, in Common Market Law Review, 2011. D. Leczykiewicz, *Enforcement or compensation? Damages actions in European Union after the Draft common frame of reference*, in M. Kenny, J. Devenney, *The transformation of European private law*, Cambridge University Press, 2013.

[76] Case T-577/14, *Gascogne Sack Deutschland e Gascogne v. European Union, op. cit.*, par. 48.

[77] See the conclusions of Advocate General Léger in case C-185/95 *P. Baustahlgewebe v. European Commission* of 3 February 1998, par. 70-76.

[78] D.P. Domenicucci, G. Muguet-Poullennec, *À la recherche du temps perdu: Du droit de voir sa cause jugée dans un délai raisonnable, ou, des difficultés de passer de la prévention à la guérison*, in V. Giacobbo-Peyronnel, C. Verdure (sous la direction de), *Contentieux du droit de la concurrence de l'Union européenne*, Brill Publishing House, 2017, p. 623 and 663.

[79] G. Beck, *The legal reasoning of the Court of Justice of the European Union*, Hart Publishing, 2012.

[80] D. Liakopoulos, *First considerations and discussion of the proposed reform of litigation competences of the Court of Justice of the European Union*, in International and European Union Legal Matters-working paper series, 2018.

about the possible transfer of jurisdiction to the EGC of the infringement procedures, with a judgment in the appeal before the CJEU. Finally, and more generally with respect to the *pourvois*-which can also be promoted by natural and juridical persons-the organizational and procedural changes made with the refinery in 2012[81] seem nevertheless to largely avert the risk in question[82].

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[81] M.A. GAUDISSART, *La refonte du règlement de procédure de la Cour de justice*, in Cahier de Droit Europèen, 2012, p. 603. P. IANNUCCELLI, *La réforme des règles de procédure de la Cour de justice*, in Diritto dell'Unione Europea, 2013, p. 107. J.A. GUTIERREZ-FONS, *Le nouveau règlement de procédure de la Cour de justice au regard du contentieux de l'Union européenne*, in S. MAHIEU (sous la direction), *Contentieux de l'Union européenne. Questions choisies*, Brill Publishing House, 2014, p. 41.

[82] See the following cases C-578/11P, *Deltafina SpA v. European Commission* of 12 June 2014, T-577/14, *Gascogne Sack Deutschland and Gascogne v. European Union, op. cit.*, par. 48. S. GREER, J. GERARDS, R. SLOWE, *Human rights in the Council of Europe and the European Union. Achievements, trends and challenges*, Cambridge University Press, 2018.

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- C-59/09, *Hasbro* of 10 July 2009
- C-197/09, *M v. EMEA* of 17 December 2009
- C-201/09P and C-216/P, *Arcelor Mittal Luxembourg v. European Commission* of 29 March 2011
- C-334/12 RX, *Rèexamen Arango Jaramillo and others v. EIB* of 12 July 2012
- C-369/09P, *Polska Sp. z.o.o. and others v. European Commission* of 24 March 2011
- C-417/14 RX-II, *Reèxamen Missir Mamachi di Lusignano v. European Commission* of 9 September 2014C-522/09P, *Ferrero v. OHM* of 24 March 2011
- C-579/12 RX-II, *Reèxamen Commission v. Strack* of 11 December 2012
- T-1/89, *Rhône-Poulenc v. European Commission* of 24 October 1991
- T-24/90, *Automec Srl v. European Commission* of 18 September 1992
- T-51/89, *Tetra Pak Rausing v. European Commission* of 10 July 1990
- T-120/89, *Stahlwerke Peine-Salzgitter v. European Commission* of 27 June 1991
- T-485/08P, *P. Lafili v. European Commission* of 2 July 2010

OBSERVATIONS WITH REGARDS TO CHINA'S RELATIONS WITH ROMANIA AND MOLDOVA[1]

Daniel HAITAS*

Abstract

China's importance in the international arena is increasing, also including in the European region. In recent times there has particularly been an attempt to intensify relations in the context of the Belt and Road Initiative and in the case of Central and Eastern Europe, also through the creation of the 16 + 1 format. Two countries with connections to these initiatives are Romania and Moldova, the former being a European Union Member State and the latter a country with an Association Agreement with the European Union. Romania historically has strong ties to China, going back to the Cold War period, while Moldova now appears to have the potential be able to play the role of an important partner for China in Eastern Europe.

Keywords: *China, Romania, Moldova, European Union, Belt and Road Initiative, bilateral relations*

1. Introduction

The rise of China and its growing influence has become a major factor in shaping the present international environment. As a result, we have seen China strengthening its relations with various countries around the globe, particularly in the context of the Belt and Road Initiative. Europe has been no exception to this, including the Central and Eastern European region. An important example of China reinforcing its ties to this region can be seen in the developing of its relations with both Romania and Moldova. Here there will be an overview of the basic framework of China-Romania relations, and important developments that have taken place in this relationship over time. Keeping in mind that 2019 will mark 70 years of the establishment of diplomatic relations between Romania and the People's Republic of China[1], the author considers this article as a timely contribution to the literature on this important and current subject. Furthermore, this article shall also briefly survey China's relations with Moldova. The latter offers an interesting example of a small country in Eastern Europe which can be said to exist at a geopolitical crossroads, which appears to be pursuing something of a multivector foreign policy, part of which is the strengthening of bilateral relations with China.

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[1] Xinhua: *China, Romania agree to deepen cooperation in infrastructure, finance*, 8 July 2018, http://www.xinhuanet.com/english/2018-07/08/c_137309015.htm (last access 14.09.2018).

2. Romania and China

In the post-communist period of its history, Romania has firmly placed itself within the European and Euro-Atlantic community, which has meant membership of the European Union and the North Atlantic Treaty Organization as the main defining features of its international identity. However, this has not precluded its pursuing constructive relations with third countries outside of this community, one particularly notable example being its relationship with China. This relationship rests on a strong tradition of historical bilateral relations. It can be said that Romania's establishment of diplomatic relations with China began when King Carol I sent notification of the independence of Romania to the Guangxu, Emperor of China, who in kind sent a positive response to this development[2]. Later, Romania and the People's Republic of China established diplomatic relations on 5 October 1949, and the first ambassadors were exchanged in March of the following year[3]. In October 1971 Romania, as one of the co-sponsor states, voted for a resolution in the 26th United Nations General Assembly which called for the restoration of China's rights in the organization[4]. It can even be said that at this time Romania was China's closest European ally[5]. Romania during the rule of Nicolae Ceaușescu played a not insignificant role in the normalization of relations between the United States of America and China[6]. The positive bonds which existed between Romania and China during the Ceausescu period must be seen in the context of both Romania and China's tensions with the Soviet Union, with both attempting to chart an independent path in the international arena and resisting Moscow's leadership[7].

The Chinese side has explicitly recognized the historical roots of this relationship and its importance even in recent times. Li Keqiang, Premier of the State Council of People's Republic of China, said in a speech to the Romanian Parliament in 2013 that "Solid traditional friendship may serve as anchors for stable relations. Over the past 60 years and more since the establishment of diplomatic ties, our two countries have always lived in amity with each other and shared weal and woe" and that "Our two countries have always respected each other, treated each other as equals, firmly supported each other's core interests and fully respected each other's choice of development path. China is the

[2] Andrea Chiriu and Liu Zuokui: *Sino-Romanian Relations, from the First Ponta's government to Klaus Werner Iohannis's victory in the presidential elections*, 16 + 1 China-CEEC Think Tanks Network, 11 January 2011, http://16plus1-thinktank.com/1/20160111/1094.html (last access 23.09.2018).

[3] Embassy of the People's Republic of China in Romania: *China and Romania (En)*, 16 February 2004, http://ro.china-embassy.org/rom/zlgx/t66052.htm (last access 30.09.2018).

[4] China Daily: *Sino-Romania relations*, 8 June 2004, http://www.chinadaily.com.cn/english/doc/2004-06/08/content_337604.htm (last access 30.09.2018).

[5] Mihai Titienar: *Comment: Why is Romania's relation with China underdeveloped*, Romania Insider, 16 November 2016, https://www.romania-insider.com/comment-romanias-relation-china-underdeveloped/ (last access 12.10.2018).

[6] Deseret News: *Nixon Lauded Ceausescu For Help With China Relations*, 24 December 1989, https://www.deseretnews.com/article/78176/NIXON-LAUDED-CEAUSESCU-FOR-HELP-WITH-CHINA-RELATIONS.html (last access 10.10.2018).

[7] Simona R. Soare: Romania and China: Rekindling the special relationship? In Mikko Huotari, Miguel Otero-Iglesias, John Seaman and Alice Ekman (eds.): *Mapping Europe-China Relations A Bottom-Up Approach*, Mercator Institute for China Studies French Institute of International Relations (ifri) Elcano Royal Institute European Think-tank Network on China (ETNC), 2015, 66, https://www.ifri.org/sites/default/files/atoms/files/etnc_web_final_1-1.pdf (last access 23.09.2018).

largest developing country in the world and Romania the second largest among Central and Eastern European countries in terms of population and area. Romania is looking east for cooperation while China is expanding its westward opening-up. When our two countries are moving towards each other, there would be more common interests between us[8]."

The change of political system in Romania in 1989 did not bring a complete rupture in relations between the two countries, with China stating at that time that ""Ideologies and social systems should not become the obstacle to establishing and developing the relations between different countries.....The relations should be established on the basis of common interests.....In accordance with the principles of respect for the choice of the people of every country and not interfering in the internal affairs of other countries, China will maintain friendly exchanges and economic cooperation with Poland, Hungary, Czech and Slovak Federal Republic, Romania and Bulgaria[9]".

However, despite this, it is generally acknowledged that the relationship in Romania's post-communist period has been significantly different in terms of the level of its closeness and intensity as compared to that fostered and experienced during the communist period[10]. Some of the reasons for this include that post-communist Romania set as its primary foreign policy goals to integrate into the European and Euro-Atlantic structures, primarily the European Union and NATO, and thus set as its main aim the deepening of relations with the members of these organizations[11]. Additionally, China at the time of the change of system in Romania and the immediate aftermath, despite its importance as a world power even at that time, can be said not to have attained then the same level of development and influence that it now enjoys[12].

One important milestone in the recent history of Romanian-Chinese relations was the establishment in 2004 of a Comprehensive Friendly and Cooperative Partnership[13]. China in its international dealings has created a partnership network (CPN), and the status of Broad Friendship and Cooperation Partnership accorded to Romania belongs to the terminology of China's diplomatic relations and its classification of the level of those relations with various countries[14]. Later in 2013

[8] Ministry of Foreign Affairs of the People's Republic of China: China-Romania Friendship and Cooperation Move Forward Like a Ship Sailing Far in High Gear Speech by H.E. Li Keqiang Premier of the State Council of People's Republic of China at the Palace of the Romanian Parliament, Bucharest, 27 November 2013, https://www.fmprc.gov.cn/mfa_eng/topics_665678/lkqcxzdogjldrhwbdlmnyjxzsgsfwcxshhzzzcygzlhy/t1114823.shtml (last access 23.09.2018).

[9] Gao Ge: *The Development of Sino-Romania Relations After 1989*, Global Economic Observer, "Nicolae Titulescu" University of Bucharest, Faculty of Economic Sciences; Institute for World Economy of the Romanian Academy, vol. 5(1), June 2017, 127, http://www.globeco.ro/wp-+content/uploads/vol/split/vol_5_no_1/geo_2017_vol5_no1_art_016.pdf (last access 23.09.2018).

[10] Titienar *op. cit.*

[11] *Ibidem*.

[12] *Ibidem*.

[13] Derek J. Mitchell: China and the Developing World. In Carola McGiffert (ed.): *Chinese Soft Power and Its Implications for the United States: Competition and Cooperation in the Developing World – A Report of the CSIS Smart Power Initiative*, Washington, Center for Strategic and International Studies, 2009, 126, https://csis-prod.s3.amazonaws.com/s3fs-public/090212_06china_developing.pdf (last access 13.10.2018).

[14] Zhou Yiqi: *China's Partnership Network Versus the U.S. Alliance System: Coexistence or Conflict?*, China Quarterly of International Strategic Studies, Vol. 03, No. 01, 2017, 1, 5, https://www.worldscientific.com/doi/abs/10.1142/S2377740017500075 (last access 30.09.2018).

Romania and China issued a Joint Declaration on deepening bilateral cooperation in the new circumstances[15]. It states that "The two countries have always had a strategic vision on the development of bilateral relations, considering each other as good friends and good and honest partners, who cooperate to their mutual advantage[16]". The declaration includes support for the broader cooperation between the European Union and China, as well as the initiative of Central and Eastern European countries and China attempting to intensify their engagement[17].

With Romania's European integration and attaining full membership in the European Union in 2007, it can be now said that Romania and China's relations must not only be seen in the context of bilateral connections, but also within broader multilateral context, which include all the obligations and responsibilities that Romania now has as a EU Member State. Relations between the European Union and China are based on several main instruments, particularly the 1985 Agreement on Trade and Economic Cooperation between the European Economic Community and the People's Republic of China, which still provides the basic legal framework for the EU-China relationship[18]. It has been proposed that this agreement eventually be upgraded and expanded[19], as it is believed this would better reflect the realities of the present day relationship between Europe and China[20].

A major development in recent times and which has the potential to provide a new impetus for China's engagement with Romania and the broader Central and Eastern European region has been the launching of its One Belt, One Road Initiative, also known as The Belt and Road Initiative. This was initiated with a speech that Chinese President Xi Jingping made on September 7 2013[21], in which he said that "To forge closer economic ties, deepen cooperation and expand development space in the Eurasian region, we should take an innovative approach and jointly build an economic belt along the Silk Road" and that "This will be a great undertaking, benefiting the people of all countries along the route. To turn this into a reality, we may start with work in individual areas and link them up over time to cover the whole region[22]."

Perhaps the most significant step towards China's greater engagement with

[15] Romanian Government: *Joint Declaration by the Government of Romania and the Government of the People's Republic of China on deepening bilateral cooperation in the new circumstances*, 25 November 2013, http://gov.ro/en/news/joint-declaration-by-the-government-of-romania-and-the-government-of-the-people-s-republic-of-china-on-deepening-bilateral-cooperation-in-the-new-circumstances (last access 10.10.2018).

[16] *Ibidem.*

[17] *Ibidem.*

[18] European Union External Action: Summary of Treaty, Treaties Office Database, http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=341 (last access 31.10.2018).

[19] European Commission: *Closer partners, growing responsibilities*, http://eeas.europa.eu/archives/docs/china/docs/eu-china_leaflet_en.pdf [last access 30.09.2018].

[20] Zhang Jiao: *The EU-China relationship arriving at a bottleneck – A look at the ongoing negotiation of the PCA*, College of Europe: InBev-Baillet Latour Chair of European Union-China Relations, Issue 4 2011, 2, https://www.coleurope.eu/system/files_force/research-paper/eu_china_observer_4_2011.pdf?download=1 [last access 30.09.2018].

[21] Michelle Witte: *Xi Jinping Calls for Regional Cooperation Via New Silk Road*, The Astana Times, 11 September 2013, https://astanatimes.com/2013/09/xi-jinping-calls-for-regional-cooperation-via-new-silk-road/, [last access 31.10.2018].

[22] *Ibidem.*

the countries of Central and Eastern Europe in relation to the broader Belt and Road Initiative is the 16 + 1 Forum, which includes 16 Central and Eastern European countries, one of which is Romania[23]. In addition, there are several observer countries to the forum[24]. 16 + 1 began in 2012[25], and aims to strengthen the connection between China and states in Central and Eastern Europe in various key areas[26]. A summit takes place every year within the context of the 16 + 1 format, which was held in Bulgaria in 2018,[27] and which shall be hosted by Croatia in 2019.[28] One specific Romanian contribution to 16 + 1 is the creation of the Center for Dialogue and Cooperation on Energy Projects 16 +1, which came into being with the support of Romania's Ministry for Energy and Ministry for Foreign Affairs, and which aims to help foster cooperation between China and Central and Eastern Europe in the area of energy based on the principles of the 16 + 1 format[29].

Certain major projects have been proposed and envisaged between Romania and China in recent times, one of the most prominent is in the field of energy, which is the proposed construction of two new reactors at the Cernavoda nuclear power plant[30]. At the present time the Cernavoda plant produces around 20% of Romania's electricity[31]. In relation to the Cernavoda project, in 2015 China and Romania signed an agreement for the latter to construct these two nuclear reactors worth around 6 billion euros[32]. Romania's Nuclearelectrica, the country's nuclear power producer, has stated that it wishes to finalize negotiations with regards to the project with China General Nuclear Power Corporation by the end of 2018[33]. Additionally, in early 2018 Romania's deputy energy minister Robert Tudorache stated that work on the two new nuclear reactors at Cernavoda may

[23] Meeting of China-CEEC Business Council and Business Organizations Latvia 2017: *About 16 + 1*, http://ceec-china-latvia.org/page/about [last access 30.09.2018].

[24] ERT International: *Greece observer at the 6th CEEC Summit in Hungary*, 2017, http://int.ert.gr/greece-observer-at-the-6th-ceec-summit-in-hungary/ [last access 30.09.2018].

[25] Eszter Zalan: *Hungary-Serbia railway launched at China summit*, Euobserver, 29 November 2017, https://euobserver.com/eu-china/140068 [last access 30.09.2018].

[26] About 16 + 1 *op. cit.*

[27] Noinvite.com: *Beijing Says that the Meeting with Eastern European in Sofia is not Postponed*, 13 March 2018, http://www.novinite.com/articles/188663/Beijing+Says+that+the+Meeting+with+Eastern+Europe+in+Sofia+is+not+Postponed [last access 30.09.2018].

[28] Government of the Republic of Croatia: *Croatia to host 16 + 1 initiative summit next year*, 6 July 2018, https://vlada.gov.hr/news/croatia-to-host-16-1-initiative-summit-next-year/24118 [last access 30.09.2018].

[29] Center for Dialogue and Cooperation on Energy Projects 16 +1: *Mission and objectives*, http://www.cdcep-16plus1.org/index.php?page=mission-and-objectives [last access 13.10.2018].

[30] Valentina Crivat: *Romania and China – Friends with No Benefits*, The Market for Ideas, No. 4, Mar-April 2017, http://www.themarketforideas.com/romania-and-china-friends-with-no-benefits-a250/ [last access 30.09.2018].

[31] World Nuclear Association: *Nuclear Power in Romania*, October 2017, http://www.world-nuclear.org/information-library/country-profiles/countries-o-s/romania.aspx [last access 12.10.2018].

[32] Tsvetelia Tsolova, Noah Barkin, Robin Emmott: *China's ambitions in eastern Europe to face scrutiny at summit*, Reuters, 4 July 2018, https://www.reuters.com/article/us-china-easteurope/chinas-ambitions-in-eastern-europe-to-face-scrutiny-at-summit-idUSKBN1JU1NR [last access 24.09.2018].

[33] Romania Insider: *Romanian nuclear power producer aims to finalize negotiations for new reactors this year*, 19 July 2018, https://www.romania-insider.com/nuclearelectrica-finalize-negotiations-new-reactors/ [last access 12.10.2018].

commence in 2020[34]. It has been predicted that the Cernavoda project has the potential to transform Romania into a regional electricity hub and create thousands of new jobs[35].

With Romania taking over the rotating presidency of the European Union in 2019 and which, as already been mentioned, happens to be the same year as the 70th anniversary of the establishment of diplomatic relations between Romania and the People's Republic of China, Romania's Prime Minister Viorica Dancila has said that this would provide an opportunity for the country to actively promote ties between the European Union and China, and to strengthen the 16 + 1 cooperation[36].

3. Moldova and China

Moldova, by virtue of geography, history and other factors, can be said to be a country which in recent times has followed something of a multidimensional foreign policy. One manifestation of this is that despite the fact that it signed an Association Agreement with the European Union, in April 2017 Moldova was granted observer status in the Eurasian Economic Union, being the first country to have received this status[37]. Another aspect of its multidimensional foreign policy is its strengthening relations with China. In examining this relationship, we see an interesting dynamic at work, with one of Europe's smaller countries dealing with a state with the world's largest population and which is also one of the world's great powers. Nonetheless, there is a strong mutual interest in deepening and strengthening relations.

Diplomatic relations were established between the People's Republic of China and Moldova on 30 January 1992[38]. To date Moldova and China have signed 61 cooperation agreements between them in various different sectors[39]. As of 2018, the volume of trade between of Moldova and China was around 245.5 million dollars, an increase of close to 36.5% since the previous year[40]. Chiril Gaburici, Moldova's Minister of Economy and Infrastructure said that "We know that China's market has more than 1.3 billion consumers, we want to export and have a liberalized regime for the strategic products - wine, cereals, dried fruit, animal

[34] Central European Financial Observer.eu: *Romania: Works on nuclear reactors may start in 2020*, 9 February 2018, https://financialobserver.eu/recent-news/romania-works-on-nuclear-reactors-may-start-in-2020/ [last access 30.09.2018].

[35] Raluca Besliu: *China is Using the Balkans as a Testing Ground to Expand its Nuclear Industry*, Balkanist, 30 March 2017, http://balkanist.net/china-is-using-the-balkans-as-a-testing-ground-to-expand-its-nuclear-industry/ [last access 12.10.2018].

[36] Xinhua: Spotlight: *China, CEEC envision new prospects for 16+1 cooperation*, 8 July 2018, http://www.xinhuanet.com/english/2018-07/08/c_137309738.htm [last access 24.09.2018].

[37] Sam Morgan: *Moldova granted observer status in Eurasian Union*, Euractiv, 19 April 2017, https://www.euractiv.com/section/europe-s-east/news/moldova-granted-observer-status-in-eurasian-union/, [last access 02.08.2018].

[38] Ministry of Foreign Affairs and European Integration of the Republic of Moldova: *25 years of diplomatic relations between the Republic of Moldova and People' Republic of China*, Press Releases, 30 January 2017, http://www.mfa.gov.md/press-releases-en/506778/ [last access 10.10.2018].

[39] Moldpres State News Agency: *Moldova interested in deepening bilateral relations with China*, 18 July 2018, https://www.moldpres.md/en/news/2018/07/18/18006304 [last access 05.10.2018].

[40] *Ibidem.*

products, industrial products, etc[41].” An important trade development between the two countries in recent times relates to an increase in Moldova’s wine exports to China, which this year has reached 10% of its total wine exports this year, and is now one of the five major markets for Moldovan wine.[42] China has also made it known that it is willing to connect the Belt and Road Initiative to Moldova’s strategy for development.[43] Moldova has also expressed a desire to participate in the 16 + 1 forum[44], and it has also been speculated that the country may have aspirations of joining the 16 + 1 platform in the future[45]. This could be as a full member, or it could be as an observer country.

A major development took place in the bilateral relationship when on 28 December 2017 Moldova and China signed a Memorandum of Understanding on Launching China-Moldova Free Trade Agreement Negotiations[46]. This was signed by Moldovan Economy and Infrastructure Ministry Secretary Iuliana Dragalin and China’s Vice-Minister of Trade, Fu Ziying[47]. The background to the signing of this memorandum was the China-Moldova FTA Joint Feasibility Study, which was launched in December 2016, and concluded in May 2017[48]. The Chinese Ministry of Commerce stated that the study concluded “that establishing China-Moldova Free Trade Zone would help reach a closer bilateral relationship, tap economic and trade cooperation potential and promote the development of the two countries’ economy[49]”.

There is an important factor which must be borne in mind with regards to Moldova and its relations with China, which is that the country has an Association Agreement with the European Union, as opposed to being a full Member State of the European Union. This Association Agreement was signed in June 2014 and coming into full effect since July 2016[50], and belongs to what has been described as the „New Generation” of Association Agreements, which are much more extensive and comprehensive than those which have existed previously, aiming at a deep integration with the European Union[51]. However, at the same time, these agreements

[41] Publika: *Top-rated Second round of negotiations on FTA Moldova-China concluded*, 30 July 2018, https://en.publika.md/top-rated-second-round-of-negotiations-on-fta-moldova---china-concluded-_2652592.html [last access 05.10.2018].

[42] Xinhua: *China becomes important market of Moldova’s wine export*, http://www.xinhuanet.com/english/2018-08/24/c_137413886.htm [last access 05.10.2018].

[43] Ecns.com: *China to boost Belt and Road cooperation with Moldova, Azerbaijan*, http://www.ecns.cn/news/2018-09-20/detail-ifyyehna1447614.shtml [last access 05.10.2018].

[44] *Ibidem.*

[45] Richard Q. Turcsanyi: *What to Expect at the 2018 China-CEE 16 + 1 Summit*, The Diplomat, 6 July 2018, https://thediplomat.com/2018/07/what-to-expect-at-the-2018-china-cee-161-summit/ [last access 03.10.2018].

[46] Ministry of Commerce People’s Republic of China: *China and Moldova Officially Launch the FTA Negotiations*, 29 December 2017, http://english.mofcom.gov.cn/article/newsrelease/significantnews/201801/20180102694506.shtml [last access 03.10.2018].

[47] Moldova.org: *Moldova and China begin talks on Free Trade Agreement*, http://www.moldova.org/en/moldova-china-begin-talks-free-trade-agreement/ [last access 03.10.2018].

[48] Ministry of Commerce People’s Republic of China *op. cit.*

[49] *Ibidem.*

[50] European Commission: *Countries and Regions: Moldova*, http://ec.europa.eu/trade/policy/countries-and-regions/countries/moldova/ [last access 13.10.2018].

[51] Roman Petrov and Peter Van Elsuwege: What does the Association Agreement mean for Ukraine, the EU and its Member States? A Legal Appraisal. In Aalt W. Heringa (ed.):*Het eersteraadgevend referendum. Het EU-*

fall short of the full obligations and rights of membership in the European Union, even lacking an explicit membership perspective. It may be argued that this gives Moldova a certain flexibility to establish a free trade agreement with China, which is something it would not be able to do independently if it were a full Member State of the European Union.[52] Article 157(1) of the Moldova's Association Agreement with the European Union explicity states that „This Agreement shall not preclude the maintenance or establishment of customs unions, other free trade areas or arrangements for frontier traffic except in so far as they conflict with the trade arrangements provided for in this Agreement[53]".

It should be noted that a precedent for a free trade agreement with China being entered into by a state that has this type of "new generation" Association Agreement with the European Union is Georgia, which signed such an agreement with China in May 2017 and which later came into effect on 1 January 2018[54]. It has also been said that if a free trade agreement can be successfully concluded between China and Moldova, as the latter is located in Eastern Europe, it could possibly set an example for the wider region[55]. It should also be mentioned that a reason why Moldova can be attractive as a trading partner for China is this very Association Agreement which it has with the European Union. In the same way that Ukraine has been described as a desirable destination for Chinese investment due to its similar Association Agreement and Deep and Comprehensive Free Trade Agreement with the European Union, having the potential to act as a vital transit country to the European Union, being located at the crossroads between East and West[56], so it could be argued that Moldova may have the potential to play a similar role.

Conclusion

Romania's past and present relations with China reflect the countries multifaceted diplomatic history. Despite the change in political system and less emphasis being placed on the relationship than during Romania's communist period, the connection has continued to develop in various ways, and must now also be seen within the context of the broader European Union-China relationship, and also in light of China's Belt and Road Initiative and such multilateral initiatives as the 16 + 1 format. In relation to Moldova, the country's desire to expand its relations with China in the form of a free trade agreement can be seen in the broader context of that state's multidimensional foreign policy, and may

OekraineAssociatieakkord.Den Haag, Montesquieu Institute, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2779920 [last access 05.10.2018].

[52] This relates to the Common Commercial Policy (CCP) and the complete transference by the Member States to the EU of this particular competence. See Paul Craig and Grainne De Burca: *EU Law: Text, Cases, and* Materials, Oxford, Oxford University Press, 5th edition, 2011, 311.

[53] *Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part*, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=uriserv%3AOJ.L_.2014.260.01.0004.01.ENG [last access 09.10.2018].

[54] Tamara Karelidze: *China-Georgia FTA Takes Effect*, Emerging Europe, 3 January 2018, https://emerging-europe.com/news/china-georgia-fta-takes-effect/ [last access 03.10.2018].

[55] Liu Zhen: *Can a China-Moldova free-trade deal give Beijing a foothold in eastern Europe?*, South China Morning Post, 29 December 2017, https://www.scmp.com/news/china/diplomacy-defence/article/2126179/can-china-moldova-free-trade-deal-give-beijing-foothold [last access 03.10.2018].

[56] Xinhua: *Belt and Road Initiative holds vast development opportunities for Ukraine: First Vice PM*, 10 October 2017, http://www.xinhuanet.com/english/2017-10/04/c_136658920.htm [last access 05.10.2018]; Olena Mykal: *Why China Is Interested in Ukraine*, The Diplomat, 10 March 2016, https://thediplomat.com/2016/03/why-china-is-interested-in-ukraine/ [last access 05.10.2018].

act as an interesting example of certain countries embarking on the path of European integration, while not yet having gained full European Union membership, and at the same time attempting to expand and deepen their relations with China, giving them a more comprehensive character.

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SUPREMACY OF THE CONSTITUTION THEORETICAL AND PRACTICAL CONSIDERATIONS

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Abstract

Regarding the term of supremacy of the constitution, many authors consider that it is notorious and therefore does not require a special scientific analysis. There are taken under consideration the characteristics of the fundamental law, such as its legal force and normative content, through which it expresses its superordinate position in the normative system of the state. In our analysis, we demonstrate that the supremacy of the constitution is a quality of the fundamental law that has complex, social, political, historical and normative determinations and relates to the role of the constitution in the state social system. The supremacy of constitution can not be reduced only to the formal significance resulting from its legal force. In this context we consider the concept of supremacy as a constitutional obligation with specific legal consequences. There are analyzed the consequences and guarantees of the supremacy of the constitution, the role of the Constitutional Court in fulfilling the main function of guarantor of the supremacy of the Constitution, as well as the competence of the courts, to guarantee through specific procedures this quality of the fundamental law. In this aspect, jurisprudential issues are presented and analyzed.

The relationship between the supremacy of the constitution and the principle of the priority of the European Union law is another aspect of the research carried out in this study.

Keywords: *The notion of constitution and the supremacy of the constitution, legality and legitimacy, consequences and guarantees of constitutional supremacy, relationship between stability and constitutional reform, the correspondence between the law and the constitutional principles.*

1. Introduction

In order to understand the relation between the two principles, i.e. Constitution's supremacy on the one hand, and primacy of European Union law on the other hand, there are a few considerations that are useful in connection to this quality of the Basic Law of being supreme in the rule of law, internal and social policy.

Constitution's supremacy expresses the upstream position of Basic law both in the system of law, as well as in the entire political and social system of every country. In the narrow sense, constitution supremacy's scientific foundation results from its form and content. Formal supremacy is expressed by the superior legal force, procedures derogating from common law on adopting and amending the constitutional rules, and material supremacy comes from the specificity of regulations, their content, especially from the fact that, by constitution, premises and rules for organization, operation and duties of public authorities are set out.

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In that connection, it has been stated in the literature that the principle of Basic law's supremacy "Can be considered a *sacred*, intangible precept (…) it is at the peak of the pyramid of all legal acts. Nor would it be possible otherwise: Constitution legitimizes power, converting individual or collective will into State will; it gives power to the government, justifying its decisions and ensuring their implementation; it dictates the functions and duties incumbent on public authorities, enshrining the fundamental rights and duties, it has a leading role in relations between citizens, them and public authorities; it indicates the meaning or purpose of State activity, that is to say political, ideological and moral values under which the political system is organized and is functioning; Constitution is the fundamental background and essential guarantee of the rule of law; finally, it is the decisive benchmark for assessing the validity of all legal acts and facts. All these are substantial elements converging toward one and the same conclusion: *Constitution's material supremacy.* However, Constitution is supreme in a *formal sense* as well. The adoption procedure for the Constitution externalizes a particular, specific and inaccessible force, attached to its provisions, as such that no other law except a constitutional one may amend or repeal the decisions of the fundamental establishment, provisions relying on themselves, postulating their supremacy"[1].

The concept of Constitution supremacy may not, however, be reduced to a formal and material significance. Professor Ioan Muraru stated that: "Constitution's supremacy is a complex notion in whose content are comprised political and legal elements (values) and features expressing the upstream position of the Constitution not only in the system of law, but in the whole socio-political system of a country"[2]. Thus, Constitution's supremacy is a quality or trait positioning the Basic law at the top of political and juridical institutions in a society organized as a State and expresses its upstream position, both in the system of law and in the social and political system.

The legal basis for Constitution's supremacy is contained by provisions of Art. 1 paragraph 5) of the Basic law. Constitution supremacy does not have a purely theoretical dimension within the meaning it may be deemed just a political, juridical or, possibly moral concept. Owing to its express enshrining in the Basic law, this principle has a normative value, from a formal standpoint being a constitutional rule. The normative dimension of Constitution's supremacy involves important legal obligations whose failure to comply with may result in legal penalties. In other words, in terms of constitutional principle, enshrined as legislation, supremacy of Basic law is also a constitutional obligation having multiple legal, political, but also value meanings for all components of the social and State system. In this regard, Cristian Ionescu would highlight: "From a strictly formal point of view, the obligation (to respect the primacy of the Basic law n.n,) is addressed to the Romanian citizens. In fact, observance of Constitution, including its supremacy, as well as laws was an entirely general obligation, whose addressees were all subjects of law – individuals and legal entities (national and international) with legal relations, including diplomatic, with the Romanian State"[3].

[1] Ion Deleanu, *Instituţii şi proceduri constituţionale - în dreptul roman şi în dreptul comparat*, C. H. Beck Publishing House, Bucharest 2006, p. 221-222.

[2] Ioan Muraru, Elena Simina Tănăsescu, *Constituţia României - Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2009, p. 18.

[3] Cristian Ionescu, *Constituţia României. Titlul I. Principii generale art. 1-14. Comentarii şi explicaţii*, C.H. Beck Publishing House, Bucharest, 2015, p. 48.

The general significance of this constitutional obligation relates to compliance of all law to the Constitution's rules. It is understood by "law" not just the legal system's component, but also the complex, institutional activity of interpretation and enforcement of legal rules, beginning with those of the Basic Law. "It was the derived Constituent Parliament's intention in 2003 to mark the decisive importance of the principle of Constitution supremacy over any other normative act. A clear signal was given, particularly as regards the public institution with a governing role to strictly respect the Constitution. Compliance with the Constitution is included in the general concept of lawfulness, and the term of respecting Constitution supremacy requires a pyramid-like hierarchy of normative acts at the top of which is the Basic law"[4].

2. The notion of constitution and the supremacy of the constitution

Among the many social, political and, last but not least, legal issues that the principle of the supremacy of the Constitution has and implies, we analyze in this study two:

a) the relationship between stability and constitutional reform; and b) the correspondence between the law and the constitutional principles applying to Criminal Codes.

A) An important aspect of the principle of the constitution's supremacy is the content of the relationship between stability and constitutional reform

One of the most controversial and important juridical problems is represented by the relationship between the stability and innovation in law. The stability of the juridical norms is undoubtedly a necessity for the predictability of the conduct of the law topics, for the security and good functioning of the economical and juridical relationships and also to give substance to the principles of supremacy of law and constitution.

On the other hand, it is necessary to adapt the juridical norm and in general the law to the social and economical phenomenon that succeed with such rapidity. Also, the internal juridical norm must answer to the standards imposed by the international juridical norms in a world in which the 'globalization" and "integration" become more conspicuous and with consequences far more important in the juridical plan also. It is necessary that permanently the law maker be concerned to eliminate in everything that it is "obsolete in law", all that do not correspond to the realities.

The report between stability and innovation in law constitutes a complex and difficult problem that needs to be approached with full attention having into consideration a wide range of factors that can determine a position favorable or unfavourable to legislative modification[5].

One of the criterions that help in solving this problem is the principle of proportionality. Between the juridical norm, the work of interpretation and its applying, and on the other hand the social reality in all its phenomenal complexity must be realized with an adequate report, in other words the law must be a factor of stability and dynamism of the state and society, to correspond to the scope to satisfy in the best way the requirements of the public interest but also to allow and guarantee to the individual the possibility of a free and predictable character, to accomplish oneself

[4] Cristian Ionescu, *op. cit.*, p. 48.

[5] Victor Duculescu, Georgeta Duculescu, *Revizuirea Constituţiei*, Lumina Lex Publishing House, Bucharest, 2002, p. 12.

within the social context. Therefore, the law included in its normative dimension in order to be sustainable and to represent a factor of stability, but also of progress, must be adequate to the social realities and also to the scopes for which a juridical norm is adapted, or according to the case to be interpreted and applied. This is not a new observation. Many centuries ago Solon being asked to elaborate a constitution he asked the leaders of his city the question:" Tell me for how long and for which people" then later, the same wise philosopher asserted that he didn't give to the city a constitution perfect but rather one that was adequate to the time and place.

The relationship between stability and innovation has a special importance when the question is to keep or to modify a constitution because the constitution is the political and juridical foundation of a state[6] based on which is being structured the state and society's entire structure.

On the essence of a constitution depends its stability in time because only thus will be ensured in a great extent the stability of the entire normative system of a state, the certitude and predictability of the law topics' conduct, but also for ensuring the juridical, political stability of the social system, on the whole[7].

The stability is a prerequisite for the guaranteeing of the principle for the supremacy of constitution and its implications. On this meaning, professor Ioan Muraru asserts that the supremacy of constitution represents not only a strictly juridical category but a *political-juridical* one revealing that the fundamental law is the result of the economical, political, social and juridical realities. "It marks (defines, outlines) a historical stage in the life of a country, it sanctions the victories and gives expression and political-juridical stability to the realities and perspectives of the historical stages in which it has been adopted" [8].

In order to provide the stability of the constitution, varied technical modalities for guaranteeing a certain degree of rigidity of the fundamental law, have been used, out of which we enumerate: a) the establishing of some special conditions for exercising of an initiative to revise the constitution, such as the limiting of the topics that may have such an initiative, the constitutionality control ex officio upon the initiative for the constitution's revising; b) the interdiction of contitution's revising by the usual legislative assemblies or otherwise said by the recognition of the competence for the constitution's revising only in favour of a Constituent assembly c) the establishing of a special procedure for debating and adopting of the revising initiative; d) the necessity to solve the revising by referendum; e) the establishing of some material limits for the revising, specially by establishing of some constitutional regulations that cannot be subjected to the revising[9].

On the other hand a constitution is not and cannot be eternal or immutable. Yet from the very appearance of the constitutional phenomenon, the fundamental laws were conceived as subjected to the changes imposed inevitably with the passing of time and dynamics of state, economical, political and social realities. This idea was

[6] Ion Deleanu, *Drept constitutional si institutii politice*, vol. I, Europa Nova Publishing House, Bucharest, 1996, p. 260.

[7] Ioan Muraru, Elena Simina Tănăsescu (coord.), *Constitutia Romaniei. Comentariu pe articole*, All Beck Publishing House, Bucharest, 2008, p.1467-1469.

[8] Ioan Muraru, Simina Elena Tănăsescu, *Drept constitutional si institutii politice*, 11th edition, All Beck Publishing House, Bucharest, 2003, p. 80.

[9] For the development see Ioan Muraru, Elena Simina Tănăsescu, *op. cit.*, p. 52-55, Tudor Drăganu, *Drept constitutional si institutii politice. Tratat elementar*, vol. I, Lumina Lex Publishing House, Bucharest, 1998, p. 45-47, Marius Andreescu, Florina Mitrofan, *Drept constitutional. Teorie generala*, Publishing House of Pitești University, 2006, p. 43-44, Victor Duculescu, Georgeta Duculescu, *op. cit.*, p.28-47, Ion Deleanu, *op. cit.*, p.275-278.

consecrated by the French Constitution on 1971 according to which "A people has always the right to review, to reform and modify its Constitution, and in the contemporary period included the "International Pact with regard to the economical, social and cultural rights" as well as the one regarding the civil and political rights adopted by U.N.O. in 1966 - item 1 - is stipulating:"All nations have the right to dispose of themselves. By virtue of that right they freely determine their legal status.

The renowned professor Constantin G. Rarincescu stated on this meaning:" A constitution yet is meant to regulate in future for a longer or a shorter time period, the political life of a nation, is not destined to be immobile, or perpetuum eternal, but on the other hand a constitution in the passing of time can show its imperfections, and no human work is being perfect, imperfections to whose some modifications are being imposed, on the other side a constitution needs to be in trend with the social necessities and with the new political concepts, that can change more frequently within a state or a society[10]". Underlying the same idea the professor Tudor Drăganu stated: "The constitution cannot be conceived as a perennial monument destined to outstand to the viccisitudes of the centuries, not even to the ones of the decades. Like all other juridical regulations, the constitution reflects the economical, social and political conditions existing in a society at a certain time of history and aims for creating the organizational structures and forms the most adequate to its later development. The human society is in a continuous changing. What it is valid today tomorrow can become superannuated. On the other side, one of the characteristics of the juridical regulations consists in the fact that they prefigure certain routes meant for chanelling the society's development in one or another direction. These directions as well as the modalities to accomplish the targeted scopes may prove to be, in their confronting with the realities, inadequate. Exactly for this very reason, the constitutions as all other regulations, cannot remain immutable but must adapt to the social dynamics[11]".

In the light of those considerents we appreciate that relationship between the stability and the constitutional revising needs to be interpreted and solved by the requirements of principle of proportionality[12]. The fundamental law is viable as long as it is adequated to the realities of the state and to a certain society at a determined historical time. Much more – states professor Ioan Muraru – "a constitution is viable and efficient if it achieves the balance between the citizens (society) and the public authorities (state) on one side, then between the public authorities and certainly between the citizens. Important is also that the constitutional regulations realize that the public authorities are in the service of citizens, ensuring the individual's protection against the state's arbitrary attacks contrary to one's liberties"[13].In situations in which such a report of proportionality no longer exists, due to the imperfections of the constitution or due to the inadequacy of the constitutional regulations to the new state and social realities, it appears the juridical and political necessity for constitutional revising.

Nevertheless in the relationships between the stability and constitutional

[10] Constantin G. Rarincescu, *Curs de drept constitutional*, Bucharest, 1940, p. 203.

[11] Tudor Drăganu, *op. cit.*, p. 45-47

[12] For development see Marius Andreescu, *Principiul proportionalitatii in dreptul constitutional*, CH Beck Publishing House, Bucharest, 2007.

[13] Ioan Muraru, *Protecția constituțională a libertății de opinie,* Lumina Lex Publishing House, Bucharest, 1999, p. 17.

revising, unlike the general relationship stability – innovation in law the two terms have the same logical and juridical value. It is about a contrariety relationship (and not a contradiction one) in which the constitution's stability is the dominant term. This situation is justified by the fact that the stability is a requirement essential for the guaranteeing of the principle of constitution supremacy with all its consequences. Only through the primacy of the stability against the constitution's revising initiative one can exercise its role to provide the stability, equilibrium and dynamics of the social system's components, of the stronger and stronger assertion of the principles of the lawful state. The supremacy of the constitution bestowed by its stability represents a guarantee against the arbitrary and discretionary power of the state's authorities, by the pre-established and predictable constitutional rules that regulate the organization, functioning and tasks of the state authorities. That's why before putting the problem of constitution's revising, important is that the state's authorities achieve the interpretation and correct applying of the constitutional normative dispositions in their letter and spirit. The work of interpretation of the constitutional texts done by the constitutional courts of law but also by the other authorities of the state with the respecting of the competences granted by the law, is likely to reveal the meanings and significances of the principles for regulating the Constitution and thus to contribute to the process for the suitability of these norms to the social, political and state reality whose dynamics need not be neglected. The justification of the interpretation is to be found in the necessity to apply a general constitutional text to a situation in fact which in factum is a concrete one"[14].

The decision to trigger the procedure for revising a country's Constitution is undoubtedly a political one, but at the same time it needs to be juridically fundamented and to correspond to a historical need, of the social system stately organized from the perspective of its later evolution. Therefore, the act for revising the fundamental law needs not be subordinated to the political interests of the moment, no matter how nice they will be presented, but in the social general interest, well defined and possible to be juridically expressed. Professor Antonie Iorgovan specifies on full grounds:" in the matter of Constitution's revising, we dare say that where there is a normal political life, proof is given of restraining prudence, the imperfections of the texts when confronting with life, with later realities, are corrected by the interpretations of the Constitutional Courts, respectively throughout the parliamentary usance and customs, for which reason in the Western literature one does not speak only about the Constitution, but about the block of constitutionality"[15].

The answer to the question if in this historical moment is justified the triggering of the political and juridical procedures for the modifying of the fundamental law of Romania can be stressed out in respect with the reasons and purpose targeted. The revising of Constitution cannot have as finality the satisfying of the political interests of the persons holding the power for a moment, in the direction of reinforcing of the discretionary power of the Executive, with the inacceptable consequence of harming certain democratical constitutional values and principles, mainly of the political and institutional pluralism, of the principle of separation of powers in the state, of the

[14] Ioan Muraru, Mihai Constantinescu, Simina Tănăsescu, Marian Enache, Gheorghe Iancu, *Interpretarea constituţiei: Doctrină şi practică*, Lumina Lex Publishing House, Bucharest, 2002, p. 14.

[15] Antonie Iorgovan, *Revizuirea Constitutiei si bicameralismul*, in the Public Law Journal no. 1/2001, p. 23.

principle of legislative supremacy of the Parliament.

On the other hand, such as the two decades lasting history of democratical life in Romania has shown, by the decisions taken for many times, were distorted the constitutional principles and rules by the interpretations contrary to the democratical spirit of the fundamental law, or worse, they didn't observe the constitutional dispositions because of the political purposes and their support in some conjunctural interests. The consequences were and are obvious: the restraining or violation of some fundamental rights and liberties, generating some political tensions, the nonobservance of the constitutional role of the state's institution, in a single word, due to political actions, some dressed in juridical clothes, contrary to the constitutionalism that needs to characterize the lawfull state in Romania. In such conditions, an eventual approach of the revising of the fundamental law should be centered on the need to strengthen and enhance the constitutional guarantees for respecting the requirements and values of the lawfull state, in order to avoid the power excess specific to the politician subordinated exclusively to a group interests, many time conjunctural and contrary to the Romanian people, which in accordance to Constituion item 2 paragraph (1) of the one who is the holder of the national sovereignity.

In our opinion, the preoccupation of the political class and state's authorities in the current period, in relation to the actual contents of the fundamental law, should be oriented not so for the modification of the Constitution, but especially into the direction of interpreting and correct applying and towards the respecting of the democratical finality of the constitutional institutions. In order to strengthen the lawfull state in Romania, it is necessary that the political formations, mostly those that hold the power, all authorities of the state to act or to exercise its duties within the limits of a *loyal constitutional behavior* that involve the respecting of the meaning and demoratical significances of the Constitution.

B) Another aspect relates to the relationship between the Constitution and the law, meaning "law" the sphere of inferior normative acts as a legal force to the Basic Law, analyzed in accordance with the requirements and consequences of the principle of the supremacy of the Constitution, reveals two dimensions:

- The first concerns the constitutionality of inferior normative acts as a legal force to the Fundamental Law, and in the general sense the constitutionality of the whole law. Essentially, this requirement corresponds to one of the consequences of the supremacy of the Basic Law, namely the compliance of the whole right with constitutional norms. The fulfillment of this constitutional obligation, a direct consequence of the principle of the supremacy of the Basic Law, is mainly an attribute of the infra-constitutional legislator in the elaboration and adoption of normative acts. The fulfillment of the requirement of constitutionality of a normative act presupposes first the formal and material adequacy of the law to the norms, principles, values and reasons of the Constitution. The formal aspect of this report expresses the obligation of the legislator to observe the rules of material jurisdiction and the legislative procedures, which are explicitly derived from the constitutional norms or from other normative acts considered to be the formal sources of constitutional law.

The formal compliance of normative acts with the Basic Law implies a strict adherence of the premiums to the norms and principles of the Constitution, and there is no margin of appreciation or interpretation by the legislator.

The material dimension of this report is more complex and refers to the compliance of the normative content of a law with the principles, values, norms, but also with the constitutional grounds. And this aspect of law compliance with constitutional norms is a constitutional obligation generated by the principle of the supremacy of the Basic Law. The fulfillment of this obligation is a main attribute of the infra-constitutional legislator, who in the act of legislating is called to achieve not only a simple legislative function, but also a legal act, , we would say new, value and scientific, to elaborate and adopt the law according to the rationale, the normative content and the principles of the Constitution. In this way, in order to give effect to the principle of the supremacy of the Basic Law, in the act of legislating the legislator must carry out a complex activity of interpretation of the Constitution, which must not lead to circumvention of the meanings, meanings and especially the concrete content of the constitutional norms . This complex process of adequacy of the normative content of a law to constitutional norms is no longer strictly formal and procedural because it implies a certain margin of appreciation specific to the work of interpretation performed by the legislator and at the same time corresponds to the freedom of law which, Parliament's case, is found in the very legal nature of this institutional forum defined in art. 61 par. 1 of the Basic Law: "The Parliament is the supreme representative body of the Romanian people and the sole legislator of the country". This is the expression of what in the literature is defined as the principle of parliamentary autonomy.

A second aspect of achieving the requirement of constitutionality of the law, which is very important in our opinion, refers to the obligation of the infra-constitutional legislator to transpose and develop in normative acts elaborated and adopted, depending on their specificity, normative content, principles and values constitutional. We can say that in the activity of drafting the normative acts, understood as the main attribution of the Parliament and the Government, after the accession of Romania to the European Union, the preoccupation to concretize principles and constitutional values, which would give individuality to the elaborations normative, especially for the important areas of state activity and social and political life. As demonstrated by legislative practice and unfortunately also happened in the case of the recently adopted Criminal Code and the Code of Criminal Procedure, "models" are often sought in the legislation of other states or in the legal system of EU law European. Refusing to give effect to the Romanian legal traditions, but also to the principles and values enshrined in the Basic Law, and last but not least to the concrete social political realities of the state and society, often the legislator, by adopting a complex normative act for important fields of activity, performs an eclectic, formal, activity with significant negative consequences on the interpretation and application of such a normative act, especially in the judicial activity.

We emphasize that observance of the principle of the supremacy of the Constitution can not be limited to formal compliance

In the new Criminal Codes there are many omissions regarding the reception and transposition of the principles and norms of the Constitution of Romania, and especially the inadequacies of the content of certain legal norms with the regulations of the Basic Law, the latter being fully perceived and censored by the Constitutional Court. Undoubtedly, verifying the constitutionality of the law as regards the fulfillment of the requirements of formal and material compliance with the constitutional norms is

an exclusive attribute of the Constitutional Court, if the constitutional control is constituted by the laws of the Parliament and the ordinances of the Government. According to the provisions of art. 142 para. 1 of the Basic Law, "the Constitutional Court is the guarantor of the supremacy of the Constitution". However, this fundamental institution of the rule of law is not the only one called to contribute to guaranteeing the supremacy of the Basic Law. For the other categories of normative acts, it is necessary to recognize the competence of the courts to carry out such a constitutionality review in accordance with the rules of competence and the powers laid down by law.

The constitutionalisation of the normative system and generally of law is another reality of the application and observance of the principle of the supremacy of the Basic Law and which, in a narrow sense, can be understood as the complex activity carried out mainly by the Constitutional Court and by the courts, within the limits of the law to interpret the normative act in force, in whole or in part, with reference to the norms, principles, values and reasons of the Constitution. In the procedural sense, the constitutionalisation of law and law is the operation by which the constitutionality of a legal norm below the constitutional norms is invalidated or confirmed, and has the effect of setting or, more correctly, re-establishing the law within the value and normative framework of the Constitution. The constitutionalisation of the law is the result of the constitutional control of the laws in force, carried out by the Constitutional Court of Romania on the path of the unconstitutionality exception, a procedure regulated by the provisions of art. 146 lit. d) of the Constitution, as well as by the subsequent provisions of the Law no. 47/1992, republished, on the organization and functioning of the Constitutional Court.

In a broad sense, the constitutionalisation of law has a complex significance, which is not limited to constitutional control, in fact it is a permanent activity expressing the dynamics of law in relation to the dynamics of the state system and the social system. It is a permanent work of lawfulness to the evolutionary, social and state reality, through a judicious interpretation and valorization of the constitutional reasons within the limits provided by the normative content of the Basic Law. Without this, we emphasize the important role of the courts in the complex work of constitutionalizing the law through their specific attribute, interpreting and applying the law, but also the constitutional norms, with the obligation to respect the normative content, the values and the reasons of the Constitution. In the literature it is argued that, by its role in the constitutionalisation of law, materialized in the procedural attributions specific to the act of the court, the judge from the common law courts becomes, in fact, a constitutional judge.

The constitutionalisation of law and law is an evolutionary process determined not only by legal reasons, but also by social, political and economic factors outside the law. This dialectic process in concrete terms, referring to a certain normative act, lasts as long as the law in question is in force. In some cases, the constitutionalisation of a normative act may continue even after it is abrogated in the case of ultra-activation.

Applying these considerations to the normative reality of the new Criminal Codes, we note that, within a relatively short period of time since their adoption, the Constitutional Court admitted numerous exceptions of unconstitutionality, finding the unconstitutionality of a significant number of norms in the Code and the Criminal Procedure Code, which, in our opinion, raises three issues: The first

concerns the constitutionality of Parliament's legislative activity, which resulted in the adoption of the Criminal Codes. The question arises as to how much the legislator respected the principle of the supremacy of the Fundamental Law and its degree of concern in order to ensure the material compliance of the norms of the Criminal Codes with the norms of the Constitution. Given the large number of admissible exceptions of unconstitutionality, we consider that the legislator's concern to respect the principle of the supremacy of the Basic Law in its simplest form, namely the compliance of the norms of the Criminal Code and the Criminal Procedure Code with the Basic Law of the country was not a priority the law-making process in this area; the second issue concerns the concrete process of constitutionalisation of the criminal legislation through the decisions of our constitutional court. We have in mind both the decisions of the Constitutional Court which rejected exceptions of unconstitutionality regarding the norms of the criminal codes and which, through the arguments put forward, contribute to the process of constitutionalisation of the law, but above all the decisions that found the unconstitutionality of some normative provisions. In the latter situation, the legal effect of the decisions of the Constitutional Court, which found the unconstitutionality of provisions of the two Criminal Codes, was raised. For the courts that are called upon to apply the rules of the Criminal Codes, as well as the Constitutional Court's decisions, the aspect raised is very important, especially in the rather frequent situation in which the Parliament or, as the case may be, the Government did not intervene, according to the Basic Law, to agree the normative provisions found to be unconstitutional with the decisions of the Constitutional Court; A third issue concerns the reception of the constitutional normative provisions, the principles and the rationale of the Basic Law, important for the entire coding work in criminal matters, in the drafting of the two Criminal Codes by the infra-legislative legislator.

The legislator did not show any particular interest in enshrining in the Criminal Code and the Code of Criminal Procedure general principles of law, especially those whose origin is formed by constitutional norms, which give systemic and explanatory cohesion of the entire normative content of the codes and to which one can report who applies and interprets criminal law.

We consider that the normative expression in the two Criminal Codes of general principles of law, which by their nature are also constitutional principles, would have resulted in a high level of constitutionality for the two normative acts through a better harmonization of the content normative with the norms of the Basic Law. This high level of constitutionality would have resulted in the functional stability of codes by avoiding the unconstitutionality of some important legal norms, as has been the case so far.

The importance of the principles of law for the cohesion and harmony of the entire normative system has been analyzed and emphasized in the literature. The principles of law give value and legitimacy to the norms contained in the law. In this respect, Mircea Djuvara remarked: “All the science of law is not really, for a serious and methodical research, than to release from their multitude of laws their essence, that is, precisely these ultimate principles of justice from which all the other provisions derive. In this way, this entire legislation becomes very clear and what is called the legal spirit. Only in this way is the scientific elaboration of a law “. Equally significant are the words of the great philosopher Immanuel Kant: “It

is an old desire, who knows when ?, will happen once: to discover in the place of the infinite variety of civil laws their principles, for only in this can be the secret of simplify, as they say, the legislation."

From the normative point of view, the source of the principles of any legal branch, and especially of a code, must be primarily the constitutional norms which, by their nature, contain rules of maximum generality, which constitute a basis but also a source of legitimacy for all other legal rules.

Conclusions

The supremacy of the Constitution would remain a mere theoretical issue if there were no adequate safeguards. Undoubtedly, the constitutional justice and its particular form, the constitutional control of the laws, represent the main guarantee of the supremacy of the Constitution, as expressly stipulated in the Romanian Basic Law.

Professor Ion Deleanu appreciated that "constitutional justice can be considered alongside many others a paradigm of this century." The emergence and evolution of constitutional justice is determined by a number of factors to which the doctrine refers, among which we mention: man, as a citizen, becomes a cardinal axiological reference of civil and political society, and fundamental rights and freedoms only represent a simple theoretical discourse, but a normative reality; there is a reconsideration of democracy in the sense that the protection of the minority becomes a major requirement of the rule of law and, at the same time, a counterpart to the principle of majority; "Parliamentary sovereignty" is subject to the rule of law and, in particular, to the Constitution, therefore the law is no longer an infallible act of Parliament, but subject to the norms and values of the Constitution; not least, the reconsideration of the role and place of the constitutions in the sense of their qualification, especially as "fundamental constitutions of the governors and not of the governors, as a dynamic act, further modeling and as an act of society[16]."

The constitutionalisation of law and law is primarily the work of the Constitutional Court and the courts but, in a broader sense, the entire state institutional system according to the rules of competence contributes to the process by interpreting and applying the constitutional norms complex of continuous approximation of the normative content of laws and other categories of normative acts, principles, values and reasons of constitutional norms. It is obvious that the infra-constitutional legislator plays a very important role in the constitutionalisation of law and law, especially by taking into account in the normative acts elaborated and adopted what we call the reasons and values found in the normative content of the Basic Law.

In our opinion, the role of the Constitutional Court as the guarantor of the Fundamental Law must be amplified by new powers in order to limit the excess power of state authorities. We disagree with what has been stated in the literature that a possible improvement of constitutional justice could be achieved by reducing the powers of the constitutional litigation court. It is true that the Constitutional Court has made some controversial decisions regarding the observance of the limits of the exercise of its attributions Constitution, by assuming the role of a positive legislator. . Reducing the powers of the constitutional court for this reason is not a legal solution. Of course, reducing the powers of a state authority has as a consequence the elimination of the risk

[16] Ion Deleanu, *Justitie constitutionala*, Lumina Lex Publishing House, Bucharest, 1995, p. 5.

of misconduct of those attributions. Not in this way it is realized in a state of law the improvement of the activity of a state authority, but by seeking legal solutions to better fulfill the attributions that prove to be necessary for the state and social system.

It is useful in a future revision of the fundamental law that art. 1 of the Constitution to add a new paragraph stipulating that "The exercise of state power must be proportionate and non-discriminatory". This new constitutional regulation would constitute a genuine constitutional obligation for all state authorities to exercise their powers in such a way that the adopted measures fall within the limits of the discretionary power recognized by the law. At the same time it creates the possibility for the Constitutional Court to sanction the excess of power in the activity of the Parliament and the Government by way of the constitutionality control of laws and ordinances, using as a criterion the principle of proportionality.

The Constitutional Court may also include the power to rule on the constitutionality of administrative acts exempt from the legality control of administrative litigation. This category of administrative acts, to which Article 126 paragraph 6 of the Constitution refers and the provisions of Law no. 544/2004 of the contentious-administrative are of great importance for the entire social and state system. Consequently, a constitutional review is necessary because, in its absence, the discretionary power of the issuing administrative authority is unlimited with the consequence of the possibility of an excessive restriction of the exercise of fundamental rights and freedoms or the violation of important constitutional values. For the same reasons, our constitutional court should be able to control the constitutionality and the decrees of the President to establish the referendum procedure.

The High Court of Cassation and Justice has the power to take decisions in the appeal procedure in the interest of the law that are binding on the courts. In the absence of any check of legality or constitutionality, practice has shown that in many situations the supreme court has exceeded its duty to interpret the law, and through such decisions has amended or supplemented normative acts by acting as a true legislator in violation of the principle of separation of powers in the state. In these circumstances, in order to avoid the excess power of the Supreme Court, we consider it necessary to assign to the Constitutional Court the power to rule on the constitutionality of the decisions of the High Court of Cassation and Justice adopted in the appeal procedure in the interest of the law.

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TOOLS TO ENSURE THE PREVENTION OF CONTRAVENTIONS

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Abstract

Nowadays, the most common form of law infringement is contravention. The Romanian contravention law was improved at the end of 2017 by a legislative novelty regulating the instruments to ensure the prevention of contraventions.

The contraventions provided in this administrative act are diverse and it is interesting that despite this, the law maker provides in many cases the application of a penalty, namely the warning, which is then followed, as the case may be, by the application of a measures plan, limited in time. Furthermore, the offenders will not be pardoned every time, but only once, provided that they fulfill the obligations provided by the measures plan and within the deadline established by the official examiner. This law would have remained only at the stage of intention and without application if the executive had not adopted the administrative act identifying the contraventions contemplated by it, but once the respective Government resolution has been adopted, we can only wait for the time to see the effectiveness of it application.

This is why, in this study, we will analyze this topic by being of great interest and adapted to social realities. By being a legislative novelty for the national law system, the scientific research that we performed is mainly focused on the legislation and the doctrine.

Keywords: *Contraventions, prevention law, correction plan, warning, Government resolution.*

1. Introduction

The field of contraventions is undoubtedly an area with the most profound and complex implications in the everyday life of citizens and, by default, in the administrative practice of authorities with duties in the field[1]. Therefore, we believe that it is required to know the legislation in the field, the contravention functioning mechanism, not so much in terms of the sanction, but especially in terms of the tools for the prevention of contraventions.

The scientific research started with the documentation on the topic and included: legislation, doctrine and case law. Therefore, we noted that, in what concerns the subject we propose and the date on which we draw up this study, no doctrine and case law is available, being about the recent adoption of Prevention Law no.270/2017 of 22.12.2017 (hereinafter referred to as the Prevention Law)[2] and Government Resolution no. 33/2018 establishing the contraventions which fall under the scope of Prevention Law no. 270/2017, and of the correction plan model[3], having the nature of legislative novelty.

Prevention Law no. 270/2017 came into force on January 17th, 2018 but it could not be applied due to the fact there is a

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[1] Dana Apostol Tofan, *Drept administrativ*, volume II, edition 4, Bucharest, C.H. Beck Publishing House, 2017, p. 371.

[2] Prevention Law no. 270/2017 of December 22nd, 2017, published in Official Journal no. 1037 of 27.12.2017.

[3] Government Resolution no. 33/2018 establishing the contraventions which fall under the scope of Prevention Law no. 270/2017, and of the correction plan model, published in Official Journal no. 107 of 05.02.2018.

provision in the content of the law, respectively art.10 para.(3) which conditioned the subsequent issue of an administrative act, respectively of a Government Resolution to identify the contraventions which fell under the scope of the law and of the correction plan model. This administrative act was adopted only on February 5th, 2018 due to the fact Romania had to face a resigning government during this term.

The activity of public administration authorities[4], at any level, is subject to principles resulting from the legislation, and the lawfulness principle is, in our opinion, the corollary of all principles and is provided by the revised Constitution of Romania itself: "no one is above the law". In the current historical background, in which humanity escalates a new stage of civilization, thus embracing "unity in diversity", the role of general principles of law, the legal expression of fundamental relationships within the society is amplified[5].

Every state has its own enacted law, in accordance with its own socio-political requirements, with the traditions and values it proclaims [6]. The failure to comply with the laws entails legal liability. One explanation for the failure to observe the laws is that the laws are inappropriately made, approved not for common good, but for private interests(...)[7].The violation by the lawmaker of the justness standard often leads to the adoption of unfair laws[8]. "Prevention", according to the definition provided by DEXonline means, among others "avoiding bad things by taking timely, preventive measures, prevention"[9]. Bad laws do not harm only the ordinary citizen, but they also lower the prestige of the legal system and amplify the contempt for the law, which, like a poison, empoisons the rule of law[10].

Therefore, in our opinion, Prevention law is not a bad law, but a good law, in accordance with the evolution of the society, adjusted to social realities. A good law should not be seen only from the penalties perspective, but also from the prevention perspective, as in case of the Prevention Law, according to its name given by the law maker. No state has a legislation valid for all times[11]. Therefore, the scope of this study is to point out the opinion of the law maker on the tools for the prevention of contraventions, by presenting in detail how this law works.

2. Content

2.1. Civil sanctions

The governing rules of contraventions are provided by Government Ordinance no. 2/2001 on the legal regime of

[4] For further details, see Roxana Mariana Popescu, *ECJ case-law on the concept of „public administration" used in article 45 paragraph (4) TFEU*, in proceeding CKS ebook 2017, p. 528-532.

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

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

[7] Mario Vargas Llosa, *Civilizația spectacolului*, Translation from Spanish by Marin Mălaicu-Hondrari, Humanitas Publishing House, Bucharest 2017, p. 126.

[8] See Elena Anghel, *Justice and equity*, in proceedings CKS-eBook 2017, Bucharest, p. 370.

[9] https://dexonline.ro/definitie/prevenire [last access on 07.02.2018].

[10] Mario Vargas Llosa, *op. cit.*, p. 126.

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

contraventions[12]. Contravention is defined by Government Ordinance no. 2/2001 (...) as: "the act committed with guilt, established and sanctioned by law, ordinance, Government resolution, or as the case may be, by decision of the local council of commune, city, municipality or district of Bucharest, county council or General Council of Bucharest". Contravention Law protects social values which are not protected under the criminal law, according to art. 1 thesis 1 of Government Ordinance no. 2/2001 (...).

From another point of view, contravention, in the opinion of the European Court of Human Rights is qualified as "criminal charge"[13]. Romania is permanently bound to harmonize its legislation with the European legislation, and the national doctrine has given us many opportunities to analyze the supremacy of the European Union law[14]. Romania ratified the Treaty of Lisbon amending the Treaty on European Union[15] (...) in 2008. The failure to comply with the EU legal regulations leads, as well known, to the opening of the infringement procedure[16]. The European Union law embraces the theory of monism, that is the existence of a single legal order which includes international law and domestic law in an unitary system[17]. In order to eliminate arbitrariness in assessing the social danger degree of an act in order to qualify it as contravention or offence, normative acts provide expressly the category under which a certain illicit conduct falls[18]. A recent study has analyzed comparatively the contravention and the offence[19], but this is not the object of our study. We can therefore say that the will of the law maker, by being based on criminological analyzes, studies and researches is the one that cause an unlawful act to be included in the category of the contraventions or of the offences[20].

Civil sanctions are provided both by the regulations in the filed (*s.n.* G.O. no. 2/2001), and by laws and special contravention laws[21]. According to art. 5 of G.O. no. 2/2001 on the legal regime of contraventions, civil sanctions can be principal and complementary. There are three *principal civil sanctions*: warning, fine and provision of community service.

[12] Government Ordinance no. 2/2001 on the legal regime of contraventions, published in Official Journal no. 410 of July 25th, 2001, as further amended and supplemented.

[13] See Elena Emilia Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ,* Prouniversitaria Publishing House, Bucharest, 2013, p. 216-218.

[14] Roxana-Mariana Popescu, *Specificul aplicării prioritare a dreptului comunitar european în dreptul intern, în raport cu aplicarea prioritară a dreptului internațional*, in the Community Law Romanian Journal, no. 3/2005, p. 11-21; Augustin Fuerea, *Manualul Uniunii Europene*, 6th edition, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2016, p. 252-253.

[15] For further information see the Treaty on the European Union, Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, p. 62-63.

[16] For other details, see Roxana-Mariana Popescu, *General aspects of the infringement procedure*, LESIJ - Lex et Scientia International Journal, no. 2/2010, Pro Universitaria Publishing House, p. 59-67.

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

[18] Cătălin Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishig House, Bucharest, 2016, p. 214.

[19] Elena Emilia Ștefan, *Delimitarea dintre infracțiune și contravenția în lumina noilor modificări legislative*, Dreptul Journal no. 6/2015, p. 143-159.

[20] Cătălin Silviu Săraru, *op.cit.*, p. 215.

[21] Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, 4th edition, All Beck Publishing House, Bucharest, 2005, p. 408.

Complementary civil sanctions are: arrest warrant in rem intended to, used or resulted from contraventions; suspension or cancellation, as the case may be, of the endorsement, agreement or authorization to perform an activity; closing the unit; bank account lock out; the suspension of the activity of the economic agent; the withdrawal of the license or authorization for external, temporary or definitive trade; works dismantling and return of the land at its initial state.

The doctrine identified other complementary civil sanctions provided for by art. 96 para. (2) of G.E.O. no.195/2002: a.) application of penalty points; b.) the suspension of the exercise of the right to drive, on limited term; c.) arrest warrant in rem intended to contraventions provided for by G.E.O. no. 195/2002 or used for this purpose; d.) vehicle dowtime; e.) ex officio deregistration of the vehicle, in case of declared vehicles, according to the law, by order of the authority of local public administration, with no owner or abandoned.[22]

2.2. Prevention Law

2.2.1. Scope and terms of Prevention Law

Prevention Law no. 270/2017 of 22.12.2017 published in Official Journal no. 1037 of 27.12.2017 and Government Resolution no. 33/2018 establishing the contraventions which fall under the scope of Prevention Law no. 270/2017, as well as of the correction plan model, published in Official Journal no. 107 of 05.02.2018 are the two normative acts with novelty nature in our law system regarding the field of contraventions.

Prevention Law is a normative act which consists of a low number of articles, respectively 11. Appendix no. 1 of Government Resolution no. 33/2018 (...) has 70 items listing the contraventions which fall under the Prevention Law and Appendix no.2 The model of the record of findings and subsequent penalties which consists of: Part 1- *Correction Plan* and Part II – *Correction measures fulfillment modalities.*

The declared scope of the Prevention Law is "to regulate a series of tools to ensure the prevention of contraventions. The Government Resolution shall establish the contraventions which fall under the scope of this law". The Government Resolution the Prevention Law refers to is aforementioned Government Resolution no. 33/2018 (...).

The prevention Law defines the following terms which are found in its content, namely: correction measure, correction plan and correction deadline:

- *correction* measure*:* any measure ordered by the official examiner in the correction plan the scope of which is the fulfillment by the offender of the obligations established by the law;
- *correction plan:* appendix to the record of findings and subsequent penalties, whereby the official examiner established correction measures and deadline;
- *correction deadline:* the term of no more than 90 calendar days, as of the delivery or communication of the record of findings and subsequent penalties, where the offender can correct the ascertained irregularities and fulfill the legal obligations. The correction deadline shall be established by taking into account the circumstances of the offence and the term required for the fulfillment of the legal obligations. The correction deadline established by the control body cannot be modified.

[22] Cătălin Silviu Săraru, *op.cit.*, p. 217.

2.2.2. Prevention Law functioning mechanism

According to the law maker, the Prevention Law seems to be a law that sanctions an offender who commits a contravention which falls under the scope of this law and establishes a measure plan that the offender is bound to fulfill within a certain established deadline. In fact, Prevention Law establishes two stages where the official examiner acts when founds the commission of a contravention, following the performance of a control. We hereby point out that not all contraventions benefit from this relaxed sanctioning regime, but only those expressly provided by Government Resolution no. 33/2018 (...) adopted by the executive branch. There is a sole institution with executive powers at the European Union level, namely the European Commission [23]. Furthermore, we have to make two important notes:

1. As of the enforcement of the Prevention Law, by way of derogation from the provisions of Government Ordinance no. 2/2001 (...), for finding and sanction contraventions referred to in Government Resolution no. 33/2018 (...), the provisions of this law shall apply.
2. In what concerns the sanctions applied according to Prevention Law, these shall be supplemented by the provisions of G.O. no. 2/2001(...).

Stage no. 1.

According to the provisions of art. 4 para. (1) in case of finding one of the contraventions established by the Government Resolution in art. 10 para. (3), respectively Government Resolution no. 33/2018 (...), the official examiner concludes a record of findings whereby *warning sanction is applied* and a *correction plan is attached.* In this case, no complementary contravention sanctions are applied.

The law expressly provides that the liability for the fulfillment of the correction measures shall be incumbent on the person who, according to the law, bears the contravention liability for the acts which were found.

The official examiner, according to paragraphs (2 and 3) of art. 4 of the Law shall not draw up a correction plan but shall only apply the warning sanction, in the following situations:

- if the offender fulfills the legal obligation throughout the performance of the control;
- if the contravention is not continuous
- if the sanctioning of the contraventions of art. 10 para.(3) of the Law expressly referred to in Government Resolution no. 33/2018 (...), expressly establish the exclusion from the application of the warning.

Furthermore, Prevention Law also regulates the situation where an offender committed several contraventions which fall under its scope. In such cases, if a person commits several contraventions which are found at the same time by the same official examiner, a single record of findings and subsequent penalties shall be concluded, under the fulfillment of the provisions of art. 4 and, as the case may be, a correction plan shall be attached to. We hereby point out that the correction plan model the Prevention Law refers to and which is attached to the record of findings and subsequent penalties is the one published in Government Resolution no. 33/2018 (...).

Stage no. 2

[23] For further information on the European Commission, see Augustina Dumitrașcu, Roxana-Mariana Popescu, *Dreptul Uniunii Europene. Sinteze și aplicații*, 2nd edition, Universul Juridic Publishing House, Bucharest, 2015, p. 65 and the following.

Art. 8 para. (1) of Prevention Law establishes that, within no more than 10 business days as of the expiry of the correction deadline, public authority/institution with control powers shall be bound to *resume control* and to fill in part II of the correction plan attached to the record of findings and subsequent penalties and if the case may be, the control ledger with notes on the fulfillment of the correction measures.

Art. 8 para. (2) of Prevention Law provides that, in case the failure to fulfill the legal obligations according to the correction measures within the established deadline is found during the resumption of the control, the official examiner concludes another record whereby the commission of the contravention is found and the contravention sanction/s, other than the warning, is/are applied.

Another important provision of the Prevention Law refers to *the passing of a period of 3 years as of the conclusion of the record of findings* and subsequent penalties, according to this Law. There are two situations regulated by art. 9 of the Law, namely:

- if, within 3 years as of the conclusion of the record of findings and subsequent penalties provided for by art. 4, the offender commits again the same contravention, the legal provisions in force on contravention finding and sanctioning shall be directly applicable;
- if within 3 years as of the conclusion of the record of findings and subsequent penalties provided for by art. 5[24] the offender commits again one or several contraventions provided for by art. 10 para. (3) of the Law, respectively in Government Resolution no. 33/2018 (...), the legal provisions in force on contravention finding and sanctioning shall be directly applicable.

The Prevention Law assigns an article to the importance of the *Control Ledger*. Therefore, art. 6 expressly provides that the official examiner shall be bound to check in the control ledger and in the records of the public authority/institution it is part of whether the offender benefited from the provisions of art. 4. This means that at the end of the control, the details of the control shall be recorded in writing in the control ledger.

There is also the category of those who are not bound to have a control ledger, according to the law. In this case, the official examiner shall be bound to check in the records of public authority/institution it is part of whether the offender benefited from the provisions of art. 4. The official examiner shall be bound to provide expressly the correction plan in the control ledger.

In what concerns the *nullity of the record of findings*, Prevention Law provides in art.7 that the violation of art. 4 paragraphs (1 and 2) shall lead to the nullity of the records.

2.2.3. The obligations of public authorities /institutions with control powers

Prevention Law establishes an obligation which is incumbent on public authorities and institutions responsible for controlling, sanctioning and finding contraventions and describes this obligation in art. 3. Public authorities and institutions responsible for controlling, sanctioning and finding contraventions shall be bound, depending on the fields they lead, to produce and disseminate documentary materials, guides and to allocate on the web page dedicated sections on public information on the following:

[24] It is about several contraventions (...).

a) legislation in force on contravention finding and sanctioning;
b) rights and obligations of these public authorities/institutions in the performance of the activity on finding contraventions and subsequent penalties, as well as rights and obligations of persons subject to these activities;
c) distinct indication of contraventions for which public authority/institution has the power of finding and sanctioning contraventions, as well as of sanctions and/or other applicable measures.

Public authorities and institutions with control powers, depending on their competence areas, shall be bound to guide interested persons for an appropriate and unitary application of the law.

In order for the guiding activity to be carried out, public authorities and institutions with control powers shall be bound: a) to issue guidance and control procedures to be used by persons authorized to carry out control activity; b.) to publish on own sites high-frequency cases and guidance solutions provided in this cases, as well as the developed procedures; c.) to exercise actively the role of guidance of the controlled persons in case of every control activity, thus making available, according to the procedures, the indications and guidance required in order to avoid law infringement on the future. The fulfillment of this obligation shall be expressly mentioned in the control protocol, thus showing the provided indications and guidance.

Finally, the central public administration authorities with powers to coordinate nationally the business environment shall be bound that, within 6 months as of the enforcement of the law, to develop and operate a portal dedicated to providing centralized online services and resources for information purposes.

2.2.4. Examples of contraventions which fall under the scope of Prevention Law

Government Resolution no. 33/2018 for the establishment of contraventions which fall under the scope of Prevention Law no. 270/2017, as well as of the correction plan model, published in Official Journal no. 107 of 05.02.2018 lists in Appendix 1 the contraventions which fall under the scope of Prevention Law.

For example, the following contraventions fall under the scope of the Prevention Law:

- The failure of the signatory parties to submit for publication purposes the collective labor agreement at the level of group of units or sector of activity (art. 217 paragraph 1, letter c. of the Law on social dialogue[25]);
- The establishment of plantations with areas of more than 0.5 ha of fruit trees and of areas larger than 0.2 ha of fruit-bearing shrubs by every economic operator or family or their extension over the limits of those existent, without planting permission, according to the law (art.29 the Law on fruit growing[26]) etc.
- The conclusion of management/forestry service agreements with persons who acquire exclusively the ownership over the land where it is located (art. 3 paragraph 2 of the Law on finding and sanctioning contraventions in the field of

[25] Law no. 62/2011 on social dialogue, published in Official Journal no. 625 of August 31st, 2012, as further amended and supplemented.

[26] Law no. 348/2003 on fruit growing, published in Official Journal no. 300 of April 17th, 2008, as further amended and supplemented.

forestry[27]) etc.

- The following acts shall not be deemed offences: the issuance of the fiscal receipt containing erroneous data or not containing all the data provided by the law; the fiscal receipt is not handed to the customer by the operator of the electronic cash register and/or the failure to issue the invoice upon the customer's request (art. 10 letter f/ g of G.E.O. no. 28/1999[28]) etc.
- The following acts shall not be deemed offences: the failure of the taxpayer/payer to submit within the deadline provided by the law the tax registration declarations, tax deregistration declarations or declarations of mentions; the failure of the taxpayer/payer to comply with the obligation to submit to the tax body the data archived in electronic format and the computer applications that generated them (art. 336 paragraph 1 letters a/f of the Code of fiscal procedure[29]) etc.
- the failure to purchase the control ledger from the general departments of the public finance administration within the territory where the taxpayer has his/her registered office, on the legal deadline (art. 7 letter a of Law no. 252/2003 on the control ledger[30]) etc.
- The failure of the traders to comply with the legal provisions on misleading and comparative publicity (art. 10 paragraph 1 of Law no. 158/2008 on misleading and comparative publicity [31].) etc.

Conclusions

Prevention Law will prove its efficiency after passing the time test, after drawing a case law and after appearing its first weaknesses or, on the contrary, it will prove to be a perfect law. If the judge does not find principles appropriate to the case resorted for settlement, the judge can and must create a new rule of law[32]. For the time being, we cannot speak about case law, as we have shown before; despite this, in our opinion, the law maker's effort to pardon an offender from the application of a sanction, under certain terms, is commendable, being fully pointed out the preventive nature of this law with regard to contraventions, deeds entailing a lower social danger compared to offences.

As we have shown in the content of the study, Prevention Law has, on the one hand, a derogatory regime of application compared to common law on contraventions, namely G.O. no. 2/2001 and, on the other hand, is applied only to those contraventions which are expressly provided by Government Resolution, respectively Government Resolution no. 33/2018 on the contraventions which fall under the scope of Prevention Law no. 270/2017, as well as of the correction plan model.

The contraventions provided in this administrative act are diverse and it is interesting that despite this, the law maker provides in many cases the application of a penalty, namely the warning, which is then

[27] Law no. 171/2000 on finding and sanctioning contraventions in the field of forestry, published in Official Journal no. 513 of July 23rd, 2010, as further amended and supplemented.

[28] G.E.O. no. 28/1999 on the obligation of economic operators to use electronic cash registers, published in Official Journal no. 75 of January 21st, 2005, as further amended and supplemented.

[29] Law no. 207/20115 on the Code of fiscal procedure, published in Official Journal no. 547 of July 23rd, 2015, as further amended and supplemented.

[30] Law no. 252/2003 on the control ledger, published in Official Journal no. 429 of June 18th, 2003, as further amended and supplemented.

[31] Law no. 158/2008 on misleading and comparative publicity, republished in Official Journal no. 454 of July 24th, 2013.

[32] Elena Anghel, *Judicial precedent, a law source*, in proceeding CKS ebook 2017, Bucharest, p. 364.

followed, as the case may be, by the application of a measures plan, limited in time. Furthermore, the offenders will not be pardoned every time, but only once, provided that they fulfill the obligations provided by the measures plan and within the deadline established by the official examiner.

To conclude, we believe that we have achieved the scopes established in drawing up of this study, namely to show this legislative novelty in the field of contraventions and we hope that this will be an efficient law and not a reason for breaking the law due to postponing the application of the penalty after the first control where the contravention was found.

Refereces

- Elena Anghel, *Justice and equity*, in proceedings CKS-eBook 2017, Bucharest
- Elena Anghel, *Judicial precedent, a law source*, in proceeding CKS ebook 2017, Bucharest
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- Prevention Law no. 270/2017 of December 22nd, 2017, published in Official Journal no. 1037 of 27.12.2017
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- Law no. 207/2015 on the Code of fiscal procedure, published in Official Journal no. 547 of July 23rd, 2015, as further amended and supplemented
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- Law no. 158/2008 on misleading and comparative publicity, republished in Official Journal no. 454 of July 24th, 2013
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- https://dexonline.ro/definitie/prevenire

CASE LAW OF THE COURT OF JUSTICE OF EUROPEAN UNION: A VISIT TO THE WINE CELLAR

Alina Mihaela CONEA*

Abstract

It must be observed that a quality wine is a very specific product. Its particular qualities and characteristics, which result from a combination of natural and human factors, are linked to its geographical area of origin and vigilance must be exercised and efforts made in order for them to be maintained. (Court of Justice of European Union, Rioja Wine Judgement)[1]

The present paper will consider some of the most relevant judgements of the Court of Justice of European Union regarding wine. Coincidentally or not many of these cases are also landmark decisions of the European Union law.

The purpose of this paper is to present the variety of European Union law areas enriched through the Court wine judgments: intellectual property, free movement of goods, fiscal barrier to trade, EU legal order, fundamental rights, public health and external relations.

Surveying the wine jurisprudence of the Court of Justice of European Union resembles a wine testing. One can sense the savours rich bouquet that the case law expresses, on strong cultural choices, policies, lifestyle or identity at national and European level.

Keywords: *wine, Court of Justice of European Union, intellectual property, international agreement, taxation.*

1. Introduction

The European Union is the world leading producer of wine[1]. Almost half of the world's vineyards are in the European Union (EU) and the EU produces and consumes around 60% of the world's wine[2].

Therefore, wine is a complex and vivid area of EU law. A simple search of word "wine" on EUR-Lex shows 19066 results. When refined, EUR-Lex displays 2466 results on Legislation and wine subject, of which 2120 regulations and 12 directives. If the search is refined by author (Council of the European Union) and regarding only regulations the result is 547[3]. When search

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[1] Judgment of the Court of 16 May 2000, *Kingdom of Belgium v Kingdom of Spain (Rioja wine)*, Case C-388/95, ECLI:EU:C:2000:244, p. 57.

[1] According to European Commision, it accounts for 45% of world wine-growing areas, 65% of production, 57% of global consumption and 70% of exports in global terms, https://ec.europa.eu/agriculture/wine_en.

[2] Meloni, Giulia and Swinnen, Johan F. M., *The Political Economy of European Wine Regulations* (October 17, 2012). Available at SSRN: https://ssrn.com/abstract=2279338 or http://dx.doi.org/10.2139/ssrn.2279338.

[3] The basic two regulations are: Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December, establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (CMO Regulation): and Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008.

for the subject matter "wine" in the EU case law, in the form of Judgments, the number of results is 120. This paper is, accordingly, only a survey of the case law, based on an ample specialized literature.

The present paper will consider only some of the most relevant judgements of the Court of Justice of European Union regarding wine. Coincidentally or not many of these cases are also landmark decisions, shaping the EU law. What we find remarkable is the relevance and impact of the wine cases over different fields of EU law.

The purpose of this paper is to present this variety of EU law areas enriched through the Court wine judgments: intellectual property (Capitol 2), fundamental rights (Capitol 3), EU legal order (Capitol 4), external relations (Capitol 5), fiscal barrier to trade (Capitol 6) and public health (Capitol 7).

2. Intellectual property

2.1. Protection of protected designations of origin

The EU legislation for quality wine consists of two types of classification: Protected Denomination of Origin (PDO) regarding "quality wines produced in a specified region" and Protected Geographical Indication (PGI) regarding "quality wines with geographical indication". In the specific case of the wine industry, protection by origin plays an imperative role, since it is not only a 'labeling' issue, as wine quality is strongly linked to the place where the grape is harvested in terms of the terroir of the vineyard[4].

The Court had occasion to define the concepts related to protected **designations of origin in many cases.**

In a recent judgement of 20th December 2017, *Champagner Sorbet*[5], the Court held that a sorbet may be sold under the name 'Champagner Sorbet' if it has, as one of its essential characteristics, a taste attributable primarily to champagne. If that is the case, that product name does not take undue advantage of the protected designation of origin 'Champagne'.

At the end of 2012, Aldi, a company distributing, inter alia, foodstuffs, began to sell a frozen product, distributed under the name 'Champagner Sorbet' and contained, among its ingredients, 12% champagne. Taking the view that the distribution of that product under that name constituted an infringement of the PDO 'Champagne', the Comité Interprofessionnel du Vin de Champagne, an association of champagne producers, brought proceedings before the Landgericht München.

In this respect, the CJEU, first of all, rejected the position of the Comité that the protection granted under these provisions was absolute. The Court stated that the use of a protected designation of origin as part of the name under which is sold a foodstuff that does not correspond to the product specifications for that designation but contains an ingredient which does correspond to those specifications cannot be regarded, in itself, as an unfair use and, therefore, as a use against which protected designations of origin are protected in all circumstances by virtue of the applicable provisions of EU law[6]. It is true that the use

[4] Jazmín Muñoz and Sofía Boza, *Protection by origin in Chile and the European markets: the case of the wine sector, SECO/WTI Academic Cooperation Project*, Working Paper No. 14/2017, https://www.wti.org/media/filer_public/8d/23/8d234fa5-d456-483f-8def-79ea8009392d/munozbozasecowp.pdf.

[5] Judgment of 20 December 2017**,** Vin de Champagne v Aldi Süd, Case C-393/16, ECLI:EU:C:2017:991.

[6] https://www.bardehle.com/ip-news-knowledge/ip-news/news-detail/court-of-justice-of-the-european-union-champagne-sorbet-does-not-infringe-champagne-if-the-sorb.html.

of the name 'Champagner Sorbet' to refer to a sorbet containing champagne is liable to extend to that product the reputation of the PDO 'Champagne', which conveys an image of quality and prestige, and therefore to take advantage of that reputation. However, such use of the name 'Champagner Sorbet' does not take undue advantage (and therefore does not exploit the reputation) of the PDO 'Champagne' if the product concerned has, as one of its essential characteristics, a taste that is primarily attributable to champagne.

The decision ***Port Charlotte***[7]**,** in Case C-56/16 P, provides guidance in situations which give rise to exploitation of the reputation regarding a protected designation of origin. The Scottish company Bruichladdich Distillery Co. Ltd. Filed, a trade mark application for "Port Charlotte, for whisky. Instituto dos Vinhos e do Porto filed an application with the European Union Intellectual Property Office (EUIPO) for a declaration that the mark was invalid.

The Court held that national law on PGIs cannot be used to provide supplementary protection above and beyond that provided under EU law. It was also settled that a PGI for "port" cannot be used to prevent registration of other trademarks containing the word "port", if the use is legitimate and without confusion with the PGI.

The Court has turned its attention to the labelling of wine in many cases, interpreting the use of terms 'méthode champenoise', "cremant" and "chateu[8]".

The case ***Méthode champenoise***[9] concerns a dispute between SMW Winzersekt GmbH ('Winzersekt') and the Land Rheinland-Pfalz on the use after 31 August 1994 of the term 'Flaschengärung im Champagnerverfahren' ('bottle-fermented by the champagne method') to describe certain quality sparkling wines produced in a specified region ('quality sparkling wines PSR'). Winzersekt is an association of wine-growers who produce sparkling wine from wines of the Mosel-Saar-Ruwer region using a process referred to as 'méthode champenoise', which means in particular that fermentation takes place in the bottle and the cuvée is separated from the lees by disgorging.

The Court held that a wine producer cannot be authorized to use, in descriptions relating to the method of production of his products, geographical indications which do not correspond to the actual provenance of the wine.

In Case C-309/89, ***Codorníu***[10] successfully challenged the validity of a regulation which allowed the use of the word "Crémant" only in respect of sparkling wines from France or Luxembourg and thus forbad its use in respect of wines emanating from Spain.

The Court held in *Codorníu* that the reservation of the term "crémant" to wines produced in two Member States cannot validly be justified either on the basis of traditional use, since it disregards the traditional use of that mark in the third State for wines of the same kind, or by the indication of origin associated with the mark

[7] Judgment of the Court of 14 September 2017, European Union Intellectual Property Office (EUIPO) v Instituto dos Vinhos do Douro e do Porto, IP (Port Charlotte), Case C-56/16 P, ECLI:EU:C:2017:693.

[8] Judgment of the Court of 29 June 1994, Claire Lafforgue, née Baux and François Baux v Château de Calce SCI and Coopérative de Calce (*Château de Calce*), Case C-403/92, ECLI:EU:C:1994:269.

[9] Judgment of the Court of 13 December 1994, SMW Winzersekt GmbH v Land Rheinland-Pfalz, Case C-306/93, ECLI:EU:C:1994:407,

[10] Judgment of the Court of 18 May 1994, Codorníu SA v Council of the European Union, Case C-309/89, ECLI:EU:C:1994:197.

in question, since it is in essence attributed on the basis of the method of manufacture of the product and not its origin. It follows that the different treatment has not been objectively justified and the said provision must therefore be declared void.

On the other hand, the Court clearly ruled out in case ***Tocai friulano***[11] that the Italian name Tocai friulano' and its synonym Tocai italico are not a protected geographical indication within the meaning of the EC-Hungary Agreement.

'Tocai friulano' or 'Tocai italico' is a vine variety traditionally grown in the region of Friuli- Venezia Giulia (Italy) and used in the production of white wines marketed inter alia under geographical indications such as 'Collio' or 'Collio goriziano'. In 1993, the European Community and the Republic of Hungary concluded an agreement on the reciprocal protection and control of wine names. In order to protect the Hungarian geographical indication 'Tokaj', the agreement prohibited the use of the term 'Tocai' to describe the abovementioned Italian wines at the end of a transitional period expiring on 31 March 2007. In 2002, the autonomous region of Friuli-Venezia Giulia and the regional agency for rural development asked the Tribunal amministrativo regionale del Lazio to annul the national legislation implementing the prohibition provided for by the agreement. In that context, the Italian court made a reference to the CJEU.

The Court clearly ruled out that as the Italian name Tocai friulano' and Tocai italico' are not a protected geographical indication and the Hungarian name Tokaj' is, the EC-Hungary Agreement do not apply.

In case ***Kingdom of Belgium v Kingdom of Spain (Rioja wine)***[12] the Court turned its attention to the Spanish rules govern the bottling of wines bearing the designation of origin "Rioja".

Belgium considered that those rules which, in particular, require the wine to be bottled in cellars in the region of production in order to qualify for the "controlled designation of origin" (denominación de origen calificada) were detrimental to the free movement of goods.

The Court finds that national rules applicable to wines bearing a designation of origin which make the use of the name of the production region conditional upon bottling in that region constitute a measure having an effect equivalent to quantitative restrictions on exports.

However, the requirement of bottling in the region of production, whose aim is to preserve the considerable reputation of the wine bearing the designation of origin by strengthening control over its particular characteristics and its quality, is justified as a measure protecting the designation of origin which may be used by all the wine producers in that region and is of decisive importance to them, and it must be regarded as being in conformity with Community law despite its restrictive effects on trade, since it constitutes a necessary and proportionate means of attaining the objective pursued in that there are no less restrictive alternative measures capable of attaining it[13].

In the case ***Abadía Retuerta- Cuvée Palomar***[14], the applicant, Abadía Retuerta

[11] Judgment of the Court of 12 May 2005, Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA) v Ministero delle Politiche Agricole e Forestali (Tocai friulano) Case C-347/03, ECLI:EU:C:2005:285.

[12] Judgment of the Court of 16 May 2000, *Kingdom of Belgium v Kingdom of Spain (Rioja wine)*, Case C-388/95, ECLI:EU:C:2000:244

[13] Judgment of the Court of 16 May 2000, *Rioja wine*, Case C-388/95.

[14] Judgment of the General Court of 11 May 2010, Abadía Retuerta, SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (Abadía Retuerta), Case T-237/08, ECLI:EU:T:2010:185.

SA, filed a Community trade mark application at the Office for Harmonisation in the Internal Market (OHIM), pursuant to Regulation No 40/94. The trade mark for which registration was sought is the word sign *Cuvée Palomar* for wines.

OHIM takes the view that the mark applied for was inadmissible. The reason was an obligation to interpret the Community trade-mark legislation, as far as possible, in the light of the wording and purpose of TRIPs Agreement, which lays down a specific prohibition on registration of geographical indications identifying wines and spirits.

Under Spanish law the area of production protected by the registered designation of origin 'Valencia' consists of, inter alia, the sub-region Clariano, which includes, inter alia, a local administrative area with the name *el Palomar*. The name *el Palomar* thus constitutes a geographical indication for a quality wine produced in specified regions (psr). Under Spanish law and, accordingly, under Article 52 of Regulation No 1493/1999 on the common organisation of the market in wine, which provides that, if a Member State uses the name of a specified region, including the name of a local administrative area, to designate a quality wine psr, that name may not be used to designate products of the wine sector not produced in that region and/or products not designated by the name in accordance with the provisions of the relevant Community and national rules[15].

2.2. Distinctive character of trademarks

In case ***Freixenet***[16], the Spanish sparkling wine producing company seeks to set aside the judgments of the General Court of the European Union concerning applications for registration of signs representing a frosted white bottle and a frosted black matt bottle as Community trademarks. Freixenet's trademark application for the both bottles provided the following disclaimer: "The applicant states that through the mark now being applied for he does not want to obtain restrictive and exclusive protection for the shape of the packaging but for the specific appearance of its surface",

It rarely happens that the Court of Justice annuls a decision of the General Court, and, thus, the decision is per se remarkable. It becomes even more remarkable when considering that the decision appears to broaden the scope of signs that are protectable under the category of "other" marks[17]. The Court held that when assessing protectability of the surface of a product as a trademark, a significant departure from the norm or customs in the sector concerned is sufficient to confer distinctiveness on the mark.

It was commented[18] that as well as the visual aspect, the matt finish bottle could be regarded as a tactile sign.

[15] Judgment of the General Court of 11 May 2010, *Abadía Retuerta*, Case T-237/08, , P. 82, 86-88, 110-112.

[16] Judgment of the Court of 20 October 2011, Freixenet, SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (Freixenet). Joined cases C-344/10 P and C-345/10 P., ECLI:EU:C:2011:680.

[17] Philipe Kutschke, *Court of Justice of the European Union on the protectability of the shading of a bottle as a trademark* (decision of October 20, 2011 Joined Cases C-344/10 P and C-345/10 P – Freixenet v OHIM), BARDEHLE PAGENBERG IP Report 2011/V.

[18] Graeme B. Dinwoodie, Mark D. Janis, *Trademark Law and Theory: A Handbook of Contemporary Research*, Edward Elgar Publishing, 2008, p. 521.

3. Fundamental rights

It would appear useful to mention a series of judgments ***Liselotte Hauer***, ***Méthode champenoise* (*Winzersekt)***, ***Tokai firuliano***, in which the Court, while affirming its concern to fundamental right protection, noted the limits imposed to the right to property or to the freedom to pursue a trade or profession

3.1. Right to property

Liselotte Hauer[19] was the owner of a plot of land forming part of the administrative district of Bad Dürkheim. Mrs. Hauer applied for authorization to undertake the new planting of vines on the land which she owns. The Land Rheinland-Pfalz refused to grant her that authorization. While the application was pending, the European Commission issued an order prohibiting the planting of that type of vine for three years.

The Court declare that fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the court. In safeguarding those rights, the latter is bound to draw inspiration from constitutional traditions common to the member states, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those states are unacceptable in the Community. International treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can also supply guidelines which should be followed within the framework of community law.

The scope of that right should be measured in relation to its social function; the substance and enjoyment of property rights are subject to restrictions which must be accepted by each owner on the basis of the superior general interest and the general good.

The Court clearly ruled out that the measure in question does not adversely affect the "substance" of the right to property: it does not restrict the owner's power to make use of his land except in one of the numerous imaginable ways and is of limited duration.

In the case ***Méthode champenoise* (*Winzersekt)***[20] the designation 'méthode champenoise' is a term which, prior to the adoption of the regulation, all producers of sparkling wines were entitled to use. The prohibition of the use of that designation cannot be regarded as an infringement of an alleged property right vested in Winzersekt. The use of terms relating to a production method may refer to the name of a geographical unit only where the wine in question is entitled to use that geographical indication.

In ***Tocai friulano***[21] the Court holds that, since it does not exclude any reasonable method of marketing the Italian wines concerned, *the prohibition does not constitute deprivation of possessions* for the purposes of the European Convention on Human Rights (ECHR).

Consequently, the lack of compensation for the winegrowers concerned is not in itself a circumstance demonstrating incompatibility between the prohibition and the right to property. In addition, even if that prohibition constitutes control of the use of property as referred to in the ECHR, the interference which it involves may be justified.

[19] Judgment of the Court of 13 December 1979, *Liselotte Hauer v Land Rheinland-Pfalz*, Case 44/79, ECLI:EU:C:1979:290.

[20] Judgment of the Court of 13 December 1994, *Méthode champenoise* (*Winzersekt)*, Case C-306/93.

[21] Judgment of the Court of 12 May 2005, *Tocai friulano*, Case C-347/03.

In that regard, the Court observes that the objective of the prohibition is to reconcile the need to provide consumers with clear and accurate information on products with the need to protect producers on their territory against distortions of competition. The prohibition therefore pursues **a** *legitimate aim of general interest.*

The Court rules that the prohibition is also proportionate to that aim, given, inter alia, that a transitional period of thirteen years was provided for and that alternative terms are available to replace the names 'Tocai friulano' and 'Tocai italico'[22].

3.2. Freedom to pursue a trade or profession

In the same way as the right to property, in **Liselotte Hauer*[23]*,** the right of freedom to pursue trade or professional activities, far from constituting an unfettered prerogative, must be viewed in the light of the social function of the activities protected thereunder.

To the extent to which it affects the second aspect, the prohibition on planting in question does not constitute an unacceptable interference with the fundamental right freely to pursue economic activity; *the latter is not an absolute individual right, excluding any restriction; it must be seen in a social context.*

So far as concerns the impairment of the freedom to pursue a trade or profession, the Court held in ***Méthode champenoise* (*Winzersekt)*[24]*,*** that the EU legislation do not impair the very substance of the right freely to exercise a trade or profession relied on by Winzersekt since those provisions affect only the arrangements governing the exercise of that right and do not jeopardize its very existence. It is for that reason necessary to determine whether those provisions pursue objectives of general interest, do not affect the position of producers such as Winzersekt in a disproportionate manner and, consequently, whether the Council exceeded the limits of its

4. EU legal order

4.1. Supremacy

***Liselotte Hauer*[25]** addresses the question of supremacy of EU law regarding constitutional law of member states. The Court declare that: **"**the question of a possible infringement of fundamental rights by a measure of the community institutions can only be judged in the light of community law itself. The introduction of special criteria for assessment stemming from the legislation or *constitutional law* of a particular member state would, by damaging the substantive unity and efficacy of community law, lead inevitably to the destruction of the unity of the common market and the jeopardizing of the cohesion of the community"[26].

4.2. Direct application of a regulation

The Court had the occasion to rule on the direct application of a regulation in **Bureau national interprofessionnel du**

[22] CJE/05/42 12 May 2005, Press Release No 42/05, 12 May 2005.
[23] Judgment of the Court of 13 December 1979, *Liselotte Hauer*, Case 44/79.
[24] Judgment of the Court of 13 December 1994, *Méthode champenoise* (*Winzersekt)*, Case C-306/93.
[25] Judgment of the Court of 13 December 1979, *Liselotte Hauer*, Case 44/79.
[26] *Ibidem*.

Cognac[27]**.** In that regard, the Court affirms that in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of EU law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such effect must be given to them[28].

In that connection, it should be recalled that the direct application of a regulation means that its entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law, strict compliance with that obligation being an indispensable condition for the simultaneous and uniform application of regulations throughout the European Union.

4.3. The notion of 'individual concern'

Codorniu[29] sought to challenge a Regulation reserving the word "cremant" for high-quality sparkling wines from specific regions in France and Luxembourg.

Codorniu is a Spanish company manufacturing and marketing quality sparkling wines psr. It is the holder of the Spanish graphic trade mark "Gran Cremant de Codorniu", which it has been using since 1924 to designate one of its quality sparkling wines. Codorniu is the main Community producer of quality sparkling wines, the designation of which includes the term "crémant". Other producers established in Spain also use the term "Gran Cremant" to designate their quality sparkling wines.

The Court held, departing from the previous case law[30], that the applicant was *individually concerned* because the reservation to producers in France and Luxembourg interfered with Codorniu's intellectual property rights[31].

Although it is true that according to the criteria in the second paragraph of Article 263 of TFUE the contested provision is, by nature and by virtue of its sphere of application, of a legislative nature in that it applies to the traders concerned in general, that does not prevent it from being of individual concern to some of them[32].

Natural or legal persons may claim that a contested provision is of individual concern to them only if it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons. By reserving the right to use the term "crémant" to French and Luxembourg producers, the contested provision prevents Codorniu from using its graphic trade mark. It follows that Codorniu has established the existence of a situation which from the point of view of the contested provision differentiates it from all other traders[33].

[27] Judgment of the Court of 14 July 2011, *Bureau national interprofessionnel du Cognac*, Joined cases C-4/10 and C-27/10, ECLI:EU:C:2011:484.
[28] *Ibidem*, p. 26.
[29] Judgment of the Court of 18 May 1994, *Codorníu*, Case C-309/89, ECLI:EU:C:1994:197.
[30] Paul Craig, Gráinne de Búrca, *EU Law, Text, Cases, and Materials*, Oxford University Press, 2015, p. 497.
[31] http://www.eulaws.eu/?p=171.
[32] Judgment of the Court of 18 May 1994, *Codorníu*, p. 19.
[33] *Ibidem*, p. 22.

4.4. Non-contractual liability of the Community

The case ***Cantina sociale di Dolianova***[34] involved wine cooperatives which were producers of wine in Sardinia (Italy). Following a series of disputes concerning the payment of Community subsidies between wine producing cooperatives, the distiller and the Italian authorities responsible for the management of such subsidies, those cooperatives – since there were unable to obtain the full amount of the payments required before the national courts after the distiller went bankrupt – had brought an action before the Court of First Instance for a declaration that the Commission was non-contractually liable and for the Commission therefore to pay for the damage which they had suffered[35].

In the case ***Cantina sociale di Dolianova*** the Court of Justice set aside the Court of First Instance"s ruling which had taken a subjective approach according to which the damage caused by an unlawful legislative act could not be regarded as certain as long as the allegedly injured party did not perceive it as such[36].

The court underline that the rules on limitation periods which govern actions for damages must be based only on strictly objectives criteria. If it were otherwise, there would be a risk of undermine the principle of legal certainty on which the rules on limitations periods specifically rely and the point in time at which those proceedings become time-barred varies according to the individual perception[37].

4.5. Preliminary ruling

The court declined jurisdiction

Foglia v. Novello[38] is the only case to date where the court declined jurisdiction in a preliminary ruling case on account of the spurious nature of the main proceedings[39]. The questions concerned the legality under Union law of an import duty imposed by the French on the import of wine from Italy[40].

Mr. Foglia, having his place of business at Santa Vittoria D ' Alba, in the province of Cuneo, Piedmont, Italy, made a contract to sell Italian liqueur wines to the defendant, Mrs. Novello. The contract provided that the parties would not be liable for any taxes levied by French or Italian authorities which were contrary to EC law. The parties to the contract were, in fact, concerned to obtain a ruling that a tax system in one Member State was invalid by expedient the proceedings before a court in another member state. The court decline its jurisdiction.

The Court states that it does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of a dispute. The duty assigned to

[34] Judgment of the Court (Fourth Chamber) of 17 July 2008., Commission of the European Communities v Cantina sociale di Dolianova Soc. coop. arl and Others, (*Cantina sociale di Dolianova*) Case C-51/05 P, ECLI:EU:C:2008:409.

[35] European Commision, Summary of important judgements, http://ec.europa.eu/dgs/legal_service/ arrets/05c051_en.pdf

[36] Koen Lenaerts, Ignace Maselis, Kathleen Gutman, *EU Procedural Law*, OUP Oxford, 2014, p.546.

[37] Judgment of the Court of 17 July 2008., *Cantina sociale di Dolianova*, Case C-51/05 P, p 59-60.

[38] Judgment of the Court of 11 March 1980, *Pasquale Foglia v Mariella Novello*, Case 104/79, ECLI:EU:C:1980:73.

[39] Koen Lenaerts, Ignace Maselis, Kathleen Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2014, p. 93.

[40] Lorna Woods, Philippa Watson, *Steiner & Woods EU Law*, Oxford University Press, Oxford, 2014, p. 231.

the Court by is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States.

Consequences of an earlier judgment giving a preliminary ruling

In case ***Kingdom of Belgium v Kingdom of Spain (Rioja wine)***[41], the most interesting issue however arises not from the interpretation of the Treaty free movement provisions but from the unclear relationship between the *Delhaize ruling*[42] and the case at issue; from a first reading it seems that the Court, without saying it, overruled itself: however a more careful reading of the two judgments does not seem to support this view[43].

Both in the *Delhaize case* and in the *Rioja* one, the Court found the Spanish legislation to constitute a measure having equivalent effect to a restriction on exports. As far as the issue of justification is concerned, in the Delhaize case the Court clearly stated that it had not been *shown* that the Spanish legislation was justified. The Court points out that in the *Rioja* proceedings, the Spanish, Italian and Portuguese Governments and the Commission have produced new information to demonstrate that the reasons underlying the contested requirement are capable of justifying it. It is necessary to examine this case in the light of that information[44].

Use of art. 259 TFEU: State vs. State

The ***Rioja case*** is also interesting for the use of art. 259 TFEU which enables a Member State to bring an action against another Member State.

In the history of European integration only six times a Member State has directly brought an action for failure to fulfil the obligations before the CJEU against another State[45]. Of the sixth cases, only four proceeded to judgment, the other two were settled amicably[46].

5. External relations

5.1. Principles of international law relating to treaties

The Court held in ***Tocai friulano***[47] that the European Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, is not the legal basis of Decision 93/724 concerning the conclusion of the Agreement between the European Community and the Republic of Hungary on the reciprocal protection and control of wine names.

The appropriate legal basis for the conclusion by the Community alone of the latter agreement is Article 133 EC, an article which confers on the Community competence in the field of the common commercial policy. That agreement is part on the common organisation of the market in

[41] Judgment of the Court of 16 May 2000, *Kingdom of Belgium v Kingdom of Spain (Rioja wine)*, Case C-388/95, ECLI:EU:C:2000:244

[42] Judgment of the Court of 9 June 1992. Établissements Delhaize frères and Compagnie Le Lion SA v Promalvin SA and AGE Bodegas Unidas SA (*Delhaize*), Case C-47/90, ECLI:EU:C:1992:250.

[43] Eleanor Spaventa, *'Case C-388/95, Belgium v. Spain'*, 38 Common Market Law Review, Issue 1, 2001, p. 211–219.

[44] Judgment of the Court of 16 May 2000, *Rioja wine*, Case C-388/95, p.52.

[45] Case 141/78, France v United Kingdom, Case C-388/95, Belgium v Spain, Case C-145/04, Spain v United Kingdom, Case C-364/10, Hungary v Slovakia, Case 58/77, Ireland v France, Case C-349/92, Spain v United Kingdom.

[46] Dimitriu Ioana Mihaela, *State versus state: who applies better EU law?*, Challenges of the Knowledge Society, Volume 5, Number 1, 2015, p. 404-410 (7).

[47] Judgment of the Court of 12 May 2005, *Tocai friulano*, Case C-347/03.

wine and its principal objective is to promote trade between the Contracting Parties

The Court then points out that in the case of homonymity between a geographical indication of a third country and a name incorporating the name of a vine variety used for the description and presentation of certain Community wines, the provisions on homonyms contained in the Agreement on Trade-Related Aspects of Intellectual Property (the TRIPs Agreement) do not require that the name of a vine variety used for the description of Community wines be allowed to continue to be used in the future[48].

5.2. Direct effect of TRIPS Agreement

The Court upholds in ***Abadía Retuerta***[49] that although the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) do not have direct effect, it is nevertheless true that the trade−mark legislation, must, as far as possible, be interpreted in the light of the wording and purpose of that agreement.[50]

5.3. International agreement to which the European Union is not a party

The case ***International Organisation for Vine and Wine (OIV)***[51] is notable from several perspectives: the emergence and proliferation of informal means of co-operation challenging the monopoly of traditional forms of international law-making and, secondly, the competence of EU to act externally.

In *OIV* case the Court was confronted with the question of the legal character and effects of an informal act issued by an international organisation to which the EU is not a member.

The OIV is an intergovernmental organisation of technical and scientific nature. It allows for discussions and eventually adopts non-binding recommendations on vine, wine marketing and wine production standards. The EU is not a member of the OIV, and only 21 of its Member States are. Issues dealt with in the OIV fall within the area of agriculture, a shared competence. The Member Statesand the Commission initially coordinated OIV positions informally prior to OIV meetings. Later, the procedure was formalised and the Council started adopting common positions on recommendations by the Commission through art. 218(9) TFEU, a Treaty provision concerning procedures on international agreements.49 In other words, EU institutions and Member States found ways to cooperate to assure unity of representation in the OIV, thereby fulfilling the duty of art. 4(3) TEU.

Germany, challenged this practice by arguing that the legal basis of art. 218(9) TFEU could not be used when the international organisation does adopt legally binding acts and the EU is not a member[52].

The case the discussion focuses on the scope and interpretation of the sole Article 218(9) TFEU because, as Germany points out, no other substantive legal basis was indicated in the contested decision. This case

[48] CJE/05/42 12 May 2005, Press Release No 42/05, 12 May 2005.

[49] Judgment of the General Court of 11 May 2010, *Abadía Retuerta*, Case T-237/08.

[50] *Ibidem*, p 67-72.

[51] Judgment of the Court (Grand Chamber), 7 October 2014, Federal Republic of Germany v Council of the European Union (OIV), Case C 399/12, ECLI:EU:C:2014:2258.

[52] Johan Bjerkem, *Member States as 'Trustees' of the Union? The European Union and the Arctic Council*, College of Europe, EU Diplomacy Papers, 12/2017, (http://aei.pitt.edu/92758/1/edp-12-2017_bjerkem.pdf).

raises crucial issues not only for the European Union (EU) and its Member States, but also for the proper functioning of the international organisations in which they operate[53].

First, this case may be seen as one of the exponents of the vivid academic debate over norm creation that occurs outside the classic international law framework[54].

Overall, the declining importance of form and formalities, treaty-fatigue, and the proliferation of new actors, outputs and processes have accentuated the phenomenon of informal international law-making, and thus, the problem of distinguishing between law and non-law. Also, recent years have also witnessed the proliferation of informal instruments issued by private actors. The trend towards privatisation manifests itself through the increased engagement of private actors with autonomous self-regulation, the emergence of mixed public-private acts (coregulation) and the proliferation of standard-setting instruments[55]

The *OIV* case is also relevant for the debates on the autonomy[56] of EU law.

Also, the Court made it plain that a clear distinction must be drawn between the existence (and qualification) of a competence on the one hand, and its exercise on the other. The fact that, given these circumstances, the Union cannot exercise its competence on the international forum through its own external actors[57], in particular the Commission or the High Representative, has no implications whatsoever for the issue of the existence of a competence (or even its qualification as being exclusive or not), which the Court had no difficulty accepting in this case. As the Court recalls: "in such circumstances the Union must act via its Member States, members of that organization, acting jointly in the interest of the Union".

6. Taxation

The CJEU decisions on duties and taxation made a significant contribution to the realization of a single market. The Court interpreted the relevant Treaty articles in the manner best designed to ensure the Treaty objectives are achieved. In relation to taxation the issues are more complex. The original Rome Treaty left a considerable degree of autonomy to Member States in the fiscal field, albeit subject to constraints imposed by Articles 30 and 110 TFEU[58].

In this area, as in many others, there is a link between judicial doctrine and legislative initiatives. The very fact that a challenged national tax policy will, according to Court decision in ***French Sweet***

[53] Govaere, Inge. 2014. "*Novel Issues Pertaining to EU Member States Membership of Other International Organisations: The OIV Case*." In The European Union in the World: Essays in Honour of M. Maresceau, ed. Inge Govaere, Erwoan Lannon, Peter Van Elsuwege, and Stanislas Adam, 225–243. Leiden, The Netherlands: Martinus Nijhoff Publishers.

[54] Eva Kassoti, The EU and the Challenge of Informal International Law-Making: The CJEU's Contribution to the Doctrine of International Law-Making, Geneva Jean Monnet Working Paper 06/2017, https://www.ceje.ch/files/3615/1748/7746/kassoti_6-2017.pdf .

[55] *Ibidem.*

[56] R.A. Wessel and S. Blockmans (Eds.), Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations, The Hague: T.M.C. Asser Press/Springer, 2013, p. 1-9; Konstadinides, Theodore, In the Union of Wine: Loose Ends in the Relationship between the European Union and the Member States in the Field of External Representation (2015). 21 (4) European Public Law (Forthcoming). Available at SSRN: https://ssrn.com/abstract=2584995.

[57] Roxana-Mariana Popescu, *Place of international agreements to which the European Union is part within the EU legal order*, Challenges of the Knowledge Society, Volume 5, Number 1, 2015, p. 489-494(6).

[58] Paul Craig, Gráinne de Búrca, *EU Law, Text, Cases, and Materials*, Oxford University Press, Oxford, 2015, p. 636.

Wines case[59], be upheld if the court deems it to be compatible with the Treaty can lead to paradoxical results. The absence of harmonization has led to the ironic result that the Commission, abetted by the CJEU, has managed to wield perhaps more influence over Member States" tax policies, and their economic and social policies, than would be the case if the Council had agreed a uniform tax regime.

"Article 110 TFEU purpose is to prevent Member States to introduce new taxes which had the purpose or effect of discouraging the sale of imported products in favour of the sale of similar products available on the domestic market and, in this way, to circumvent the prohibitions in Articles 28 TFEU, 30 TFEU and 34 TFEU"[60].

The prohibition laid down in article 110(1) applies if two cumulative conditions are met: first, relevant imported product and the relevant domestic product must be *similar* and, secondly, there must be *discrimination*[61].

Article 110(2) TFEU applies if two cumulative conditions are met: first, the imported product and the domestic product must be in *competition*, and, secondly, the tax must *protect* the domestic product[62].

In some cases, the **Spirits cases**[63], the Court follows a "holistic" approach[64], which does not distinguish between the two paragraphs of article 110 TFEU.

6.1. Similar products - Art. 110 (1) TFEU

The Court has turned its attention to the concept of similarity between wine and other alcoholic beverages in several cases. It was underline[65] that in terms of production conditions and characteristics, whilst wine is an agricultural product, with an elevated cost of production and subject to climate vicissitudes, beer is an industrial product.

The Court endorsed a broad interpretation of the concept of similarity in its judgment of 27 February 1980, in Case 168/78[66], ***Commission v French Republic***.

The Court stated that "it is therefore necessary to interpret the concept of "similar products" with sufficient flexibility. It is necessary to consider as similar products which have similar characteristics and meet the same needs from the point of view of consumers. It is therefore necessary to determine the scope of the first paragraph of Article 110 on the basis not of the criterion of the strictly identical nature of the products

[59] Judgment of the Court of 7 April 1987, *Commission v French Republic (French sweet wines)*, Case 196/85, ECLI:EU:C:1987:182.

[60] Judgment of the Court of 7 April 2011, *Ioan Tatu v Statul român prin Ministerul Finanţelor şi Economiei* and Others, Case C-402/09, p.53.

[61] Catherine Barnard and Steve Peers, *European Union Law*, Oxford University Press, Oxford,2014, p. 348.

[62] *Ibidem*, p. 350.

[63] Judgment of the Court of 27 February 1980, *Commission v French Republic*, Case 168/78, ECLI:EU:C:1980:51; Judgment of the Court of 27 February 1980, *Commission v Ireland*, Case 55/79, ECLI:EU:C:1980:56; Judgment of the Court of 12 July 1983, Case 170/78, ECLI:EU:C:1983:202; Judgment of the Court of 27 February 1980, *Commission v Kingdom of Denmark*, Case 171/78, ECLI:EU:C:1980:54; Judgment of the Court of 27 February 1980, *Commission v Italian Republic*, Case 169/78, ECLI:EU:C:1980:52.

[64] Catherine Barnard and Steve Peers, *European Union Law*, Oxford University Press, Oxford, 2014, p. 348.

[65] Theodore Georgopoulos, *Taxation of alcohol and consumer attitude is the ECJ sober?*, American Association of Wine Economists Working Paper, No. 37, June 2009, http://www.wine-economics.org/aawe/wp-content/uploads/2012/10/AAWE_WP37.pdf.

[66] Judgment of the Court of 27 February 1980, *Commission v French Republic*, Case 168/78, ECLI:EU:C:1980:51.

but on that of their similar and comparable use".

The court interpreted the meaning of similar products in case ***Johnny Walker*** [67], where it was able to assess the compatibility with the provision of a system of differential taxation applied under Danish tax legislation to Scotch whisky and fruit wine of the liqueur type. Consequently, the Court held that in order to determine whether products are similar "it is necessary first to consider certain objective characteristics of both categories of beverages, such as their origin, the method of manufacture and their organoleptic properties, in particular taste and alcohol content, and secondly to consider whether or not both categories of beverages are capable of meeting the same needs from the point of view of consumers"[68].

In case ***Commission v Kingdom of Denmark (Fruit wine)*** the court asses weather Denmark infringe the treaty imposing a higher rate of duty on wine made from grapes than on wine made from other fruit.

"As the concept of similarity must be given a broad interpretation, the similarity of products must be assessed not according to whether they are strictly identical but according to whether their use is similar and comparable"[69].

The court takes a dynamic interpretation concluded that the point of view of consumers must be assessed on the basis not of existing consumer habits but of the prospective development of those habits.

The concept of *indirect discrimination* was applied by the Court in ***Marsala*** case[70], without mentioning it expressly[71]. In the context of identical rates applied to manufacture of nationally and foreign produced wine alcohol, a reduction was granted by the Italian legislation to alcohol distilled from wine and used in the production of liqueur wines which qualify for the designation "Marsala", a beverage made in western Sicily. The Court observed that no imported liqueur wine can ever qualify for the preferential treatment accorded to Marsala and that imported liqueur wines accordingly suffer discrimination.

6.2. Goods not similar but in competition – Art. 110(2) TFEU

In the case ***Commission v French Republic***, Case 168/78, the court held "that the function of the second paragraph of Article 110 TFEU is to cover all forms of indirect tax protection in the case of products which, *without being similar* within the meaning of the first paragraph, *are nevertheless in competition*, even partial, indirect or potential, with certain products of the importing country. For the purposes of the application of that provision it is sufficient for the imported product to be in competition with the protected domestic production by reason of one or several economic uses to which it may be put, even though the condition of similarity for the

[67] Judgment of the Court of 4 March 1986, *John Walker & Sons Ltd v Ministeriet for Skatter og Afgifter*, Case 243/84. ECLI:EU:C:1986:100

[68] *Ibidem*, p.11.

[69] Judgment of the Court of 4 March 1986, *Commission v Kingdom of Denmark (Fruit wine)*, Case 106/84, ECLI:EU:C:1986:99.

[70] Judgment of the Court of 3 July 1985, *Commission v Italian Republic (Marsala)*, Case 277/83, ECLI:EU:C:1985:285.

[71] Christa Tobler, *Indirect Discrimination: A Case Study Into the Development of the Legal Concept of Indirect Discrimination Under EC Law*, Intersentia nv, 2005, p. 127.

purposes of the first paragraph of Article 95 is not fulfilled[72]".

The case ***Wine and Beer[73]*** concerns the great difference between the rate of excise duty on still light wine produced in other Member States and the rate of excise duty on beer produced in the United Kingdom that, according to the Commission, afforded indirect protection to beer and was contrary to the second paragraph of Article 110 of the Treaty.

The Court emphasized that "the second paragraph of Article 110 applied to the treatment for, tax purposes of products which, without fulfilling the criterion of similarity, were nevertheless in competition, either partially or potentially, with certain products of the importing country".

As regards the question of competition between wine and beer, the Court considered that, to a certain extent at least, the two beverages in question were capable of meeting identical needs, so that it had to be acknowledged that there was a degree of substitution for one another[74]. In view of the substantial differences in the quality and, therefore, in the price of wines, the decisive competitive relationship between beer, a popular and widely consumed beverage, and wine must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and cheapest varieties[75].

The Court concluded that the United Kingdom's tax system has the effect of subjecting wine imported from other Member States to an additional tax burden so as to afford protection to domestic beer production. Since such protection is most marked in the case of the most popular wines, the effect of the United Kingdom tax system is to stamp wine with the hallmarks of a luxury product which, in view of the tax burden which it bears, can scarcely constitute in the eyes of the consumer a genuine alternative to the typical domestically produced beverage[76]. So, the emphasis is on the considerably higher tax burden applied to the wines.

In a more recent case, ***Commission v Kingdom of Sweden[77]***, the Court was once again called to give answers to the question of taxation of wine and beer in the light of Article 110 TFEU. The Court took a different view, considering that the Swedish measure was compatible with EU law. This can reflect the accent on the possibility of the measure to have protectionist effect[78].

In this case the major issue was the consumer's attitude towards selling prices of alcoholic beverages.

The Court applied the method of relationship of final selling prices between a litter of strong beer and a litter of wine in competition and compared this relationship with the one that would apply if tax rates of beer were applied to wine. Thus, the Court found that the relationship between final selling prices of beer and wine would be 1: 2.1 instead of the actual 1: 2 .3. In this sense, the CJEU considered that the impact of

[72] Judgment of the Court of 27 February 1980, *Commission v French Republic*, Case 168/78, ECLI:EU:C:1980:51.

[73] Judgment of the Court of 12 July 1983, *Commission v United Kingdom of Great Britain and Northern Ireland (Wine and Beer)*, Case 170/78, ECLI:EU:C:1983:202.

[74] *Ibidem*, p.8.

[75] Judgment of the Court of 12 July 1983, Wine and Beer, Case 170/78, ECLI:EU:C:1983:202, p.12.

[76] *Ibidem*, p.27.

[77] Judgment of the Court (Grand Chamber) of 8 April 2008, *Commission v Kingdom of Sweden*, Case C-167/05, ECLI:EU:C:2008:202

[78] Friedl Weiss, Clemens Kaupa, *European Union Internal Market Law*, Cambridge University Press, 2014, p. 91.

higher taxation on wine would be "virtually the same". According to the Court's reasoning, given the important difference of the final selling prices the fluctuation of the ratio is not likely to change the consumer's attitude[79].

6.3. Exceptions

In ***French sweet wines*** **case**[80], the Court accepted France was not in violation of the community law treating sweet wine production more favourably under the domestic taxation regime on account of being a need to sustain the production in areas of country where growing conditions were poor and unpredictable[81].

The Court held that Community law does not restrict the freedom of each Member State to lay down tax arrangements which differentiate between certain products, even products which are similar on the basis of *objective criteria*, such as the *nature of the raw materials* used or the production processes employed. "Such differentiation is compatible with Community law if it pursues objectives of economic policy which are themselves compatible with the requirements of the Treaty and its secondary legislation, and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, in regard to imports from other Member States or any form of protection of competing domestic products".

The aim of offsetting the more *severe conditions under which certain products are produced*, in order to sustain the output of quality products which are of particular economic importance for certain regions of the Community must be regarded as compatible with the requirements of Community law[82]

The ***Joustra***[83] case offers the Court the occasion to rule on interpretation of Directive 92/12/EEC on the general arrangements for products subject to excise duty.

Mr. Joustra is a Dutch national and together with some 70 other private individuals formed a group called the 'Circle des Amis du Vin'.

Each year, on behalf of the circle, Mr. Joustra orders wine in France for his own use and that of the other members of the group. On his instructions, that wine is then collected by a Netherlands transport company which transports it to the Netherlands and delivers it to Mr. Joustra's home. The wine is stored there for a few days before being delivered to the other members of the circle on the basis of their respective shares of the quantity purchased. Mr. Joustra pays for the wine and the transport and each member of the group then reimburses him for the cost of the quantity of wine delivered to that member and a share of the transport costs calculated in proportion to that quantity. It is common ground that Mr. Joustra does not engage in that activity on a commercial basis or with a view to making a profit[84].

The Dutch tax authorities nevertheless charged excise duty on the wine and Mr. Joustra submitted an appeal against this decision.

[79] Theodore Georgopoulos, *Taxation of Alcohol and Consumer Attitude: Is The ECJ Sober?*, AAWE WORKING PAPER, no. 37, 2009, p. 2-6.

[80] Judgment of the Court of 7 April 1987, *Commission v French Republic (French sweet wines)*, Case 196/85, ECLI:EU:C:1987:182.

[81] Dermot Cahill, Vincent Power, Niamh Connery, *European Law*, Oxford University Press, Oxford, 2011, p. 64.

[82] Robert Schütze, *An Introduction to European Law*, Cambridge University Press, 2015,p.230.

[83] Judgment of the Court of 23 November 2006, *Staatssecretaris van Financiën v B. F. Joustra (Joustra)*, Case C-5/05, ECLI:EU:C:2006:733.

[84] *Ibidem*, p.17.

In the course of the ensuing proceedings, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) raised questions concerning the interpretation of Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products.

Joustra is interesting for the literal interpretation method applied by the Court. The court held that only products acquired on a person's own behalf fall within the application of Article 8, while those purchased for other individuals do not. Furthermore, transportation must be effected personally by the purchaser.

The Court expressly mention that it is for the Community legislature to remedy the legal lacuna, if necessary, by adopting the measures required in order to amend that provision[85].

7. Public health

The EU's main competencies are in creating a single European market rather than making health policy. We may therefore expect that alcohol policy has seen the dominance of economic over health interests. However this might be a simplistic picture[86].

The case ***Commission v French Republic***[87] regarded a French law which interdict the advertising of grain-based spirits (mainly foreign) while allowing advertising of wine based spirits (mainly French).

National legislation restricting the advertising of some alcoholic drinks it constitutes arbitrary discrimination in trade between Member States where it authorises advertising in respect of certain national products whilst advertising in respect of products bearing comparable characteristics but originating in other Member States is restricted. Legislation restricting advertising in respect of alcoholic drinks complies with the requirements of Article 30 EEC only if it applies in identical manner to all the relevant drinks whatever their origin.

The Court held that by subjecting advertising in respect of alcoholic beverages to discriminatory rules and thereby maintaining obstacles to the freedom of intra-Community trade, the French Republic had failed to fulfil its obligations under Article 30 EEC. The Court recognize in ***Commission v French Republic***[88] that national legislation restricting the advertising of some alcoholic drinks may in principle be justified by concern relating to the protection of public health.

In case ***Deutsches Weintor***[89] the court examined the definition of *health claims*. In this case the reference to the Court has been made in proceedings between Deutsches Weintor, a German winegrowers' cooperative, and the department responsible for supervising the marketing of alcoholic beverages in the *Land* of Rhineland-Palatinate concerning the description of a wine as 'easily digestible' ('bekömmlich'), indicating reduced acidity levels. The German authority objected to the use of the description 'easily digestible' on the ground that it is a *'health claim'*, which, pursuant to the regulation 1924/2006, is not permitted for alcoholic beverages.

[85] Judgment of the Court of 23 November 2006, *Joustra*, Case C-5/05, ECLI:EU:C:2006:733, 46.

[86] Ben Baumberg, Peter Anderson, *Health, alcohol and EU law: understanding the impact of European single market law on alcohol policies*, Oxford University Press, European Journal of Public Health, Vol. 18, No. 4, 392–398.

[87] Judgment of the Court of 10 July 1980, Commission v French Republic, Case 152/78, ECLI:EU:C:1980:187.

[88] *Ibidem*.

[89] Judgment of 6 September 2012, Deutsches Weintor, Case C–544/10, ECLI:EU:C:2012:526.

The court specifies that the concept of a 'health claim' is deemed to refer not only to the *effects* of the consumption – in a specific instance – of a precise quantity of a food which is likely, normally, to have only *temporary* or fleeting effects, but also to those of the *repeated, regular, even frequent* consumption of such a food, the effects of which are, by contrast, not necessarily only temporary and fleeting[90]. On the other hand, the concept of a 'health claim' must cover not only a relationship implying an *improvement* in health as a result of the consumption of a food, but also any relationship which implies the absence or reduction of effects that are adverse or *harmful* to health and which would otherwise accompany or follow such consumption, and, therefore, the mere preservation of a good state of health despite that potentially harmful consumption[91].

8. Conclusion

Defending wines shaped landmark decisions of EU law.

The Court declare, in *Liselotte Hauer*, that "*fundamental rights form an integral part of the general principles of the law*, the observance of which is ensured by the court". Furthermore, the Court affirms the supremacy of EU law vis-à-vis *constitutional law* of Member states.

In the field of EU procedural law, in *Codorníu*, the Court recognize, for the first time, the *individual concern* of the applicant in the action for annulment of *a legislative act*. "

Foglia v. Novello is the only case to date where the Court declined jurisdiction in a preliminary ruling case on account of the spurious nature of the main proceedings[92].

The *Rioja Wine case* is one of the six cases in the history of European integration when a state use the art. 259 TFEU and directly brought an action for failure to fulfil the obligations before the CJEU against another State.

In the case of an informal act issued by an international organisation to which the EU is not a member, *the Union must act via its Member States*, members of that organization, *acting jointly in the interest of the Union (International Organisation for Vine and Wine).*

A long series of decisions, such as *Spirits cases*, *Wine and Beer, Johnny Walker or French Sweet Wines case, on* duties and taxation made a substantial contribution to the realization of the single market

We may say wine is one of the key ingredients that creates law and, thus, defines who the EU is. Indeed, no efforts were saved or vigilance rest in protecting the Europe"s wine cellar.

In any case… *in vino veritas.*

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[90] *Ibidem*, para. 36.
[91] *Ibidem*, para. 35.
[92] Koen Lenaerts, Ignace Maselis, Kathleen Gutman, *EU Procedural Law*, OUP Oxford, 2014, p. 93.

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PROTECTING EU VALUES. A JURIDICAL LOOK AT ARTICLE 7 TEU

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Abstract

Every European state that wishes to become a member of the European Union (EU) must adhere to the values enshrined in Article 2 of the Treaty on European Union (TEU). After accession, it is assumed that all Member States are further bound by these same values, such as the rule of law. However, the successful enlargement of the EU, especially towards the new democracies of Eastern Europe, gave rise to the need for a means to balance this somewhat utopian view of irreversible common ground. Thus, in 1999, in preparation for the wave of accession of 2004, the Treaty of Amsterdam introduced Article 7 in TEU as a means of protecting EU values in the Member States. The study makes a juridical analysis of this text, focusing on its content, its possible legal effects, its pluses and minuses in representing an efficient means of dissuasion in relation to the Member States that have raised concerns of serious breaches of the rule of law in the last few years. The main goal is to identify the vulnerabilities of this legal mechanism in order to find solutions for its improvement and to suggest complementary measures which might aid obtaining positive results. The way this matter is addressed shall shape the future of the EU.

Keywords: *European Union; values; rule of law; illiberalism; Article 7 TEU.*

1. EU values in peril

In the last few years the EU's institutions, especially the European Commission and the European Parliament, have shown an increasing focus on protecting the values enumerated in Article 2 TEU[1]. These values are meant to represent the very basis for the Member States' agreement to work together within this original integration organisation, since Article 49 TEU states that respecting and promoting them is a condition for accession to the EU[2].

For the most part of the EU's existence, neither the EU, nor the Member States, had any cause for concern about the solidity of this common ground. However, at the end of the 1990s and the beginning of the years 2000, the European Union's institutions were preparing to implement the expansion policy towards Eastern Europe and were negotiating with 12 states aspiring

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[1] Article 2 TEU reads: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." The Treaty on European Union was signed at Maastricht on 7 February 1992 and is in force since 1 November 1993. For the consolidated version of TEU see: http://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html, last accessed on 10 March 2018.

[2] Article 49 TEU first thesis of the first paragraph: "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union."

to membership status[3], some of them still undergoing a complex reform process to consolidate their newly found democracy. The number of Member States was expected to grow from 15 to 27. In this context, the Treaty of Amsterdam[4] inserted a new text in TEU, former Article F.1[5], which was supposed to act as a preventive measure by empowering the EU to determine the existence of a serious and persistent breach by a Member State of EU values and, eventually, to "suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council."[6] The Treaty of Nice[7] amended this Article, to allow a public warning that there is a clear risk of a serious breach of EU values by a Member State, further emphasizing that the objective is to have the Member State reconsider its position, rather than act when the damage is already done.

The study shall make a legal analysis of Article 7 TEU, in correlation to Article 2 TEU, then it shall present the steps taken so far by EU institutions in applying this text in response to concerns about serious breaches of the rule of law by some Member States, especially in the last three years.

The matter is not only recent and in development, as it is the first time Article 7 TEU might be applied, but it is also of the utmost importance for the future of the EU, giving rise to a fiery debate about the efficiency of the means to protect EU values at the disposal of EU institutions and about complementary solutions that might be adopted, such as infringement actions or the multi-speed EU or the differential allocation of funds.

The study aims to identify the weaknesses of Article 7 TEU and give suggestions on how it could be improved, to present the actions taken so far by EU institutions on its basis and to assess their efficiency, in an effort to see the limits of the current mechanisms and to find complementary ones that would favor constructive solutions.

Given the great interest the subject matter stirs up in legal literature, there are quite a few doctrinal works that have taken up the topic. The study intends to offer a more technical approach, focused on the legal texts and on the juridical aspects of the problems being debated.

2. The legal mechanism for protecting EU values

2.1 The creation and development of Article 7 TEU

The 1993 Copenhagen European Council took the view "that post-communist central and eastern European countries had a vocation to become members of the Union"[8]. One of the three criteria the European Council set out for the candidate country aspiring to membership was achieving the "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection

[3] In 2004 the EU welcomed: Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia and in 2007 Bulgaria and Romania.

[4] Signed on 2 October 1997. It entered into force on 1 May 1999.

[5] Currently Article 7 of the consolidated version of TEU.

[6] Article 1 point 9 of the Treaty of Amsterdam, available at: https://europa.eu/european-union/sites/europaeu/files/docs/ body/treaty_of _amsterdam_en.pdf, last accessed on 10 March 2018.

[7] Signed on 26 February 2001. It entered into force on 1 February 2003.

[8] Hillion, "EU Enlargement", 193.

of minorities"[9]. This led to a development of the normative basis for enlargement, which included amending Article 49 TEU by the Treaty of Amsterdam in the sense of expressly providing the cadidate's obligation to respect the principles the Union is founded on: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law[10].

A complementary legal measure, designed to ensure this criterion is met also post-accession, was the introduction in TEU of current Article 7. The initial text established the competence and described the procedure which allowed the Council to determine the existence of a serious and persistent breach by a Member State of the principles mentioned above and to apply the sanction of suspending certain rights of that state deriving from membership status, such as the right to vote in the Council.

Further, the Treaty of Nice added a first paragraph that permitted the Council to determine even just the existence of a clear risk of a serious breach of the principles and to address appropriate recommendations to that state[11]. This leaves the necessary room for a diplomatic solution before the *fait accompli*. The Commission expressed the view that: "By giving the Union the capacity to act preventively in the event of a clear threat of a serious breach of the common values, Nice greatly enhanced the operational character of the means already available under the Amsterdam Treaty, which allowed only remedial action after the serious breach had already occurred[12]."

The last amending treaty that reformed EU constitutional law, the Treaty of Lisbon, inserted current Article 2 in TEU and modified Articles 7 and 49 TEU accordingly, replacing the reference to the principles set out in former Article 6 paragraph 1 TEU with the reference to the values EU is founded on[13].

It also replaced the words 'The Council, meeting in the composition of the Heads of State or Government and acting by unanimity' with 'The European Council, acting by unanimity', in order to differentiate between the Council and the European Council. The latter was officially included among EU's institutions by the Treaty of Lisbon[14]. It is composed of the heads of state or government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy takes part in its work. It has a political role, providing the EU with the necessary impetus for its development and defining the general political directions and priorities. It does not exercise legislative functions[15]. The

[9] Conclusions of the Presidency of the European Council in Copenhagen, 21-22 June 1993, page 13, available at http://www.consilium.europa.eu/en/european-council/conclusions/1993-2003/, last accessed on 10 March 2018.

[10] Article 1 points 8 and 15 of the Treaty of Amsterdam, available at: https://europa.eu/european-union/sites/europaeu/files /docs/body/treaty_of_amsterdam_en.pdf, last accessed on 10 March 2018. See also Fuerea, *Manualul…*, 2011, 67.

[11] Article 1 point 1 of the Treaty of Nice, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12001C/TXT, last accessed on 10 March 2018.

[12] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, Brussels, 15.10.2003, COM(2003) 606 final, available at: http://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-606-EN-F1-1.Pdf, last accessed on 10 March 2018.

[13] Article 1 points 3, 9 and 48 of the Treaty of Lisbon, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2007:306:FULL&from=EN, last accessed on 10 March 2018.

[14] For the legal recognition and role of the European Council prior to this treaty, see Craig and de Búrca, 2009, 68-72.

[15] Article 15 paragraphs 1 and 2 TEU.

Council, on the other hand, is the traditional legislative of the EU and it consists of a representative of each Member State at ministerial level [16].

The other adaptations the Treaty of Lisbon made to Article 7 TEU are of a technical nature[17] and they do not represent fundamental changes to the procedure.

2.2. Article 7 TEU's content[18]

Since respecting and promoting the common EU values by all Member States represents the foundation of the EU and the basis for the application of the principle of mutual trust, the scope of Article 7 TEU is not confined to areas covered by EU law but extends to areas where the Member States can act autonomously. As recent history proved, it is more often in the fields where there is no obligation to have harmonized legislation that national measures are more likely to be questionable.

Also, Article 7 TEU is not designed as a remedy for individual breaches in specific situations. It is a solution of last-resort, a concerted action for systematic problems, that raise to a certain threshold of seriousness and persistence.

As presented above, Article 7 TEU offers two possibilities for protecting EU values, each with its own procedure:

a) for the Council to determine the existence of a clear risk of a serious breach of EU's values by a Member State;
b) for the European Council to determine the existence of a serious and persistent breach of EU's values by a Member State.

In the first case, the first paragraph of Article 7 TEU provides that the Council can act on the basis of a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission and only after hearing the Member State in question and obtaining the

[16] Article 16 paragraphs 1 and 2 TEU. For a comparison between the Council and the European Council, see Fuerea, 2011, *Manualul…*, 102-103.

[17] For a concurrent opinion, see Gâlea, 2012, 28.

[18] Article 7 TEU reads: "1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2.The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4.The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5.The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union." Text available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M/TXT, last accessed on 10 March 2018.

consent of the European Parliament. The Council may decide, by a majority of four fifths of its members, either to make recommendations, or to declare that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU.

Thus, the Council has the discretion to appreciate on the grounds of the matter: whether there is a risk, whether that risk is clear and what values are in peril by the national measures the state in question has taken or is about to take; whether the materialisation of the risk would amount to a serious breach. The threat is potential, but it must be clear, obvious, unequivocal.

From a procedural point of view, the discretion is reduced to the nature of its decision: wether it is enough to just make recommendations or to directly declare the existence of the risk. The other procedural conditions are quite restrictive: just three subjects are allowed to start the procedure; the Council cannot start it *ex officio*; the Council has to obtain first the consent of the European Parliament, given with an absolute majority of two thirds of its component members[19]; it has to hear the Member State in question; it has to verify regularly if the grounds on which it detetermined the existence of the clear risk subsist.

It is not clear who has the primary responsibility for starting the procedure and assessing the situation. As 'Guardian of the Treaties', it would seem that the institution with the executive role, the European Commission, is responsible with following the facts and making its findings known to the other institutions. This is confirmed by the Commissions actions in recent years, as it shall be shown in subsection 2.4.

Since there isn't an express interdiction, the Council may follow the procedure and decide to give recommendations and, if those recommendations are not fully observed, it may follow it again and declare the existence of a clear risk.

The second case has two stages, in a logical succession in the sense that sanctions may be applied only after the existence of a serious and persistent breach of EU's values by a Member State is determined.

The second paragraph of Article 7 TEU is dedicated to the first stage. This time the European Council has the discretion to assess the grounds of the matter: whether there is a breach of one or more values; if that breach is serious enough; if it is persistent.

The Commission explained that, in order to determine the seriousness of the breach a veriety of criteria will have to be taken into account, including the purpose and the result of the breach", like the fact that vulnerable social classes are affected and that several values are breached simultaneously. Further, the Commission noted that persistence can be expressed in a veriety of manners, like: adopting legislation or administrative instruments or mere administrative or political practices of the authorities of the Member State that already form the object of complaints or court actions; systematic repetition of individual breaches; repeated condemnations for the same type of breach over a period of time by an international court such as the European Court of Human Rights and not demonstrating the intention to take practical remedial action[20].

[19] Article 354 paragraph 4 of the Treaty on the Functioning of the European Union (TFEU).

[20] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, Brussels, 15.10.2003, COM(2003) 606 final, page 8, available at: http://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-606-EN-F1-1.Pdf, last accessed on 10 March 2018.

The procedure in paragraph 2 of Article 7 TEU is even more restrictive than in paragraph 1. Now there are only two subjects that can start the procedure, a third of the Member States or the European Commission; the prior approval of the European Parliament is still required and the European Council must decide unanimously. However, the vote of the representative of the state in question and the abstentions are not taken into account for achieving unanimity[21].

The third paragraph of Article 7 TEU sets forth the sanctions. This second stage is a possibility for the Council, not an obligation, as deduced from a grammatical interpretation of the text which contains the verb 'may'. Thus, the Council may decide to suspend certain of the rights of the Member State in question, including the right to vote in the Council, although the state shall still be bound by all the correlative obligations.

The Council must act by a qualified majority and must take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The fourth paragraph of Article 7 TEU allows the Council to modify or to revoke these sanctions, also with a qualified majority, if the situation that determined the European Council to declare the breach changes. The principle of symmetry is applied in part, only with respect to the Council's power to apply and modify or revoke the sanction. But, by doing so, the Council makes an implicit decision on the persistence of a serious breach although it does not have the power to declare its existence.

The fifth paragraph of Article 7 TEU sends to the provisions of Article 354 TFEU for the voting arrangements applying to the institutions involved in the two procedures.

One observation that can be made after reading Article 7 TEU is that there is no obligation to follow first the procedure in paragraph 1 of Article 7 in order to be able to start the procedure in paragraphs 2-4 against the same Member State. There is nothing in the text to limit direct recourse to paragraph 2 if the facts of the matter call for a more ferm position from the EU, as there is nothing to limit using them in a succesive manner if the facts of the case allow it.

Also, one can even imagine a simultaneous application of both procedures, the first for some national measures that present risk to one or more EU values and the second for other national measures that amount to breaches of other EU values, with regard to the same Member State. However, such an approach might not be practical. It is probably more efficient to treat the matter as a whole and to take the firmer action.

Another observation is that there aren't any legal elements to facilitate the assessment of the risk or of the breach. The Council and the European Council have the discretionary power to qualify the factual elements presented to them about the measures implemented or about to be implemented by a Member State as representing a clear risk for one or more of EU's values or as amounting to a serious and persistent breach of one or more EU values.

Furthermore, many legal notions do not have a definition in the Treaties. The values in Article 2 TEU, such as democracy, the rule of law, respect for human rights, pluralism or tolerance, do not have a predefined content. They are abstract notions and it is not always easy to say if a certain measure poses a risk to or represents a breach of one of them.

Of course, a systematic interpretation of these notions is possible to some extent,

[21] Article 354 paragraph 1 TFEU.

as for some, like gender equality, there is subsequent EU legislation.

Sometimes the interpretation of the content of these values can be deduced from the Court of Justice of the European Union's jurisprudence, or from that of other international courts, such as the Court of Human Rights or from other international agreements EU Member States are parties to.

Doctrinal works may also offer pertinent arguments and explanations to aid interpretation.

A detailed analysis of the values the EU is founded on would far exceed the scope of this study, as each of them is a vast subject in itself.

However, it is useful to mention a few details about the rule of law. The notion is complex and there isn't consensus on all of its definitional elements. The interpretation of this term also depends on "specific national historical diversities of a political, institutional, legal"[22] and philosophical nature.

Still, there is a rather general agreement that the rule of law has two constituent elements: the formal one, regarding the authority of the lawmaker and the quality of the law (the law should be adopted by a freely and fairly elected majority; the law should be clear, predictable, stable, not retroactive) and the substantive one, concerned with obeying and correctly applying the law (no one is above the law; an independent judiciary; access to justice and judicial review; proportionality; equality and non-discrimination; transparency) [23].

Having considered the broad view of the rule of law, two authors defined "rule of law backsliding as the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal cheks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party"[24].

2.3. Legal effects

Article 7 TEU produces, first of all, declaratory effects. The consequence of applying the procedures described in the first two of its paragraphs is, basically, a warning signal from the other Member States for the Member State in question. As we have seen above, only if the Member State has already breached one or more of EU's values in a persistent and serious manner, concrete sanctions can be imposed, consisting in a suspension of certain rights provided by the Treaties, such as the right to vote in the Council.

The text does not specify what are the rights that may be suspended and offers just the example of the right to vote in the Council. Thus, it is for the institution enabled to apply the sanction, the Council, to choose from the rights established for the Member States by the Treaties that represent EU's constitutional law. The only obligation of the Council is to choose the sanction taking into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

If this is the only limit for the Council's discretion, one can wonder if the Council could suspend, for example, the distribution of funds to that state or its right to vote in all the other institutions.

[22] Bárd, Carrera, Guild and Kochenov, 2016, 53.

[23] See also Kochenov and van Wolferen, 2018, 4-5, Bárd, Carrera, Guild and Kochenov, 2016, 53-56, Leal-Arcas, 2014 and Tamanaha, 2007.

[24] Pech and Scheppele, 2017, 7.

Even if such measures could be imposed it is difficult to get to this point because of the large majorities required for a legal vote and especially because the European Council must decide in unanimity. It is true that the state in question cannot vote (*nemo iudex in causa sua*) and that abstentions are not taken into account, but recent developments have shown that two or more Member States may be in similar situations and express support for each other. The consequence is that the Member States in question could veto the European Council's decision and avoid being sanctioned by the Council.

Since Article 7 TEU uses the singular when referring to a member state, there is nothing in the text to suggest the European Council could do anything else than deal with the situation in each state separately. This conclusion is supported by the principle that responsibility is personal.

On the other hand, there is also the argument that if Article 7 TEU is to be interpreted in the light of the *effet utile* principle, then the two or more Member States should lose their veto of sanctions against the other in case Article 7 TEU is triggered against all of them[25].

The Member State in question could have resorted to using the annulment action established by Article 263-264 TFEU[26] against the Council's decision and against the European Council's decision. The legal requirements regarding what acts can be challenged, by whom and against whom would have been met. The state would have had to observe the time limit of 2 months and to present the factual and legal aspects as to amount to one of the reasons for annulment: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers[27].

However, such a possibility was precluded by the Treaty of Lisbon, which inserted new Article 269 in the TFEU. This text gives the Court of Justice[28] jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 TUE. The action may be filed only by the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in Article 7 TEU. There is a time-limit of one month from the date of such determination and the Court is obliged to rule within one month from the date of the request.

This legal remedy appears as a special type of annulment action, with a specific object: the acts adopted by the Council and the European Council on the basis of Article 7 TEU. The parties may only be the Member State in question and the institution that adopted the act. The reasons for annulment are confined to procedural aspects. For example, an infringement of a procedural requirement would be if the Council decides without the consent of the European Parliament.

The Court does not have jurisdiction to substitute itself to the Council or the European Council and decide otherwise on the grounds of the matter, nor can it apply other, lesser or harsher, sanctions.

The procedure is rapid, but, in our opinion, there is nothing to prevent the Member State from asking the suspension of

[25] See Pech and Scheppele, 2017, 24.

[26] About the annulment action, see Schütze, 2012, 260-273 and Fuerea, 2016, *Dreptul…*, 65-74.

[27] Article 263 paragraph 2 TFEU.

[28] The former Court of Justice of the European Communities. Different from the General Court and the former Civil Service Tribunal, but part of the Court of Justice of the European Union.

application of the act until the Court gives its judgment[29].

2.4 The first attempts to apply Article 7 TEU

Hungary is the first EU Member State that took national measures which raised concerns about the state's commitment to EU values, especially the rule of law. As early as 2011, the President of the Commission adressed the issue of a new Hungarian law that put all media under the control of a media council which contained only members of the governing party[30]. With a comfortable majority in parliament, the governing party made a constitutional reform and then passed a number of other laws crticised by EU officials for non-compliance with the rule of law, such as the one that would affect the independence of the Central Bank or the one lowering the retirement age for judges, prosecutors and public notaries. The Commission started infringement procedures[31].

The Hungarian Prime Minister in office since 2010 explained in multiple speeches that his government has adopted a new approach, illiberalism, which does not reject the fundamental principles of liberalism, but adds a special, national approach[32].

By 2013 the idea of a systemic problem started taking shape and the President of the Comission stated that: "Safeguarding its values, such as the rule of law, is what the European Union was made to do, from its inception to the latest chapters in enlargement.

In last year's State of the Union speech, at a moment of challenges to the rule of law in our own member states, I addressed the need to make a bridge between political persuasion and targeted infringement procedures on the one hand, and what I call the nuclear option of Article 7 of the Treaty, namely suspension of a member states' rights.

Experience has confirmed the usefulness of the Commission role as an independent and objective referee. We should consolidate this experience through a more general framework. It should be based on the principle of equality between member states, activated only in situations where there is a serious, systemic risk to the rule of law, and triggered by pre-defined benchmarks.

[29] See Article 278 TFEU and Article 39 of Protocol No. 3 to TFEU on the Statute of the Court of Justice of the European Union.

[30] Statement by President of the European Commission José Manuel Durão Barroso at the press conference held after the meeting of the Commission with the Hungarian Presidency of the Council, 7 January 2011, Speech/11/4, available at: http://europa.eu/rapid/press-release_SPEECH-11-4_en.htm, last accessed on 10 March 2018.

[31] See, for example, the judgment of the Court of Justice in case C-286/12, available at: http://curia.europa.eu/juris/ document/ document.jsf?text=&docid=129324&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1032099, last accessed on 10 March 2018. The Court declared that by adopting a national scheme requiring compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 – which gives rise to a difference in treatment on grounds of age which is not proportionate as regards the objectives pursued – Hungary has failed to fulfil its obligations under Articles 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[32] See, for example, Prime Minister Viktor Orbán's Speech at the 25th Bálványos Summer Free University and Student Camp, 26 July 2014, Tusnádfürdő (Băile Tuşnad), Romania, available at: http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp, last accessed on 10 March 2018.

The Commission will come forward with a communication on this. I believe it is a debate that is key to our idea of Europe[33]."

This new instrument was to be a soft law one, not legally binding, called the Rule of Law Framework[34]. It was adopted in March 2014 and it is meant to be an early warning tool, a pre-Article 7 TEU procedure. Esentially, it allows the Commission to assess the situation, to issue an opinion about the existence of a systemic threat to the rule of law, to make recommendations and to monitor their implementation[35].

We share the opinion that "Article 7(1) TEU implicitly empowers the Commission to investigate any potential risk of a serious breach of EU values by giving it the competence to submit a reasoned proposal to the Council should the Commission be of the view that Article 7 TEU ought to be triggered on this basis. […] The Rule of Law Framework merely makes more transparent how the communication between the Commission and the potentially offending government shall proceed"[36].

Though it was clearly designed for Hungary, this instrument was to be used first in relation to Poland. After the legislative elections in October 2015, the governing party won an absolute majority and started taking a series of controversial measures. The first was to nullify the election of constitutional judges by the prior parliament and to elect new ones. The Constitutional Tribunal declared the election of the new judges unconstitutional, but the government refused to publish or acknowledge this ruling. This determined the European Commission to follow the Rule of Law Framework and to adopt a Recommendation on 27 July 2016[37], but the results were not positive. Poland refused to comply and even threatened to formulate an annulment action[38] against the Rule of Law Framework, even if it cannot be the object of such an action, since it is not legally binding.

Poland continued on this path, adopting even more concerning measures, like the Act of 22 July 2016, considered a final act of constitutional capture that strongly limited the independence of the Constitutional Tribunal[39], and the three justice laws that allowed the governing party to appoint the president of the Constitutional Tribunal and to reenact a law that had been declared unconstitutional. Also, four new acts were passed in one month, that allowed the government to fire all judges of the Supreme Court and replace the leadership of the lower courts.

In response, the Commission chose to adopt a second Recommendation on 21 December 2016 and a third one on 26 July 2017 and initiated infringement proceedings arguing that the independence of judges is undermined by the introduction of a different retirement age for female and male judges and by giving the Minister of Justice the discretionary power to prolong the mandate of judges who have reached the retirement age, as well as to dismiss and

[33] See State of the Union address 2013, 11 September 2013, http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm, last accessed on 10 March 2018.

[34] European Commission presents a framework to safeguard the rule of law in the European Union, Strasbourg, 11 March 2014, press release available at: http://europa.eu/rapid/press-release_IP-14-237_en.htm, last accessed on 10 March 2018.

[35] For more details, see Kochenov and Pech, 2016 and von Bogdandy, Antpöhler and Ioannidis, 2016.

[36] Pech and Scheppele, 2017, 12.

[37] Available at: http://europa.eu/rapid/press-release_IP-16-2643_en.htm, last accessed on 10 March 2018.

[38] See Articles 263-264 TFEU.

[39] See Śledzińska-Simon and Ziółkowski, 2017, pages 18-21.

appoint court presidents, even if independence is required by Article 19 paragraph 1 TEU and Article 47 of the EU Charter of Fundamental Rights[40]. The course of this infringement procedure has only reached the Reasoned Opinion[41].

The European Parliament has supported the Commission's concerns and adopted three Resolutions: of 13 April 2016, 14 September 2016 and 15 November 2017, calling on the Polish Government to comply with all provisions relating to the rule of law and fundamental rights enshrined in the Treaties, the Charter of Fundamental Rights, the European Convention on Human Rights and international human rights standards, and to engage directly in dialogue with the Commission[42].

The Council, on the other hand, was silent for the most part. It discussed the issue in the General Affairs Council on 16 May 2017 and told the Commission to continue dialogue with Poland, despite criticising Poland for lack of cooperation.

Finally, after two years of unfruitful dialogue with Poland, the Commission decided to activate Article 7 paragraph 1 TEU and to make the formal proposal to the Council. The Commission explained: "It is up to Poland to identify its own model for its justice system, but it should do so in a way that respects the rule of law; this requires it to safeguard the independence of the judiciary, separation of powers and legal certainty.

A breach of the rule of law in one Member State has an effect on all Member States and the Union as a whole. First, because the independence of the judiciary – free from undue political interference – is a value that reflects the concept of European democracy we have built up together, heeding the lessons of the past. Second, because when the rule of law in any Member State is put into question, the functioning of the Union as a whole, in particular with regard to Justice and Home Affairs cooperation and the functioning of the Internal Market, is put into question too[43]."

On 1 March 2018, the Parliament gave its consent for the Commission's proposal to trigger Article 7 paragraph 1 TEU and to ask Poland to address the risk[44]. The procedure is ongoing and, even if the majorities required by Article 7 paragraph 1 TEU are reached, it is doubtful that new recommendations will be observed by Poland. As to sanctions, Hungary has already declared it shall support Poland and implied it will veto an eventual European Council decision in this respect[45]. We shall have to see if the doctrinal view that the two

[40] European Commission launches infringement against Poland over measures affecting the judiciary, Brussels, 29 July 2017, press release available at: http://europa.eu/rapid/press-release_IP-17-2205_en.htm, last accessed on 10 March 2018.

[41] Independence of the judiciary: European Commission takes second step in infringement procedure against Poland, Strasbourg, 12 September 2017, press release available at: http://europa.eu/rapid/press-release_IP-17-3186_en.htm, last accessed on 10 March 2018. For more details on the infringement procedure, see Fuerea, 2016, *Dreptul…*, 112-123.

[42] See, for example, Resolution of 15 November 2017, available at: http://www.europarl.europa.eu/sides/getDoc.do? type= TA&language=EN&reference=P8-TA-2017-0442, last accessed on 10 March 2018.

[43] Rule of Law: European Commission acts to defend judicial independence in Poland, Brussels, 20 December 2017, press release available at: http://europa.eu/rapid/press-release_IP-17-5367_en.htm, last accessed on 10 March 2018.

[44] Press release available at: http://www.europarl.europa.eu/news/en/press-room/20180226IPR98615/rule-of-law-in-poland-parliament-supports-eu-action, last accessed on 10 March 2018.

[45] Viktor Orbán's speech at the 28th Bálványos Summer Open University and Student Camp, 22 July 2017, Tusnádfürdő (Băile Tuşnad), Romania, available at: http://www.kormany.hu/en/the-prime-minister/the-prime-

states could not veto each other's sanctions because that would take away the *effet utile* of Article 7 TEU shall prevail or not.

In Hungary's case the Commission did not activate the Rule of Law Framework, despite multiple resolutions adopted by the European Parliament[46] and despite continuing to criticise some of the measures adopted by the government, like the laws that allowed political control over the appointment of judges and their individual career and even case asignment to specific judges, or the ones that targeted the Central European University and foreign funded non-governmental organisations. The Commission took the view that, unlike Poland, Hungary never refused dialogue and has made some progress[47].

In legal literature, the explanations found are of a more practical nature and focus either on the support Hungary receives in the European Parliament as a member of the largest political group, the European People's Party, whereas Poland is part of a much smaller political group or on the gravity of the situation in the sense that Hungary passed these laws after legally modifying its Constitution by virtue of its large majority in parliament, whereas Poland did it after infringing the decision of its Constitutional Tribunal, which it refused to publish and observe. Poland continued with measures to undermine the independence and legitimacy of the constitutional court. Thus, constitutionality of national legislation can no longer be guaranteed, which in turn affects the principle of mutual trust between Member States[48].

Finally, the European Parliament was the one that took the stand and adopted a Resolution on 17 May 2017 in which it stated its belief that the current situation in Hungary represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU and warrants the launch of the Article 7 paragraph 1 TEU procedure, then instructed its Committee on Civil Liberties, Justice and Home Affairs to initiate the proceedings and draw up a specific report with a view to holding a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7 paragraph 1 of the TEU[49]. The resolution is still being prepared and nothing has been made public yet.

Some concerns have been expressed about certain deficiencies in other Member States, such as Bulgaria, Greece, Italy, Romania and Slovakia[50], but the EU institutions have not indicated that starting the mechanism for the protection of EU values is imminent. Also, Bulgaria and Romania are still under the Verification and Cooperation Mechanism.

2.5. Solutions for increasing efficiency

As deduced from the presentation above, there is a quest for solutions to improve the efficiency of the mechanism that Article 7 TEU represents and/or for complementary measures.

minister-s-speeches/viktor-orban-s-speech-at-the-28th-balvanyos-summer-open-university-and-student-camp, last accessed on 10 March 2018.

[46] For example, the Resolutions of 10 June 2015, 16 December 2015, 25 October 2016 and 17 May 2017.

[47] Pech and Scheppele, 2017, 19.

[48] See Pech and Scheppele, 2017, 23.

[49] Resolution available at: http://www.europarl.europa.eu/sides/getDoc.do? type=TA&language=EN &reference =P8-TA- 2017- 0216, last accessed on 10 March 2018.

[50] See von Bogdandy, Antpöhler and Ioannidis, 2016, page 1. See also Halmai, 2017. For an opinion on the causes that make central and eastern European countries more vulnerable to facing a crisis of constitutional democracy, see Bugarič and Ginsburg, 2016.

The text of Article 7 TEU could be improved, for example, by reducing the majorities for a legal vote in the EU institutions involved, by forbidding Member States that are in similar situations to veto each other's decisions in the European Council or by introducing new types of sanctions[51]. Still, this might prove to be very difficult because it would mean amending the founding Treaties, a procedure which requires each and all of the Members States to ratify the amending treaty[52]. Of course, the Member State or States in question would refuse to act against their own interest. In such a case, Article 48 paragraph 5 TEU provides the matter shall be referred to the European Council and no other legal consequence. Thus, a legal vicious circle, which only leaves the possibility of a political solution.

As we have seen, a complementary measure of the Commission was to start infringement proceedings on multiple specific matters. This has the advantage of the intervention of the Court of Justice and the possibility to apply pecuniary sanctions. The disadvantage is having to fit into the frame of Articles 258-260 TFEU, as interpreted so far by the Court of Justice and not being able to tackle the systemic issue, the situation as a whole. In principle, the Commission or another Member State has to argue that specific obligations provided for the Members States by the Treaties have been disrespected.

However, it was suggested that the Commission could adopt a more ambitious interpretation of its infringement powers and adjust them to deal with Member States that systematically challenge the rule of law by bringing together a set of distinct complaints into a single action and by insisting on reversing the damage caused to the uniform application of EU law across the Union or even by arguing a violation of Article 2 directly[53].

While we find pertinent the first two doctrinal proposals, the last of them seems to create a parallel system with Article 7 TEU. It would appear that the general rule, that violations of EU law can be the subject of an infringement procedure, would be applied in parallel with the special norm, that provides for specific sanctions for the violation of Article 2 TEU.

Furthermore, as we have seen above, the exact content of the concepts behind the values is difficult to identify and some of the criticised measures are often taken in areas of national jurisdiction, where the Court of Justice of the European Union does not have competence[54]. So, relying direcly on Article 2 TEU might mean, at least in part, to subject such measures to the judicial review of the Court of Justice. It is doubtful the Court would agree to take the view of such an extensive interpretation of its powers.

Another complementary measure could be reforming other areas of EU competence in a sense that would affect the rogue state's interests and stimulate it to comply with EU values. A few proposals have been made:

[51] For introducing gradated sanctions, culminating with expelling, see Bugarič, 2016, 14-15.

[52] See Article 48 TEU. For a commentary on this Article, including the problem of what would happen if a Member State does not proceed with the ratification of the amending treaty, see Hartley, 2010, 88-92.

[53] Pech and Scheppele, 2017, 32. In support of this opinion, see Bárd, Carrera, Guild and Kochenov, 2016, 30.

[54] For a concurrent opinion, see Bugarič, 2016, 13.

c) a multi-speed EU[55] or a two-tiered EU[56] with a stronger integration for those in the euro group, since some of the central and eastern European countries, including Hungary and Poland, are not in the Eurozone;
d) withholding or suspending the allocation of EU funds or more strict criteria for funding. Both Hungary and Poland have benefited from important regional and cohesion EU funds;
e) reform of citizens' initiative and political party funding, in order to increase democratic legitimacy[57].

Some of these measures could still be blocked because they would require an amending treaty.

The proposal regarding the different levels of integration[58] offers Member States more choices but might have the effect of discouraging trust in the European project in the countries outside the hard core of integration.

As far as funding is concerned, this would put pressure on the governments of the Member States involved but would affect primarily their inhabitants and the development of those regions of the internal market, diminishing, on the long run, the chances for the state to ever reach the common standards, against the very purpose of the EU funding.

Increasing public participation to decisionmaking and transparency of funding of the parties could have a positive effect on preserving liberal democracy and increasing public trust in the EU, but its results will probably show in some time. It does not provide an answer for the current challenges the rule of law faces in some Member States.

If diplomatic solutions fail, the crisis has the potential to persist for quite a long period of time. The Member State or Member States in question could refuse to observe the Council's recommendations, they could ignore or dismiss the declarations under paragraphs 1 and 2 of Article 7 TEU, they might veto the European Council's decision for another state in a similar situation, they might use their right to file actions on the basis of Article 269 TFEU and even refuse to make any progress after being sanctioned. They could even choose to ignore the Court of Justice's judgement in infringement procedures, just as the Polish government "publicly indicated its intention to ignore the Court of Justice's interim injunction to suspend all logging"[59] in a protected forest.

If a state truly no longer shares all of EU's values and the differences are irreconcilable, an amiable separation might be in the best interest of all parties. If they agree, an international convention and/or an amending treaty could be drafted to decide the terms of the split (*mutuus consensus, mutuus dissensus*).

Also, the Member State could unilaterally decide to leave, using Article 50 TEU, just like the United Kingdom of Great Britain and Northern Ireland did.

[55] See the *White paper on the future of Europe – Reflection and scenarios for the EU27 by 2015*, COM(2017)2015, 1 March 2017, page 20, available at: https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf, last accessed on 10 March 2018.

[56] *Reflection paper on the deepening of the Economic and Monetary Union*, COM(2017) 291 final, Brussels, 31 May 2017, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017DC0291, last accessed on 10 March 2018.

[57] *State of the Union 2017 - Democracy Package: Reform of Citizens' Initiative and Political Party Funding*, Brussels, 15 September 2017, press release available at: http://europa.eu/rapid/press-release_IP-17-3187_en.htm, last accessed on 10 March 2018.

[58] For more about the concept of integration, see Dumitrașcu, 2012, 17-25.

[59] Pech and Scheppele, 2017, 16.

But what if the other Member States decide expelling is the only solution? This would pose problems because, unlike other international agreements[60], the Treaties of the EU do not provide for a procedure of expelling, nor the grounds for it. The EU would have to resort to the rules of public international law[61]. For example, perhaps it may suspend or terminate the operation of the Treaties in relation to the rogue state on the basis of the violation of a provision essential to the accomplishment of the object or purpose of the Treaties[62], as Article 2 TEU can be considered such a provision.

It seems unlikely extreme events would take place. However, the loss of mutual trust and the dissolution of common values and standards could have other serious, unforseen consequences. For example, it was even noted that if the independence of the judiciary in Poland is structurally undermined, this might raise the issue whether Polish courts still constitute 'courts' within the meaning of Article 267 TFEU and can still be permitted access to the preliminary rulings procedure[63].

This is why it is important for all the parties to understand the gravity of these circumstances and to get actively involved in finding the proper combination of legal and political solutions, within a reasonable timeframe, to prevent the deterioration of the situation and irreparable damage to the EU's unity and strength.

3. Conclusions

The developments in some Member States in the last few years, especially the rise of illiberalism in Hungary and Poland, have been interpreted by the European Union's institutions as posing a clear risk of a serious breach of EU values and especially of the rule of law. This brought into the spotlight Article 7 TEU, the mechanism for protecting EU values in the Member States, introduced in the EU's constitutional legislation in 1999 and amended in 2003, in order to prepare for the biggest wave of accession in the EU's history and to welcome central and eastern European fresh democracies.

[60] Article 6 of the United Nations Charter reads: "A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council." Text available at: http://www.un.org/en/sections/un-charter/chapter-ii/index.html, last accessed on 10 March 2018.

Article 8 of the Statute of the Council of Europe reads: "Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine." Article 3 reads: "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I." Text available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680306052, last accessed on 1 March 2018.

For an overview of UN and Council of Europe's monitoring instruments, see Bárd, Carrera, Guild and Kochenov, 2016, 15-26.

[61] See Miga-Beşteliu, 2010, 104-107.

[62] Article 60 paragraph 3 letter b) of the *Vienna Convention on the law of treaties*, concluded on 23 May 1969, available at: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf, last accessed on 10 March 2018. All of the EU's Member States, except France and Romania, are parties to this convention, as results from the status at 10 March 2018: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

[63] Pech and Scheppele, 2017, 35. For more details about the preliminary rulings procedure, see Broberg and Fenger, 2010.

An overview of Article 7 TEU's content and its possible legal effects is necessary now that the EU's institutions are preparing to apply it for the first time. The study has taken a juridical look at the text's strengths and weaknesses, in an effort to assess its efficiency in being a deterrent, as well as a sanctioning means and has presented the steps taken so far by the EU's institutions involved in the procedure in order to trigger Article 7 paragraph 1 TEU against Poland and Hungary. The last part was dedicated to an inventory of solutions for improving the protection mechanism, including complementary measures that might help in convincing rogue Member States to reevaluate their interests and their position and to choose a future in the EU.

The main objective of the research was to add to the legal debate and to the doctrinal works which draw attention to the importance and to the gravity of the subject matter in the hope of more involvement from both EU institutions and Member States in using and improving the existing mechanisms for the protection of the common values, values which define EU's identity and which have been so hard to win in the course of our history.

Related topics for further research could be a detailed analysis of each of the values enumerated in Article 2 TEU, in order to determine their definition and their content and a closer look at the proposals for the EU's reformation in the context of the many economic and political challenges it faces, including the first ever exercise by a Member State of its right to withdraw from the Union.

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REFLECTIONS ON THE RIGHT TO A FAIR TRIAL AND TRUST IN JUSTICE IN THE LIGHT OF THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS[1]

Oana Maria HANCIU*

Abstract

In this article, discussions on the right to a fair trial are mainly influenced by the provisions of article 6 of the European Convention on Human Rights, and in secondary by the other international and national regulations. In the cases of the European Court of Human Rights, the principle of equality of arms is considered to be one of the fundamental elements of a fair trial. Besides this principle, another essential element for a fair process is the independence and impartiality of the courts, and even the impression of an independent and impartial justice in the eyes of public opinion[2].

Keywords: *the right to a fair trial, the independence of the courts, the impartiality of the courts, the equality of arms, ECHR.*

1. Introduction

The European Convention on Human Rights (hereinafter referred to as "the Convention") was adopted in 1950 by the Council of Europe and entered into force in September 1953. The Convention was a symbolic statement of the West's belief and a means of preventing some States of Communism's Return. It was also a reaction to the events that Europe witnessed during the Second World War[1]. The Convention establishes a series of civil and political rights and freedoms, guaranteeing their respect by the states that have ratified it.

Romania has ratified the Convention and the Additional Protocols thereto by Law no. 30 of May 18, 1994, published in the Official Monitor no. 135 of 31 May 1994. Thus, the Convention and its protocols became an integral part of national law, with priority being given to the national courts being obliged to apply immediately the provisions of the Convention and its protocols and the national judgments to be subject to the prescribed control by the European Court of Human Rights.

The purpose of the Convention is therefore to protect human rights. One of these rights is the right to a fair trial, a universal right protected not only by the Convention but also by the Universal Declaration of Human Rights of 1948, the International Convention on Civil and Political Rights of 1966, the American

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[2] Kyprianaou v. Cipru, ECHR, 15 December 2005, aplication no. 73797/01.

[1] Harris, O Boyle&Warbrick, *Law of the European Convention on Human Rights, 3rd edition*, Oxford University Press, 2014, p. 3.

Convention on Human Rights of 1978, The African Charter on Human and Peoples' Rights, and humanitarian instruments, such as, for exemple, the Geneva Convention.

The right to a fair trial is guaranteed in Article 6 of the Convention, as follows: "Everyone has the right to a fair, public and reasonable hearing of the case by an independent and impartial tribunal established by law, which will decide either on the violation of civil rights or obligations or on the merits of any criminal charge against him. The judgment must be pronounced in public, but access to the meeting room may be forbidden to the press and the public throughout the trial or part thereof in the interests of morality, public order or national security in a democratic society, where the interests of minors or the protection of the privacy of the parties to the proceedings so require, or to the extent strictly necessary by the tribunal, where, owing to particular circumstances, advertising would be likely to prejudice the interests of justice.

Any person accused of a criminal offense shall be presumed innocent as long as his guilt has not been legally established."

Thus, according to article 6 of the Convention, the criteria for a trial to be considered fair are: the debates to be public and the case to be examined within a reasonable time. In addition to these criteria, the Court's case-law also includes a number of fundamental principles for a fair trial, namely the principle of equality of arms, the principle of contradictory law, the right of a person accused of silence and of not contributing to his own accusation, and the clear and thorough motivation of judgements.

2. The Principle Of Equality Of Arms - A Fundamental Element Of The Right To A Fair Trial

For over 50 years, the European Court of Human Rights (ECHR) has created an impressive case law, being a source of inspiration not only for the States that have ratified the Convention but also for states that are not under its jurisdiction.

In the case of the ECHR, the principle of equality of arms is considered a fundamental element of the right to a fair trial.

The principle of equality of arms implies that each party is given the opportunity to present its case in such a way that it is not put at a disadvantage to the opposite side[2]. This implies that the accusing authorities present all the material they have, whether they are for or against the prosecution (**Jasper versus the United Kingdom case**).

The purpose of article 6 of the ECHR is "to ensure respect for the right to a fair trial for any individual".

Thus, article 6 (1) of the Convention requires that in order for a trial to be fair, two fundamental principles, namely the principle of contradictoriality and the principle of the right to defense, must be respected, these two ensuring the equality of arms within the process.

A distinctive sign of the ECtHR case-law on article 6 is that a process is examined in its entirety in terms of fairness. This allows some defense rights to be balanced in spite of other rights and interests, provided that the trial as a whole is considered fair to the accused. An example of this is the right of the accused to be present at the hearing of the witnesses.

All evidence must be presented in a public hearing and in the presence of the

[2] Thomassen W., *Everyone has the right to a fair trial, Hague Yearbook of international law, Volume 21,* Martinus Nijhoff Publishers, 2008, p. 5.

accused with the help of a contradictory debate. However, the Court agreed with written testimonies of victims or witnesses if they were too vulnerable to be cross-examined at a public hearing or if it was impossible for the witness to be present.

Moreover, the Court has agreed that in some exceptional situations written testimonies should be accepted even if the identity of the witness is kept secret and the witness can not be confronted with the defense. Thus, the Court tried to defend both the rights of the witness and the rights of the defense. However, the Court has stated that no trial can be considered correct if the decision was taken only on the basis of such a testimony that the defense could not directly participate in[3].

The Court found that there was a breach of the principle of contradiction in the **Dima versus Romania** case, since the Supreme Court of Justice ruled on an accounting expertise to which the applicant had not been summoned. In **Cottin versus Belgium** case, on 2 June 2005, the complainant complained about the fairness of the criminal proceedings in a trial in which he was indicted for bodily injury, since the medical expertise performed to determine the extent of the victim's injury did not respect the principle of contradictory, he being unable to participate in the expertise. The Court held that although the complainant had the opportunity to submit observations to the court on the conclusions of the expert report, it is not clear that he had a real opportunity to comment effectively. As a result of the fact that he was unable to take part in the expertise, the applicant had no opportunity to submit to a counter-interrogation personally or through his lawyer or a medical counselor, the persons questioned by the expert, to make observations examine the parts examined by the expert or ask him to proceed with further investigations. Therefore, the complainant was deprived of the opportunity to comment on an essential piece of evidence, and the Court found that article 6 (1) of the Convention had been violated.

The European Court of Human Rights also ruled in **Grozescu versus Romania** case, in breach of article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial due to non-compliance with the principle of contradictory the domestic judicial procedure.

In fact, the applicant showed that, in the domestic judicial proceedings, after the case remained in the ruling on the exception of the non-recourse to the appeal, the court, in its absence, allowed the filing of the proof of payment of the stamp duty in the case file by the appellant and gave her word on the merits of the appeal.

In the **Moiseyev versus Russia** case, the Court held that there was a lack of equality of arms, since the prosecutor had absolute control over the attorney's access to the lawyer, and more, each lawyer's visit needed the prosecutor's permission and all the documents between the attorney and the detainee were passed under the prosecutor's filter. The Court also noted that the fact that the prosecutor did not give the prisoner access to all the evidence in the file or the refusal to admit witnesses of the defense represents a violation of the equality of arms, in violation, among others, of the principle of contradictory[4].

Moreover, in **Dirioz versus Turkey** case, the privileged position of the

[3] Thomassen W., *Everyone has the right to a fair trial*, *Hague Yearbook of international law, Volume 21*, Martinus Nijhoff Publishers, 2008, p. 7.

[4] Harris, O Boyle & Warbrick, *Law of the European Convention of Human Rights, 3rd edition*, Oxford University Press, 2014, p. 415.

prosecutor in the courtroom did not violate the principle of equality of arms, according to the Court.

In **Komanicky versus Slovakia** case, the Court held that a violation of arms equality was the only situation where only one party participated in the hearing in the absence of the other. At the same time, in the **Wierzbicki versus Poland** case, the Court ruled that parties should be treated equally when there are suggestions of witnesses.

In other cases, the Court held that the principle of equality of arms had been violated and when the parties did not have equal access to the examination of the evidence in the file (**Uzukauskas versus Lithuania** case), the expert was not neutral (**Hentrich versus France** case), or the term the referral of the court was different for the parties, thus making certain favors not granted to the state or to another part of the process (**Stankiewick versus Poland** case).

The Court has also breached the violation of the principle of equality of arms in cases where the state has modified the legislation with retroactive effect, with the intention of influencing the outcome of an ongoing alien process (**Greek Refineries versus Greec**e case). The case concerns the annulment by a legislative act of an arbitration sentence establishing the existence of a state debt.

The Court found that the legislator's intervention in the present case took place at a time when the judicial procedure to which the State was party was pending. The principle of the preeminence of the right and the notion of a fair trial oppose any interference of the legislative power in the administration of justice in order to influence the judicial outcome of a dispute. By intervening decisively in favoring the imminent settlement of the procedure to which he was party, the state violated the rights of the petitioners guaranteed by article 6.1.

3. The Right To A Fair Trial From The Point Of View Of The Independence And Impartiality Of The Courts

In addition to the principle of equality of arms, another element essential for a fair trial is the independence and impartiality of the courts, and even the impression of an independent and impartial justice in the eyes of public opinion[5].

Courts have to judge and deliberate in such a way that the accused and the community as a whole trust their judgment. This must be the mission of national and international courts[6].

If the independence of the courts assumes that the system of courts through which the act of justice is made is not subordinated to executive or legislative power, impartiality implies the guarantee in the eyes of the public opinion that the act of justice is uncorrupted.

The guarantees set out in article 6.1. ECHR also include the duty of the courts to give full reasons for their judgments (**H aversus Belgium** case), in which case the Court held that a well-grounded decision demonstrates to the parties that their case has been properly analyzed.

An eloquent example of the independence of a "court" / tribunal is the **Sramek versus Austria** case. The Court investigated whether it was a "independent and impartial tribunal", finding that the requirements of article 6.1. ECHR had been violated. Thus, the Court stated that "the Tyrol law meets the requirements of article 6.1 as regards the term of office of members of the regional authority (three years) and

[5] Kyprianaou v. Ciprus, ECHR, 15 December 2005, aplicant No. 73797/01.

[6] Thomassen W., *Everyone has the right to a fair trial, Hague Yearbook of international law, Volume 21*, Martinus Nijhoff Publishers, 2008, p. 8.

the limited possibility of revoking them. The procedure has a contradictory character. Members, with the exception of a magistrate, are appointed by the Land Government but designated to act on an individual basis and the law prohibits public authorities from instructing them as to the presence of the three officials of the Land Government Office and it is in principle compatible with the Convention. However, one of them, the rapporteur, who occupies a key post, was hierarchically superior to the real estate controller who reported to the regional authority and represented the Land Government in front of it. Undoubtedly, he could not receive instructions from the controller to follow in the examination of cases, but the Court could not confine himself to assessing the consequences that the rapporteur's subordination to the controller could have in fact: appearances can also be important. Since a court has a person who is subordinate as a function and duties to one of the parties, the judges can legitimately doubt the independence of that person. Such a situation seriously affects the trust that jurisdiction must inspire in a democratic society. "

A similar approach is found in **Absandaze versus Georgia** case, where the Court has stated that although "the Supreme Court judges are elected by the Parliament at the proposal of the Head of State, one can not assume that judges receive instructions from him in their judicial work."

In the **Sacilor-Lormines versus France** case, the Court held that "the mere nomination of judges by a member of executive or by Parliament does not create a relationship of dependence, provided that once appointed they do not have any pressure or instructions in the exercise of their duties. "

Also, in **Filippini versus San Marino** case, the Court stated that although some political sympathies may play a role in the nomination process, it is still an insufficient criterion to raise doubts about the independence and impartiality of judges.

On the other hand, in the **Salov versus Ukraine** case, the Court held that there had been a violation of article 6.1 of the Convention, considering that there were insufficient safeguards against the external pressure of judges. The Court held that there were many legislative and financial loopholes, in the absence of which there was the possibility of pressure to influence both the appointment of judges and the initiation of disciplinary proceedings or the impact on their professional development.

In the **Pescador Valero versus Spain** case, the applicant claimed that one of the Supreme Court judges was impartial, because he is an associate professor at the University that is a party to the proceedings. The Government opposed this argument as the applicant brought this matter to question two years after the start of the trial, which was the reason for the judge's refusal to withdraw. The Government's argument was not accepted by the Court. The Court has stated that under Spanish law a judge is obliged to withdraw if there are certain reasons, without waiting to be asked to withdraw for incompatibility. Concerning the lack of impartiality, the Court stated that the judge had received considerable incomes from the University, from didactic activity, and the fact that the University was part of the process objectively raised doubts about impartiality. Thus, in this case, the applicant's request was considered reasonable.

Over the years, the Court has outlined "criteria" to determine the independence and impartiality of the courts.

As regards the independence of the courts from legislative and executive power, the Court is guided by the following "criteria": "the manner of appointment and the term of office of the members of the

court; the existence of protection from outside interventions by the executive or parties; the existence of appearances of independence. "[7]

The "Criteria" of the Court regarding the impartiality of the court are analyzed both objectively and subjectively. From a subjective point of view, "the impartiality of the court is analyzed to the contrary", and from an objective point of view the Court can investigate whether there are "sufficient safeguards to exclude any partial suspicion. The court can use in its appreciation even the appearances. "[8]

And internationally, there have been proclaimed several principles on the independence of justice, as follows:

The United Nation Basic Principles on the Independence of Justice state that:

1. Independence of justice must be guaranteed by the State and enshrined in the Constitution or national laws. It is the duty of all governments and other institutions to respect the independence of justice.

6. The principle of the independence of the judiciary entitles magistrates and obliges them to ensure that judicial proceedings are conducted fairly and with due respect for the rights of the parties.

In the European Charter on the Status of Judges, Article 1, General Principles, states that:

1.1. The statute of judges seeks to ensure the competence, independence and impartiality to which every person is legitimately expected of the courts and of every judge entrusted with the defense of his or her rights. It excludes any provision or procedure that could put in danger the confidence in such competence, independence or impartiality.

4. Conclusions

In the light of what has been said in this article, we can conclude that the independence of the judiciary and the impartiality of the judges is a fundamental guarantee of a fair trial. Although there are some differences between the judicial systems in the European Union, the principles are the same.

At the same time, the principle of equality of arms is considered to be one of the fundamental elements of a fair trial, repeatedly reiterated in the case law of the European Court of Human Rights.

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[7] Hatneanu Diana Olivia, Cojocaru-Stancesu Raluca, Cum să formulăm o cerere la CEDO,Hamagiu Publishing House, 2009, p. 31.

[8] *Ibidem.*

COMPUTER SEARCH VERSUS TECHNICAL-SCIENTIFIC FINDING

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Abstract

The study intends to establish delimitation between computer search and technical-scientific finding, having as a starting point certain cases encountered in the judicial practice when the law enforcement authorities confused the scopes of these two evidentiary procedures. The author emphasises that such an error can injure the fundamental rights of the parties of the criminal case, including the right of defence that the suspect or the defendant has, and can lead to the exclusion of the gathered evidence.

Keywords: *search, technical-scientific finding, computer system, the role of the specialists, the exclusionary rule.*

1. Introduction

It is a more and more frequent practice that law enforcement bodies, especially during the criminal investigation stage, confuse the two technical evidentiary procedures: computer search and technical-scientific finding of the storage media.

The situation seems to be generated by the fact that both investigative methods involve the support of specialists in fields that exceed criminal procedure, which tends to generate the perception that it is one and the same procedure.

Such an evaluation is actually false, and the decision for a technical-scientific finding when the case asks for a computer search can lead to a breach in certain procedural rules that impact on the rights, which are guaranteed as a fundamental principle for the parties of the trial, including on the right of defence. The problem does not imply a simple displacement of evidentiary procedures and this is due to the fact that the Criminal Procedure Code stipulates considerably different norms in respect to the computer search compared with the technical-scientific finding. Therefore, the consequences can take severe forms, up to the point of a nullity of the procedure and to the exclusion of evidence.

This study intends to wise up the fundamental differences between the two evidentiary procedures and to identify the situations and circumstances in which the judicial authority can resort to one of them and to offer solutions in order to rectify an inconsistency in case of evidence collection during a criminal case. The analysis is structured based on a real case identified in the practice of the criminal investigation bodies, and the arguments shall capitalize the aspects that the doctrine has developed till now regarding the scientific evidentiary procedures.

Content

Jurisprudence recorded the following situation:

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In the case no. 183/P/2013 run by a unit of the prosecutor's office, several documents were collected as evidence and, according to the prosecutor; they were obtained during a technical-scientific finding of a **memory-stick**. The technical-scientific finding is performed by specialists who work within an authority outside the General Prosecutor Office.

The examined memory-stick had been previously lifted from a person's house place in the course of a house search authorized by the judge for rights and liberties.

After the house search was completed, the prosecutor asked the judge for rights and liberties for the authorization of a computer search on the memory-stick, under the provisions of Article 168 Criminal Procedure Code, because the memory-stick is a computer data storage medium [art. 181 Criminal Code]. The judge for rights and liberties **authorized the computer search,** explicitly pointing out the legal provisions to be complied with during the evidentiary procedure.

After the computer search was authorized, the prosecutor actually ordered **a technical-scientific finding** over that computer data storage medium. In the order that authorized the search, the prosecutor referred to the resolution and the authorization of a computer search.

The designated specialists started to search the memory-stick and identified several scanned documents and printed them in a written form. A **technical-scientific report** was written, containing the technical methods used to access the computer data storage medium, and the written documents were attached to the file case as evidence.

From the above mentioned summarized presentation, we notice that the prosecutor used the authorization of a computer search to order a technical-scientific finding over a computer data storage medium. At least apparently, this latter procedure was the one to be performed.

The juridical problem is actually generated by the considerable differences in regards to the procedural circumstances of each of the two evidentiary procedures.

Thus, according to Article 172 paragraph (9) Criminal Procedure Code, the technical-scientific finding may be ordered by the criminal investigation body when there is a peril for the evidence to be lost or for the facts to change or an urgent clarification of the facts and circumstances of the case is needed.

According to Article 181[1] paragraph (1) Criminal Procedure Code, the criminal investigation body identifies the object of the technical-scientific finding, the questions that the specialist has to answer to and the time limit for this action. The criminal law doctrine noticed that, unlike search, in the case of a technical-scientific finding, the law does not stipulate the obligation of the judicial authorities to present the objects to the parties and likewise nor the possibility for the parties to have a party-specialist[1].

On the other hand, the computer search is ordered when an investigation of a computer system or of a storage media is required. Due to the fact that such a procedure is a blatant intrusion into a persons' private life, the previous authorization from a judge for rights and liberties is compulsory. Moreover, according to Article 168 paragraph (11) Criminal Procedure Code, the computer or a computer data storage medium search is performed in the presence of the suspect or of the defendant, and he is allowed to be

[1] M. Udroiu, A.M. Şinc în M. Udroiu (coord.), *Codul de procedură penală. Comentariu pe articole*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2017, p. 899-900; B. Micu, R. Slăvoiu, A.G. Păun, *Procedură penală. Curs pentru admiterea în magistratură şi avocatură*, 3rd edition, Hamangiu Publishing House, Bucharest, 2017, p. 172.

attended by a trustful person and by his attorney.

Likewise, we can notice a difference of content between the procedural documents written at the end of each procedure. Thus, the technical-scientific finding is followed by a report including the description of the operations performed by the specialist, the methods, the programs and equipments used, and of the technical-scientific finding conclusions [art. 181^1 paragraph (2) Criminal Procedure Code], while the computer system search ends with a written record that contains other type of data [for example, according to Article 168 paragraph (13) letter c) Criminal Procedure Code, the name of the persons who assist the search].

Due to these differences, the confusion between the two evidentiary procedures generates severe effects for the criminal trial, and leads even to the avoidance of certain norms, which have the purpose to guarantee the parties' defence right during a criminal trial.

Thus, the substitution of a computer search with a technical-scientific finding triggers the consequence that the person from whom the storage media was taken is not going to be present during the technical operation procedure because the law does not enforces the obligation that the criminal investigation body or the specialist invites or asks the person to be present during the procedure. Such an obligation is stipulated for the computer search, and not for the technical-scientific finding.

Subsequently, as the party is not present and has no knowledge of the performance of the evidentiary procedure (because, we recall it, there is no obligation of telling the parties about the performance of the technical-scientific finding), the party will not know what evidence was extracted from that specific storage media and therefore he will not be able to certify in any way (for example, with a signature) the fact that the evidence was obtained during that evidentiary procedure.

Under these circumstances, due to the fact that it is a violation in the criminal procedure norms, the problem of nullity of the evidentiary procedure raises, the natural consequence being the exclusion of the gathered evidence.

We add the fact that, under these circumstances, there is the risk that the evidence is irremediably lost for the case. Theoretically, we do not exclude a new performance of an evidentiary procedure under the law, but this option is rarely encountered in practice because the prosecutor usually orders that the computer data storage medium is given back to the suspect/defendant immediately after the specialist searched the content of the device; the case file shall only keep the copies ("clones") on which the procedures were performed. Under these circumstances, there is an obvious risk that the original is later destroyed by the suspect/defendant, as he has no interest to keep it especially if he knows that the data on the device are unfavourable to him during the trial. Consequently, the evidence that remains in the file ("the clones") automatically looses its function to support the circumstances of the case that it apparently shows.

Under these circumstances, a correct delimitation of the two evidentiary procedures is necessary.

We note that **computer system search** designates the procedure for the **investigation**, **discovery**, **identification and collection** of evidence stored in a computer system or in a computer data storage medium [Article 168 paragraph (1) Criminal Procedure Code]. Due to its technical characteristics the computer system search is performed either by specialized police personnel, or by specialists that work within the judicial

authorities or somewhere else [Article 168 paragraph (12) Criminal Procedure Code].

Instead, the technical-scientific finding designates the procedure of using the knowledge possessed by a specialist to **analyse and explain certain evidence** in possession of the judicial body. This procedure asks for a specialist because the judicial authority cannot understand and assess, exclusively on its judicial background, the information contained in the evidence because this information belongs to another technical area and not to law area.

This difference is eloquently described by the criminal law doctrine, which notes that: "The criminal investigation bodies **collect** the traces and the material evidence during various tactical forensic activities: search on the scene, collection of objects and documents, **search,** establishment of the flagrant crime, etc. The traces and the material evidence **are of no value to the case as long as they have not been analyzed, interpreted or capitalized** in order to collect the maximum of data needed to contribute to the elucidation of various circumstances regarding the commission of the crime, the offenders, etc. for the purpose of finding the truth. For **the capitalization of the traces and material evidence,** for the above mentioned purpose**, adequate specialized knowledge and technical means are needed, which the criminal investigation bodies, regardless of their equipment**, **do not possess.**" It is stressed out that ordering of technical-scientific findings is necessary "in order to ensure **the scientific capitalization** of the traces and of the material evidence" [2].

Consequently, although the two evidentiary procedures – computer system search and technical-scientific finding – are similar because, due to their technical characteristics, they ask for the presence of specialists, the essential difference consists on **the completely different purpose** that the specialists have.

Thus, for the computer system search, the specialist **limits to discover, identify and collect the evidence** found in the computer system, but he is not assigned to analyse them.

On the other hand, for the technical-scientific finding, the specialist's role is precisely to support the judicial authorities to analyse and understand the technical information that the evidence reveals.

We can say that the relation between the two evidentiary procedures represents an exchange, for the situation of computer data, of the classical relation between a house search and a technical-scientific finding. If, for example, "a work of art" is found in a suspect's house and the criminal investigation body suspects it was stolen, it is absolutely necessary to establish if that "work of art" is the original or a copy. In this case, the specialist's support does not consist in finding the evidence, because it is collected during the house search. In fact, thanks to his specific knowledge in the art field, the specialist analyzes the inherent characteristics of the evidence, which, obviously, the criminal investigation body cannot perform.

If the specialist limits to identify the existence of certain documents (for example, bills, agreements, notes, photos, etc.) in the computer data storage medium, and he later on prints them, we consider that he does nothing more than to identify a computer data storage medium and to extract various information that can turn into evidence. In this case, we cannot talk about the specialist's contribution to the interpretation of the data, as it is obvious that the data have no technical nature that recalls for the person

[2] C. Aioniţoaie, I.E. Sandu (coord.), *Tratat de tactică criminalistică*, Carpaţi Publishing House, 1992, p. 238-239.

who identified and printed them to be an IT specialist. Therefore, the support of the specialist is not necessary for the scientific capitalization of the evidence, because such evidence has no scientific nature, and his support is necessary only to identify the evidence, as it is stored on a computer system.

The evidentiary procedure for this case is actually a genuine computer system search.

Technical-scientific finding is yet performed when, for example, the ITspecialist's role is to analyze the software characteristics (functions, capacity, the possibilities to encrypt, etc.) after that software was discovered during a computer system search on a hard drive. In this case, the specialist contributes, based on his skills, to the analysis of the criminal method or result, which the criminal investigation body could not make without his support.

Conclusions

A fair delimitation between the various technical evidentiary procedures stipulated by the criminal procedure legislation is essential for the proper conduct of the criminal investigation activities.

The right identification of the procedure that has to be performed in a certain criminal case, taking into consideration its characteristics, can ensure the premises for the compliance with the fundamental rights of the parties during the criminal trial and, at the same time, reduces also the risk to apply the exclusionary rule.

Taking into consideration the fact that collecting evidence in a criminal case is a difficult task, the consequences of errors when an evidentiary procedure is ordered and performed can hardly be repaired and, most of the times, they will affect the solution of the case.

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THE RIGHTS OF A PERSON DEPRIVED OF LIBERTY OF MAINTAINING FAMILY TIES IN FIVE EUROPEAN COUNTRIES

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Abstract

A prisoner's life can often be a scary way of life for many people, which is why many individuals don't want to be close to people who have been imprisoned, for obvious reasons.

But the reality is that those who execute prison sentences, sooner or later, are liberated from prison and re-enter en society. Resocialization is a hard and difficult process to be fulfilled, but obviously not impossible.

In trying to redress the behaviours of those who have chosen the wrong way of life, family involvement is essential, especially in terms of maintaining mental health, and in the hope that at the end of the punishment, at the exit of the penitentiary there will be someone waiting there for them.

The present paper aims to analyze the rights of inmates to keep in touch with their families, stipulated in the legislation of Five European countries, the similarities and possible differences of their approach in the desire to identify the best regulations in this field, with best results in re-socialization.

However, it is known that permanent contact with the family increases the confidence in the person self-esteem so that he / she overcomes the bad moments of life, as well as in the case of the prisoners the existence of more rights to maintain contact with the family is a desire.

Keywords: *rights, deprived of liberty, European country, family, re-socialization.*

1. Introduction

The incarceration is an unusual situation that deprives the person convicted of both freedom and his familiar and family environment.

Sentencing a person to the execution of a custodial sentence is an exceptional measure that is applied by the court in the case of those offenses punishable by life imprisonment or imprisonment.

In most cases, when the situation permits, the law provides rules that have the effect of avoiding the deprivation of liberty, precisely because of the obvious negative effects that the isolation of society can provide on individuals.

However, there are many cases where the enforcement of a custodial sentence is mandatory, and the data on the number of persons imprisoned in Romanian prisons confirms it.

According to World Prison Brief, on January 27/ 2018, 22,988 people were imprisoned in Romania[1].

Following the Regulation on the organization and functioning of penitentiaries, their purpose is to ensure the execution of custodial sentences and the measure of preventive arrest and to ensure the recuperative intervention, facilitating the

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[1] http://www.prisonstudies.org/country/romania.

empowerment and reintegration into society of persons deprived of their liberty.

A success of re-socialization involves first and foremost the awareness of the consequences of the committed offenses and the violation of social norms.

Changing the mentality is a route that staff in charge of educational and re-socialization activities in penitentiaries go without results if this titanic work is not based on factors outside the penitentiary, factors that are represented by family and friends.

The existence of families waiting for them to leave the penitentiary is a motivation for convicted people not to let themselves to be fooled into negative feelings and violent starts, sometimes suicidal.

Romanian legislation provides rights for arrested and convicted persons to keep in touch with their families or close persons, being in this respect in harmony with European Union provisions.

An analysis of the rights of persons legal provisions deprived of their liberty in countries in Europe can be a good thing in identifying a complete and effective picture of these rights.

In doing so, the laws of Five European countries, namely Spain, the Netherlands, Belgium, the Republic of Moldova and Romania, were analyzed.

Their choice was based on geographic aspects (taking the extremes of the Western part of Europe, in this case the Netherlands, Belgium and Spain) constitutional (some being republics, other monarchs) and EU membership (Moldavian Republic, neighbour to our country but at the same time it is not part of the European Union).

At the same time, the fact that those peoples origins, their habits and their lifestyle are different, but also with common elements has influenced their choice even more, for the radiography of how each state perceives the connection that a person should have with his family.

2. Paper Content

2.1. Spain

The Spanish legislation provides for convicted person rights to keep in touch with his family, the elements common to the Romanian legislation, but also different aspects.

The normative framework governing the rights to stay in contact with the family, which have convicted persons in Spain, is the Organic Penitentiary Law no. 1 of 1979 and the Law on the Penitentiary Regime, Royal Decree no. 190/1996.

These rights are:

- the right to correspondence;
- the right to visit, which is divided into three categories, an intimate visit, a visit to relatives and friends as well as a family visit;
- the right to telephone conversations;
- the right to receive packets.

Art. 51 of the Organic Penitentiary Act explain that convicted persons have the right to communicate periodically, both verbally and in written form, in the language they understand, with their family or friends.

These communications are done in such a way as to respect as much as possible the privacy of individuals and the way these communications are conducted without violating the security rules. In some cases, written or verbal communications may be suspended or intercepted, reasoned, with the authorization of the director of the penitentiary unit.

Art. 52 of the Law no. 1/1979, provides that in the event of death, illness or serious injury of the convicted person, the director shall immediately inform his / her family or person designated by the sentenced person. Also, if a parent or a person close to

the convicted person has died or is in serious condition, the convicted person will be immediately informed.

The detainee has the right to inform his or her family, about incarceration, as well as the transfer to another penitentiary.

In art. 53 of Law no. 1/1979, it is inserted that the penitentiary units will provide annexes, specially arranged for the family or intimate visits of those convicts who do not have a permit to leave the penitentiary.

Art. 41 of the Penitentiary Regime Act, Royal Decree no. 190/1996, provides that it is foreseen that visits and communications will be made in the manner necessary to meet the special needs of foreign detainees to which the rules applicable to Spanish citizens will apply in accordance with the present normative act.

According to art. 42 of the same Royal Decree no. 190/1996, the usual visits are carried out at least twice a week, for a period of at least 20 minutes, the detainee being allowed to be visited by up to 4 persons at the same time. If the location allows, the convicted person may accumulate the time for 2 visits in one.

In order to be able to visit the detainee, the family must provide evidence of family ties, and for those who are not family members, the penitentiary director's authorization is required.

Article 43 of the aforementioned normative act provides for the possibility of restricting this right in the case of violation of security rules, communicating this fact to the detainee.

Another right provided by Royal Decree no. 190/1996, in art. 45, is the possibility for inmates to have an intimate visit, a visit to relatives and friends, and a family visit.

These three types of visits are given by the categories of visitors that may come to the detainee.

Thus, the intimate visit is granted at the request of the detainee, at least once a month, which cannot be less than 1 hour but not more than 3 hours, unless the security rules prohibit it.

The visit of relatives and friends, as the name implies, is that category of visit that is granted for family, extended family and friends, on request, with a minimum of 1 hour and a maximum of 3 hours, at least once a month.

People presenting for an intimate visit or for relatives and friends do not have the right to bring packets or to be accompanied by minors (in case of intimate visits).

Family visits are made on demand and run between the detainee and his or her spouse or person with a relationship similar to that of spouses and children not older than 10 years of age. The duration of this type of visit is a maximum of 6 hours and is done at least 2 times a week.

According to art. 47 of the Penitentiary Regulations, detainees have the right to make phone calls if their families live in remote localities and cannot travel to visit it and if the detainee has to communicate some important issues to the family, the defender or another person.

In those situations permitted by the penitentiary rules the incarcerated person have the right to telephone communications that shall be made at a maximum of 5 calls per week in the presence of a supervisor and may not take more than 5 minutes.

The value of the conversations will be borne by the detainee, except those related to the communication of the penitentiary entry and the transfer to another penitentiary.

Telephone calls made between detainees from different penitentiaries can only be made on the basis of the director's authorization.

According to art. 50 of the Regulation for the organization of penitentiary units, the detainee can receive no more than two

packages per month, except for the ones included in the closed regime which can receive only one package per month and the weight of each package cannot exceed 5 kg, containing books, publications, or clothes.

2.2. Netherlands

As far as the legislation on the rights of persons deprived of their liberty is concerned, in Netherlands those rights are close to those in Spanish law, but of course with specific features.

The classification of rights covered by this analysis is:

- the right to correspondence;
- the right to visit;
- the right to telephone conversations;

The rights of convicted persons are laid down in the Penitentiary Principles Act, within the framework of Art. 38, which provides that the detainee is entitled to receive visits in accordance with the rules laid down in the Regulations for at least one hour per week.

It is foreseen that the Minister of Justice may lay down additional rules on the admission and refusal of a visit, and that the rules are set out in the Organizing Regulations on the request for a visit.

Also, it is stipulated that the director of the penitentiary unit may at the same time limit the number of persons admitted to the detainee, if necessary in order to maintain order or safety in the unit.

The director may refuse to allow the detainee to visit a particular person or persons if this is necessary for the maintenance of order and safety in the institution for the purpose of preventing or investigating offenses or for the protection of victims or other persons involved in committing the deed. This refusal may be maintained for a maximum period of 12 months.

Also for the safety reasons outlined above, the executive director of the penitentiary unit may establish that the prisoner's visit by persons outside the penitentiary is carried out under supervision. This surveillance may involve listening or recording the conversation between the visitor and the detainee, the detainee being informed of the nature and reason of the surveillance.

The Director may discontinue the visit within the specified time limit, with the intention of removing visitors from the institution if necessary to maintain order and safety in the institution for the purpose of preventing or investigating offenses or for the protection of victims or other persons, involved in the act.

At the same time, among the rights granted to the convicted persons are also those related to making phone calls with persons outside the penitentiary unit.

Art. 39 of the Penitentiary Principles Act indicate that convicted persons have the right to make one or more telephone calls, at least once a week, at the times and places established by the organizational regulations, from the telephone stations in the prisons.

The costs of calls made by persons deprived of their liberty will be borne by them, unless the director of the prison unit decides otherwise.

The telephone conversations made by or with the detainee may be supervised and recorded, with the consent of the director, if necessary to establish the identity of the person with whom the prisoner carries a conversation, if this is necessary to maintain order or safety in unity, protection of public order or national security, the prevention or detection of criminal offenses and the protection of victims or other persons involved in committing offenses.

The person concerned will be informed of the nature and the reason for the

oversight, this supervision assuming either listening to a phone conversation, live or listening to a recorded telephone conversation.

By the Council's provision on recording telephone conversations and storing and providing recorded telephone conversations, other rules on telephone call surveillance may be established.

As with the right to visit, the Director may limit the right of the prisoner to hold a particular telephone conversation or certain telephone conversations or to conclude a telephone conversation while allowed if this is necessary for the same reasons as mentioned above up. The period for which this right may be limited is no more than 12 months.

Another right that is related to keeping in touch with the family is the right to send and receive letters and documents by post, provided in art. 36 of the Law on Penitentiary Principles.

As with the other rights mentioned above, the law provides, in addition to the right itself, the limitations of its exercise. Thus, the text of the law indicates that the director is authorized to inspect envelopes or other postcards from or intended for detainees to detect forbidden goods.

Where envelopes or postcards originate from or intended for the persons or bodies involving human rights protection, examination of the documents can only be carried out in the presence of the prisoner concerned.

Also under the control that the Director can make on documents sent or received by mail, the law stipulates that these correspondences can be supervised, which may include copying letters or other postcards or letters. The detainee is advised in advance of the surveillance.

The Director has the possibility to refuse to dispatch or deliver certain letters or books or postal orders, as well as the enclosed items, if necessary to:

- keeping order or safety in the unit,
- the protection of public order or national security,
- preventing or detecting crimes,
- the protection of victims or other persons involved in committing offenses.

2.3. Belgium

The rights of detainees to keep in contact with the family in Belgium have the same rights as in the other mentioned states, namely:

- The right to visit;
- The right to correspondence;
- The right to telephone conversations.

The content of the detainees' rights is laid down in the Law on Principles on the Administration of Prison Facilities and the Legal Status of Detainees of 05.02.2005.

Thus, the right to visit in Belgian penitentiaries is a table visit, a visit with a separator, an intimacy visit and a children's visit.

The visit to the table is done in the special room assigned to this activity and represents the normal visit.

The visit with the separator is done in a space provided with a screen or window, the detainee cannot be reached.

The cases that lead to the application of this visit system, with separator, are:

- If there are reasonable suspicions that incidents that could endanger order and security may occur during the visit;
- At the request of the prisoner or visitor;
- If the former detainee or his / her visitors have violated the regulations governing the visit and there are reasons to believe that these deviations will be repeated;
- If the detainee was previously disciplined, where only a visit with a

separator is allowed;

- If the detainee is included in an individual security regime, where only a visit with a separator is allowed.

From the presentation of this type of visit, it follows that visiting with a separator is the exception in the exercise of the right to visit.

The intimate visit consists of an unattended visit, which takes place in an intimate space, without being subjected to supervision by the penitentiary staff. This type of visit can be organized at least once a month for a minimum of 2 hours. An inmate may request this type of visit after at least one month of detention.

People who can benefit from this type of visit are husband, wife, legal partner or concubine, children, parents, grandparents, brothers and sisters, uncles and aunts.

The law is limited in terms of the persons who may be included in this visit.

In order to be able to benefit from this type of visit, the visitor, who have not family ties with the detained, must prove a sincere relationship with the person incarcerated by showing an interest in the detainee over the past 6 months.

As regards the children's visit, an activity for the children and their detained parents is organized at least once a month.

As mentioned above, another right that helps maintain the ties with the family and social environment of the detainee is that of correspondence.

Belgian law allows any detainee to send and receive an unlimited number of letters, according to art. 54 of the Law on Principles concerning the Administration of Penitentiary Establishments and the Legal Status of Detainees of 05.02.2005.

Correspondence that the detainee receives from his or her family and other people is controlled to contain no prohibited articles or substances. Only if there is a danger to the order and security in the penitentiary the correspondence will be read, the director of the penitentiary unit will decide in the immediate form that the objects or letters are not handed over to the detainee but kept in a depot, informing the detainee about these matters. The detainee will received those goods at the time of release.

Correspondence that detainees send, as a rule, is not verified, however, in case there are suspicions of a threat to order and security, correspondence will be verified and, if necessary, it will be retained.

The third right to keep in touch with the family is the right to telephone calls and other means.

Unlike the countries above, Spain and the Netherlands, the legislation in Belgium is more permissive in terms of making phone calls. Thus, phone calls can be made every day, at the expense of the prisoner, from fixed or GSM stations. Phone posts are located on the cell corridor, each prisoner receiving a personal code that he inserts into his phone, and the payment of calls will be made from his personal account.

The text of the law does not specify any time limit for the conversations made.

However, if there are indications that phone calls endanger the order and security of the penitentiary, the director of the unit will forbid totally or partially a detainee to exercise the right to make telephone calls.

Within the first 24 hours after entering the penitentiary, the detainee is entitled to a free national or international free phone call of 3 minutes.

The specificity of this right, with respect to the other legislation under consideration, is that these talks cannot be recorded nor heard. Penitentiary management can only check the person with whom the prisoner held the call and how long this conversation lasted.

2.4. Moldovian Republic

The law governing the rights of convicted persons in the Republic of Moldova is the Decision no. 583 from 26.05.2006 regarding the approval of the Penalty Execution Statute of the convicted persons and Code no. 443 / 24.12.2004 on the Execution Code of the Republic of Moldova.

Detainees from Moldovan penitentiaries have the following rights closely related to maintaining family ties, according to art. 87 of the Decision no. 583/2006:

- have the right to communicate the name of the penitentiary to the family and close relatives;
- receive packets of supplies, parcels, bands and keep food, except those requiring heat treatment before being consumed and alcoholic beverages;
- to acquire and receive in the packages of necessities in the assortment provided in Annex no. 6, for storage and / or consumption;
- at meetings with relatives and other persons of a duration and number determined by the legislation;
- To phone calls from the public telephone, on its own, in the manner and under the conditions established by the Execution Code;
- Receive and dispatch, on their own, letters, telegrams and petitions, without limiting their number, in the manner and under the conditions established by the Execution Code;
- For own account, send to relatives or other persons parcels, packages and bands, under the conditions stipulated by art. 211 of the Code of Enforcement;
- In case of death or serious illness of one of the close relatives or in other exceptional personal circumstances, as well as in other cases, under the conditions provided by art. 217 of the Enforcement Code, detainees are given the right to move without escort outside the penitentiary for a short period of time.

The normative act stipulates that the detainee has the right to receive during the year at least one short-term visit of up to 5 days outside the penitentiary for visiting the family, relatives, guardian or curator, as the case may be, and convicts enrolled in higher education institutions or specialist backgrounds - for the duration specified in the Labour Code for examinations.

In order to benefit from this right, the sentenced person has to execute the joint punishment or re-socialization, and be included in the release preparation program if it is positively characterized.

Sentenced persons are entitled to short and long-term meetings. Long-term meetings can take place outside the penitentiary, with the right of the convict to reside with family members, according to art. 213 of the Code no. 443 / 24.12.2004 on the Execution Code of the Republic of Moldova, for a period of 12 hours to 3 days, the convict paying the expenses incurred by the long-term meeting.

Short-term meetings with the spouse, relatives up to the fourth degree inclusive, or with another person indicated by the convict, are given for duration of 1-4 hours. These meetings are held in specially arranged areas, under visual supervision or through video systems by the representatives of the penitentiary institution administration.

The detainee is allowed to meet up to two mature persons with whom his / her minor children may come, as well as close relatives who have not reached the age of the majority (brother, sister, nephew, niece).

The detainee is entitled to a short term meeting per month and a long-term meeting per quarter.

There is no right to long-term interviews with convicts who:

a) the right to long-term meetings has been suspended;
b) who were initially transferred as a disciplinary sanction;
c) sentenced to life imprisonment in the initial regime.

The number of meetings mentioned above may be exceeded in order to stimulate convicts.

Thus, more than 4 short-term meetings and 2 long-term meetings per year are provided as incentives, according to Decision no. 583 of 26.05.2006, art. 280.

When determining the visit period allowed, the behaviour of the detainee, the periodicity of visits, the total number of visits of the prisoner concerned, as well as the number of visits to the prison, etc., are analyzed.

Incentive appointments are only granted to the spouse and relatives and cannot be given to others.

Meetings between detainees placed in different penitentiary institutions are forbidden.

The director of the penitentiary unit approves meetings between the detainees, if the detainees are in the same penitentiary institution and if there is a marriage relationship between them, based on documents.

It is not allowed to divide the time for a visit in more short ones, but replacing the long-term meeting with the short term is only allowed at the written request of the sentenced person.

Sentenced prisoners of the Republic of Moldova have the right to make phone calls of up to 15 minutes, including the possibility of changing long and short-term meetings with telephone conversations.

For marriage, the long-term and short-term meetings on this occasion are not included in the set number of meetings.

The meeting takes place after a meeting permit issued by the prison director following the request of the detainee or the visitor.

The administration of the penitentiary may order a ban or discontinuation of a meeting if there is a suspicion that the order and safety in the penitentiary unit may be jeopardized.

In accordance to art. 305 of the Decision no. 583 of 26.05.2006 regarding the approval of the Penalty Execution Statute by condemned persons, the discussion at the short-term meetings is held in the language chosen by the persons arriving on the visit. If the representatives of the penitentiary administration do not know the spoken language, an interpreter or other person (except for the detainees who know the language) may be invited to oversee the discussion.

According to art. 313, from the Decision No. 583 of 2006, detainees can receive packets, bands or parcels from family or other persons.

In art. 314 it is stipulated that the opening and control of the contents of parcels, parcels with supplies and banderols shall be carried out by the representative of the administration of the penitentiary, in the presence of the person who brought them, and the ones sent by mail are subject to specific control in the presence of the detainee and transmitted to the last counter signature.

Persons convicted have the right to receive and dispatch letters, telegrams and petitions on their own, without limiting their number, in the manner and under the law.

Sending postal mandates to the family is done freely and to other non-family members only with the authorization of the penitentiary administration.

Correspondence between detainees of different penitentiaries who do not have family ties is allowed only with the authorization of the penitentiary

administration, according to art. 330 of Decision No. 582/2006.

Correspondence of detainees can be subject to control if there is a suspicion of a danger to safety and order in the penitentiary.

In order to keep in touch with the family, the detainees also benefit from the right to telephone calls, the penitentiary administration assuring the installation of public telephones in the penitentiary in special places.

The detainee is entitled to telephone conversations with his spouse, a relative, or another person of his choice. The payment for telephone calls is made with prepaid cards, and in the case of a telephone connected to the public fixed telephone network, according to the established tariffs, on the detainee's account of the detainee.

Provision of phone calls to detainees is only allowed at the initiative and upon request. Conversations at the request of relatives or other persons are not admitted, they can only discuss with the representatives of the administration, communicating their exceptional information to be transmitted to the detainee.

The convict is entitled to a 20-minute weekly telephone conversation with the husband, relative or other person of his choice.

As with meetings, it is not allowed to divide the time allowed for one phone call in shorter ones. Also, phone calls between inmates of different prisons are forbidden.

2.5. Romania

In Romania, Law 254/2013 regulates the execution of sentences and measures of deprivation of liberty ordered by the judicial bodies during the criminal proceedings.

By Government Decision no. 157 of 2016 approved the Implementing Regulation of Law 254/2013, which sets out in detail the composition of the rights of the convicts to preserve the contact with the external environment and especially with the family.

A first right is the right to correspondence, which is regulated in art. 63 of Law 254/2013, together with the petition right. The text of the law mentions in par. (1) only that the right to correspondence and petition is guaranteed.

In the other four paragraphs of the above mentioned article are stipulated only the restrictions on these rights.

These restrictions consist in the fact that correspondence can be held and handed over to those entitled to conduct investigations if there are good indications of a crime. The convicted person being notified in writing of these measures.

However, according to the law, correspondence and responses to petitions are confidential and can only be retained within the limits and under the conditions laid down by law.

The frequency of the use of this right was not limited by the legislator, the detainee having the possibility to make petitions and to have correspondence without limitations. In other words, the detainee has the possibility to keep in touch with his family by mail whenever he wishes.

Another right provided by national law is the right to telephone calls, provided in art. 65 of Law 254/2013[2]. Among the possibilities of the persons deprived of their liberty to communicate with the outside, the

[2] Law no. 254/2013, art. 65: "(1) Persons convicted have the right to make phone calls from public phones installed in penitentiaries. Phone calls are confidential and conducted under visual supervision. (2) In order to ensure the exercise of the right to telephone calls, the director of the penitentiary has the obligation to take the necessary measures for the installation of public telephones within the penitentiary. (3) Expenses incurred for the making of

right to make phone calls helps constantly and regardless of the distance where the punishment or educational measure is executed, maintaining the connection with the family or with other persons with whom he wants to relate.

Phone calls are made without being heard, are confidential and run during the hours of the program, both with people in the country and abroad. Under the right to telephone calls, the detainee can contact his lawyer and diplomatic representative (if the detainee is a foreign national)[3].

In art. 2 lit. m) of the Implementing Regulation of Law 254/2013, are explained that the family members, are spouse, wife, relatives up to the fourth degree, persons who have established similar relations with those spouses or between parents and children, legal representatives when appointed, as well as, in exceptional cases, persons to whom strong affective relations have been established and which maintain contact with the detainee through visits, telephone, correspondence and on-line communications.

Regarding the right to correspondence, which is not limited, as far as the right to telephone communications is concerned, it has limitations given by the regime in which the detainee is included.

The limitations imposed by the detention regime are aimed at preventing the commission of new criminal offenses by means of telephone conversations. The fact that those who are imprisoned in penitentiaries with maximum security have committed acts of certain gravity, or their situation (crime contest, recidivism) has led to a certain danger, they are considered to be more prone to use the right to hold telephone conversations to continue their criminal activity interrupted by the conviction.

Although the existence of this right may favour the continuation of criminal activity, it is advisable to maintain the link with the family, outside the penitentiary environment, helping to preserve the humanity of every person deprived of liberty and his hope to reintegrate into the world of which was temporarily excluded.

The right to receive visits and the right to be informed about the special family situations provided in art. 68, is perhaps the most important right in the lives of detainees and which, as stated above, motivates the detainee to wish to overcome the period of imprisonment.

The right to visit allows direct contact with the family, keeping in touch with the family environment, maintaining feelings of affection among family members.

This right is all the more important by providing parents with the opportunity to see their children, to be part of their lives, enabling communication and fulfilment of the role of parent through the necessary guidance for children.

Contact with family, though reduced in terms of the consequences of punishment, is so necessary for parties, family and detainees.

Visit to the place of detention is a family event, sometimes educative or full of positive influences, by comparing what can be done between the status of those who meet thru separation devices between those who come and those who are visited[4].

Visiting moments represent for true moments of celebration that have the gift of interrupting the monotony of the daily existence.

telephone conversations shall be borne by the convicted persons. (4) The number and duration of telephone conversations shall be established by the regulation for the application of this law. "

[3] Chiș Ioan, Chiș Alexandru Bogdan, *Execution of criminal sanctions*, Universul Juridic Publishing House, Bucharest, 2015, p. 385.

[4] *Idem*, p. 390.

The organization of the granting of the right to visit and the manner of granting these visits are stipulated in art. 138-144 of the Regulation implementing Law 254/2013.

Thus, detainees can be visited by the family or the caregivers and with the consent of the detainees and the approval of the director of the place of detention by other persons as well. Children up to 14 years of age can only visit detainees accompanied by a major person.

A detainee may receive a single visit during one day, the administration of the place of detention being obliged to provide a daily 12-hour program for the exercise of the right to visit by detainees.

The duration of the visit is from 30 minutes to two hours, depending on the number of requests for visits and existing spaces.

Visitors can not simultaneously visit two or more detainees, with an exception being provided when two or more inmates, husband or wife or relatives up to the second degree can be simultaneously visited by their husband or wife or relatives up to at the second degree, with the approval of the penitentiary director.

The number of persons visiting a prisoner at the same time can be limited by the motivated decision of the penitentiary director.

In order to benefit from the right to visit, it is necessary to make a prior appointment, which is made before the presentation date for the visit.

The request for the appointment is made by telephone, by e-mail or directly to the penitentiary's office, during the working hours of the package granting and visiting section.

The way of the visit is granted differently depending on the regime of execution of the custodial sentence and the conduct adopted during the detention, as follows:

a) With cabin type separation devices;
b) Without separation devices.

The visit with separating devices is granted to detainees to whom maximum security or closed regime applies and convicted detainees to whom the execution regime has not been established.

The visit without separation devices is granted to detainees to whom the semi-open and open regime applies.

The Regulation also provides for the possibility of granting the right to visit between detainees, with the approval of the prison director, under the law.

The number and frequency of visits varies depending on the regime in which the person in question is included.

Inmates to whom the open regime applies benefit monthly from 6 visits, the incarcerated in the semi-open regime, close regime and those for whom the penalty regime has not yet been established receive 5 visits per month and those to whom the maximum safety regime applies benefit monthly 3 visits.

Pregnant women who have given birth during the period of taking care of the child in their place of detention receive 8 visits per month.

The law provides for the possibility of granting a further visit, in addition to those stipulated, for the birth of the child of the detainee or the death of a family member, with the approval of the penitentiary director, which may be carried out without a separation device.

Detainees also have the right to be informed about the special family circumstances, the serious illness or the death of a family member, person or other person, as soon as they are aware of the event, being psychologically counselled, when required.

An important right that helps maintain affective and matrimonial relationships is the right to the intimate visit that is provided in art. 69 of the Law no. 254/2013[5].

The exercise of this right is done by the convicted person or preventively arrested, married, only with his spouse, being granted by the director of the penitentiary at the written request of the sentenced person.

Persons convicted or preventively arrested, who are not married, may benefit from the intimate visit only with partners with whom they have established a similar relationship to relationships established between spouses prior to the date of receipt in the penitentiary.

The partnership relationship between the convicted person and his / her partner is carried out by a declaration on his / her own responsibility given to the notary.

The director of the penitentiary may approve intimate visits and between convicted persons upon their request, subject to the above mentioned conditions.

The person convicted or preventively arrested, the spouse or his wife or partner, as the case may be, have the obligation, under the sanction of the provisions of art. 353 and 354 of the Penal Code to inform each other, through a declaration on their own responsibility, of the existence of a sexually transmitted disease or acquired immunodeficiency syndrome - AIDS. Statements are filed in the individual file.

According to art. 146 of the Implementing Regulation of Law 254/2013, the persons finally convicted, respectively preventively arrested during the trial, are entitled to a once a 3-month intimate visit, with a duration of three hours, in compliance with the legal conditions.

For marriage, the right to intimate visit, which lasts 48 hours, may be interrupted for a maximum period of 24 hours for reasons related to the administration of the place of detention, without that the 24h being reduced from the 48h, according to par. 2 and 3 of Art. 146 of the Regulation implementing Law 254/2013.

The Romanian legislation also provides for the right to receive packages and to buy goods, according to art. 70 of Law 254/2013.

According to art. 148 of the Implementing Regulation of Law 254/2013, detainees have the right to receive a packet of foodstuffs weighing no more than 10 kg per month, to which a maximum of 6 kg of fruit and vegetables can be added.

[5] Article 69 of Law 254/2013.

a) They are finally convicted and assigned to a regime for the execution of custodial sentences;

b) the legal effects ceased;

c) There is a marriage relationship, proven by a legalized copy of the marriage certificate or, as the case may be, a partnership relationship similar to the relationships established between the spouses;

d) have not benefited from the permission to leave the penitentiary in the last 3 months prior to requesting an intimate visit;

e) have not been disciplined for a period of 6 months prior to the request for an intimate visit, or the sanction has been lifted;

f) Participates actively in educational programs, psychological assistance and social assistance or work;

(2) A married convicted person may only receive an intimate visit with his or her spouse.

(3) In order to grant the intimate visit, the partners must have had a similar relationship to relationships established between spouses prior to the date of receipt in the penitentiary.

4) Proof of the existence of the partnership relationship is made by the declaration on own responsibility, authenticated by the notary.

(5) The director of the penitentiary may approve intimate visits between convicted persons under the terms of this article.

(6) The number, periodicity and procedure of the intimate visits shall be established by the regulation for the application of this law.

Detainees are forbidden:

a) the receipt of foodstuffs which, for consumption, require heating, baking, boiling or other thermal treatments;
b) the purchase of easily altered foodstuffs or which, for consumption, requires heating, baking, boiling or other heat treatment, except coffee, tea, milk and instant smoked sausages;
c) the receipt and purchase of lemons and their derivatives.

3. Conclusions

Following the analysis of the five penitentiary systems it can be concluded that the systems presented have many common points but also differentiation elements.

The result is a normal one given the fact that for maintaining strong connections between the convict and his family or friends group, both physical contact and the possibility of communicating by telephone or on-line, aspects that are also made between people at large, are necessary.

All penitentiary systems have regulated the right to visit, perhaps the most important right of all, which helps most to maintain the interest of the detainee for the family and the family for the detainee, the right to telephone calls and the right to receive packets.

The differences between those systems are the way these rights are achieved, reflecting the importance that the state attaches to the role of the family in the prisoner's life.

The Romanian penitentiary system is approaching most of the Spanish penitentiary system, in regulating the rights of convicts, but it also has common elements with the other penitentiary systems.

It is noteworthy that the legislation in our country and in Spain is the most permissive in granting the right to the usual visit, in relation to its frequency. Spanish legislation being even more permissive and by stipulating different types of visits, depending on the people who visit with different periodicities.

Analyzing the importance of each individual right, one could conclude that the existence of the right to intimate visit represents a gain, if one can say so, for both the detainee and the family, but also for society, by re-socializing the former condemned, many times he manages to overcome the negative effects of executing a prison sentence due to his family.

What is worth to note after presenting these five laws is that there are notable differences between detailing the exercise of these rights.

Thus, the Netherlands, Belgium and Spain, precisely in that order, are concise in the content of the listed rights without too much exemplifying the way in which the rights are exercised.

However, this is not the case in Romanian law, and even less so in the Republic of Moldova.

Why is it necessary to provide, in the smallest detail, the means of exercising only in Romanian and Moldovan legislation, in order to be understood by convicts, and in other legal systems is it sufficient only their succinct presentation?

Maybe there are questions whose answer comes out of the legal sphere, rather related to psychology or human consciousness.

However, what should be emphasized and praised is that the states under consideration have understood that the attempt to socialize some convicted persons cannot be achieved without the intervention of the family and the circle of friends of those condemned.

Nevertheless, there is no clear evidence that any of the systems analyzed is the best, with outstanding results in re-socialization.

It could be a solution a long-term research, during the execution of the sentence, of a representative group of convicted persons under different detention regimes, who keep in touch with the family as well as those who are not visited by family members.

But a solution of this study may be that Romanian legislation takes over those elements of the legislation of the other analyzed states, which allow a greater proximity of the family prisoner.

In the same time, the existence of more rights for the convicted person to keep in touch with the family is not an obligation on the family to honor them.

Although supplementation rights for prisoners would seem too lax compared to the punitive nature of the punishment, this must not lose sight of the fact that the punishment by imprisonment aims to punish the individual by taking away his freedom and not to break the family ties.

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THE EUROPEAN INVESTIGATION ORDER IN CRIMINAL MATTERS - GROUNDS FOR NON-RECOGNITION OR NON-EXECUTION

Daniela DEDIU*

Abstract

The European Investigation Order (EIO) is the newest mechanism for judicial cooperation in criminal matters. This instrument was laid out in the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 and was transposed into the Romanian legislation through the most recent changes of the Law nr. 302/2004 concerning international judicial cooperation in criminal matters. The main goal was the introduction of a single instrument for the gathering of evidence between EU Member States in cases with a cross-border dimension. Also, the European Investigation Order is the most recent application of the principle of mutual recognition of judgments and judicial decisions, which is, since the Tampere European Council the cornerstone of judicial cooperation in criminal matters within the Union. Starting with an analysis of the principle of mutual recognition, this paper presents the grounds for non-recognition or non-execution provided both by the Directive regarding the European Investigation Order and Romanian national legislation. Non-recognition and non-execution grounds of a European Investigation Order are either the classic reasons for the cooperation instruments (ne bis in idem principle), but are also noticed through elements of novelty as the ones based on respecting the fundamental rights, aspect that represents an important step in the cooperation matter and shows the ECJ jurisprudence tendency.

Keywords: *European investigation order, principle of mutual recognition, judicial cooperation in criminal matters, mutual legal assistance.*

1. Introduction

The European Investigation Order (EIO) is the newest cooperation mechanism in criminal matters between the EU Member States. Laid out in the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014[1], (following – "EIO Directive"), the order was transposed into the Romanian legislation through the most recent changes of the Law nr. 302/2004 concerning international judicial cooperation in criminal matters[2] (following- "The Law"), its purpose being that of facilitating and speeding up the obtaining and transfer of evidences between member states, but also offering harmonized procedures for obtaining these. The order replaces both the classic procedures of cooperation set up by the Convention concerning judicial assistance in criminal matters between the EU Member States[3], but

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[1] O.J. L130/1 of 1.5.2014.

[2] Republished in the Official Romanian Journal, Part I, no. 377 from 31 May 2011, completed through Law no. 236 from 5 December 2017, published in the Official Romanian Jurnal no. 993 from 14 December 2017.

[3] Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the EU, OJ, C 197/1 of 12.07.2000.

also the European Evidences Warrant[4]. The paper aims to analyse the non-recognition and non-execution grounds foreseen by the Romanian legislation, to identify the differences concerning their regulation into the EIO Directive, and also stating the reason for these, but also emphasizing the difficulties that can appear in a concrete applying when executing such an order.

2. Principle of mutual recognition - the cornerstone of judicial cooperation in criminal matters

By European Investigation Order we understand a judicial decision issued or validated by a judicial authority of a member state, in order to accomplish one or more investigation measures specific in another member state, in order to obtain evidences or transmitting the evidences that are already in the possession of the competent authority of the executing state[5]. The European Investigation Order can be issued for any investigation measure, with the exception of the setting up of a joint investigation team and of gathering evidence within such a team.

The fundament of the European Investigation Order is represented by the principle of mutual recognition and trust[6] that starting with the works of the Tampere Council in 1999, was confirmed as being the 'cornerstone of judicial cooperation in criminal matters'[7], having as purpose the removal of the cooperation difficulties linked to the differences of the legal systems between the member states[8]. According to this principle, a judicial sentence issued by a judicial authority of an EU Member State is acknowledged and/or executed by another member state, having the same value as a sentence emitted by the previous. In the same time, the mutual recognition implies the fact that a judicial sentence of a member state produces effects in all the member states without having to be subordinated to some extra conditions in accordance to the judicial order of the executing member state[9].

In the light of this principle, a European Investigation Order issued in one of the EU Member States has to be acknowledged and executed by the judicial authorities from the other member states in concordance with the foresights of the Directive, so that the result is obtaining the evidence in order to use them in criminal trials.

3. Grounds for non-recognition or non-execution

However, the mutual recognition is not absolute, the Directive stipulating refusal grounds for executing the European Investigation Orders specific to all the cooperation instruments. In this case, the

[4] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ, C 115/13 of 09.05.2008.

[5] Art. 268[1] alin. 2) let. a) from the Law.

[6] Art. 1 pct. 2) from EIO Directive.

[7] See Tampere Council Conclusions, Finland, 15-16 October 1999. The measure programme adopted with this occasion was published in the Official Journal of the European Communities no. C 12 E from 15 January 2010.

[8] According to pct. 36 in Conclusions, „the principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there".

[9] Giséle Vernimmen, *A propos de la reconnaissance mutuelle des décisions sentencielles en général, in Gilles de Herchove,* Anne Weyembergh (coord.), La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne, Bruxelles, Université de Bruxelles, 2001, p. 148.

non-recognition and non-execution grounds can be included into three categories: explicit and general reasons, regulated by the 11th article from the Directive, taken in the article 268[8] from the national law; recurring to alternative investigation measures (art. 10 from the Directive and art. 268[7] from the law); reasons that make the execution impossible, for example the case of a videoconference hearing without the consent of the suspect(art. 24 pt. 2 from the Directive and 268[18] from the law).

By the present paper, we will analyse only the general non-recognition and non-execution reasons (applicable to all measure categories requested through the European Investigation Orders) and explicitly regulated in the art. 268[8] from the Law and art. 11 from the Directive.

3.1. Immunities and privileges, the principle of speciality and the freedom of the press

The article 2688 let. a) from the Law: „there exists immunity or a privilege, as diplomatic immunity, or the principle of speciality or any other circumstances stipulated by the Romanian law or there are norms concerning the determination or limitation to criminal charges connected to the freedom of the press and of freedom of expression in other media information methods that make the execution of the European Investigation Order impossible".

Grounds of refusal based on the existence of „immunity" or a „privilege" are stipulated by the majority of mutual recognition instruments, the only exception being the European Arrest Warrant. Nevertheless, none of these tools doesn't define the two notions. The German doctrine, for example, also includes in the category of "privilege" the witness right of not declaring in the cases that concern relatives or the privilege of the client-advocate relationship[10]. In order to avoid this kind of interpretations, the Romanian legislative hasn't proceeded in defining these, but has exemplified their nature: „for example diplomatic immunity".

However this refusal ground is not absolute, align. 5 of art. 2688 from the Law stipulating that in this case and if the competence of revoking the privilege or the immunity reverts to an authority of the Romanian state , the Romanian execution authority files a petition in this matter with no delay. If the competence to revoke the privilege or immunity reverts to an authority of another state or an international organization, the Issuing Foreign Authority files a petition in this matter to the acting authority.

Moreover, concerning the foresights of the Directive, in the Romanian law there has also been inserted as a non-executing reason the "principle of speciality". In our opinion this regulation can only be linked to other judicial cooperation instruments, as extradition or surrender on the basis of an European Arrest Warrant, ulterior, for other deeds than the ones these have operated for, not being able to initiate a criminal investigation, including by issuing an European Investigation Order, than with respecting the principle of speciality. In the light of these considerations, we appreciate that the option of the Romanian legislative is redundant as the two shown mechanism already contain specific protection instruments through the speciality rule.

The Romanian law has also taken the ground referring to the determining or limiting the criminal responsibility connected to the freedom of the press or

[10] Lorena Bachmaier Winter, *The proposal for a Directive on the European Investigation Order and the Grounds for Refusal: A Critical Assessement*, in Stefano Ruggeri (Ed.), Transnational Evidence and Multicultural Inquiries in Europe, Springer International Publishing Switzerland, 2014, p. 78.

other mass media information methods, aspect that marks the expansion of the notion of immunity or privilege.

3.2. National security, jeopardising the information source, classified information

The article 2688 let. b) from the Law: „executing the European Investigation Order, in a specific case, would bring damage to the fundamental interests concerning the national security, would jeopardise the information source or would involve using classified information regarding specific activities of the secret services.'

The refusal ground identically implemented in the Romanian legislation is not recent, being found since the Judicial European Convention in 1959 that was also enumerating in addition grounds that concern suzerainty, public order, or other essential interests of the executing authority. Meanwhile, the Directive lets go the suzerainty and public order[11] clauses, aspect that doesn't come to restrain, but, on the contrary to considerably expand the refusal ground, covering this way the hypothesis where the execution risked to jeopardize the information source, aspect that could have an important impact in the organised crime domain where there are often necessary investigation measures whose source has to be protected[12].

3.3. The existence of a non-criminal procedure in the issuing state's legislation

The article 2688 let. c) from the Law: „the European Investigation Order was issued within the procedures stipulated in art. 2682 let. b) or c) and the investigation measure wouldn't have been authorised, according to the Romanian law, in a similar cause".

The procedures that this refusal ground is referring to concern the issued orders within the procedures initiated by the administrative authorities concerning deeds that represent the violation of the rightful law and that are punished in the national legislation of the issuing state, and where the decision can create an action in front of a competent court, especially criminal matters; or in case of the initiated procedures by the judicial authorities concerning deeds that represent braking the rightful laws and that are punished in the national legislation of the issuing state, if the decision of the mentioned authorities can create an action in front of a competent court, especially criminal matters[13].

Some judicial systems of the member states have regulated the so called „ administrative offences". For example the German law knows such a category of offences called „Ordnungswidrigkeiten" that are not punished by the criminal courts, but by an administrative group, but after the decision taken by the administrative court there can be released a procedure for the criminal courts[14]. This is the reason why the Directive has created the possibility of issuing a European Investigation Order referring to this category of offences.

[11] See Lorena Bachmaier, Transnational Evidence. Towards the Transposition of Directice 2014/41 Regarding the European Investigation Order in Criminal Matters, in Eucrim, no. 2/2015, p.47-60.

[12] Daniel Flore, *Droit pénal européen. Les enjeux d'une justice pénale européenne, 2nd edition*, Larcier, Bruxelles, p. 607.

[13] Art 4 lit.b si c of the Directive.

[14] Lorena Bachmaier Winter, *The proposal for a Directive on the European Investigation Order and the Grounds for Refusal: A Critical Assessement*, in Stefano Ruggeri (Ed.), Transnational Evidence and Multicultural Inquiries in Europe, Springer International Publishing Switzerland, 2014, p. 80

However in the case when for the offence for which the European Investigation Order was issued the requested measure cannot be authorised in the legislation of the executing authority, it is incident the analysed refused ground.

3.4. Ne bis in idem principle

The article 2688 let. d) from the Law: „executing the European Investigation Order would be contrary to the ne bis in idem principle".

Ne bis in idem principle is recognised at a supranational level inside EU, being regulated by art. 50 from the Charter of Fundamental Rights of the European Union. At the same time, ever since the Directive Preamble, it is emphasised that the ne bis in idem principle represents a fundamental principle in the Union's right, as it was recognised by the Charter and expanded by the jurisprudence of the European Justice Court[15]. This way the executant authority should have the right to refuse executing a European Investigation Order if its execution would be contrary to this principle. However, the Directive recognises the preliminary character of the procedures that stand at the ground of a European Investigation Order, so that the execution of this shouldn't have the role of a refusal when it wants to establish the existence of a possible conflict with ne bis in idem principle or when the issuing authority has provided insurances that the transferred evidences after the execution of the European Investigation Order won't be used with the purpose of prosecution or applying a sanction to a person for whose cause was pronounced a definitive sentence in another member state for the same offences.

In practice, we appreciate that for the execution authority it is difficult to identify the incidence of the ne bis in idem rule reported to the short description of the offences in the form where the European Investigation Order is manifested and at the low probability that an eventual procedure carried for the person in cause by the investigative measure to be known by the execution judicial authority, especially when this took place in another member state.

3.5. The place where the offence have been committed

The article 2688 let. e) from the Law: „the European Investigation Order refers to a offence that is presumed to have been committed outside the issuing state's territory and partially or totally on Romanian territory, and the deed for which the European International Order was issued in not incriminated in the Romanian law".

The ground identically adopted by the local legislation can be synthetized in completing three conditions: the offence was not committed on the territory of the issuing state; the offence has been committed partially or integrally on Romanian territory; the offence is not an offence in the Romanian legislation. This way it is noticed that the refusal ground has a double valence that derives from the principle of the territory, and also of double incrimination.

The main justifying of this ground concerns the avoidance of abusive using of the extraterritorial jurisdiction and avoiding the jurisdiction conflicts. However the refusal ground is not protected from critics because it is considered that the solution of the jurisdiction conflicts can be found

[15] Considerent 17 from Preamble.

through other methods, not being mandatory to stop obtaining the evidences[16].

3.6. Respecting the fundamental rights

The article 2688 let. f) from the Law: „there are strong grounds to consider that executing an investigation measure would be incompatible with the obligations assumed by the Romanian state according to art. 6 TEU and the Charter of Fundamental Rights of the European Union".

The directive represents the first instrument of cooperation based on the principle of mutual recognition that introduces a refusal ground based on protecting the fundamental rights[17]. The reason of non-existing of such a refusal ground can be taken from the jurisprudence of the CJUE according to whom the mutual recognition principle that represents the base of the European Investigation Order has as a fundament mutual trust between the member states regarding the fact that their national juridical orders are capable to provide an effective and equivalent protection of the fundamental rights accepted by the Union, especially in the Charter[18].

However in the recent jurisprudence of the Luxembourg Court there has been admitted that not respecting the fundamental rights in the issuing state can lead to the postponing of executing an European warrant until information are obtained regarding the detention conditions in the issuing state and in the end to the refusal of executing the warrant in case the non-respecting of the fundamental rights issued in art. 4 from the Charter[19] is established.

The regulation of the refusal ground in the Directive is quite large, evidences concerning the violation of the fundamental rights not being necessary, but 'strong reasons' that the execution of a European Investigation Order would be qualified to produce such a violation[20].

There has to be emphasized that the referring point in the appreciation of the incidence of this refusal ground is art. 6 from TEU and the stipulations of the Charter, aspect that is meant to stop the member states from imposing their own fundamental right standards[21].

3.7. Lack of double incrimination

The article 2688 let. g) from the Law: „the deed for whom the European Investigation Order was issued is not incriminated in the Romanian law, with the exception of the case where there are

[16] Lorena Bachmaier Winter, The proposal for a Directive on the European Investigation Order and the Grounds for Refusal: A Critical Assessement, in Stefano Ruggeri (Ed.), Transnational Evidence and Multicultural Inquiries in Europe, Springer International Publishing Switzerland, 2014, p. 84.

[17] The refusal ground has represented a particular request of the European Parliament within the negotiations of the Directive. What is noticeable is that the Directive is the first instrument that is situated in the repressive sphere where the European Parliament is co-legislator. See D. Flore, *Droit pénal europ**é**en. Les enjeux d'une justice pénale europ**é**enne*, 2nd edition, Larcier, Bruxelles, p. 607.

[18] See ECJ, C-168/13, Jeremy F., Judgment of 3 May 1013, ECLI:EU:C:2013:358, pct. 50.

[19] ECJ, C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, Judgment from 5 April 2016, ECLI:EU:C:2016:198.

[20] Lorena Bachmaier, *Transnational Evidence. Towards the Transposition of Directice 2014/41 Regarding the European Investigation Order in Criminal Matters*, in Eucrim, no. 2/2015, p. 54.

[21] Regina Garcimartin Montero, *The European Investigation Order and the Respect for Fundamental Rights in Criminal Investigations*, in Eucrim, no. 1/2017, p.47. See, also ECJ, C-399/11, *Stefano Melloni*, Judgment from 26 february 2013, ECLI:EU:C:2013:107.

references to the crimes from annex nr. 14[22], this being indicated by the issuing authority, if the deed is punishable in the issuing state with an arrest sentence or with a freedom privative measure for a period of maximum three years".

In matters of international cooperation, the double incrimination means that the deed that is in cause to be an offence both in the requiring state and the solicited one. Starting with the mechanism of the European Arrest Warrant, the cooperation instruments that have at their grounds the mutual recognition principle have marked an easing of the double incrimination rule that represents a useless distrust signal not compatible with the postulate of mutual recognition[23].

From the economy of the dispositions that regulate the refusal ground, it is concluded that for executing a European Investigation Order the rule is the existence of the double incrimination for the offence.

As an exception, the execution cannot be refused if the offence is included in the list of the 32 crimes mentioned in the directive and adopted by the Romanian law, if these are punished by the issuing state legislation with a maximum of three years of incarceration. Concerning the regulation of the positive list of crimes, doctrinarian discussions about the European Arrest Warrant are maintained, this way being emphasized that these rather represent criminological categories than independent offences, aspect that is meant to offer a big manoeuvring range to the issuing state. But we also appreciate that it maintains the actuality the orientation given by ECJ in the Advocaten voor de Wereld cause. In this cause, concerning the legality of the incrimination principle , ECJ has ruled that, in the process of applying a frame-decision even though the member states textually take over the counting of the categories of infractions from the list of 32, the real definition of these crimes and the applicable sentences are the ones stipulated by the issuing member state's right, and this because the frame-Decision is not following the harmonising of the crimes regarding their constitutive elements or the sentences stipulated for these[24]. At the same time referring to the mutual recognition principle and considering the high level of solidarity and trust between the member states, that, through their nature, or the maximum sentence of minimum three years, the categories of that crime are part of the ones where the gravity of the damage brought to public order and security justifies the elimination of checking the double incrimination[25].

A second exception from the double incrimination is aimed at, by the non-intrusive and non-coercive measures, obtaining information or evidences already in possession of the Romanian execution authority and information that could be

[22]. Participation in a criminal organization, terrorism, trafficking in human beings sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives corruption, fraud, including that affecting the financial interests of the European Union within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests laundering of the proceeds of crime counterfeiting currency, including of the euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage.

[23] D. Flore, p. 584.

[24] ECJ, C-303/05, *Advocaten voor de Wereld*, Judgment from 2 May 2007, ECLI:EU:C:2007:261, para. 52.

[25] *Ibidem*, para. 57.

obtained in accordance to the Romanian Law within some crime procedures or for the purposes of the evidences that could be European Investigation Order; obtaining information contained in data bases owned by the police or judicial authorities that are direct accessible to the execution authority within some crime procedures; hearing a witness, an expert, a victim, suspect or accused or a third part on Romanian territory; any measure of investigation without a coercive character as it is defined in the Romanian law; identifying abandoned people by a phone number or IP address within the conditions of the Romanian Law.

Expressly, art. 268^8 align 3 takes from the Directive the fact that in case of the European Investigation Order is referring to a offence of custom matters, of taxes of the exchange rate, the executing authority cannot reuse the acknowledgment or execution using the reason that the Romanian legislation doesn't claim the same type of taxes or the same regulations concerning customs, of duties, taxes or currency as the right of the issuing state.

3.8. The impossibility of applying the measure according to the Romanian legislation for the offence referred in the European Investigation Order

The article 2688 let. h) from the Law: „the indicated measure in the European Investigation Order is not stipulated in the Romanian law only for some offences or sentence limits, that don't include the offence that the European Investigation Order refers to".

For example, in case of the soliciting of communications and calls interceptions, the offence where the measure can be displayed has to be found among the ones stipulated in the from the Criminal Procedure Code.

As in the referring situation to the double incrimination, the refusal ground is not incident but for the following measures: obtaining information or evidence already in the possession of the executing Romanian authority and information or evidences that could be acquired, in conformity to the Romanian law, within some crime procedures or in European Investigation Order purposes; obtaining information from data bases owned by the police or judicial authorities that are direct accessible to the execution authority among some crime procedures; hearing a witness, an expert, a victim, a suspect or accused or a third part on the Romanian territory; any investigation measure without coercive character, as the Romanian law is defined; identifying people subscribed to a phone number or an IP address, within the conditions of the Romanian law.

4. Conclusions

Non-recognition and non-execution grounds of a European Investigation Order are either the classic reasons for the cooperation instruments (ne bis in idem principle), but are also noticed through elements of novelty as the ones based on respecting the fundamental rights, aspect that represents an important step in the cooperation matter and shows the ECJ jurisprudence tendency. However all these grounds are optional, the executing authority having only the possibility to refuse the recognition and execution the European Investigation Order and not an obligation.

But, in most of the cases, before deciding the non-recognition or non-executing of a European International Order for the execution judicial authority it is established the obligation of consulting with the eminent authority through any means that permit a written recording, and require the eminent authority to provide with no delay any necessary information by case.

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SPECIFIC ASPECTS OF THE OFFENSE OF LEAVING THE PLACE OF THE ACCIDENT

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Abstract

The legislator has adopted the respective texts of law to the new social realities once with the repeal of the criminal segment of GEO no. 195/2002 relating to the circulation on public roads, republished and the introduction of this one in the content of the New Criminal Code.

The offence of leaving the place of the accident, actually found in the content of the provisions of art. 338 of Criminal Code is one of the eight offences against the safety on public roads.

Knowing important modifications, the legal text may appear relatively ambiguous if we refer to the old indictment, meaning that certain factual situations remained outside the criminal law. We will analyse in this regard the obligations that arise to the driver in case of a traffic accident, bringing into question even the decriminalization of the prohibition of the consumption of alcohol after the road event.

Furthermore, we will treat even aspects related to the causes of special no imputation that, on a closer analysis, can create problems of interpretation. Through the phrase "it does not constitute the offence of leaving the place of the accident when only material damages occurred after the accident", the legislator has chosen to indict this offence even if the victim has evaluable lesions within 1-2 days of medical care, on condition that for the same fact, in the old regulation, 10 days were required or it was an oversight of the legislator that it is to be resolved at some point?

Keywords: *accident, driving, circulation, Criminal Code, offence, road.*

1. Introduction

The new regulation stipulates the offense of leaving the place of the accident or its modification or deletion of its traces is regulated as follows:

1. Leaving the place of the accident, without the authorization of the police or the prosecutor who carries out the investigation of the place of the deed, by the driver of his vehicle, by the driving instructor undergoing the process of training or either by the examiner of the competent authority found during the practical tests of the examiner in order to obtain the driving licence involved in a road traffic accident, is punished with imprisonment from 2 to 7 years.
2. The same penalty is penalized even the deed of any person to change the status of the place or to delete the traces the road traffic accident that has resulted in killing or the injury of bodily integrity or health of one or more people, without the consent of the research team on the spot.
3. It does not constitute an offense the leaving of the place of the accident when:

a) only material damage has occurred after

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the accident;

b) the driver of the vehicle, in the absence of other means of transport, carries himself the injured people to the nearest healthy unit able to provide medical assistance and to which he declared his personal identification and the number of registration plate or the registration of the driven vehicle, recorded in a special register, in case he returned immediately to the place of accident;
c) the driver with priority of circulation regime notifies the police as soon as possible and after the end of the mission he will be present at the headquarters of the police whose jurisdiction the accident occurred in order to draw up the documents of infringement;
d) the injured leaves the place of the deed and the driver of the vehicle notifies immediately the nearest police station.

In relation to the old regulation, we mention the fact that this one conditioned the existence of the offense of gravity and the consequences of the occurred accident, while the new infringement does not make any difference in this regard. They are excluded from the existence of the crime the situations of leaving the place of the accident that caused only material damage, this circumstance representing a special supporting cause.

The leaving of the place of the accident must be also done without the authorisation of the competent authority.

If the author had to disobey the consent of the police that carried out the research at the place of the deed in the old regulation, the new Criminal Code provides expressly that the consent of the leaving the place of the accident may be given by the police or the prosecutor who carried out the research on the place of the accident[1].

Analysing further, we notice that due to the lack of the phrase "if the accident occurred as a result of a crime" (in the new regulation) the material element does not find one of the previous normative variants, and consequently, the driver involved in an accident will not be punished when leaving the place of the accident occurred due to the commitment of an offense (accident in which resulted only material damage).

In a simple form, the offense takes over some of the provisions of the old regulation, with a series of differences. The qualified active subject of the law must be involved in a traffic road accident; the new regulation no longer brings provisions relating to the seriousness or the extent of the traffic accidents which mean that the leaving of the place of any sort of accident may lead to the existence of the infringement. Of course, we refer to those that had as a consequence a minimal bodily injury or of health of a person except that sometimes, even a single day of medical treatment, aspect established by a forensic certificate, will be able to lead to the meeting of typical elements.

Related to this thing, it is important to remember the decision of the HCCJ no. 66 of 15th October 2007 relating to the understanding of the phrase the injury of bodily integrity or the health of one or more people, contained in the provisions of article 89 para. (1) of GEO no. 195/2002.

The practice of the law courts experienced a variety of solutions in relation to the meaning of the phrase "the bodily injury or health of one or more people", contained in article 89. para. (1) of EO no. 195/2002, republished, which criminalise the offense of leaving the place of the accident.

Thus, some of the courts have ruled in the sense that the deed of the driver of a

[1] Tudorel Toader, Maria-Ioana Michinici, Anda Crisu-Ciocinta, Mihai Dunea, Ruxandra Raducanu, Sebastian Radulet, *Noul Cod penal, Comentarii pe articole*, Hamangiu Publishing House, 2014.

vehicle of leaving the place of the accident in which he was involved, without the consent of the police who carried out the investigations, meets the constitutive elements of the offense provided in art. 89 para. (1) of GEO no. 195/2002, republished, without having relevant the number of days of medical treatment necessary for the cure of wounds.

Other courts, on the contrary, considered the phrase "the injury of bodily integrity or health of one or more people" refers only to the injuries that required for healing more than 10 days of medical care and the other consequences provided in the old regulation in the provisions of art. 182 para. (2) of the old Criminal Code. Thus, these courts have acted that whenever did not happened one of these consequences the typical elements of the analysed offense are not met because it lacks the condition that the injury of bodily integrity or health have had consequences required by law.

Under these circumstances, we can notice that the problem of law subject to the interpretation of the magistrates of the Supreme Court of Justice dealt with the meaning of the above mentioned phrase, thus, by the recalled decision, the High Court of Cassation and Justice stated that the offense of leaving the place of the accident, within the text of law, cannot be considered as committed if they are not met even the objective conditions imposed by the definition given to the injury of bodily integrity of manslaughter by art. 184 of the old Criminal Code, respectively, over 10 days of medical care.

Regarding the current situation, we consider that relative to the provisions of art. 338 of Criminal Code the meaning of the term "injury" in the content of the provisions of art. 75 of GEO no. 195/2002 and the philosophy which has been the basis for the decision no. 66 of 15th October 2007 of HCCJ (above mentioned) are incomplete.

In this respect, the High Court of Cassation and Justice has been delegated by the Bacau Court of Appeal in order to solve this problem of law.

They have put into question, in this way, whether to be met the constitutive elements of the offense of leaving the place of the accident provided by art. 338 para. (1) of Criminal Code with reference to the provisions of art. 75 (b) of GEO no. 195/2002 concerning the public roads, republished, it is necessary that the victim of the accident show lesions recorded in a medical act, measurable outcomes (injury) in a number of days of medical treatment or not, in any case, if there is necessary the existence of a forensic certificate; and what is meant by the term of injury provided by art. 75 (b) of GEO no. 195/2002, from a legal point of view, taking into account that the explicative Dictionary of Romanian language defines the wound as being "an internal or external breakage of the tissue of a living bring, under the action of a destructive agent; injury, wound."

The analysis drawn by the rapporteur judge of HCCJ for the meeting of January 25, 2018 outlines the idea that the interpretation and application of the provisions of art. 338 para. (1) of the Criminal Code regarding the offense of leaving the place of the accident, the term of "injury" provided by art. 75 (b) sentence II of GEO no. 195/2002 should be interpreted in the sense of "traumatic lesions or affecting the health of a person whose seriousness is assessed by days of medical treatment (at least one day)."

We do not share this point of view of the rapporteur judge, as the old regulation clarified by the decision no. 66 of 15th October 2007 (Appeal in the interest of the law) we appreciate it much closer to the juridical-objective reality, but HCCJ, in the panel to solve a problem of law will decide,

but we as practitioners of the law, of course, will own those laid down.

2. Pre-existing conditions

The constituent elements of this offense must be linked with other legal provisions such as those from the content of the art.6 of GEO no. 195/2002, republished, regarding the traffic on public roads or the performance of those from the content of art. 79 of GEO no. 195/2002, republished, relating to the traffic on public roads.

According to the article 75 of GEO no. 195/2002, the traffic accident is defined as being the road event which occurred on a road open to the public traffic or had the origin in such a place, which had a result the death, injury of one or more people or the damage of at least one vehicle or other material damages and in which it was involved at least one moving vehicle.

The special literature has shown that the concept of traffic accident exclude the intentional acts (which might constitute separate offenses), referring only to car incidents occurred by manslaughter, with random character[2].

At a first glance overview on the incriminating text, we find that there are two types of crime, one type of criminal [para. (1)] and the other assimilated [paragraph. (2)]. The type variant involves the leaving of the place of the accident, without the authorisation of the police or the prosecutor who carries out the investigation of the place of the deed, by the driver of his vehicle by the driving instructor, found in the process of training, or by the assessor of the competent authority, found during the practical examination in order to obtain the driving licence, involved in a traffic accident.

The assimilated version consists in the deed to change the status of the place or to delete the traces of the traffic accident which has resulted in killing or the injury of bodily integrity or health of one or more people, without the approval of the research team on the place of the spot.

In the content of paragraph (3) there are four special supporting causes related to the commitment of the offense of leaving the place of accident which will be analysed in a future section.

The allowed situation in the case of committing this offense is constituted by the production of a car accident, of course, prior to the performance of the material element of the analysed offense. The accident must accomplish the conditions set by GEO no. 195/2002 republished to have impact in the case of this offense[3].

It is generally understood by *car accident"* an event occurred within the road traffic, due to the breaking of the road traffic during driving or by breaking the norms relating to technical verification of vehicles produced by swabbing, knocking, tipping over, falling of the load or any other way, and which has resulted in the death, the injury of bodily integrity or health of the people, the damage of goods or which interrupts the traffic. "[4]

We will not find in the presence of the offense of leaving the place of the accident or the changing or the deletion of the traces of this one in the case in which the accident (the premise situation) has been consumed, for example, in a courtyard (private property as well as other area that cannot enter under the term "public road"), even if the material

[2] Mihai Adrian Hotca, Maxim Dobrinoiu, *Infracţiuni prevăzute în legi speciale. Comentarii şi explicaţii*, C.H. Beck Publishing House, Bucharest 2010, p. 518.

[3] Alexandru Ionaș, Alexandru Florin Măgureanu, Cristina Dinu, *Drept penal. Partea Specială*, Universul Juridic Publishing House, 2015, Bucharest, p. 508.

[4] Alexandru Boroi, *Drept penal. Partea specială*, C.H Beck Publishing House, Bucharest, 2014, p. 585.

element committed by the respective author folds exactly on the rule of incrimination.

The legal object of the offenses provided by article 338 of NCC is constituted by the social relations related to *the traffic safety on public roads*, "whose existence and normal conduct involve the criminalization of the facts of leaving the place of accident by the driver of his vehicle by the driving instructors, found in the process of training or by the assessor of the competent authority, found during the practical tests to obtain the driving licence, involved in a car crash, without the consent of the prosecutor or the police that carries out the research of the place of the crime[5]. "

The obligation of the drivers to remain at the place of the accident appears justified by the necessity to establish the causes that have caused the accident, to identify the guilty people responsible for producing it, and, consequently, to call these ones to account, according to the law[6].

We can say in subsidiarity that committing such crimes brings prejudice even to the social relationships concerning the administration of justice, because it is complicated the activity of finding the truth and the good conduct of the criminal investigations. They are also affected the relations arisen as a result of the obligation for the granting of first aid to the victims of the traffic accidents[7]. We could say under the latter aspect that the act provided in art. 338 of the new Criminal Code could be confused with the act provided by art. 203 of Criminal Code (leaving without help a person in difficulty), the difference consisting in that the offense provided by art. 203 may have as active subject only a person whose activity was not endangered the life, the health or the bodily injuries of the victim while the active subject of the offense provided by art. 338 is just the person involved in the traffic accident[8].

Regarding the material subject, on the hypothesis provided by article 338 para. (1) of NCC this one lacks, but on the hypothesis provided by para. (2) it exists, consisting of any element (object) as modified, deleted or removed from the place of the accident.

The active subject of the typical version provided by the paragraph (1) is qualified, the offense subsisting only in the case of the driver of the vehicle, of the driving instructors, found in the process of training, or the examiner of the competent authority, found during the practical exam to obtain the driving licence, involved in a traffic accident.

Some authors state, however, that the active subject of this crime is directly, and can be represented by any person who satisfies the conditions of criminal liability[9].

The qualification of the active subject shall not be subject only to the quality of the driver of the vehicle, but also by his involvement in a road traffic accident, within the framework of the typical version.

If we analyse through the perspective of the assimilated version provided by the paragraph (2), the active subject loses his qualification, the offense can subsist having as active subject any person who commits one the ways of the material element.

The criminal participation is possible in all its forms stating that in the case of the variant provided in para. (1) the accomplice

[5] Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hatca, Ioan Chis, Mirela Gorunescu, Norel Neagu, Maxim Dobrinoiu, Mircea Constantin Sinescu, *Noul Cod Penal comentat. Partea Specială, 2nd edition*, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2014, p. 731.

[6] *Ibidem.*

[7] *Ibidem.*

[8] *Idem*, p. 732.

[9] Viorel Pașca, Petre Dungan, Tiberiu Medeanu, *Drept penal parte special. Prezentare commparativă a Noului Cod Penal și a Codului Penal din 1968*, Universul Juridic Publishing House, 2013, p. 209.

is not possible due to the nature of the offense. We say this because the conditions of the accomplice for this crime cannot be fulfilled. When there are more drivers of vehicles involved in a road traffic accident, these ones committing subsequently to the accident, the material element provided by the art. 338, we will not retain the institution of the accomplice but a separate offense for each of them.

Taking into account the nature of these offenses, we believe that the legal people may respond to criminal law as a participant (complicity, instigation or improper participation).

Thus, in the situation in which a driver, the manager of a building company, while driving his the car from the work causes a road traffic accident resulted with the death of a person, is helped by other employees of the company sent to the place of the accident by the governing bodies in order to delete the traces of the accident (helped with a bull-excavator, of a legal person, to move the victim's car) , we will retain in addition to other incident crimes in the present case and complicity to leaving the place of the accident for the legal entity or ,depending on the case, the improper participation to the commitment of this offense in the situation in which the employees are unaware of the fact that there had been a traffic accident with victims.

In another situation, if an employee of a transport company of values causes a road traffic accident resulting with the injury of bodily integrity of a person and leaves the place of the accident in order to continue the transport, at the determinative instigation of the collective governing entity, we will find ourselves in the situation of instigation to commit the offense of leaving the place of the accident by the legal entity.

The main passive subject of this criminal liability is *the state*. The secondary passive subject is constituted by *the injured person by the road traffic accident.*

3. The constitutive content

3.1. The objective side

The offense provided and punished by art. 338 para. (1) can be accomplished by leaving the place of the accident without the consent of the police or the prosecutor who carries out the investigation the place of the deed, by the people referred to in the text of incrimination, involved in a road traffic accident.

As far it concerns the offense contained in the provisions of para. (2), the material element of this one is achieved through the deed to modify the condition of the place or to delete the traces of the traffic accident that resulted with the killing or injury of bodily integrity or health of one or more people, without the consent of the investigation team on the spot.

The obligation imposed on the driver of any vehicle involved in a traffic accident, with the exceptions listed in para. (3) to remain at the place of the accident is justified by the necessity to establish the causes that have caused the accident, to identify the people responsible for producing the accident and to call them to account to penal liability.

The place of the accident means the area of land where the action or inaction took place and has caused the accident, where the injury has been produced (fatal or with harmful consequences for bodily injuries or health) and where different traces are printed that are relevant for the determination of the causes of the accident[10].

Leaving the place of the traffic accident means the removal and the departure of the person involved in the area

[10] *Idem.*

(area of land) where the road event (accident) occurred in question.

In relation to cognitive processes which determine the driver to undertake such action, we can retain the attempt to evade from the penal liability (e.g. the r the driver is under the influence of beverages or other substances or as a result of the accident the injury of bodily integrity or the death of one or more people occurred).

The fear of the crowd may represent another reason promoter of committing the penal deed, but in such situation we believe that criminal liability will not be held.

The change of status of the place of the traffic accident consists in changing or transforming the elements of the surface of the land on which the traffic accident occurred and had as result the killing or the injury of bodily integrity or health of one or more people. For example, by introducing and creating some non-existent traces or by removing of some objects resulting from the accident[11].

Deleting the traces of the traffic accident involves an activity of elimination or removal of signs left by the road event which has resulted in killing or injury of bodily integrity or health of one or more people.

We notice that frequently the commitment of the offense of leaving the place of the accident knows, in fact, the achievement of the typicality by the action of continuing the way or by the action of stopping, the investigation of the situation by the guilty driver of producing it and continuing the road.

Thus, if the driver proceeds to leave the place of the accident with the vehicle involved in the accident, we consider that it is necessary to retain a contest of offenses between the offenses referred to para. (1) and (2), the status of the place being modified and the traces of the road accident being removed. On the other hand, the driver who abandons the vehicle after the traffic accident and leaves, on foot or by other means of transport, the place of the accident will be responsible for committing the offense provided and punished by art. 338 para (1).

In other words, whenever the commitment of the material element of the offense provided by paragraph (1) shall be carried out by using the vehicle involved in the accident, it will be as an incident the contest of offenses consequential connection.

The incriminator text provides an essential requirement attached to the material element, namely that the leaving of the place of the road traffic accident to be carried out *without the consent of the police or of the prosecutor who carries out the investigation of the place of the deed*[12].

Another essential requirement affects the driver's involvement in a road traffic accident, which means that he must have a certain role in the occurrence of the road event.

Analysing the hypothesis provided in paragraph (1), (2) and the special supporting causes from the content of paragraph (3), we could say that under the incidence of art. 338 of Criminal Code not all the traffic accidents are included, thus, "leaving the place of the accident in order to create a state of danger for the protected social values by the incrimination of this deed and, therefore, to justify the intervention of the criminal liability, it is necessary that the road traffic accident to present certain seriousness and also a certain significance. Moving away

[11] Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chis, Mirela Gorunescu, Costica Paun, Norel Neagu, Maxim Dobrinoiu, Mircea Constantin Sinescu, *op. cit*., 2014, p. 735.

[12] Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chis, Mirela Gorunescu, Costica Paun, Norel Neagu, Maxim Dobrinoiu, Mircea Constantin Sinescu, *op. cit*., p. 734.

from the place of the accident, as well as the modification of the status of the place or deletion of the traces of the accident fall under the incidence of criminal law only if after the road traffic accident occurred the killing or the injury of bodily integrity or health of one or more people, and also without the consent of the investigation team on the spot[13]. "

The first instance court held essentially that on 26th .03.2015, around 08.50, the defendant got behind the wheels of the vehicle, wanting to head for the place of work. While he was performing the manoeuvre of reverse, the defendant injured a victim who was on the sideway of the boulevard. Following the accident, the defendant got out of the car and noticed that the person who was hit was sitting on the sidewalk having a bruise and a wound at the right cheekbone. The defendant has proposed the injured person to take him to hospital, but this one refused. Under these conditions, got behind the wheel of the vehicle and left the place of the accident without the consent of the police.

Following the reports of forensic discovery, it was established that the victim suffered injuries that required 3-4 days of health care.

The defendant has requested his acquittal on the grounds that the deed was not committed with guilt prescribed by law or intentionally, claiming that the form of guilt would have been the negligence, reported also to the attitude of this one with regard to his insistence for the transportation to the hospital of the injured person, remained at the place of the accident until the driver's departure, fact which has reinforced the belief that there is no form of norm violation broken from the point of view of the safety on public roads.

The same court of first instance considered that the existence of the fault without provision cannot be held, meaning that the defendant had not provided the result of his deed, given the fact that it was obvious that he committed a road traffic accident, within the acceptation of law circulation (art. 75 of GEO no. 195/202), and as an experienced driver (owner of the driving licence since 1995, as a result of the auto registration sheet), may not plead any excuse as regards the unfamiliarity with the legal provisions and the obligations which were his due.

The defendant noticed that the person who had hit was hurt, but however he did not notify immediately the police and left the lace of the accident, having the representation of the socially dangerous result of his deed.

On the other hand, by proceeding to a comparative analysis of the two successive text of law, the court concluded that for the meeting of the constitutive elements of the offence it is no longer necessary to satisfy the condition that the deed shall have the following result: „killing or the injury of bodily integrity or the health of one or more people", as provided by article 89 of GEO no. 195/2002, so that the decision was left without consequence, by the will of the legislature.

Under these circumstances, it was appreciated by the trial court that in law, the deed of the defendant meets under the aspect of the objective and subjective nature, the constitutive elements of the offense of leaving the place of the accident, provided by the art. 338 paragraph 1 of the Criminal Code.

To those shown, the court noticed that, beyond any reasonable doubt that the deed really exists, it is an offence and it has been committed by the defendant, so that the court ordered his conviction.

The defendant has made an appeal in legal terms against this decision requiring

[13] Alexandru Boroi, *op. cit.*, p. 586.

the acquittal on the basis of article 396 paragraph 5 in relation to article 16 para. 1 (b) of the Criminal Procedure Code since he had no intention of leaving the place of the accident, he tried to help the injured person, had no time the representation that he violates a legal standard.

Examining the documents and the works of the file in the context of the invoked critics, Bucharest Court of Appeal, in complete disagreement with the majority held that the appeal in question was founded.

As it was constantly shown in the doctrine, both under the influence of previous rule and the new Penal Code, the offence provided by article 338 of the Criminal Code is committed only intentionally, which may be direct or indirect. The realization of the act of negligence does not constitute an offence.

There is an intention, for example, when the offender realizes that by leaving the place of the accident a state of danger for the safety of the road traffic is created and, at the same time, the activity of the judicial authorities related to that accident is prevented or hindered.

Even in everyday speech, as it is set in the Explanatory Dictionary of Romanian Language, (which the legislation cannot ignore), the terms "leaving the place of a deed" have certain connotations of hit-and-run offence to ensure his escape, in order not to be discovered or to make difficult or ruin the finding out the truth, and such attitude is always based on punishable intention.

Or, in this case, the whole attitude of the defendant to get off the car, to talk to the injured person, offering to take him to the hospital, to wait, to make sure that the person moves alone, and the caused injuries are very minor and to only after then, they are incompatible with the detention of the intention of committing the offence which is retained in charge.

The minimal injuries suffered by the hit person, his conscious refusal to be taken to the hospital, the fact that he was the first to leave the place of the accident in a good physical condition created the defendant the belief that he may leave a his turn without breaking the law.

This subjective representation constituted an offence of the defendant, regarding the criminal provisions, the lack of the intention as a form of guilt leading to the not meeting of the constitutive elements of the offence provided by the art. 338 paragraph 1 of Criminal Code. Therefore, The Court of Appeal from Bucharest criminal division II, in complete disagreement with majority, ordered the acquittal of the defendant for the commitment of the offence provided by the article 338 paragraph (1) of Criminal Code because the deed was not committed with the form of guilt required by law, mainly on the basis on art. 17 related to art. 396 paragraph (5) of Criminal Procedure Code combined with article 16 paragraph (1) letter (b) sentence II[14].

Of course, the analysed offences will be committed even in a real contest with conventional convexity, in the situation in which the material element provided by the paragraph (2) shall be carried out in order to hide the traces of the accident and implicitly of the offence of leaving the place of the accident in the normative version covered under paragraph (1). In such case, the commitment of the second offense will be familiar with the form of guilt of direct intention due to the fact that it has a special purpose, that of hiding the commitment of the first offense.

In the case of committing the offense provided by article 338 par. (1) from Criminal Code, the immediate consequence consists of the creation of a state of danger for the social relationships regarding: the

[14] Bucharest Court of Appeal – *Second Criminal Section, criminal decision no. 1257*/A dated 19.09.2016.

safety of driving on public roads, the arising relations as a result of the obligation of granting the first aid and the social relations regarding the carrying out of the justice.

For the reunification of the objective side of the offenses regarding the safety of driving on public roads, especially of the offense provided and punished by article 338 par. (1) from Criminal Code, there must be a causal link between the action that which constitutes the material element and the specific result, report of causation which results *ex re* (from the nature of the deed). Related to the offense provided by par. (2), the casual link must be proved.

In the case of the infringement provided by paragraph (2), the immediate consequence will be constituted by the damage of the social relationships relating to the safety of driving on public roads and the social relationships relating to commitment of the justice.

3.2. Subjective side

The offense provided by the article 338 par. (1) from the Criminal Code will be able to be committed only intentionally, which can be direct or indirect. The situation is similar to and in the case of the situation provided by par. (2).

There is a direct intention when the offender realizes that by leaving the place of the accident it is created a state of danger for the safety of driving on public roads and also prevents or makes difficult the activity of judicial bodies linked to that accident, but not related to another deed that constitutes an offense. Consequently, for the existence of the offense, it is not necessary the intention of the avoidance of following, but of running some useful findings to find the truth[15].

There is an indirect intention if the driver passes over an obstacle that could be even a person, this one not being able to realize exactly (due to weathercast conditions, to speed, etc.), then continued on his way. Thus, the respective driver provides the result of his deed and, even he does not follow the commitment of the offense, he accepts the possibility of producing the result which is socially dangerous.

If the commitment of the offense under the form of the real contest of conventional connection, above described, the commitment of the second offense will always meet the form of guilt of the direct intention, thus there will be the special purpose, that of hiding the commitment of the first offense, but, generally, the mobile and the purpose of the commitment of offense are not relevant in order to retain or not the offenses provided and punished by the article 338 from the new Criminal Code, these ones may have relevance in the case of individualisation of the case.

Analysing further the defendant's psychological process of the defendant at the time of committing the offense provided and punished by the article 338 par. (1) from the Criminal Code, we cannot neglect the aspects related to the commitment of the offenses as a result of a fear. We will not discuss the fear of being taken to criminal liability or the fear of finding other offenses, but about the fear inspired by the specific objective of the factual situation.

Thus, from this perspective we recall the criminal decision no. 97/R/20210 pronounced by the Court of Appeal of Bacau, case in which the defendant argued in hid defence the commitment of the deed as a result of some fear created by the people found at the place of the accident that was not received by the court resulting the fact that at the moment or producing the

[15] Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chis, Mirela Gorunescu, Costica Paun, Norel Neagu, Maxim Dobrinoiu, Mircea Constantin Sinescu, *op. cit.*, p.736.

accident, this one had an alcoholic saturation in blood of 1.90%, and under the aspect of the subjective side it was demonstrated his intention of leaving the place of the accident in order to hide the drunkenness.

The problem becomes even more interesting because there may really be situations in which the author of the criminal deed eave the place of the accident due to the fear created by people found on the spot, by eyewitnesses, relatives to the victim, etc.

By penal decision no. 176/1993 of the Court of Bucharest, criminal section I, it was argued that there will be no state of necessity if the defendant left the place of the accident which occurred in order to save himself and the people in the vehicle created by a group of gypsy people who, gathered at the place of the accident, started to throw stones on his car because the serious danger which requires with necessity an action of save is determined by a random and not an attack from the part of one or more people.

We criticise the decision of the court on the grounds that the danger may come from accidental causes but also from deed committed intentionally or negligence, the danger being able to create even from the conduct of the offender.

3.3. Forms, penalties

The preparatory acts are not punishable but possible, the legislator considering that these ones do not present a degree of enough social danger in order to have criminal relevance. The consumption of the offence takes place the moment when the material element is fully made. We also mention that the attempt is not criminalized although it is possible in the case of analysed crimes.

Regarding the incriminating system, the commitment of the offences provided by article 338 para. (1) and (2) are punished with imprisonment from 2 to 7 years.

3.4. Special supporting causes

According to the article 338 (3) of the new Criminal Code, the leaving of the place of the accident does not constitute on offence when:

a) only material damage occurred following the accident.

We must point out related to this hypothesis that if the accident resulted with at least one person who suffered an injury of bodily integrity or health or has undergone some simple physical sufferance (minor), the specific justified cause no longer finds incidence.

b) the driver, in the lack of other means of transport, carries himself the injured people to the nearest medical care able to provide the necessary medical assistance and where he declared his personal data of identification and the number of registration of the driven vehicle, recorded in a special register, if he returns immediately to the place of the accident.

This case of inexistence of the offence is not anything else than a particular application of the state of emergency as a supporting cause. We appreciate that the legislator did not define the meaning and the sense of the word "immediately", but we will appreciate it as a period of time when a person who committed a car crash and carries the victims to a medical care must return to the place of the accident so the term will receive a special connotation depending on the particular circumstances of the cause[16].

Exemplifying in this regard, in relation to the criminal law, by the penal sentence no. 178 of 5th December 2016 of the Court from

[16] Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chis, Mirela Gorunescu, Costica Paun, Norel Neagu, Maxim Dobrinoiu, Mircea Constantin Sinescu, *op. cit.*, p.737.

Bolintin Vale village, which remained final by the rejection of the appeal, the Court held the deed of the person of carrying immediately the victim after the commitment of the car crash, but not to the nearest medical care, without returning to the place of the accident, meets the constitutive elements of the analysed offence, the defendant not being present under the incidence of some special supporting cause.

c) the driver of the vehicle with priority circulation regime notifies immediately the police, and he presents to the headquarters of the police whose jurisdiction occurred the accident after the mission, in order to draw up the documents on the findings.

In this case, the text of the law governs the situation of the drivers of vehicles with priority regime driving. E.g.: The vehicles of the Ministry of Internal Affairs, Ministry of Defence, the Romanian Intelligence Service, the Border Police, the Protection and Guard Custom Service, those intended for the extinguishing fires, ambulances, etc.

d) the victim leaves the place of the accident, and the driver of the vehicle announces immediately the event to the nearest police station.

4. Aspects of procedural penal law

In the case of committing this crime, the criminal proceedings will be initiated **ex officio.** The competence of carrying the criminal offence ids the responsibility of to the criminal research bodies of the judicial police. The competence of judgement in the first instance returns to the Court.

Of course, from those set out above, we find applicability only I the situation in which the quality of the person does not arise another level of competence. Thus, if the person who commits the crime has the quality of, or example, a lawyer, the competence in the first instance will return to the Court of Appeal.

5. Legislative no concordance, following, as a result of Decision no.3/2014 of the High Court of Cassation and Justice and of the decision 732/2014 of the Constitutional Court of Romania

All the offences provided I the previous normative act have equivalent in the content of the New Criminal Code, even if changes subsist sometimes, the deeds forbidden by law do not remain the same.

As we previously mentioned, once with the coming into force of the codes, the road offences provided by GEO no. 195/2002 met their correspondent in the content of the new Criminal Code, in title VII., Offences against the public safety.

We noticed that even though the offence provided by article 90 from GEO no. 195/2002, namely:

(1) The deed of the driver or of the instructor, found in the process of training, or of the assessor of the competent authority, found during the evolution of the practical tests of the exam in order to obtain the driving licence, alcohol consumption, products or narcotic substances or drugs with similar effects to these ones, after causing a car crash that has as a result the killing or the injury of bodily integrity or health of one or more people, up to biological samples or to the test with a technical means approved and verified by the metrological or up to the establishment with the approved technical means of their existence in the exhaled air , it is punished with imprisonment from 1 to 5 years, it has constituted an integrated part in the text of incrimination of the offence provided and punished by the article 336 from Criminal Code under the influence of driving a vehicle under the influence al alcohol or other substances:

(1) driving on public roads a vehicle for which the law provides the obligation of owning the driving licence by a person who, at the moment of collecting the biological samples**,** the driver has an alcoholic impregnation of over 0,80 g/l of pure alcohol in blood is punished with imprisonment from 1 to 5 years or by fine.

We can easily notice that by the phrase *at the moment of collecting the biological samples*, from the article 336, the legislator transposed the ideology of the incrimination of the art. 90 from GEO no. 195/2002.

It is prohibited by art. 90 the consumption of alcohol, products or narcotic substances or drugs with similar effects to these ones, after causing a car accident which had a result the death or the bodily injury or health of one or more people, up to the collecting of the biological samples or up to the testing in order to establish those values with an approved means, the article 336 from New Criminal Code proposed as for committing the offence of driving a vehicle under the influence of alcohol or other substances that the relevant value al the alcohol or the level of intoxication with forbidden substances to be the one from the first collection of biological samples in this matter.

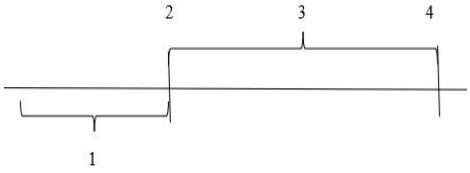
Thus, in the old regulation, with the assumption that a driver (*who was not under the influence of alcoholic beverages or other substances similar effects to these ones)* has committed a car accident (with human victims), it is forbidden to this one to under the incidence of committing the criminal offence, the consumption of alcohol or other substances up to the moment of the collection of biological samples. Otherwise, this one would have answered criminally for the commitment of the offence provided and punished by art. 90 of GEO no. 195/2002 and the establishment of the factual situation in terms of the alcoholic impregnation of blood or the consumption of other substances at the time of the committing the accident or driving a vehicle, they were calculated backward, by the collection of two biological samples taken every one hour, thus, establishing the descendent or ascendant curve relevant to the forensic biologists.

1. The moment of driving the vehicle- with criminal relevance to the commitment of the offence of driving a vehicle under the influence of alcoholic beverages until the date of 1st .02.2014;
2. The moment of committing the accident;
3. The time interval until the arrival of the bodies of criminal investigation and *the time interval prohibitive for the consumption of alcohol or other substances,* with criminal incidence for the commitment of the offence provided and punished by article 90 from GEO no. 195/2002.
4. The moment of collecting the biological samples.

We notice that the article 90 from GEO met its implementation only for the time interval shown at point 3. Of course, this one has another particular application in the situation when the driver leaves the place of the accident, but this situation does not interest for what we will further present.

In the new legislative version, the driver is no longer prohibited, *in law*, by the consumption of alcohol after the accident, but from the interpretation of article 336 from New Criminal Code, the biological sample with criminal relevance would be the first, so, a similar difficult situation for the driver as the one from the old regulation. The driver would have responded criminally under the aspect of the committing the offence provided and punished by article

336 no matter the fact that at the moment of committing the car accident has already been under the influence of alcoholic beverages or forbidden substances or he has taken them after the commitment of the car accident, but until the moment of collecting the biological samples. Thus, we can notice the legislative analogy.



1. the moment of driving the vehicle – without criminal relevance for the commitment of the offence of driving a vehicle under the influence of alcoholic beverages or other substances, at the date of 1st .02.2014 and until the moment of the publication of the Decision of Constitutional Court of Romania no. 732/16th .12.2014;
2. The moment of committing the accident;
3. The period of time up to the arrival of the bodies of criminal investigation, period which is no longer prohibiting, in law, regarding the consumption of alcohol or other substances.
4. The moment of collecting the biological samples with criminal relevance for the commitment of the offence provided and punished by article 336 from New Criminal Code;

No matter the time that would have been when the driver of the vehicle under the influence of alcoholic beverages or would have consumed, the only moment with criminal relevance is constituted by the point 4, and the only incident offence may be constituted by article 336 from New Criminal Code.

We may say the old regulation was tougher in terms of committing of a contest of the offence of driving a vehicle under the influence of alcoholic beverages or other substances and the consumption of alcohol or other substances after the accident. As shown above, in the case of the new regulation, in this situation we could have retained only an offence.

On several occasions, the doctrine and practitioners denied the effectiveness of the incriminating text of the article 336 of New Criminal Code.

At the same time, the admission of the unconstitutional exception of the phrase "the time of the collection of biological samples" makes that the offence provided by article 90 from GEO no. 195/2002 which was introduced later in the content of the text of incriminating provided by article 336 from New Criminal code (as shown above), to be decriminalized.

6. Conclusions

The offence of leaving the place of the accident was one of those that has met changes once with the coming into force in the content of New Criminal Code.

Relating to the former regulation, we noticed the courts no unitary the law in the terms of the interpretation of the provisions relating to "injury of bodily integrity or health of one or more people", from the content of article 89 from GEO no. 105/2002. The High Court of Cassation and Justice ruled by the Decision LXVI (66) of 15th October 2007 in this direction, settling these aspects in terms of the understanding of the phrase in the spirit and the understanding of the terms from a legal point of view, not literary. Therefore, the offence in order to be incident, it was necessary that the victim has suffered assessable injuries in at least 10 days of medical care or other necessary consequences in order to be able to be brought the incidence of the offence of bodily injury by negligence.

We notice that due to the new form incrimination, the attorneys charged with the application according to the law have faced real difficulties in adopting solutions regarding the legal analysed provisions.

The Decision of the High Court of Cassation and Justice of 15th October 2007 remaining without echo in the new form of the regulation, we can't wait for the new legislative solution that the Supreme Court will pronounce.

Due to the fact that the criminal law appears as a subject according to the social relationships, being associated with the mirror and the values of the current community, the future decision of HCCJ will repeal or confirm us the fact if, at least under this aspect, the perception the road crime, related to the provisions of article 338 of Criminal Code suffered other approach, being evident, at least referring to the way of writing of the offence that the incriminating provisions are much more severe.

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WATER INFESTATION AS A CRIME UNDER ROMANIAN LAW

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Abstract

The purpose of this paper is to highlight the main theoretical issues concerning the enforcement of art.356 of the Romanian Criminal Code, in regard to the protection granted by several special regulations that protect water resources.

In order to establish a frame for the content of this article, its structure shall be divided into four parts.

The first part will consist of an introduction, in order to establish the importance of this subject and its actual status in Criminal Law literature.

The second part will represent the first half of the paper content and will consist of a special criminal law approach to the provisions of art.356 of the Romanian Criminal Code, most importantly pointing out its constitutive content.

The third part, namely the second half of the paper content, will refer to specific provisions found in art.92 of Law no.107/25.09.1996, namely The Water Law or in art.98, paragraph 4, let.b of Government Emergency Ordinance no.195/22.12.2005, regarding the protection of the environment and finally in art.49 of Law no.17/07.08.1990, regarding the Regime of interior maritime waters, of the territorial sea, of the contiguous zone and of the exclusive economic zone of Romania, and their relations with the provisions of art.356 of the Romanian Criminal Code.

The fourth and final part will consist of brief conclusions as resulting from the content of this article, respectively the actual configuration of water protection, by Romanian Criminal Law provisions today, with a de lege ferenda proposal.

Keywords: *water infestation, environmental protection, criminal liability, crimes against the environment, water protection.*

1. Introduction

The importance of water sources is obvious today for everybody. Life itself and society as we know it depend on access to quality water, and therefore, it is expected for water purity to be protected even on a criminal scale.

Water is a renewable, vulnerable and limited natural source, indispensable for life and society, raw materials and productive activities, energy sources and transport and a key factor in maintaining ecological balance[1].

By law, the importance of water is recognized and the subsequent paragraph of the same article qualifies it as national patrimony, that needs to be protected as such, fact continuously supported by environmental literature[2].

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[1] Article 1, paragraph 1 of Romanian Law no.107/25.09.1996, namely The Water Law, published in the Romanian Official Journal, no.244/08.10.1996.

[2] D. Marinescu, M. C. Petre, *Treaty of environmental law* (original title: Tratat de Dreptul Mediului), Universitara Publishing House, Bucharest, 2014, p. 165.

Water protection against infestation by any means is incriminated in the Romanian Criminal Code[3], art.356. Alongside that provision, specific forms of water infection, prior to the enforcement of the Criminal Code, are found in art.92 of Law no.107/25.09.1996, The Water Law, or in art.98, paragraph 4, let.b of Government Emergency Ordinance no.195/22.12.2005, regarding the protection of the environment[4], and finally, in art.49 of Law no.17/07.08.1990, regarding the Legal regime of interior maritime waters, of the territorial sea, of the contiguous zone and of the exclusive economic zone of Romania[5].

This paper will establish the limits of the incrimination found in the Criminal Code, by reference to the provisions earlier mentioned, in order to specify the legal qualification of some actions that may represent the material element for both general and specific provisions subjected to analysis.

The expected outcome of this research is to highlight the effectiveness of the general regulations found in art.356 of the Criminal Code, nowadays, especially considering the fact that it is not a new type of incrimination, being almost identical to the provisions of the old art.311 of the 1969 Romanian Criminal Code, the only difference consisting in the penalty limits, and it is also similar to art.372 of the 1936 Romanian Criminal Code.

2. Water infestation, according to art.356 Romanian Criminal Code

Title VII, Chapter V of the Special Part of the Romanian Criminal Code incriminates water infestation, as a crime against public health, in art.356. According to paragraph 1 of the text earlier mentioned, *the infestation by any means of water sources or water networks, if the water becomes harmful to the health of humans, animals and plants, is punishable by prison between 6 months and 3 years or a fine.* Paragraph 2 of the same article stipulates: *The attempt is punishable.*

In order for an analysis, some terminological specifications must be made.

A *water source* is a natural accumulation or manmade installation which contains water, regardless whether if it is drinkable or not.

Water networks consist of channels, pipes, aqueducts, gutters, that hold water[6], or in which water circulates from a source to a consumer. I subscribe to the opinion[7] that water networks include water purifying machines or other technological equipment used to transport water between the source and the end-user. Equally, networks can be of natural origin, like a network of rivers or underground waters.

The special legal object consists in social relations regarding public health, by special reference to the security of water sources and networks[8].

The material object of the crime is represented by the quantity of water found in

[3] Law no. 286/2009, published in the Official Journal no.510/24.07.2009 regarding the Criminal Code of Romania, enforced since the 1st of February 2014, actual on the 1st of March 2018.

[4] Published in the Romanian Official Journal, no.1196/30.12.2005.

[5] Republished, in the Romanian Official Journal, no.252/08.04.2014

[6] I. Tănăsescu in G. Antoniu, T.Toader (coordinators), *Explanations of the New Criminal Code* (original title: *Explicațiile Noului Cod Penal*), vol. IV, Universul Juridic Publishing House, Bucharest, 2015, p.816.

[7] I.Tănăsescu, *op.cit.*, p. 817.

[8] I. Oancea in V. Dongoroz (coordinator), *Theoretical Explanations of the Romanian Criminal Code* (*Explicații teoretice ale Codului Penal Român), vol. IV, 2nd edition*, CH Beck and Romanian Academy Publishing Houses, Bucharest, 2003, p. 542.

sources or networks subjected to infection. On a water circuit between the source, the purification facilities and the end user, the material object will be represented only by the water upon which the infection is initiated. I appreciate that the infected water is only the product of the crime, not its material object.

The active subject of the offense can be represented by any person, either an individual or a moral person[9].

The primary passive subject is society itself, as beneficiary of the social relations regarding public health, namely the security of water sources and networks. The secondary passive subject is the owner of the water source or network, which is not adequate for normal use anymore. If an individual is affected by the consumption of infected water, or the animals or plants of an individual or legal person are affected, I consider that person to be a tertiary passive subject.

The premise for the constitutive content is the preexistence of a source of water or a water network, destined for the use of humans, plants and animals. I do not appreciate that the water should be destined for consumption, firstly because the provisions of art.356 Criminal Code do not stipulate the need of consumption, and secondly because water can become harmful for humans even if it is used only for hygiene purposes. Equally, I cannot subscribe to the opinion that the premise is not met if the water source or network is only of individual use[10], mainly because a private fountain, found in the private garden of a family, is subjected to multiple use, by all members of a family, or by animals and plants living in that household. More than that, as mentioned in recent literature[11], water originating from a particular source can end up being incorporated in different products destined for public use.

Contrary to specific literature[12], I do not consider that the preexistence of technical provisions that qualify water as drinkable or for industrial use represent a premise for the crime analyzed. In this regard, art.356 of the Criminal Code, does not refer to technical measures to establish is the water infected is harmful for the health of humans, animals and plants and the effect of the crime should be evaluated *in concreto*, after the *verbum regens* has been executed.

The material element, from my point of view, can be fulfilled either by an action of infestation or by omission, for example, in the case in which an operator of a water purification plant doesn't take all the measures necessary to limit the quantity of chlorine to be inserted in the purification process, before sending the water on the distribution networks to the end-user.

Equally, it is important to see that the legislator stipulated the infection of water, *by any means*, fact that will include any action or omission that will change the quality of water in order to make it harmful for human, animal or plant use, regardless of the substances or procedures used: poison, chemical substances, bacteria, radiations, microbes, waste, etc.

The immediate consequence is a result, and consists of an alteration of the quality of water, in such a manner that it becomes harmful to humans, animals or plants. Establishing the fulfilment of the immediate

[9] Based on conditions of criminal liability of the legal entity imposed by art. 135, 136 and 137 of Law no. 286/2009 regarding the Criminal Code of Romania.

[10] I. Oancea, *op.cit.*, p. 541.

[11] V. Cioclei, L. V. Lefterache in G. Bodoroncea, V. Cioclei, I. Kuglay, L. V. Lefterache, T. Manea, I. Nedelcu, F. M. Vasile, *The Criminal Code. Comment by articles* (original title: Codul penal. Comentariu pe articole), CH Beck Publishing House, Bucharest, 2014, p. 774.

[12] I. Tănăsescu, *op.cit.*, p. 816.

consequence is a matter of fact, and has to be done in a particular manner, mainly because plants and animals have different standards of harmfulness by water than humans. Secondly, there is no need for a person, animal or plant to be effectively harmed by the use of infested water. If such a result occurs, the perpetrator will also be held responsible for another crime against life, health or patrimony.

The causal relation must exist, and also must be proven for the incrimination to be effective.

In what concerns the subjective element, I consider that the crime can be committed both with direct and indirect intention, according to art.16, paragraph 6 of the Criminal Code. The mobile and purpose are of no interest to the legal qualification.

According to art.356, paragraph 2 of the Criminal Code, the attempt is punishable. It is important to notice that this is a difference from the old regulation of art.311 of the Criminal Code of 1969. Personally I consider this a progress, given the high importance of the incrimination and the great need of protection, both for public health and for the environment.

The punishment provisioned for the typical form is prison between 6 months and 3 years, or a fine. The limits are inferior to those stipulated by the ancient regulation, where the maximum was of 4 years.

Briefly I do not appreciate the new incrimination as being fundamentally different from the old regulation, with the reserves above mentioned.

3. Specific forms of water infestation, as provided by special regulations

In this part, I will point out the main differences between the general provision for water infestation and the particular incriminations found in special legislation.

Art.92 paragraph 1 of Law no.107/25.09.1996, The Water Law, stipulates: Discharging, dumping or injection into surface water and groundwater, in inland waterways or in territorial sea waters of waste water, waste, residues or products of any kind containing substances, bacteria or microbes, in an amount or concentration that may change the water characteristics, endangering the life, health, and physical integrity of persons, animal life, the environment, agricultural or industrial production, or the fishery fund, constitutes a crime and is punished by imprisonment from one to five years.

Firstly, this provision specifies the exact manner in which the infestation is incriminated[13]: Discharging, dumping or injection into surface water and groundwater, in inland waterways or in territorial sea waters.

I appreciate that surface water and ground water are generic terms that include water sources or water networks, as long as they are of natural origin. Man made installations, even if they contain water, cannot be included in this category.

Departing from the text, for the crime to be typical, it may seem that an essential request implies that the infestation must be done with *waste water, waste, residues or products of any kind containing substances, bacteria or microbes.* I appreciate that this is not limitative, given the fact that it can be

[13] M. Gorunescu, *Crimes against the environment* (original title: Infracțiuni contra mediului înconjurător), CH Beck Publishing House, Bucharest, 2011, p. 249.

done with *products of any kind*, containing *substances.* By using the generic term „substances", without any specific differences, the legislator virtually incriminated water infestation by discharging, dumping or injection, regardless of the products used for the infestation.

The immediate consequence is a result, namely a change of water characteristics which would endanger the life, health, and physical integrity of persons, animal life, the environment, agricultural or industrial production, or the fishery fund. Personally, I see this outcome as more comprehensive than that of art.356 of the Criminal Code. Equally, the causal relation must clearly be proven.

Paragraph 2, letter a) of the same article stipulates: With the punishment provided in paragraph 1 the following acts shall also be sanctioned: pollution in any way of water resources if it is systematic and produces damage to downstream water users.

I see this version as an assimilated form of the crime provisioned in art.92, paragraph 1 mainly because the distinction of the material element in alternative forms disappears. More than that, for the crime to be effective two essential requests are stipulated: 1) the pollution of water resources needs to be systematic, meaning that the acts would imply a repeated form based on the same general resolution, in an organized manner, most suitable for industrial activities that generate water pollution, and 2) effective damage must be produced to downstream water users. It is not important if the damage results from harming the health or life of humans, animals or plants. It can also derive from delay of an economic activity, resulting in material, namely financial, damage for the person who provides that activity.

Another important delimitation must be made from the provisions of art.98, paragraph 4, let.b of Government Emergency Ordinance no.195/22.12.2005, regarding the protection of the environment. According to the text, *It is a crime, and it is punished with prison from 1 to 5 years, if it is likely to endanger human, animal or plant life or health: discharging waste water and waste from ships or floating platforms directly into natural waters or knowingly causing pollution by discharging or submerging dangerous substances or wastes into natural waters directly or from ships or floating platforms.*

The main difference from the provisions of art.356 of the Criminal Code is that *verbum regens* is only possible by *discharging* waste water and waste, or *discharging or submerging* dangerous substances or waste. The most striking problem is the similitude with the provisions of art.92, paragraph 1 of Law no.107/25.09.1996, earlier analyzed. It is clear that both the objective and subjective elements of art.98, paragraph 4, let.b of G.E.O. no.195/22.12.2005 are included in the constitutive content of art.92, paragraph 1 of Law no.107/25.09.1996. More than that, the penalty limits are exactly the same.

My appreciation is that we are facing a double incrimination of the same conduct, punishable in the same manner found in two different acts. This situation must be regulated as soon as possible, by abolishing the provision found in art.98, paragraph 4, let.b of G.E.O. no.195/22.12.2005. Equally, I consider that repealing the latter is a salutary step in simplifying the criminal legislation in regard to water protection, but also I find it normal to remove specific water regulations from the same paragraph as crimes regarding nuclear materials as they are both found in art.98, paragraph 4 of the act earlier mentioned.

The third essential delimitation that must be made in this study is between the provisions of art.356 of the Criminal Code and art.49 of Law no.17/07.08.1990, regarding the Legal regime of interior maritime waters, of the territorial sea, of the contiguous zone and of the exclusive economic zone of Romania. According to paragraph 1 of the latter, *It constitutes a crime and it is punishable by prison from 3 months to 2 years, or by a fine, the discharge of polluting substances from a ship into: a) inland waterways or harbors to which Marpol 73/78 applies; b) territorial sea; c) the exclusive economic zone or an equivalent area established in accordance with international law; d) the high seas.*

Judging by penalty limits and its constitutive content, respectively the immediate consequence does not imply a minimal damage done to the environment or to water quality, I appreciate this provision as an attenuated form of art.356 of the Criminal Code.

It is relevant to analyze an aggravated form of this crime, provided by paragraph 3 of art.49 of Law no.17/07.08.1990: The act provided for in paragraph 1, which has caused significant damage to marine life is punishable by prison from one to five years.

The immediate consequence is a *significant damage to marine life*, which has to be appreciated *in concreto*. This outcome is far wider than the provisions of art.356 of the Criminal Code[14], but I believe it cannot coexist with the provisions of art.92 paragraph 1 of Law no.107/25.09.1996, namely because the area of protection is the same, and if the conditions of the latter incrimination are not fulfilled, then the legal qualification according to paragraph 3 of art.49 of Law no.17/07.08.1990 is possible.

4. Conclusions

The expected result of this study is to establish the limits of water infestation, as a crime, regulated by art.356 of the Romanian Criminal Code, taking into account its relationship with special provisions discussed in the third part of this paper.

I consider that art.92 paragraph 1 of Law no.107/25.09.1996 represents an aggravated form by reference to art.356 of the Criminal Code.

If the action or omission that represents the material element of the crime is done against a water network or water source of anthropic origin, then, the only incrimination viable is the general provision of art.356, paragraph 1 Crim.Code. If the material object of the crime is water situated in natural water networks or sources, and the action is done by *discharging, dumping or injection into surface water and groundwater*, I appreciate that the legal qualification should be done according to art.92 paragraph 1 of Law no.107/25.09.1996, because, as shown above, the immediate consequence of the two crimes is covered by the latters provisions.

If the material element is done otherwise than by the three actions above mentioned, the only valid incrimination is that of art.356, paragraph 1 Crim.Code.

Considering the crime regulated by art.92 paragraph 2, letter a) of Law no.107/25.09.1996, I appreciate that if the action is done in a systematic manner, this regulation shall prevail, but if the systematic way of action has not been proven, the act can be legally qualified as the crime provisioned in art.356, paragraph 1 Crim.Code.

[14] And I consider the crime regulated by paragraph 3 of art. 49 of Law no.17/07.08.1990 to be a specific aggravated incrimination for art. 356, paragraph 1 of the Criminal Code, considering that the outcome is an effective damage to marine life.

Regarding art.98, paragraph 4, let.b of G.E.O. no.195/22.12.2005, although it is a clear form of an aggravated crime by reference to art.356 Crim.Code, it is also a double incrimination of art.92 paragraph 1 of Law no.107/25.09.1996. It is obvious that the penalty limits are the same, the normative content is included in the latter provisions, and its place in G.E.O. no.195/22.12.2005 does not respect the natural organizing of criminal provisions by the object of protection, therefore, I consider, *de lege ferenda*, that art.98, paragraph 4, let.b of G.E.O. no.195/22.12.2005 must be abolished.

Last, I have observed that art.49 paragraph 3 of Law no.17/07.08.1990 is a special aggravated form of art.356 Crim.Code, which shall apply accordingly if the conditions of the incrimination are fulfilled.

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BRIEF OVERVIEW ON THE PENITENTIARY SYSTEM – LESS COMMON ASPECTS

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Abstract

After last year's study regarding the occupational therapy as a possible solution for preventing the breach of criminal law[1]*, in which we have analysed the penitentiaries in Europe, we have considered to further explore the penitentiary system in order to show the lesser-common aspects.*

Around the world there are prisons which offer those who have been convicted a decent life, as these facilities have been especially designed to re-educate them.

Therefore, we have considered that it might be useful to approach the types of penitentiaries that exist around the world because the persons interested in this subject will have the possibility to get a comprehensive view on the evolution of one specific part of the punitive justice system, namely prisons, considering the development of the human society, as well as peoples' mentalities.

Keywords: *penitentiary, prison, punitive measures, security.*

1. Introduction

In our opinion, it might prove useful to approach the types of penitentiaries that exist in various countries round the world because the characteristics, that some of them have, underline not only lesser-known facts, but also lesser-common aspects.

Thus, those interested in this issue will have the possibility to get a comprehensive view on the evolution of one specific part of the punitive justice system, namely prisons, considering the development of the human society, as well as peoples' mentalities.

Along time, in the evolution of mankind, there have been different views on punitive measures, which have had direct consequences on the organizations of the spaces allocated to offenders, so that these places would either instil fear or regulate human relationships (e.g. keeping families together).

2. Less Common Penitentiaries Around the World

The Sark Prison is the smallest prison in the world and is situated on Sark Island in Guernsey, a British territory, a few hundred kilometres away from the French coast. This prison was built in 1856 and it has only two cells. Local authorities still use it for short imprisonments[1].

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[1] Please see Constantin Marc Neagu, *Occupational Therapy - Possible Solution for Preventing the Breach of Criminal Law and Socially Reintegrating Offenders*, published in LESIJ – Lex et Scientia International Journal, no. XXIV, vol. 2/2017, p. 136 – 144, available at http://lexetscientia.univnt.ro/ro/articol/OCCUPATIONAL-THERAPY--POSSIBLE-SOLUTION-FOR-PREVENTING-THE-BREACH-OF-CRIMINAL-LAW-AND-SOCIALLY-REINTEGRATING-OFFENDERS~612.html.

[1] Please see https://www.ziare.com/.

Another less common prison is the one from Aranjuez, Spain. This prison is said to be the only one in the world providing not only special family cells displaying Disney characters on their walls, but also a kindergarten and playgrounds for the inmates' children. The Spanish penitentiary was designed so as to give the prisoners the possibility to spend time with their children. Aranjuez is 40 kilometres away from Madrid and has 36 family cells[2].

The first ecological prison in the world lies in Norway. Although the idea of an 'eco-friendly' penitentiary is not very popular, the small island Bastoey in Norway succeeded in changing the local prison into a 'green' one. The minimum-security prison uses solar panels to obtain energy, produces almost 100% from the food it consumes and recycles everything it can. The prison looks more like a farm and emphasize should be made that the extra ecological fruit and vegetables are sent to other prisons in Norway.

In Mexico one can find Cereso Chetumal, a prison where disputes that arise are solved in the boxing ring. Although, to some extent, it may sound odd and one might assume that violence is encouraged, for more than 10 years no violent acts have been committed by prisoners. According to the warden, Victor Terazzas, 'when there is a dispute between two prisoners, they put on their boxing gloves and climb into the ring, and 2 or 3 rounds later they end up their disagreement[3].'

In the San Pedro Prison in Bolivia, the prisoners can 'buy' their cells. The San Pedro prison, the biggest prison in Bolivia's capital city, La Paz, hosts approximately 1,500 prisoners. Once you enter it, leaving behind the thick walls and the enormous gates, any resemblance to a normal prison goes away: there are children playing in the streets, stalls, barber shops and even a hotel. There are no guards, uniforms or bars. Nevertheless, a price needs to be paid for this freedom to exist: the prisoners must buy their cells, so most of them are expected to work. 'If you have money, you can live like a king here', said a prisoner. And it seems that he is right as in the Los Pinos prison section the cells are large, they have their own bathrooms, kitchens and TV sets and in their courtyards, there are billiards tables, kiosks and stalls. These cells can be bought for $1,000-1,500. In the poor section of the prison, the prisoners sleep in the open air or they are crammed in very small cells[4].

In the Cebu Prison in the Philippines, the inmates are very good dancers. The 1,500 prisoners take dancing lessons every day and they have become so highly valued that they are often invited to cultural events and they are really paid for their performances. They have even recorded a few videos. Moreover, the Cebu Prison organizes live shows and spectators can buy T-shirts like those of the prisoners or other souvenirs[5].

3. Less Common Penitentiaries in Romania

Less common prisons can also be found in Romania. In 2017, BBC made a feature story in Biertan village in Transylvania. This unique Romanian village belonging to the UNESCO patrimony is the place where the fortified church, built in 1490, sheltered a special cell, where couples who were unable to get on well with each other were locked up by the priest for six weeks to solve their problems.

[2] Please see www.9am.ro.
[3] Please see www.ziua.ro.
[4] Please see https://www.mediafax.ro/.
[5] *Idem.*

Consequently, there was only one divorce in 300 years.

According to the BBC reporter, 'Picturesque Biertan, one of Transylvania's seven Saxon Unesco World Heritage villages, feels frozen in time. Horse-drawn carts are still a part of daily life, and local residents gather to trade their wares in a cobbled village square. At the heart of the village, a 15th-Century fortified church towers over the surrounding structures from its hilltop perch.'

'Inside the Eastern part of the church, along one of its fortification walls, is a small building with a room inside barely larger than a pantry, named the marital prison cell' continues the feature story.

For 300 years, couples whose marriages were on the rocks would find themselves here, locked away for up to six weeks by the local bishop with the hope that they would iron out their problems and avert a divorce. Documents from that period show that this type of counselling, the 'marital prison', was efficient, added the British reporters.

"Thanks to this blessed building, in the 300 years that Biertan had the bishop's seat we only had one divorce," said Ulf Ziegler, Biertan's current priest.

Today, the small dark prison is a museum exhibiting mannequins. The room has low ceilings and thick walls, and is sparsely equipped with a table and chair, a storage chest and a traditional Saxon bed that looks small enough to belong to a child. As couples attempted to repair their marriages inside this tiny space, everything had to be shared, from a single pillow and blanket to the sole table setting.

Lutheranism, the religion of the Transylvanian Saxons, governed most aspects of life, and although divorce was allowed under certain circumstances (*i.e.* for adultery), it was preferred that couples attempt to save their union. Therefore, a couple seeking divorce would voluntarily visit the bishop, who would send them to the marital prison to see if their differences could be reconciled before they parted ways.

'The prison was an instrument to keep society in the old Christian order,' explained Zielger, who noted that it also protected women and children, who were dependent on the family unit to survive. If a divorce did occur, the husband had to pay his ex-wife half of his earnings, but if he remarried and divorced again, the second wife was entitled to nothing[6].

Another less common prison in Romania is the one in Târgşor, in the Prahova county, which is, nowadays the sole Romanian prison for women. Nevertheless, between 1948-1952, in Târgşor, functioned the only prison for children in the world. Hundreds of minors who either explicitly fought against the communist regime or were members of the Romanian fascist movement were forced to study the works of Marx and Engels, had to undergo psychological experiments and were beaten so that they could be reborn as brand-new individuals, true communists.[7]

4. The 'Pitești' Phenomenon

The Pitești penitentiary stood out among Romanian prisons in the communist era due to its harshness. Romanian political prisoners arrested after 1945 were brought to the Pitești Penitentiary, in the Argeș county, and they had to go through 'the Pitești experiment' – an intensive brainwashing torture program.

The prison was built before starting the experiment. According to Eugen Măgirescu, work on this prison started in the late 1930s, during the reign of King Charles II of

[6] Please see www.news.ro.
[7] *Idem.*

Romania, and was finished during Ion Antonescu's dictatorship. Nobel Laureate Alexander Solzhenitsyn called the treatment in the Pitești Penitentiary 'the most terrible act of barbarism in the contemporary world'.

The 'Pitești' Phenomenon represented an experiment by means of which torture was used to re-educate young intellectuals detained in communist prisons, as they were considered potential threats against the communist regime. The so-called *new man*, wholly embracing the Marxist-Leninist ideology was expected to come out of the experiment.

In 1949, the Romanian communist authorities decided to apply, by means of the 'Securitate' (i.e. the Romanian secret police in the communist era), the Makarenko pedagogical methods, which aimed at re-educating detainees in communist prisons. The model that the Romanian authorities chose to closely follow was the Chinese model, Mao Zedong's, because of its success. In Romania, these methods were applied by the 'Securitate' general Alexandru Nicolschi and the place chosen to put into practice the preparatory stage of the re-education experiment was Pitești.

At that time, there were more than one thousand prisoners in Pitești. They were students from all the universities in Romania, aged between 18 and 25. Most of them had been members of the Iron Guard, the Liberal Party, the Peasants' Party, Zionists or even apolitical individuals and they were charged with having committed crimes invented by the communist regime: conspiracy against social order or the omission to denunciate. The goal of the experiment conducted in this prison was to exterminate the Romanian intellectuals, who might have organized themselves as opponents of the communist regime.

The preparatory stage of the horrific experiment lasted six months, from June 8th to December 6th, 1949. A group of political prisoners was chosen to be 're-educators', which might represent the originality of the Romanian experiment. These 're-educators' themselves had been previously tortured and promised to be released and become part of the 'Securitate', provided they could determine the political prisoners to confess to all the information they had kept secret during the enquiries. To achieve this, non-stop unimaginably atrocious torture methods were used, which led to the extermination of many prisoners. The chief investigator was the one who would set up the 're-education' stages, under strict and close guidance from the 'Securitate'.

In October 1949, student-torturers and their leader, Eugen Țurcanu, arrived in Pitești from the prison in Suceava. Țurcanu had been sentenced to seven years of prison for his Iron Guard membership and he was appointed chief 're-educator'.

Besides being severely beaten on a regular basis, the prisoners were forced to torture each other in order to eliminate any loyalties developed prior to their imprisonment. The guards forced them to attend scheduled or ad-hoc political training sessions on dialectic materialism or Joseph Stalin's History of the Soviet Communist Party. During these sessions, the prisoners usually suffered from random physical abuse and were encouraged to delate real or invented offences. The purpose was to make the prisoners mentally collapse, in order to become entirely subordinated and committed to the regime.

All the victims of the experiment were first interrogated, and, during this stage, they underwent physical torture in order to disclose intimate details directly related to their personal life (this was called 'the external dilation'). Thus, the prisoners were obliged to reveal details allegedly not confessed during previous interrogations and hoping that they could avoid torture, many of them admitted to imaginary

misdeeds. The second stage, 'the internal dilation', required the tortured to reveal the names of those who had behaved less brutal or somewhat indulgently towards them in detention. The third stage, 'public moral dilation' involved public humiliation, the prisoners being forced to dilate all their beliefs, ideas and personal values. For example, religious inmates were dressed as Jesus Christ and the others were compelled to insult them or blaspheme against religious symbols and sacred texts.

The prisoners had to admit to the fact that their own family members had criminal and grotesque features. Moreover, they were obliged to write false autobiographies, comprising accounts of deviant behaviour. According to Dumitru Bacu, 'by gradually feeding the victim's subconscious with information contrary to the one usually accepted as real and truthful, by constantly altering and belittling the existing reality and replacing it with a fictitious image, the re-educator achieve the purpose of dilation: to make the untruth become real for the victim so that he would forget what was previously meaningful to him; the values the victim had believed in before were completely reversed indeterminately'.

In the Pitești penitentiary, in addition to physical violence, inmates subject to 're-education' were supposed to work for exhausting periods in humiliating jobs (*e.g.* cleaning the floor with a rag clenched between the teeth). Malnourished and kept in degrading and unsanitary conditions, they were not allowed to have contact with the outside world, they were even forced to cover their eyes on the rare occasions when they went out of their cells. Usually, the newcomers were badly treated by the 're-education' veterans: they were beaten so that could not fall asleep; they were forced to eat quickly from plates left on the floor, their hands being kept on the back. It has been argued that the methods used in this Romanian prison were derived from the controversial principles characterizing Anton Makarenko's pedagogy and penology in respect to rehabilitation. Moreover, the Pitești prison was also used as a starting point for those prisoners who would later join the forced labour camps in Romania (*e.g.* the Danube-Black Sea Canal, Ocnele Mari, Aiud, Gherla, Târgu Ocna, Râmnicu Sărat, Târgşor), where ex-detainees teams were to continue the experiment.

In the Pitești penitentiary, because of the torturing methods, it is estimated to have died between 100 and 200 prisoners, although their exact number remains unknown. Usually, the cause of their death was falsified in the death certificate, so that no evidence would possibly exist for future reference[8].

5. Other Categories of Prisons

One should also acknowledge the fact that there are prisons which offer those who have been convicted a decent life, as these facilities have been especially designed to re-educate them. A possible example is the Storstrom prison in Denmark, considered by the mass media as 'the most humane prison in the world'. The penitentiary that could accommodate up to 250 inmates is near the Danish town Gundslev, cost $160 million to build and is likely to be taken for a university campus. Each prisoner has his own 4 m^2 cell containing a TV set, a fridge, a cupboard and a bathroom. The prison's amenities include a church, sport grounds, common areas, gardens, as well as agricultural land. The people responsible with this project consider that not only will the comfortable environment contribute to the inmates' re-education, but it will also be a pleasant for the employees.

[8] Please see http://ro.wikipedia.org/.

The prison was designed to be similar with any common Danish village: a completely open space, comprising buildings inspired by Scandinavian architecture. Nobody might be seen 'behind bars', as the private cells look more like dorm rooms. There is no central canteen, as common kitchens have been built and they shared by four to seven inmates that prepare their own meals. This prison's design is based on the idea that if inmates are given as much of a normal, free existence as possible, when they will be released from prison, they are less likely to re-offend. In Denmark, this strategy is widely used, and consequently the reoffence rate is approximately 27%, almost half as compared with the one in the USA, which varies between 49 to 80%, depending on the offence[9].

Another prison which is very similar to a hotel is in Norway. Built in 2010, the Norwegian penitentiary can accommodate 252 persons and provides hotel like amenities: private cells have TV sets, fridges and modern furniture, and the big windows do not have bars. The special lock on the door is the thing which reminds the inmates that they are not in a hotel. Most guards are unarmed because, according to the prison management, 'arms create a hostile atmosphere characterized by unnecessary intimidation and social distance'. To spend their time, the prisoners have access to a library, an indoor sport area which includes a climbing wall, being also able to practice various sport activities outdoors.[10]

The Bastoy prison is also in Norway, on the island with the same name. This prison is struggling hard to become the first ecological prison in the world. The inmates do not live in cells, they live in wooden cottages and work on the prison farm every day. In their free time, they have access to relaxation activities, such as horse riding, fishing, playing tennis and skiing. Probably many people would be willing to pay to spend their holiday in such a place[11].

In Austria one can find Leoben Justice Centre, which, although it does not seem so, it is also a prison. When one steps inside the Austrian penitentiary, one might think he/she is in a court of law or a university. Its walls are made of wood and secure glass, and some cells have balconies. The inmates can wear their own clothes, and, during the day, they can join various activities, they can relax using the facilities provided or they can exercise outdoors or indoors. The private cells have their own bathroom, and every fifteen cells share a common kitchen[12].

Very close to the Finnish coast, on a small island, one can find the Suomenlinna Prison. By far, it is the most open prison in the world, as the prisoners serve their sentences living in huts built on the entire area of the island. The huts have modern furniture, widescreen TV sets and kitchens are shared by several prisoners. In addition to that, the inmates can visit their families almost anytime. As a matter of fact, it is quite difficult to realize that you are in a prison: there are no locks or bars, mobile phones are allowed, you can go shopping in the town and you can even own a pet. Therefore, it is no wonder that no one would like to escape from this prison[13].

The Qincheng Prison, near Beijing is considered a penitentiary which provides decent detention conditions in communist China. This is the place where most privileged prisoners (*e.g.* the former Chinese political leaders) are usually sent. The

[9] Please see www.adevarul.ro.
[10] Please see www.romaniatv.net/.
[11] *Idem.*
[12] Please see www.adevarul.ro.
[13] *Idem.*

penitentiary has big cells with amenities such as desks, sofas and private showers. The prison yard comprises orchards and fish ponds, and the food is very similar to the one expects to find in luxury hotels. Unfortunately, because most inmates formerly held important state offices, there are only a few photographs available from this penitentiary.

To help old inmates keep pace with the modern world, a prison in Beijing was transformed into a fake town. Within its walls, one can find a supermarket, an internet café and even a fake subway station, and prisoners can learn how to use a banking card or a subway ticket. In order to make the inmates serving more than 20 year sentences become aware of current developments, the Chinese authorities envisaged a prison education program in the townlike prison: 'Sometimes prisoners find it hard to adapt when they are released from prison, so it might prove helpful for them to know how to use a banking card, mobile phones or computers, as most of them did not have these opportunities before they were put behind bars' said guard Liang Chiu, according to Oddity Central. The guard hopes that this type of imprisonment, favouring rehabilitation, will reduce the re-offence rate.

6. Conclusions

Having all this in mind, we consider that an overview of the penitentiaries from various regions of the world, providing decent detention conditions, could help us better understand how to choose the way Romanian prisons should be organized and possibly designed.

Moreover, this overview could also help us select the best type of re-education and social rehabilitation program for those persons sentenced to spend time without their family, lacking the comfort of the normal social environment.

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