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SOCIAL INNOVATION AND CIVIL SERVICE LAW

Gábor MÉLYPATAKI[*]

Abstract

The framework of administrative law is a static area of the legal system, but its content is very dynamic. The administration and the civil service law have been influenced by new technologies and social situations. These new things make innovations not just in the economy, but in the society as well. Social innovation is the rethinking of the relations between the persons, or between the persons and the state. We need to rethink the relationships in all ways. The state has new functions and must provide services for the citizens. The positions of the civil servants are influenced by new forms of the relationships with the citizens. This relation is very complex. We need to highlight digitalisation and PSR. Both effects have big significance in the changing of the situation of the civil servants, in the mirror of the roles of the state.

Keywords: *civil service law, social innovation, teleworking, PSR.*

1. Introduction

Changing is constant. New trends influence not just the relationships of the market, but the relationships of the administration as well. The trends are sometimes similar, but the administration has other ways. Civil service law and labour law is similar in many points. The scheme is the same in both areas. The basis of these laws is dependence. The definition of dependence is different in labour law and civil service law. Civil service law does not build on the equality of the parties. Civil service employment was not a formal agreement between two equal parties, but rather a decision of the State.[1] The decision of the State is not limitless. The state has to limit its own actions. In this relation the State is the employer and the owner as well. The state is the boss and the legislator in one person. This situation is very problematic, because in many times the state does not want to limit itself. The roles mix in lots of cases. It cannot be said where the role of the state ends as a legislator and begins as an employer. This duality makes the civil service law uncertain. So, it is hard to follow the changes of the system. On the one hand, this is criticism, and on the other hand it is an explanation. Civil service law is a very complex system which roots in the history and traditions. The history and traditions are different from country to country. So, it is very hard to talk about civil service law in general, but it is not impossible. Globalism

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[1] Civil Service Law & Employment Regimes, World Bank, in: http://siteresources.worldbank.org /PUBLICSECTORANDGOVERNANCE/Resources/285741-1345485407865/CSLaw&EmploymentRegimes.pdf, (01.12. 2018).

influences the administration systems of the European countries. This effect influences the situation of the civil servants indirectly.[2] Due to globalisation the function of the state has changed. The classical systems are broken up and changed. It means not just the classical Weberian models, but the classical New Public Management (hereinafter: NPM) models too. Bureaucratism is an overtaken theory from many points of view, and the theory of NPM is tight. How can we describe the civil service system today? The short answer is: complex. The longer answer is: "program installation is in progress".

If we would like to research civil service law properly, we need to analyse the changings of the society. We need to follow the processes of the society. The society has been transformed in these years. We can meet many innovations in our life. We need to know not just the technical innovations, but the social innovations as well. The innovations change people's life. Social innovation means innovative activities and services that are motivated by the goal of meeting a social need and that are predominantly developed and diffused through organisations whose primary purposes are social.[3] Social innovation is a new situation in the society. This new situation affects to the lives of the people.[4] This innovation affects not just to the private life, but work and public life too. The regulation can follow this change slowly. From this point of view, we can connect civil service law to social innovation.

The content of civil service law is compound. One of the main relations from this area is the work relation. This action is to bear resemble labour relations. The construction of the relationship and the character of hierarchy have similar basis.[5] The employer instructs, directs and controls the work of the employees. The employees accomplish their work according to the instructions of the employer. The state as an employer gives the instructions directly and indirectly in the relationship of the civil service law.[6] The role of the parties in the labour law is not fix. The employee and the employer have scope for action. This scope is guaranteed by the Labour Law Act.[7] This freedom favours to the development. Development and innovation walk hand in hand. The new tendency bounds to the

[2] Kim Chon-Kyun, "*Public Administration in the Age of Globalisation*", *International Public Management Review*, Vol 9. Issue 1, (2008), p. 39.

[3] Geoff Mulgan et al, "*Social innovation: what it is, why it matters and how it can be accelerated*" http://eureka.sbs.ox.ac.uk/761/1/Social_Innovation.pdf (2007).

[4] György Kocziszky – Mariann Veresné Somos and Károly Balaton: "*A társadalmi innováció vizsgálatának tapasztalatai és fejlesztési lehetőségei*" [The experience of the social innovations research, and possibilitis of develpoment], *Vezetéstudomány* 2017/6-7, (2017), p. 16.

[5] For example: David Špaček: "*Public Administration Reform in Czechia after 2000 – Ambitious Strategies and Modest Results?*", *The NISPAcee Journal of Public Administration and Policy*, Vol. XI, no. 1, Summer (2018), p. 166.

[6] The state as employer, See more: Mélypataki, Gábor, "*The State as an Employer – Does it Personalize a Public Authorty or an Owner?*" In: *MultiScience - XXXI. microCAD International Multidisciplinary Scientific Conference Miskolc, Magyarország, 1-5*, edited by Kékesi, Tamás (Miskolc, Miskolci Egyetem, 2017), download 13.11.2018, http://www.unimiskolc.hu/~microcad/publikaciok/2017/e1/E1_12_Melypataki_Gabor.pdf, (DOI: 10.26649/musci .2017.100); Stewart, Angus,"*The Characteristic of the State as Employer: implications for Labour Law*", Industrial. Law. Journal, 16 (Juta) 15 (1995), p. 15-29; Ellguth, Peter and Kohaut, Susanne, " *Der Staat als Arbeitgeber: Wie unterscheiden sich die Arbeitsbedingungen zwischen öffentlichem Sektor und der Privatwirtschaft?*", Industrielle Beziehungen, 18 1-2, (2011), p. 11-38. Old.

[7] See more: Per Légreid and Lois Recascino Wise, "*Transitions in Civil Service Systems: Robustness and Flexibility in Human Resource Managemen*t" in *Comparative Civil Service Systms in the 21st Century*, p. 206, edited by van der Meer, Frits M – Raadschelders, Jos C.N. and Toonen, Theo A.J.,(Hampshire, Palgrave McMilan 2015) (DOI 10.1007/978-1-137-49145-9), p. 206.

definition of flexicurity in the labour law.[8] Flexicurity has more goals. One of the goals is the harmonisation between work and family life. The other goal is the adaptation to the new life and economic situations. How can the relationship of civil servants follow these progresses? We are analysing two ways in this paper. The first will be the flexibility of the relationship, and the second will be responsibility.

2. The altering labour market and the civil servants

The position of civil servants is very special in the labour market. In many countries these people make up a big part of the employees in the labour market.[9] This fact prevails in most countries independently from the type of the administration, but the extent of the emergence depends on the administration system.[10] The change of the labour market influences the administration as well. The new form of the employment has been manifesting constantly in the public sector too. The role of the state influences how fast. A classical close systemic (carrier model) state allows it just slowly, but an open (managerial model) state allows it faster. In the latest case the connection between the public sector and the other part of the labour market is closer. With the change of social relations labour relations have changed as well. The labour market needs flexible employment forms and atypical labour relations.[11] The Labour Law Acts in the world have added the atypical forms. On the one hand, these forms are flexible and on the other hand they must be secure. Security ensures that the employees will not be in vulnerable position.[12] The future of civil service depends on the ability of adaptation. How can the new forms and tendencies of the labour market adapt? The big part of employees works in the framework of atypical employment. Digitalisation and other conditions are determining the new relations. How can the relationships of the civil service law react for this? We do not know. But it assures that some bureaucratic features are not vanishing. It is also not clear what the post-bureaucratic paradigm is, apart from remedies to the weaknesses of the classical bureaucratic model. Demke said: *"Still, developments like decentralisation, responsibilisation, greater flexibility, deregulation and more openness are too wide and too fluid concepts. These developments are also full of paradoxes and ambivalences."*[13] Can we crystallize this definition? In our opinion, yes, we can define it with the help of the labour market. The origin of flexible employment is in the labour market. Most definitions can be transformed and adopted. The goals will be similar in both areas. Effectiveness is the first condition what we need to research. The

[8] Jakab, Nóra and Tóth, Hilda: "*Flexicurity in Hungary from the more Vulnerabe Party's Point of View*" In: *5th International Multidisciplinary Scientific Conference on Social Sciences and Arts SGEM 153-160*, Sofia, Bulgária STEF92 Technology Ltd., 2018, (DOI: 10.5593/sgemsocial2018H/11/S02.020); Nóra Jakab, "*Systematic thinking on employee status*", *Lex et Scientia* XXV: 2 (2018), p. 56-68.

[9] Berndt Keller and Hartmut Seifert, *"Atypical forms of employment in the public sector – are there any?"*, (SOEP - The German Socio-Economic Panel study at DIW Berlin, 774-2015, 2015), p. 43.

[10] Tony J.G. Verheijen and Aleksandra Rabrenovits: *Civil service Development in Central and Estern Europe*, in: Frits M. van der Meer- Jos C.N. Raadschelders – Theo A.J. Toonen: *Comparative Civil Service Systems in the 21st Century*, p 17.

[11] For example: part-time job, teleworking, mini job, mid job.

[12] Jakab and Tóth, "*Flexicurity in Hungary from the more Vulnerabe Party's Point of View*", p 155.

[13] Cristoph Demke: "*Civil Services in the EU of 27 – Reform Outcomes and the Future of the Civil Service*", *EIPASCOPE* 2010/2, (2010), p. 8.

action of the state demands effectiveness. This is very important in this time. The connection between the citizens and the state is more than administrational. People in modern states are more than numbers and data. The new role of the state is the role of service provider. The citizens use the function of the state as a service. This perception affects to the relation of the state and civil servants. The classical interpretation of the administration is not enough. The position of civil servants changes parallelly with the employees' as well.[14] One part of the legislators has recognised that the attitudes of the civil servants and the employees are similar and, in most cases, they are the same. The civil servants have the same needs and problems. The nature of the legal relations fight with similar problems. Usually, the limits of both areas blur. The power of the state has transformed. The manager approach adumbrates the classical authority. The basis of this transformation was the NPM. The public sectors became opened, or less closed. The definitions of the labour law and labour market became the definition of the civil service law too. The usage of these definitions helps in the protection of civil servants. The biggest danger is that the state, as an employer takes over only flexibility, but not security, from these employment forms. The state as an employer is bounded by the rules of the labour market. The state must have self-restraint. In the classical relations the state was more dominant than now. Every right comes from the will of the state. It was a one-way relation, but this relation is relatively bilateral.[15] Civil servants have the right to make decision on their own labour relations. In the system of these former bounds, they can have a say in their own destiny.

Effectiveness functions in not just the framework of public authority, but in the framework of a special social service system. Civil service law is more today than a part of administrative law. This area is a bridge between labour law and administrative law. The work conditions are influenced by this bridge role. These definitions and tendencies of the private law are added to the public law approach. The main tendency is digitalisation. Digitalisation changes the employment relationships.

3. Digitalisation and the civil servants: teleworking

Digitalisation and new technologies are very important in the present society. Communication has new grounds. The relationships have been transformed. We live in the "now" society, where the processes are speeded up. Communication is faster and easier. These facts are changing the former communication forms and traditions.[16] One of these effects is that the information habits of public authorities in the public administration have changed and subsequently, the use of the info-

[14] Brian Bercuson, *"European Labour Law"*, (Cambridges, Cambridge University Press, 2009), p. 404.

[15] Tamás Prugberger, *"Európai- és magyar összehasonlító munka- és közszolgálati jog"*, Budapest, Complex, 2006, p. 295; Werner Dörring and Jürgen Kutzki, *"TVöD Kommentar"*, Berlin – Heidelberg, Springer Verlag, 2007; Tamás Prugberger - Andrea Szőllős, and Hilda Tóth, "*The Development of the Hungarian Labour and Public Service Laws After the Regime Change*", *Polgári Szemle* vol:14 (2017) p. 337-351 (DOI: 10.24307/psz.2018.0422).

[16] Balázs Budai – Balázs Szabolcs Gerencsér and Bernadett Veszprémi, "*A digitális kor hazai közigazgatási specifikumai*" [Domestic administrative specificities of digital age], Budapest, Dialóg Campus, 2018, p. 15; "*Teleworking Pilot Project Research report for: National Commission for the Promotion of Equality*", p. 2, downloaded 10.12.2018, https://ncpe.gov.mt/en/Documents/Projects_and_Specific_Initiatives/Gender _Mainstreaming -the_Way _Forward/telework.pdf.

communication tools as well. This influences the functioning of public administration.[17] We do not analyse the full horizon of this topic. We would like to speak about the changes of the civil servants' work life. The new technologies give new possibilities. Changes of the legislation relating to Occupational Health and Safety, and atypical forms of employment will be required to embody this form of work. The ICT technologies are accessible for many citizens. Nowadays, the e - infrastructure is constructed in most countries. One of the goals of the administration is the foundation of virtual offices. This infrastructure helps civil servants and the state too. The most optimal employment form besides the atypical forms is teleworking. Budai et al. said that the teleworking assumed five conjunctive dimensions.

1. Place of work: mostly in an alternative workplace. This place can be at home, tele-cottage, telecommunications, teleworking centre, satellite hotspot, that means the job is done by the worker, where it is the most convenient for him and where the environment is the most ideal to work.
2. Working means: mostly self-hired or info-communication devices.
3. Type of work: independently and regularly that means the worker does his job one or two days a week or every day.
4. Communication between parties: as the activity is strongly bounded to computers, transferring the result happens also electronically.
5. Work time: In most cases it is regular, permanent, predictable (or ad hoc), but it makes flexible scheduling possible.[18]

However, teleworking and flexible work have a serious set of conditions, which partly overlaps with the criteria for the development of virtual offices. Teleworking has numerous conditions: personal conditions, infrastructure, organising, cultural conditions, general social and economical conditions. Personal conditions and organising are the most important conditions from the viewpoint of civil servants. The civil servants can primarily become teleworkers based on their qualifications, experience and/or previous work, but based on their personal characteristics and attitudes as well. The examination of psychological factors gives answers to suitability, such as flexibility, reliability, adaptability, concentration, self-discipline, creativity, organizational skills, problem-solving skills, autonomy, ability to cooperate. The legislator is recognising the possibilities of the teleworking in the area of administration. In the Italian public sector, instead, a governmental directive for civil servants has been recently issued which intended to stimulate a deep cultural change in the concept of work: the shift from "stamping the time-card" to work for goals, where the workers have large freedom to self-organize job as long as they meet the goals set at the deadlines. The innovative part of the directive is to configure smart working as an organizational tool and not as a contractual type, with the aim of making it workable by all employees who carry out tasks that are compatible with smart working.[19]

[17] Budai – Gerencsér and Veszprémi, *"A digitális kor hazai közigazgatási specifikumai,"* p. 15.

[18] Budai – Gerencsér and Veszprémi, "*A digitális kor hazai közigazgatási specifikumai*," p. 413.

[19] Patrizio Di Nicola, *"Smart Working and Teleworking: two possible approaches to lean organisation management"*, downloaded 10.12.2018, https://www.unece.org/fileadmin/DAM/stats/documents/ece/ces/ge.58/2017 /mtg4/Paper_11- _Di_Nicola_rev.pdf.

Some countries try to create a new practice. According to the statistics, Spanish workers spend more time in the office than in other European countries, however their productivity is not higher.[20] For this reason the Spanish government adopted a program in 2005 called Plan Concilia, which had the primary purpose to help for the public servants to harmonize their public duties and their family life. The Government was convinced in that the conciliation of work and private life makes the public servants more efficient and enthusiastic, and they strengthen the quality of the public service through their work. The Concilia program of the Spanish Government mentioned telework as a proper tool for the conciliation of the work and familiar duties. Thus, the government decided to introduce the possibility of teleworking in the central administration. The program was successful. The level of the effectiveness of the work did not decrease. In the pilot program it combined three things. The first group of the civil servants worked at home every workday, the second worked some days in a week at home, and the third group worked every workday at the office. The third group was the control group in this experiment. This pilot project can show that the most important element of telework is the personal conditions. If somebody works in telework, he needs different skills than in teamwork and/or office work. Depending on the nature of the work, staff who have, for instance, decision-making and problem-solving skills, experience in information technology and the ability to cope with a reduced level of social contact may be particularly suited to e-working.[21] The easiness is the hardness as well. The possibilities of teleworking provide freedom for the civil servants. Most of the civil servants cannot take the opportunity. Most people's character is not suitable for home office work. The effectiveness was not a problem. The negative effects of telework are in the human factor. A big part of the employees complained about loneliness. They thought that they were fallen out from the former group and their colleagues are so far. The Spanish Government analysed the resources at the end of the pilot project. The project was successful, but it did not reach its goals. The civil servants did not talk about how can it help their family life?

In other countries the Spanish way was chosen and telework was tried out in the administration. This employment form will be not bypass. The new generations are stepping in the labour market in this time. The members of Z generation live most of their life in the on-line space. They prefer the new technologies: e- government, m-government, gig economy. Teleworking or mobile working, as well as flexible working arrangements, are increasingly sought after by the younger generations, and may go hand in hand with changing IT-supported workflows and services. Alternative working conditions may also be attractive for women who would like to work in leading positions and want to have a family at the same time.[22]

We need to speak about the role of organisation besides the personal conditions in the framework of telework. The role of the office changes in this relationship. We can speak about a virtual office and a physical office as well. In the virtual office there is no

[20] Vajk Farkas, *"Telework Pilot Projects in Spain*", Pilot projects in *Public Administration Management - Summary of a Research at Pázmány Péter Catholic University Faculty of Law and Political Sciences Volume II*, edited by Gerencsér, Balázs Szabolcs (Budapest, Pázmány Péter Katolikus Egyetem, 2013), p. 15.

[21] Airgeadais, An Roinn, "*Circular 4/2003: Pilot schemes to promote e-working in the Civil Service*" downloaded 10.12.2018, https://circulars.gov.ie/pdf/circular/finance/2003/04.pdf.

[22] "OECD Public Governance Reviews. *Engaging Public Employees for a High‑Performing Civil Service*", OECD, 2016, (DOI: https://dx.doi.org/10.1787/9789264267190-en), p. 97.

direct contact between the partners. They meet in the virtual space. The virtual office cannot exist alone. It needed a physical office as a basis in the background. The legislator cannot source out all the tasks. In most areas of administration, it is necessary to meet the civil servants and the citizens. The E-citizen can ease this bound (for example in Estonia). The chances of introducing teleworking forms are proportional to the presence of other features of organizational innovation. These features include:

- the level of development of organizational project work,
- the extent of the use of external consultants at the organization,
- flexible working hours and wages,
- characteristics of employer supervision and job description.[23]

Organizations implement telework for a variety of reasons, but most importantly because it can reduce costs, increase productivity and appeal to employees. However, there are also negative or neutral impacts to consider when examining the merits of telework in a workplace. Telework becomes a possibility only if management perceives that the benefits outweigh the costs.[24]

The civil service is founded on centralization. The employers' right to control is dominant in this relationship. Because of this, it is very hard to build a teleworking system. The state as an employer is precarious about the authorization of telework. Some European states are beginning the rebuilding of flexibility in the public sector. In Hungary there is a new line in the public law regulation. This regulation is based on the political basis. The regulation has changed a lot in the last five years, and it has become closer and inflexible.[25] The Hungarian legal system is mobile and does not favour to flexible work forms in the civil service. The Hungarian rules had been more inflexible. This system is averse from the flexible atypical work forms. The possibilities are given. Flexibility helps the effectiveness of administration, but the Hungarian system prefers the original carrier model without carrier approach.[26]

4. The interpretation of the new role and function of the state

Digitalisation is an important area of social innovation and the reform of the administrative law. The new tendencies affect to the employees and employers too. Social innovation can open new horizons and possibilities, for example, it has made the labour market more flexible. The state has got a new character and functions. These new functions and tasks are beyond the telework. Telework is a very important tool, but it is not the only one. This approach is beyond the classical functions of the state.

The positions of the social partners have changed. These are inevitable in the new social relations. This changing is influenced by the new interpretations of the functions of the social partners. The state has acted on the huge mass of the characters of the relationship. We would like to analyse

[23] Budai - Gerencsér and Veszprémi, "*A digitális kor hazai közigazgatási specifikumai*," p. 415.

[24] Alain Verbeke - Robert Schulz - Nathan Greidanus - Laura Hambley: *Growing the Virtual Workplace - The Integrative Value Proposition for Telework*, Edward Elgar Publishing, Inc, 2008, Northampton, p. 36.

[25] Attila Kun and Zoltán Petrovics, "*The development of civil service law into an independent branch of law*" in: Civil service career and HR management, p. 91-134, Bokodi Publishing House, Márta et al., (Budapest, Magyar Közlöny Lap- és Könyvkiadó, 2014).

[26] See more: Prugberger - Tóth and Szőllős, "*The Development of the Hungarian Labour and Public Service Laws After the Regime Change"* p. 337-351.

the new role and/or interpretation of the function of the state. We can present it from two viewpoints. The first viewpoint is the character of the close (carrier) model, and the other is the character of the open model.[27]

	Characters of the close (carrier) model	Characters of the open model
Business sphere	The politician is not the owner, he has no say in specific staff decisions. The right of decision of the public manager is limited, there is a minimum of opportunity for "leadership arbitrary".	A politician can be identified as a person, who staffing decisions identified by the business sphere owner. The position and authority of the public manager are the same as the private manager.
Law	Public law (non-private) rules. Detailed legal regulation of all aspects of the employment relationship.	Rules of the Private law and labour law. Most of the elements of the employment relationships are regulated by the parties' agreement and contract.
Politics	Independence of politics, politicians in HRM decisions. Neutral staff serving any political direction	The role of the politician is decisive in HRM decisions. It is loyal, serving civil servants of the given political direction

Figure 1: The characteristics of the civil service systems

These models influence the countries administration. The character of administration is determinated by the main moments of these models. The close models have prevailed in the German roots legal systems, and the open models in the common law roots legal systems. These models affect parallelly. The question is always that which is dominant in a country. The civil service system is organised by the state based on public law in the carrier model countries and based on labour law in the open models. These models do not function exclusively. We can find the single element of both models in the same legal system at the same time. How can one or other influence the whole legal system? It depends on the position of the society. The position of the society has changed. We can recognise a cyclic movement, but the result is always different. This movement creates new situations. The legislator has to follow these situations. The elements of the social innovations come from this duality. New answers are needed for the new questions. How do civil servants connect to the politics? The answer was different in every era. We can research this topic in three ways. How do civil servants connect to the business sphere, to the law and to the politics? If we try to find all the answers, the research cannot be finished. Civil service law is a very complex area. In this field public law and private law meet.[28] Szabó

[27] See: Vainius Smalskys and Jolanta Urbanovič, *"Civil Service Systems, Oxford Research Encyclopedias"*, downloaded 15.12.2018, http://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-160, (DOI: 10.1093/acrefore/9780190228637.013.160).

[28] Morris, Gilian S., "*The future of the public/private labour law divide*", in *The Future of Labour Law - Lieber Amicorum Bob Hepple QC*, edited by Barnard, Catherin – Deakin, Simon – Morris, Gilian S., (Oxford – Portland

said: "*The state is not only an employer of public sector workers, but it also acts out of its sovereign authority and sets the legal conditions of bargaining. There are two approaches by which the state handles employment relations in the public sector, which also determine its relationship to public sector unions."*[29] An important part of bargaining is the financial part. However, in what form the state manages this amount and in what form it determines its rate of public service wages, our opinion is that the State's public service relationship is significantly affected. It is influenced by the ability to identify the ownership or how strongly it attaches to sovereignty. This duality is strongly linked to open and closed models.

The models have become opened in general in the last decades. The employer begun behaving as an employer in the business sphere. One of the main thought of the NPM was the manager viewpoint. The state started to function as a company. The state transferred the HR methods from the business sphere. This made the relationship between the state and civil servants more flexible. Fairness, impartiality and transparency expected from the public sector cannot be guaranteed in a contractual form. Civil service has principles. One of them is the care for the civil servants (Fürsorgepflicht)[30] The level of care is decreased in flexible employment forms. A company has different functions than a state. Consequently, a civil servant is expected to act faithfully to the state and, in exchange, the State takes care of the civil servant: "the link between a civil servant and the state (…) is different in nature to that of an employee and a private company".[31] The state has to take over new elements and flexibility as well, but it has to keep the role of the "defender". The state must protect the civil servants from others and itself. The social innovation is in the transformation of the state's role. The new role has changed the level of responsibility. The companies recognised that responsibility is very important, if they undertake their own selves. The Corporate Social Responsibility (CSR) is an outstretched liability. This is an extra obligation of the employer. The corporate undertakes liability in a wider circle. It is more than liability of labour law, but it is less than the "Fürsorgepflicht" More, because the companies try to make social programs, social acting. Less, because the basis of this is an unregulated liability form. The state as an employer took over the new responsibility form. This is the Public Social Responsibility (hereinafter: PSR). This institution functions similarly as the CSR, but it differs in many elements of the definition.

5. Social Innovation and PSR

Public sector organizations throughout the world carry out activities that can be classified as social responsibility because they carry out their duties for the public interest. However, the perceived trend is the spread of recognition that activity carried out

Oregon, Hart Publishing, 2004); Bercuson, *"European Labour Law"*, p. 404.; Márton Gellén, "*Közszféra és magánszféra viszonya a karrierutak tervezésében*", *Pro Bono Publico –Magyar Közigazgatás* 2014/1, (2014), p. 36.

[29] Imre Szabó, Trade unions and the sovereign power of the state. A comparative analysis of employer offensives in the Danish and Irish public sectors, *Transfer: European Review of Labour and Research* 24. évf. 2. sz., (2018), p. 167.

[30] Fürsorgepflichts (care for civil servants) is the main task of the state in the closed model. The basis is loyalty for loyalty. The state cares for their civil servants, because they are loyal. This viewpoint is the most important pillar of the public law based civil service.

[31] Christoph Demke and Timo Moilanen, *"Civil service sin the EU of 27- Reform outcomes and the Future of the Civil Services"*, (Frankfurt am Main, Peter Lang), 2010, p. 68.

for the public interest is not automatically socially responsible.[32] However, this observation is not easy to see, since the common sense of public good and the public interest is inherent with public responsibility but does not include social responsibility as well. Therefore, it is necessary to interpret public social responsibility as an administrative function. A very interesting example is the Public Social Value Act from Great-Britain. It specifies that all purchases, subsidies, programs and co-operations from the budget must consider the social value of Triple Bottom Light with the interests and needs of the community. The PSR is far beyond the obligations of the state, but it cannot draw a sharp line between the regulatory and the voluntary. The main question is where the line is?[33] From the previous question comes the second one: How will it influence the HRM of the civil service law? The main topics of PSR are equal treatment, equal chance for everybody, how safe the environment is, etc.[34] The social avail influenced the application of the PSR. We would like to show the dilemmas with a concrete example. The office needs a new employee (or civil servant). There are two applicants. The first one studied in the best schools and made every exam excellent. The second applicant did not study in good schools and he might have been a prisoner. The job does not require special qualifications. The employer must choose the person who means more social benefits. The first applicant will be able to find a job anywhere, he has lots of chances. The possibilities of the second applicant are limited. He cannot find job in a lot of places. So, it is better for the society, if the employer chooses the second person. If the local government carries out the measurement of added social value, it will come to the conclusion that the second candidate has to be recruited, since by giving him a job, it has a good chance of preventing him from re-offending, and still the first candidate will find another job for himself, the second one is not sure about the same.

The first question is how PSR is connected to equal treatment. The second candidate is preferred in this case, because he has a handicap for the reason of his social position. This moment is very important, but who can decide what is the better benefit for the society? In most cases the situation is not as clear as in our example. This is a very hard question. This role of the state functions theoretically, but the state cannot decide personally in practice. The head of the office will decide. I think, this task is quite hard for these people. The director must clear the relations in the office and do everything for the goods of the local area. This decision is overweighed. The office has to work for the better good in the society, but it has not the task to enforce it. I think the office's role has to be indirect and direct as well.

Equality is the most important issue, we must assure the same possibilities from the beginning of the relations. PSR will change the functions of the administration. If they are well-used, planning a variety of services corresponding to the community values will bring much more holistic and innovative results than the earlier practices. The use of social value in planning helps not only to reduce costs, but it can also bring benefits to the society in a long term to operate the services. There are several features that can be included in the design of the service, which have a lasting effect on

[32] Sangle, Shirish, "*Critical Success Factors for Corporate Social Responsibility: a Public Sector Perspective*", *Corporate Social Responsibility and Environmental Managemen*t 17, p. 205-214 (DOI: 10.1002/csr.200).

[33] Balázs Benjamin Buday, *"A közigazgatás újragondolása - Alkalmazkodás, megújulás, hatékonyság"* [Reconsidering public administration - Adaptation, renewal, efficiency], (Budapest, Akadémiai Kiadó, 2017), p. 95.

[34] Buday: "*A közigazgatás újragondolása*", p. 96.

their effect. For example, it has a positive impact on social interests when employing a variety of workforce in the provision of the service or paying attention to improving the skills of employees and providing access to digital technologies.

6. Summary

Social innovation influenced civil service in more ways. We wanted to show two effects of this. The first one was digitalisation. Digitalisation changes jobs in the administration.[35] It means flexibility, freedom and creativity. These definitions stay far from the administration in the carrier models, but they are not used by the opened models very often. The effects of the labour market give this new terminology to the administrative law. The state is one of the members of the labour market. In many countries it does not differ remarkably from a normal employer. In many countries it would open administration and change the role of the state and the civil servants as well. The example of Denmark is an example of long-term changes. Denmark has represented an employer approach based on state sovereignty for a long time, and this was not the case for teachers working in Danish schools. Until the 1980s, teachers in Danish schools started working as officials from the beginning of their careers, and they were strictly under the rule of sovereign employers. However, employers' local governments recognized that, because of the need for greater flexibility, it would be better to treat legal relationships on a contractual basis.[36]

Changing of the role of the state converted the obligation system of the state as well. The care for civil servants is transformed by the viewpoints of the manager. The state functions in the open models as a company. A company has fewer obligations towards the civil servants. The care for the civil servants (Fürsorgepflicht) has changed. This liability is based on the volunteering and the social benefit for the society. In the business sphere it is called CSR, in the public sector it is called PSR. This responsibility is more and less, as the care. The tasks of the PSR are basically different. The relationships of the civil service break up permanently. This process is not so fast, but it enforces in all kinds of systems. The close models will be opened in the future, and flexibility and the PSR activates this. We cannot speak about just bureaucratism, NPM or Neo Weberian models and systems. We must speak about social innovations, which cannot change basically the philosophy and the main theory of administration, but the innovations, flexibilization, and the changing. Change is constant, the other things are not important, just the attachment and the solution of the changing. Changing and social innovation mean open administration systems. Opened to business, opened to politics, opened to service and flexibility.

References

- "*OECD Public Governance Reviews. Engaging Public Employees for a High ‑Performing Civil Service*", OECD, 2016, (DOI: https://dx.doi.org/10.1787/9789264267190-en).
- "*Teleworking Pilot Project Research report for: National Commission for the Promotion of Equality*", 2, downloaded 10.12.2018, in: https://ncpe.gov.mt/en/Documents/Projects_and_Specific_Initiatives/Gender_Mainstreaming-the_Way_Forward/telework.pdf.

[35] Budai – Gerencsér and Veszprémi, "*A digitális kor hazai közigazgatási specifikumai*.
[36] Szabó, "*Trade unions and the sovereign power of the state*.", p. 170.

- Airgeadais, An Roinn, "*Circular 4/2003: Pilot schemes to promote e-working in the Civil Service*" downloaded 10.12.2018, https://circulars.gov.ie/pdf/circular/finance/2003 /04.pdf.
- Bercuson, Brian, "*European Labour Law*", Cambridges, Cambridge University Press, 2009.
- Budai, Balázs – Gerencsér, Balázs Szabolcs and Veszprémi Bernadett, "*A digitális kor hazai közigazgatási specifikumai*" [Domestic administrative specificities of digital age], Budapest, Dialóg Campus, 2018.
- Buday, Balázs Benjamin, "*A közigazgatás újragondolása – Alkalmazkodás, megújulás, hatékonyság*" [Reconsidering public administration - Adaptation, renewal, efficiency], Budapest, Akadémiai Kiadó, 2017.
- Chon-Kyun Kim(2008): "*Public Administration in the Age of Globalisation*", International Public Management Review, Vol 9. Issue 1, (2008), p. 39.
- Civil Service Law & Employment Regimes, World Bank, (download: 01.12.2018), http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/285741-1345485407865/CSLaw&EmploymentRegimes.pdf.
- Demke, Christoph and Moilanen, Timo, "*Civil service sin the EU of 27- Reform outcomes and the Future of the Civil Services*", Frankfurt am Main, Peter Lang, 2010.
- Demke, Christoph: "*Civil Services in the EU of 27 – Reform Outcomes and the Future of the Civil Service*", EIPASCOPE 2010/2, (2010), p. 5-11.
- Di Nicola, Patrizio, "*Smart Working and Teleworking: two possible approaches to lean organisation management*", downloaded 10.12.2018, https://www.unece.org/ fileadmin/ DAM/stats/documents/ece/ces/ge.58/2017/mtg4/Paper_11- _Di_Nicola_rev.pdf.
- Dörring, Werner - Kutzki, Jürgen, "TVöD Kommentar", Berlin - Heidelberg, Springer Verlag, 2007.
- Ellguth, Peter and Kohaut, Susanne, *"Der Staat als Arbeitgeber: Wie unterscheiden sich die Arbeitsbedingungen zwischen öffentlichem Sektor und der Privatwirtschaft?*", Industrielle Beziehungen, 18 1-2, (2011), p. 11-38.
- Farkas, Vajk, "*Telework Pilot Projects in Spain*", Pilot projects in Public Administration Management - Summary of a Research at Pázmány Péter Catholic University Faculty of Law and Political Sciences Volume II, edited by Gerencsér, Balázs Szabolcs Budapest, Pázmány Péter Katolikus Egyetem, 2013.
- Gellén, Márton: "*Közszféra és magánszféra viszonya a karrierutak tervezésében*", Pro Bono Publico –Magyar Közigazgatás 2014/1 (2014).
- Jakab, Nóra and Tóth, Hilda: "*Flexicurity in Hungary from the more Vulnerabe Party's Point of View*" In: 5th International Multidisciplinary Scientific Conference on Social Sciences and Arts SGEM 153-160, Sofia, Bulgária STEF92 Technology Ltd., 2018, (DOI: 10.5593/sgemsocial2018H/11/S02.020).
- Jakab, Nóra, "*Systematic thinking on employee status*", Lex et Scientia XXV: 2 (2018), p. 56-68.
- Keller, Berndt and Seifert, Hartmut, "*Atypical forms of employment in the public sector - are there any?*", SOEP - The German Socio-Economic Panel study at DIW Berlin, p. 774-2015, 2015.
- Kocziszky, György - Veresné Somos, Mariann and Balaton, Károly: "*A társadalmi innováció vizsgálatának tapasztalatai és fejlesztési lehetőségei*" [The experience of the social innovations research, and possibilitis of develpoment], Vezetéstudomány 2017/6-7., (2017), p. 15-19.
- Kun, Attila ; Petrovics, Zoltán: "*The development of civil service law into an independent branch of law*" in: Civil service career and HR management, p. 91-134, edited by Bokodi, Márta; Hazafi, Zoltán; Kun, Attila; Petrovics, Zoltán; Szakács, Gábor - Hazafi, Zoltán, Budapest, Magyar Közlöny Lap- és Könyvkiadó, 2014.
- Mélypataki, Gábor, "*The State as an Employer - Does it Personalize a Public Authorty or an Owner?*" In: MultiScience - XXXI. microCAD International Multidisciplinary

Scientific Conference Miskolc, Magyarország, p. 1-5, edited by Kékesi, Tamás, Miskolc, Miskolci Egyetem, 2017, download 13.11.2018, http://www.unimiskolc.hu/~microcad/ publikaciok/2017/e1/E1_12_Melypataki_Gabor.pdf, (DOI: 10.26649/musci.2017.100).

- Morris, Gilian S., "*The future of the public/private labour law divide*", in The Future of Labour Law - Lieber Amicorum Bob Hepple QC, edited by Barnard, Catherin - Deakin, Simon - Morris, Gilian S., Oxford - Portland Oregon, Hart Publishing, 2004.
- Mulgan, Geoff, Tucker, Simon- Ali, Rushanar, and Sanders, Ben: "*Social innovation: what it is, why it matters and how it can be accelerated*", p. 1-52, download: 01.12.2018, http://eureka.sbs.ox.ac.uk/761/1/Social_Innovation.pdf, (2007), p. 1-52.
- Per Lćgreid and Lois Recascino Wise, "*Transitions in Civil Service Systems: Robustness and Flexibility in Human Resource Management*" in Comparative Civil Service Systms in the 21st Century, edited by. Van der Meer, Frits M - Raadschelders, Jos C.N. and Toonen, Theo A.J., Hampshire, Palgrave McMilan 2015 (DOI 10.1007/978-1-137-49145-9).
- Prugberger, Tamás - Szőllős, Andrea and Tóth, Hilda, "*The Development of the Hungarian Labour and Public Service Laws After the Regime Change*", Polgári Szemle vol:14 (2017) 337-351. (DOI: 10.24307/psz.2018.0422).
- Prugberger, Tamás, "*Európai- és magyar összehasonlító munka- és közszolgálati jog*", Budapest, Complex, 2006.
- Sangle, Shirish, "*Critical Success Factors for Corporate Social Responsibility: a Public Sector Perspective*", Corporate Social Responsibility and Environmental Management 17, p. 205-214 (DOI: 10.1002/csr.200).
- Smalskys, Vainius and Urbanovič, Jolanta, "*Civil Service Systems, Oxford Research Encyclopedias*", downloaded 15.12.2018, http://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-160, (DOI: 10.1093/acrefore/9780190228637.013.160).
- Špaček, David: "*Public Administration Reform in Czechia after 2000 – Ambitious Strategies and Modest Results?*", The NISPAcee Journal of Public Administration and Policy, Vol. XI, no. 1, Summer (2018), p. 155-182.
- Stewart, Angus, "*The Characteristic of the State as Employer: implications for Labour Law*", Industrial Law Journal, 16. (Juta) 15 (1995), 15-29 (Juta) 15 (S.:1995), p. 15-29.
- Szabó Imre: *Trade unions and the sovereign power of the state. A comparative analysis of employer offensives in the Danish and Irish public sectors*, Transfer: European Review of Labour and Research 24. évf. 2. sz., p. 167.
- Verbeke, Alain – Schulz, Robert – Greidanus, Nathan and Hambley, Laura, "*Growing the Virtual Workplace - The Integrative Value Proposition for Telework*", Northampton, Edward Elgar Publishing Inc, 2008.
- Verheijen, Tony J.G. and Rabrenovits Aleksandra, "*Civil service Development in Central and Estern Europe*" in *Comparative Civil Service Systms in the 21st Century*, edited by. Van der Meer, Frits M - Raadschelders, Jos C.N. and Toonen, Theo A.J., Hampshire, Palgrave McMilan 2015 (DOI 10.1007/978-1-137-49145-9).

LIABILITY OF THE TRANSPORTATOR IN THE CASE OF THE RAILWAY TRANSPORT CONTRACT

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Abstract

When dealing with rail transport, whether we deal with aspects of domestic or international rail transport, the provisions of GO no. 7/2005 for the approval of the Romanian Railways Regulation and the Romanian Rail Transport Regulations for Internal Transport and the Convention on International Carriage by Rail (COTIF) of 9 May 1980 and Uniform Rules for the International Carriage of Goods Goods (CIM) for international transport.

Keywords: *Contractual transport, rail transport, tort law, illicit nature of the harmful act.*

Introduction

Relationships arising from the transport contract are independent of the relationship between the shipper and the beneficiary, which is based on another contract, which are not opposable to the carrier, and thus the existence of two stand-alone contracts with its own effects.

Carriage of goods is determined by the sale of a buyer from another locality or the rental of equipment for use in another locality than the one in which they are located. The use of purchased or leased goods may take place only by transporting them from the place where they are to be used.

The conclusion of the contract of carriage is determined by the prior conclusion of the sale-purchase, rental contracts without losing its autonomy through this connection. Thus, in practice, the transport contract, being autonomous, is concluded and executed independently of any existing conventions between the shipper or the consignee and third parties. In the same sense, the problem can be raised and vice versa, ie the provisions of the transport contract can not be opposed to the parties to the contract that preceded it. Thus, in a transport contract, if the jurisdiction of the Court of Arbitration in London, in which the jurisdiction of the International Commercial Arbitration Court in Bucharest was established in the event of litigation, was settled in case of litigation between sellers and buyers.

The transport contract is a legal institution with specific characters, which distinguishes it from all other contracts with economic or civil law content or which have as object the provision of services. Represents in legal terms the realization of economic relations of a special nature, such as the displacement of the object of transport, which gives it its own juridical figure with distinct characters. Being entered into between economic agents with regard to the performance of certain services, in order to carry out its tasks, the transport contracts are economic service contracts and are of a special nature.

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The contract of carriage is a unitary, autonomous and autonomous contract, in the content of which there are elements that resemble elements specific to other contracts, but which confer on this contract an own legal nature.

But not every move of things from one place to another is the subject of a transport contract but only when the shipment is made on the basis of the assumed obligation of the carrier and which it has taken to the place of loading and will hand them over to place of destination.

The towing contract is of a legal nature different from the legal nature of the transport contract because it does not involve the taking over of the goods in the port of shipment and their handing over to the port of destination but only the offshore or seagoing offshore . The towing contract may be terminated for a certain distance, for a certain length of time or for the execution of a particular operation, in return for a payment. Both Contracting Parties have obligations whose non-compliance entails the contractual liability of the defaulting party, and in the event of damage to property due to third parties by performing the towing operations, the defaulting party shall be liable to them. The contract of carriage is also different from the contract of shipment, which is the contract on the basis of which a person, called expeditionary or commissioner, undertakes to the other contracting party, appointed as the sender or the principal, that by virtue of the empowerment given by the latter to conclude with carriage on own account but on the expedition's behalf a contract for the carriage of goods and to carry out all the ancillary operations for the dispatch of the goods or their arrival at destination and the consignor undertakes to pay him a certain amount of money and the price of ancillary services. The legal relationships established between the parties to the shipment contract are of a complex legal nature.

There are two civil contracts in the relations between the consignor and the consignor: a contract without a warrant, under which the sender authorizes the shipper to conclude with a carrier the transport contract and a service contract, on the basis of which the consignor must execute all the operations necessary for transport, such as the taking over of the goods and their loading in the means of transport, the completion of the necessary formalities. The consignor is responsible for the destruction or destruction of the goods from the moment they are received until they are handed over to the carrier, and is only responsible for the proper execution of the specific shipment contract obligations and the choice of the carrier, the means of transport and the route. The sender has the right to terminate the contract, but only until the date of conclusion of the contract of carriage, in which case he is obliged to pay the expedient a sum of money, which represents the equivalent of his activity until the termination and the price of the accessories provided; unpaid, as long as the goods are still in detention, will have the right of retention. By the way it is formed and viewed from the complexity of its constitutive elements and its purpose, the transport contract has its own legal structure and specific physiognomy, being independent of any other civil or commercial contract.

1. Regulation of the transport contract.

The legal provisions applicable to the transport contract come from a series of normative acts that need to be coordinated with each other. The Civil Code refers to the transport contract within the scope of art. 1955 - art. 2008. The transport activity is

also regulated by normative acts specific to each transport sector: Government Ordinance no. 19/1997 on transport; The Romanian Railways Regulation approved by Government Ordinance no. 7/2005, Government Emergency Ordinance no. 12/1998 on the Romanian railways and the reorganization of the Romanian National Railway Company, Government Ordinance no. 42/1997 on the maritime and inland waterways, Government Ordinance no. 27/2011 on road transport. Besides the special laws and custom, as provisions that derogate from the legal regime established by the New Civil Code, it is also necessary to consider Art. 140 of the Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, which stipulates that the provisions of the international instruments ratified by Romania in the field of transport prevail over the provisions of the Civil Code.

Art. 193 of the Law no. 71/2011 provides that art. 20 par. (3) of the Government Ordinance no. 19/1997, which regulates the transport contract in general, is modified in order to know the provisions of the New Civil Code as a general rule.

Also in the sense of recognizing the provisions of the New Civil Code as a general norm in the field of transport, art. 194 of Law no. 71/2011 provides for the amendment of para. (7) of art. 1 of Government Emergency Ordinance no. 12/1998 on the Romanian railways and the reorganization of the Romanian Railway Company.

In addition to the common features of any provision of services, the transport contract is distinguished by its own characteristics, such as: an activity consisting in the movement of persons or goods; the exercise of the carrier activity as a self-employed profession; the technical and commercial management of the operation; autonomy of the transport contract against the correlation contracts.

2. Mandatory clauses of the transport contract

According to art. 1961 par. (2) the transport document is signed by the consignor and must contain, inter alia, particulars of the identity of the consignor, the carrier and the consignee and, where applicable, the person to whom the shipment is due. The transport document also mentions the place and date of receipt of the goods, the point of departure and the destination, the price and timing of the shipment, the nature, quantity, volume or mass and the apparent condition of the goods when handed over for transport, the dangerous nature of the goods, if any, as well as additional documents that have been handed over and accompany the shipment. The Parties may also agree on other entries in the transport document.

The provisions of the special law remain applicable.

The terms of the contract of carriage concern: the date of the contract; the nature of the transport document; the parties concerned; identification of the goods transported; carrier's obligations; payment of the price; the signature of the document.

The date of the contract is important because it determines the day of conclusion of the contract of carriage, as from the normal start of the assumed obligations. In addition, dating is of interest in determining whether or not the sender was a person with an exercise capacity at the time the legal act was finalized.

The nature of the transport document is requested incidentally by art. 1965 of the New Civil Code, which states that when the transport document is on order or at the bearer, the property of the transported goods is transferred by the effect of the transmission of this document. The type of transport document influences the identification of the recipient. The Civil Code requires that the sender, the carrier and

the consignee and the person who has to pay for the shipment be identified. The identity of the sender allows the carrier to know the person from whom he or she can validly receive counter-orders, such as changing the destination or replacing the consignee. The carrier, being the main party to the contract, must be nominated, because only the recipient or the rights transferee will know without a doubt who can be held accountable in the event of loss or damage to the displaced property. The mention of the seat serves to determine the territorial jurisdiction of the jurisdiction that will settle the dispute between the contracting parties, most of the times the defendant being the carrier.

The mention of the addressee is necessary to enable the carrier to determine the person entitled to the cargo at the end of the journey.

The description of the cargo that the shipper handles to the carrier is a mandatory requirement in the contract of carriage, since the nature, quantity, volume or mass and the apparent condition of the goods when delivered for carriage must be specified, the dangerous nature of the goods, if any. If things are in boxes or packages, you must specify their quality, number and seals or marks applied.

The purpose of these mentions is to facilitate the identification of things both by the carrier, who must release them at the end of the journey, as well as the recipient, who will receive them. The load description serves to assess the amount of compensation that the carrier may owe in the event of loss or damage to goods during transport.

Regarding the carrier's obligations, the New Civil Code requires that the point of departure and the destination be mentioned. By knowing only the destination, the carrier will be able to properly guide the means of transport. The term of the shipment must be mentioned, the term of delivery of the items being transported shall be decided by the parties. The time limit for the execution of the contract of carriage starts to run from the date when the work was handed over to the carrier by the consignor.

Payment of the price must be expressed in the document. The cost depends mainly on the type of transport, the distance traveled, the nature, the dimensions and the weight of the work being carried. In addition to the actual price of the transport, its total cost may also include other amounts.

The new Civil Code provides that the transport document is signed by the sender. By signing it, its unconditional adherence to the terms of the transport contract is manifested. The text does not include the carrier's signature. The nominative transport document must be signed by both contracting parties, namely carrier and consignor.

3. Comparative view of transport

Two obligations are the basis of any legislation on transport, in the general sense of a different carrier according to the rules of common law, in particular the meaning of railway under the various transport regulations.

The imperative nature of these obligations is:

- equality of treatment towards the public wishing to take part in the contracting of a transport, resulting in the publicity of the law or regulation which stipulates the conditions and the price on the means of transport, which become mandatory in the relations between the state or the entrepreneur and the private persons on the basis of the concluded transport contract;
- non-disregard of the general principle that it is not permissible to circumvent the contractual obligation giving rise to the waiver.

Any enterprise of private or private interest violates the principle of fairness in law when it is allowed by law or the regulation which would require it to deviate or diminish its contractual responsibility. Justice, by jurisprudence, has the honor of restoring the violation of this high justice principle.

3.1. France

In France, land transport was governed by the provisions of Art. 1782-1786 Civil Code and Title VI S. III Commercial Code dealing with commissioners for water and land transport in Art. 96-102 and S. IV which contained a series of provisions concerning carriers generally in Art. 103-108, these articles contained general rules applicable to any kind of transport. However, it does not apply to maritime transport as these are regulated separately from the commercial code or from the transports on the roadways to which the laws of 30 May 1851 of 17 July 1908 apply, or the trams and railway undertakings of local interest to which they apply the law of 11 June 1880 and the decree of 16 July 1907.

For a long time after the promulgation of the commercial code, France has envisioned a rich legislation on rail transport, seeking new provisions to satisfy the requirements of this mode of transport.

From the point of view of the legal nature of the transport contract, the French Civil Code regards it as an operating lease and the commercial code as a commission contract. The French Leader did not know to relinquish the transport contract that autonomy that is so logical and necessary to the important economic function it performs. The rule of law translated into law is incomplete and too old that it can no longer solve problems that arise with the development of the transport industry.

As far as the railway transport is concerned under the old laws, whenever the special tariff was applied, this presupposed in the transport contract the existence of a negligence clause on the part of the railway administration and the recipient was the one who had to prove the fault of the roads railways.

The law of March 29, 1905 considers any clause introduced in the consignment note to be void under which the reduction of liability is stipulated.

The provisions of the Code, which did not restrict the parties' freedom of contract, the carrier, to the freedom to contract with the shipper on the terms of the contract, could mitigate the extent of its liability or remove it altogether by stipulating in the contract a non-warranty clause. However, the case-law has saved the general principle of common law that each is responsible for the consequences of his deeds or the non-fulfillment of an obligation.

Through a series of steady decisions, it has defeated the desire of railway companies to work beyond the boundaries of an elementary contractual liability, being nullified by any clause to the contrary. The legal reasoning which the French courts based in their judgments referred to a clause whereby railways would be sheltered from any liability or diminished the degree of their liability resulting from the breach of contract is equivalent to the right of the railway company to free themselves from the effects of culpability, which would result in the encouragement of all the most damaging crimes and negligence and the deceptive facts. As a consequence, such an irresponsibility clause would be against public order and would not be valid.

3.2. Germany

In Germany, it was easier to regulate the transport contract because there is no

legal tradition as it was in France where the commercial code of 1807 drafted the basic principles of transport and created a legal regime that had been put into practice. The German Legislative Commission of 1848, which had been designated to deal with trade and transport business, was able to study this problem and resolve it in a satisfactory manner.

The 1861 code deals with transport through art. 390-421. Damages in the event of damage or loss were calculated according to the value of the goods in the destination city, and when the carrier was guilty of misdemeanors or misdemeanors, it used the principles of common law with regard to damage to the sender. For the amounts due by virtue of transport, the carrier had a pledge on the shipment. All of these provisions, together with the others contained in the old code, have been the basis for the drafting of the Berne international convention, which is largely a true replication of the German principles. In 1900, the new German code was promulgated, which, in transport matters, reproduced exactly the provisions of the Berne Convention, paying particular attention to the conditions under which transport must be carried out and at the same time regulating the responsibility of the carrier.

The German legal system on transport has been adopted by many countries in their transport legislation because the Germans have been the only ones who have been able to adapt to the new requirements emerging with the development of the transport industry, new principles capable of satisfying them.

Transport law is viewed by German doctrine and law as a conventional right of the parties, although their will is limited by some prescriptive rules prescribed by the Code, however, they have some freedom to contract. The principles of railway law refer to a transport of public interest, are imperative and the contractual freedom of the parties is wholly excluded.

3.3. Italy

The Italian Commercial Code of 1865, which was a copy of the French code of 1807, contained in the transport field old provisions because, during the entry into force of the French code, the transport industry was very poorly developed, trafficking in persons or goods was extremely low when, after several decades, the transport companies have expanded, especially the railway companies, and those provisions could no longer meet the new needs due to the multiplication of the means of transport and their intensification.

The Italian code deals with freight and freight forwarders, each with a sphere of activity and distinct responsibility. The Chief Officer was responsible for the way the carrier carried the task of carrying, responding to the damage, the loss or delay of the work, and the carrier responded to the commissioners as to how it had carried out the shipment.

There is no provision in this code on rail transport, and then, in the absence of a special law or regulation, the provisions of the commercial code apply, which is totally inadequate and abusive.

Thus, due to the lack of specific rules that clearly and precisely define the concept of railway administration's reputation, those companies, through their regulations and statutes, which they changed as they pleased, began to restrict their responsibilities in many cases or reserve their right to fix in the consignment note the amount of damages they would have to pay to the entitled party in the event of damage or loss attributable to them. Many times, through an express clause, they were free from any liability. The damages suffered by the public as a result of

such abusive treatment, forced in the event of damage or loss, to satisfy what companies wished to indemnify or to give up any compensation when the companies provided the clause of their irresponsibility in the contract.

Following the promulgation of the commercial code in 1885, a number of conventions entered into between the Italian State and the various companies to which the state had conceded the operation of the railways, setting out in detail the conditions under which they were obliged to carry out the transports, and also the extent of their responsibility . The Royal Decree of November 26, 1921 brought many changes to the existing legal regime for rail transport.

The Italian Legislative Commission of 1921, which deals with the reform of the commercial code, has echoed a pressing need. He also deals with the transport of people. The few principles of the commercial code applicable to all modes of transport are insufficient in their content and, with the development of public transport services, their applicability has become increasingly difficult. In this situation it was necessary to intervene in the jurisprudence to supplement these shortcomings and the legislator who by special laws to adapt the old provisions to the new requirements.

3.4. England

The regulation of transport in England is subject to the rules contained in the Railways and Canal Traffic Act of 30 July 1854 where no convention whereby the carrier would derogate from the general principles underlying its liability is prohibited under the penalty of nullity.

Any carrier is subject to those provisions which have a single purpose, a fair compensation in the event of loss, damage or delay.

3.5. Switzerland

The law of 29 March 1983 governed transport in Switzerland, which contains the same provisions as the Berne international convention. The contract of carriage is treated in Art. 440-457 of the Obligation Code of 30 March 1911.

4. Liability in the contract of carriage.

Failure to comply with the obligations assumed in the contract of transport gives rise to civil liability for the carrier and the consignor. As regards the liability of the consignor or the consignee, the rules that apply are those of ordinary law, whereas special aspects of the common law apply to the carrier.

Regarding the carrier, there is contractual liability and tort liability. Tort liability is subject to the provisions of the civil code, and contractual liability is subject to the provisions of special laws, and only in the absence of specific provisions is it subject to common law.

The legal regime of the carrier's liability is given by the provisions of the civil code by art. 1984-2002.

4.1. Tort liability of the carrier.

Tort law is a sanction specific to civil law, applied for committing an illicit act of causing damage and has a reparatory character.

According to the civil code, any person has the duty to observe the rules of conduct that the law or custom of the place requires that, by his actions or inactions, the rights or legitimate interests of others, are not prejudiced. The person who has discretion violates this obligation is responsible for all the damages caused, being obliged to repair them fully. In certain cases provided by law, a person is obliged to repair the damage

caused by the deed of another, the things or animals under his guard, as well as the ruin of the edifice.

The carrier, through the performance of the contract of carriage, assumes responsibility towards its contractor but may also assume liability to third parties in the sense that in the event that third parties have been harmed by acts committed by the carrier in the course of the activity outside the contract of trabsport, the liability of the carrier will be a tort / delict.

4. 2. The contractual liability of the carrier.

When the sender did not notify the carrier of the fault of the work, and he did not check the thing and did not know his vice, if the work deteriorated because of his vice and the things adjoined, the sender will be responsible for the damage caused by his fault. The sender's deed may extend the wholly or partly the civil liability of the carrier. In order for the liability to be wholly excluded, the creditor's deed must fulfill the features of force majeure, ie it is absolutely unpredictable and irresistible, otherwise the rules of common fault will apply. In the case of the transport contract, the following will be attributed to the sender and the consignee: - inappropriate loading or unloading, if these operations were done by the means of the consignor or the consignee or under their supervision; - the sender hid the vice of the work, declaring the contents of the package to be false; - the sender has handed over products which are excluded from the transport by any special law, under a false, inaccurate or incomplete name and confiscated by the authorities; - handing things over to a package with defects that could not be seen from the outside appearance when things were taken to transport; - the consignor did not indicate in the transport documents and on the packaging the particularities of the goods which required special conditions or certain precautions during transport or storage; - the creator designated by the consignor or consignee to accompany the transport has not taken the necessary measures to ensure the integrity of the transported work; - incorrect indications in transport documents; - handing over incomplete transport documents.

4. 3. Liability for non-transport or for delay

The carrier is also liable for the damage caused by not carrying out the transport or by exceeding the transport term, resulting in unlawful acts, such as not carrying out the transport and exceeding the transport time.

The performance of these acts may entail the liability of the carrier and is a manifestation of the non-fulfillment or inadequate execution of the obligation of the transport to carry out the transport within a certain period, determined conventionally or legally.

If it is found that the loss or damage or alteration could have occurred in certain cases, it is presumed that the damage was caused by that cause.

The carrier is relieved of liability if it proves that the total or partial loss or alteration or deterioration occurred due to:

any other offense committed intentionally or by fault by the sender or consignee or instructions given by one of them;

the major force or deed of a third party for which the carrier is not required to respond.

Article 1991 The NCC aims to group the exonerating causes of liability that may be encountered in the event of loss, alteration or degradation of the goods carried. The text is not an exhaustive list of

excusable causes of liability, but the article refers to other causes provided by special laws and other texts of the new Civil Code, and exonerating causes of liability apply also to the transport contract.

Art. 1991 The NCC establishes two categories of exonerating causes of liability, depending on the legal mechanism of producing the exonerating effect of liability. The first category is characterized by the following mechanism of producing the exonerating effect of liability: in order to apply the exonerating cause, it must be proven that it is produced and that there is damage. It is not necessary to prove the concrete causal link, that is, the fact that the actual damage is the consequence of the interference of the exculpatory case relied on. Concerning the causal link between the exonerating cause and the prejudice, art. 1991 alin. 2 The NCC requires only an abstract analysis in order to ascertain whether the intervention of the alleged reimbursement case would have the effect of giving rise to the damage suffered. If the vocation of the existence of an abstract causal link has been proved, it is assumed that there is also the concrete causal link.

The second category is characterized by the following mechanism for producing the exonerating liability: for the purpose of applying the exonerating case, it must be proved that it is produced, that there is damage and that there is a concrete causal link to prove that the damage is the consequence of the exculpatory liability .

4. 4. Causes that eliminate the illicit nature of the injurious fact

The causes that remove the unlawful nature of the harmful act are: legitimate defense; the state of necessity; the performance of a legal duty or legal order given by a competent authority; the victim's consent; the exercise of a subjective right.

In the event of intentional or gross negligence on the part of the carrier, the provisions relating to the extinction of the claimant's claims and those relating to the notice period are not applicable.

The clause which removes or limits the liability established by law to the carrier is considered unwritten. The consignor may take the risk of transport in the case of damage caused by packaging or in the case of special consignments which increase the risk of loss or damage to the goods.

Unless otherwise agreed, the carrier who undertakes to transport the goods on its operating lines and those of another carrier shall only be liable for carriage on the other lines as a commission agent.

Conclusions

Unless otherwise provided by law, in the case of successive or combined transport, liability may be brought against the carrier who has concluded the contract of carriage or the last carrier. In their relations, each carrier contributes compensation in proportion to its share of the transport price. If the damage is caused intentionally or by gross negligence on the part of one of the carriers, the full compensation is incumbent upon him. When one of the carriers proves that the damage did not occur during its transport, it is not required to contribute to compensation. Goods are presumed to have been handed over in good condition from one carrier to another if they do not require the transport document to state the state in which the goods were taken over.

In the successive or combined transport, the latter carries the others with regard to the collection of the sums under the contract of carriage and the exercise of the rights. The carrier who fails to fulfill these obligations shall be liable to the previous carriers for the amounts due to them.

References

- Gheorghe Filip, Cristina Badea, Mihai Manoliu, Gavril Paramon, *Dreptul transporturilor*, Junimea Publishing House, Iaşi, 2002.
- Florin Făinişi, *Dreptul transporturilor*, 4th edition revised and supplemented, Pro Universitaria Publishing House, Bucharest, 2014.
- Petre Alexandru Măinescu, *Codul transporturilor adnotat*, Curierul Juridic Publishing House, Bucharest, 1931.
- E. Cristoforeanu, *Despre contractul de transport*. Vol I. *Transportul terestru de lucruri. Analiza lui în cadrul dispoziţiilor din codul de comerţ*, Curierul Judiciar Publishing House, Bucharest, 1925.
- New Civil Code.
- Government Ordinance no. 19/1997 on transportation.
- Government Ordinance no. 7/2005 approving the transportation on railyaw in Romania.
- Government Emergency Ordinance no. 12/1998 on transportation on railways in Romania and reorganisation of National Company of Romanian Railways.
- Government Ordinance no. 42/1997 on maritime transport and inland waterways.
- Government Ordinance no. 27/2011on road transport.
- Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code.

PARTICULARITIES ON THE REGULATION OF THE SUE PETITION, IN THE LIGHT OF PRACTICAL DIFFICULTIES AND LEGISLATIVE CHANGES

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Abstract

According to the Romanian Civil Procedure Code, one of the trial stages of first instance is represented by the written stage in which, as a general rule, the fulfillment of the requirements regarding the petition content is analysed.

This stage is a novelty of the new Civil Procedure Code. The purpose of this check is to prevent the introduction of an inform application, as well as for predictability reasons, in order to guarantee the other parties the right of defend oneself, in order to be able to effectively respond to the plaintiff's claims.`

However, the institution has experienced some interpretation and enforcement difficulties, but also legislative changes that will be the subject of our analiysis.

Keywords: *sue petition, regulation, written stage, inform application, enforcement difficulties*.

1. Introduction

The new civil procedural law, in force since February 15, 2013, meaning the New Romanian Code of Civil Procedure Code, surprised by a novel legislative element, namely the establishment of a distinct written stage in the first instance court, immediately after the introduction of the sue petition.[1]

At this stage, the parties are mutually aware of their claims and defense, as well as of the means of evidence they intend to administer.[2] The reason for setting up this procedure is, at least on a theoretical level, to increase the efficiency for the trial, to reduce the length of the civil trial, to ensure all procedural guarantees, in particular the right to defense and the principle of contradictory.[3]

As the Constitutional Court of Romania has also decided, in the Decision no. 479 of November 21, 2013, published in the Official Journal no. 59 of January 23, 2014: "The procedure (...) is the option of

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[1] The following provisions of Article 200 of the Code of Civil Procedure are relevant regarding the conduct of the written procedure: "(3) When the application does not meet the requirements of Art. 194-197, the applicant shall be notified in writing of the shortcomings, stating that within maximum 10 days after receipt of the communication, he shall make the ordered additions or modifications, subject to the sanction of petition annulment. It is exempt from this sanction the obligation to designate a common representative, in which case the provisions of Art. 202 par. (3) are applicable.

(4) If the obligations regarding the filling in or modification of the application provided in Art. 194 lit. a) -c), d) only in the case of factual reasons and f), as well as Art. 195-197, are not fulfilled within the time limit stipulated in par. (3), the application is annulled.

(4 ^ 1) The complainant may not be required to supplement or amend the sue petition with data or information which he or she does not have in person and for which the court is required to intervene.

[2] Gabriel Boroi, "*Civil procedural law. 3rd edition, revised and added*", Hamangiu Publishing House, 2016, Bucharest, p. 332.

[3] Gabriel-Sandu Lefter, "*Sue petition regulation – a tool for achieving the right to a fair and and a predictible case*", Private Law Magazine, no. 4/2013, p. 115-116.

the legislator and aims to remedy some deficiencies of the introductory action, so that, at the beginning of the procedure for fixing the first term of trial, it shall contain all the elements provided by Article 194 of the Code of Civil Procedure.

The legislator's purpose is disciplining the parties in a trial and thus respecting the principle of celerity and the right to a fair trial. Such a procedure would not affect the very essence of the protected right, since it is also accompanied by the guarantee given by the right to make a request for review under Article 200 par. (4) of the Code of Civil Procedure. Moreover, the court rules on a matter exclusively concerning the proper administration of justice.

However, as the European Court of Human Rights has repeatedly established, most of the procedural rights, by their very nature, are not "civil rights" within the meaning of the Convention and therefore fall outside the field of application of Article 6 of the European Convention for on Human Rights and Fundamental Freedoms (...).

Therefore, while the admission in principle procedure does not concern the substance of the application, the contested provisions do not infringe the provisions relating to the right to a fair trial, since the special procedure in question does not refer to the substance of the cases, the way Article 6 of European Convention for on Human Rights and Fundamental Freedoms requests, but only on matters of purely legal nature, the examination of which does not necessarily require a debate, with the parties being cited.

Moreover, the procedural means by which justice is carried out also mean the establishment of the rules of the process before the courts, and the legislator, by virtue of its Constitutional role established in Article 126 par. (2) and Article 129 of the Constitutional Law, is able to establish the court procedure, by law. These constitutional provisions give expression to the principle also established by the European Court of Human Rights, which, for example, in its Judgment of 16 December 1992, *Case Hadjianastassiou v. Greece*, paragraph 33, stated that "the The Contracting States enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6 (Art. 6). The national courts must, however, indicate with sufficient clarity the grounds on which they based their decision. It is this, *inter alia*, which makes it possible for the accused to exercise usefully the rights of appeal available to him."

The possibility of annulling the sue petition is in line with the case law of the European Court of Human Rights, which stated that the sanction of the annulling the application (...) complies with the requirements to be prescribed by law and to pursue a legitimate aim, namely the proper administration of justice (see the inadmissibility decision of April 15, 2014, Case *Lefter v. Romania*).[4]

The written stage is provided only for the sue petition, not for the incidental claims, even if they have the legal nature of a sue petition, because they are introduced or debated after fixing the first term for the trial.[5] Also, the written stage is incompatible with certain procedures, either because the elements of the sue petition are different from those of ordinary law, or there are

[4] Traian Cornel Briciu, Claudiu Constantin Dinu, ,"*Civil procedural law", 2nd edition, revised and added,* Național Publishing House, 2018, București, p. 293.

[5] Gheorghe Florea, "*New Code of Civil Procedure, commented and annotated. Vol I. – art. 1-526*", Universul Juridic Publishing House, 2016, Bucharest, p. 737.

situations where there is no need for prior judicial preparation.[6]

It should be noted that the rudiments of this written stage also existed in the old regulation, in Articles 114[7] and 114, index 1[8] of the Old Code of Civil Procedure, but there was no possibility for the judge to annul the sue petition in the case of failure to fulfill the missing requirements, only the possibility of suspending the trial.

Regarding the effectiveness of the written stage[9], a part of the doctrine criticized the limits of the judge's appreciation of the sue petition regularity, but also the increased duration for a case, given that, in the old civil procedural law, simultaneously with the filing of the petition for registration, the first term of the hearing was also set.

It was stated[10] that, in practice, the procedure proved to be extremely rigid, among the most often requested requirements in the notifications to complete the petition were the obligation to indicate the personal numerical code for the defendant, therefore the legal provision which establishes the obligation to communicate these data, "only to the extent that they are known", being neglected.

In addition, part of the doctrine[11] claimed that, in all cases where the applicant did not comply with the obligation to complete or amend the action, the court is entitled to annul the application. It was thus considered that the legislator makes no distinction according to the essential or non-essential nature of the requirements set out in Articles 194-197 or whether they are governed by mandatory or non-mandatory rules. In the absence of legal criteria, the importance assessment of the missing element would be discretionary, left only to the judge's discretion, and if an item is qualified as non-essential, there would be no reason to request the applicant to modify or complete the application.

Indeed, the sanction of the sue petition annulment may occur both for non-compliance with the intrinsic requirements of the petition and for the extrinsic requirements provided by Articles 194-197 of the Code of Civil Procedure. That is why, in principle, the analysis of the elements of the sue petitions concerns any of these

[6] G.-S. Lefter, *op. cit*, p. 117.

[7] Article 114 of the Old Romanian Code of Civil Procedure provided as follows: "(1) Upon receipt of the sue petition, the President or the Judge replacing him shall verify that he meets the legal requirements. Where appropriate, the complainant is required to complete or amend the application and to file, in accordance with Art. 112 par. (2) and Art. 113, the application and certified copies of all the documents on which it bases the application.

(2) The claimant shall complete the application immediately. When filling is not possible, the application will be registered and will be given a short term to the complainant. If the application was received by post, the complainant will be notified in writing of its shortcomings, stating that it will make the necessary additions or amendments by the deadline (...)".

[8] Article 114, index 1, paragraph 1, of the Old Romanian Code of Civil Procedure provided as follows: "The President shall, as soon as he establishes that the conditions laid down by the law for the sue petition are met, shall fix the trial term which, under his signature, is notified for the present applicant or his representative. The other parties will be summoned according to the law.".

[9] Andrei Pap, "*Diverting the sue petition regulation procedure from the purpose for which it whas regulated in the NCCP. Incidents of judicial practice*", www.juridice.ro.

[10] Elena Ablai, "*The sue petition regulation – an instrument for imposing a procedural discipline or a filter to prevent the trial?*", www.avocatura.com; For other examples, see also Bogdan Ionescu, "Law no. 310/2018. Panorama of amendments and additions to the Code of Civil Procedure", Universul Juridic Publishing House, Bucharest, 2019, p. 57.

[11] Viorel Terzea, "*New Code of Civil Procedure annotated*", Universul Juridic Publishing House, Bucharest, 2016, p. 425; G.-S. Lefter, *op. cit.*, p. 118-119.

aspects, and not just those provided by Article 196, under the penalty of nullity.

However, in order to examine the limits of the judge's discretion in the written procedure, account must be taken of the reason for establishing this stage. It is intended to communicate to the other party an application which allows him to make a complete defense, so that the sue petition annulment will only take place insofar as, because of the ill-formed petition, the conduct of the civil process would be difficult, and the opposing party could not defend itself against a claim with such vices. In other words, the sanction of the petition annulment must be proportionate to the reasons justifying it, and the court is supposed to analyze the proportion for the missing elements affect the proper conduct of the proceedings, so that it cannot communicate the petition to the defendant and, as a consequence, it is necessary to annul the request for summons in the written stage.[12]

2. Legislative changes regarding the written stage

The Romanian legislator made changes regarding the regularization procedure, through Law no. 310 of December 17, 2018 for amending and completing the Law no. 134/2010 on the Code of Civil Procedure, as well as for amending and completing other normative acts.[13]

Thus, Article 200 (4) has been amended in order to restrict the cases in which sanctioning the petition annulment in the written stage may be applied, meaning failure to state legal reasons or the evidence.

In such cases, the court still has the obligation to verify the fulfillment of the sue petition requirements provided by Articles 194-197 of the Code of Civil Procedure, but it can not annul the application anymore.[14]

As it regards the first case, namely the failure to indicate the legal grounds, before the amendment of the Code of Civil Procedure by Law no. 310/2018, it was considered that the absence of the legal grounds does not justify the sanction of invalidity except to the extent that there is proven an injury which cannot be annulled in other way than by the annulment of the petition. Also, if the factual exposition is sufficient to imply the existence of a legal rule, the court should frame the litigious deeds in order to be lawful. Also, the applicant may not be able to indicate the law applicable to his claim, in the context in which legal aid is not compulsory in Romania.[15] Other authors have argued that a sue petition which does not include the legal grounds does not generate a procedural injury which cannot be removed except by the annulment of the procedural act.[16]

However, the legislative amendment is necessary, in the context of a widespread judicial practice of annulling the petitions for failure to state reasons.

The rationale behind this legislative change is that only the factual reasoning is essential, not the legal grounds, the latter being the subject of the court's qualification, and that cannot be done without a

[12] G. Boroi, *op. cit*, p. 351-352.

[13] Published în The Romanian Official Journal no. 1074/18.12.2018.

[14] Nicolae-Horia Țiț, Roxana Stanciu, "Law no. 310/2018 to modify and complete the Law no. 134/2010 regarding the Code of Civil Procedure", Hamangiu Publishing House, Bucharest, 2019, p. 49.

[15] Gheorghe-Liviu Zidaru, "*Some issues regarding the sue petition regulation and the new regulation of stamp taxes*", www.juridice.ro.

[16] Gheorghe Florea, *op. cit.*, p. 741.

contradictory debate.[17] Also, according to Article no. 22 paragraph (4) of the Code of Civil Procedure, it is the judge who gives or restores the legal classification of the trial acts and facts, which often involves a contradictory debate that can not be assured at the written stage.

However, the repeal of this annulment case is effective only at the written stage, the judge still being able to order the petition annulment under the common law. Thus, the judge has the role of establishing the exact legal classification of the trial acts and facts, only after having put this issue to the attention of the parties. Therefore, we appreciate that the solutions provided by the doctrine and the judicial practice before the amendment of the Code of Civil Procedure by Law no. 310/2018 are maintained, meaning that the lack of legal grounds leads to the annulment of the petition if the judge is effectively prevented from proceeding with the qualification and settlement of the application, the legal reasons not being clearly stated or contradictory[18]. This situation will not concern the written stage, but only after the completion of this procedure after contradictory debates.

Law no. 310/2018 repealed the basis for the petition annulment for failure to file evidence. The reason for introducing this amendment is the fact that the absence of evidence by the complainant entails the loss of the right to propose evidence. In addition, part of the doctrine[19] and the judicial practice considered that the sanction of annulment for the sue petition could not have acted insofar as the applicant had requested at least one evidence under procedural regularity, for example the offense report or even a copy of the identity card, for the attestation of the applicant's identity. The sanction of the petition annulment could also have been operating in the case of using a formula which is equivalent to the non-indication of the evidence, "any evidence useful to the case" or simply "witnesses" without indicating their names and addresses.[20]

Thus, the court cannot consider the applicant what type of evidence to submit at the written stage, but only at the end of that stage, under Article 203 of the Code of Civil Procedure, when the first term of the trial is set, the judge is able to provide measures to administer the evidence or to carry out the process according to the law.

However, we appreciate that, in the absence of some evidence, there still may be certain situations under which the judge would be able to order the annulment of the sue petition. We consider the situation of the documents provided by Article 194 letter c) of the Code of Civil Procedure, respectively the fiscal certificate or the land book extract, in the case of immovable property, insofar as failure to do so makes it impossible to determine the object of the claim or its value.[21] However, in this case, the annulment will also take place for not indicating the object or its value, and not for not stating the evidence.

[17] Traian-Cornel Briciu, Mirela Stancu, Claudiu-Constantin Dinu, Gheorghe-Liviu Zidaru, Paul Pop, "*Comments on the amendment of the new Civil Procedure Code by Law no. 310/2018. Between the desire for functionality and the trend of restoration"*, www.juridice.ro.

[18] Delia-Narcisa Teohari, Gabriel Boroi (coordinator), "*New Code of Civil Procedure. Comment on articles", 2nd edition, reviewed and added*, Vol. I, Universul Juridic Publishing House, Bucharest, 2016, p. 73; The Minute of the Civil Departments Presidents' Meeting in Iasi, 7-8 May 2015, pct. 10, www.inm-lex.ro.

[19] Gheorghe-Liviu Zidaru, *op. cit.*; G. Boroi, *op. cit.*, p. 354.

[20] G.-S. Lefter, *op. cit.*, p. 128.

[21] See also Mihaela Tăbârcă, *"Civil procedural law. Supplement containing comments of Law no. 310/2018"*, Solomon Publishing House, Bucharest, 2019, p. 117.

Also, the lack of proof for the representative status, under Article 194 letter b) of the Code of Civil Procedure could lead to the petition annulment in the written procedure, at least at a theoretical level, but it was rightly considered that it would be more useful to fix the first term of trial and to grant a time limit for this irregularity removal, under Article 82.[22]

Even in the context in which the legislator has understood to remove this requirement from those which may lead to the petition annulment under Article 200 of the Code of Civil Procedure, we consider that there are no significant changes in the applicant's procedural conduct, except in terms of easier access to a court, in order to analyze the substance of the claim.

On the other hand, for the plaintiff, in the case of rights that need to be exercised within a certain time-limit laid down by law, Article 2.539 par. (2) of the Romanian Civil Code provides that the limitation of the substantive right to action is interrupted if the petition has been annulled by a final judgment if the applicant, within six months of the date on which the decision of rejection or annulment has become final, introduces a new application, provided that the new application is admissible.

Under the new rules, the applicant would no longer be able to benefit from the above-mentioned provisions if he did not indicate the evidence he requested, as the provisions of Article 204 par. (1) of the Code of Civil Procedure remain fully applicable, and it allows the plaintiff to indicate only new evidence at the first term, in relation to those already indicated in the petition.[23] Thus, the applicant will not request evidence which he intends to use directly at the first hearing, as the penalty of right loss, provided by Article 254 par. (1) of the Code of Civil Procedure generally operates.

It should also be noted that in Romanian law, in the absence of evidence, the sue petition will be dismissed as unfounded, and not as unproven. Therefore, we appreciate that sanctioning the right to propose evidence at the written stage is a sufficiently vigorous sanction to establish a certain procedural discipline for the parties. Even if there is no longer any risk for the plaintiff to have his petition filed without a substantive analysis, there is an even greater risk of looking at the merits of the application, in the absence of proposed evidence within the law prescribed time limit.

We note that the New Code of Civil Procedure does not regulate an often found situation in practice, caused by the failure to conduct a written procedure or superficial petition analysis by judges followed by observing its regularity, although it contains some shortcomings related to the provisions of Articles 194-197 (in particular by requesting testimony without indicating the names and addresses for the witnesses).

In that situation, it is clear that the court does not fulfill its obligation to apply the provisions of Article 200 of the Code of Civil Procedure, by not considering the applicant's shortcomings of its own petition and, thus, communicates it to the defendant in order to lodge a contestation. On this occasion, we need to point out that a possible regularity statement in a non-contentious procedure does not prevent the defendant from claiming petition irregularities in court. The question then arises: how the court will proceed, seeing the claim with unfulfilled shortcomings at the first hearing, and the defendant invokes those shortcomings?

We consider that, in this situation, at the first hearing, the court will continue to apply the sanction of annulment under the

[22] G. Boroi, *op. cit.*, p 353.
[23] Mihaela Tăbârcă, *op.cit.*, p. 114; G. Boroi, *op. cit.*, p. 397.

conditions of the common law or the sanction of right loss, with certain nuances.

Under Article 178 par. (3) of the Code of Civil Procedure, unless the law provides otherwise, the relative nullity must be invoked by contestation for the irregularities committed before the commencement of the trial, if the contestation is mandatory. Thus, if the defendant does not claim the petition irregularity of the or the applicant's right loss to propose certain evidence by contestation, we believe that the court might consider the plaintiff to fill the petition shortcomings at the first hearing, as a corollary of respecting the applicant's right of defense, in spite of the court's omission to consider the complainant to remedy the petition's shortcomings.

However, if the defendant invokes the petition irregularity, the applicant is, however, in a position to remedy the petition deficiencies himself, even though they have not been observed by the court, since possible sanctions of invalidity or right loss may only be applied at the first hearing that the parties are lawfully summoned. Therefore, the court would no longer be able to apply the sanction of annulment at the stage of sue petition regularization, because once this phase is over, the trial can no longer return to the initial stage.[24]

If, in the present case, there is an absolute nullity cause regarding the petition, in the sense of Article 178 par. (1) of the Code of Civil Procedure, the defendant or the court may, at any time, invoke the irregularity of the application even if it has not been remedied in the written procedure.

However, we appreciate, as a *de lege ferenda* proposal, that legislative clarification is required from the legislator, and our proposed solution could underpin this regulation.

Another amendment to Article 200 par. (4) is related to the repealing of the phrase 'given in the council chamber'. In this regard, we draw attention to the fact that, in reality, this does not represent a substantive change in the legislator's view of the way in which the procedures in the written stage take place, because the nature of the written procedure is still non-contentious.

Thus, from the time of filing of the petition to the court and until observing its regularity, followed by the filing of the petition to the defendant, the latter has no knowledge of the trial, so we can talk about the applicability of Article 527 of the Code of Civil Procedure, being the case of a petition that is not intended, at this stage, to establish an adversarial right to another person, since no other person is still involved in this procedure.

As to the non-contentious nature and the provisions of Article 532 of the Code of Civil Procedure, which is fully applicable in addition, it follows that, despite the deletion of the phrase 'given in the council chamber', the further annulment of the petition will still be made in the council room.

Another argument is the legislative technique, in the context in which, through Law no. 310/2018 was also amended and Article 402 of the Code of Civil Procedure, which no longer provides for the obligation to pronounce the judgment in public hearing.

Another argument in the sense that the legislative amendment is only apparent is the legal logic: the provisions of Article 200 par. (7) have not been amended, which means that the review of the appeal, namely the request for review of the annulment will also take place in the council room.

We therefore appreciate that this legislative change is only about the general aspect of the legal text, without any practical significance.

We are reporting another legislative amendment, namely the new paragraph 4, index 1, of Article 200 of the Code of Civil Procedure, which expressly provides that the

[24] G.-S. Lefter, *op. cit.*, p. 130-131.

claimant cannot be required to supplement or amend the sue petition with data or information which he does not personally dispose and for which the court is required to intervene.

This new legal provision aims to moderate certain trends observed in judicial practice, such as the possibility of annulling the petitions for the mere fact that the applicant did not indicate the data or information requested, although he had indicated that he cannot obtain this data personally.

In fact, there are certain situations in which the parties cannot access certain databases, and the court is able to take the necessary steps, these issues being considered by the legislator through the legislative amendment.

In the doctrine before this legislative amendment, it was rightly assumed that if the plaintiff proves that he has failed to find the defendant's domicile or any other place to be summoned, the court would be able to consent to public summoning or to carry out checks in databases or other electronic content systems held by public authorities and institutions, but the sue petition annulment will not occur.[25]

Moreover, the applicant can not rely on this legal provision if he is required to take action and he fails, even though he would have been able to obtain those information personally (for example, a Trade Registry extract, a land book extract, his own personal numeric code). However, if the plaintiff proves that although he has taken care to obtain the necessary information and the competent authority has refused for legitimate reasons (for example, general data protection) or even if the refusal is abusive, in this case the court can no longer ask the plaintiff to complete the information, but the court itself is going to collect this information.

The written stage has undergone a new amendment by removing the obligation to submit a response for contestation, as it can be seen from the new wording of Article 201 par. (2) and (3). In the old regulation, the plaintiff had the obligation to file a response for contestation, and the new text merely provides the possibility of responding, but the 10-day period after the communication in which this act of procedure can be filed, is maintained, under the same sanction, the right loss to submit this act.

We appreciate this amendment to the Code of Civil Procedure, given that most of times the issues raised in the response didn't bring something new, but the plaintiff reiterated the argument in the initial petition. Also, the deadline for submitting the response was within the written procedure and, in practice, extended its duration. As a result, it lengthened the first hearing date. Under the new circumstances, within 3 days of filing the contestation, the judge will directly determine the first term of the trial and communicate the response to the contestation, instead of running a 10-day deadline, only for the response to contestation.

In the new regulation, the plaintiff enjoys the same right to submit a response, but without being an obligation in the same time. Moreover, the plaintiff may continue to invoke any contestation irregularity or procedural pleas regarding the defendant's contestation and the first hearing to which the parties are legally summoned.[26]

Conclusions

Law no. 310/2018 aimed to correct some of the New Romanian civil procedural law shortcomings, and the new legislative amendments are, in part, the expression of the need for modernization or restoring the legal provisions functionality.

[25] G. Boroi, *op. cit.*, p. 352.
[26] Traian-Cornel Briciu, Mirela Stancu, Claudiu-Constantin Dinu, Gheorghe-Liviu Zidaru, Paul Pop, *op. cit.*

However, it can be noticed that most of legislative amendments in Law no. 310/2018 aim approaching to the Old Civil Procedure Code provisions, and this phenomenon can be explained, in part, by the existence of a real need and, in part, by the resistance to change. Even the waiving of the obligation to submit a response to the contestation, which was the subject of the present study, is an approach to the old legislation, which did not regulate this procedural act.

Indeed, even at the time of the new legislation issue, there were critical voices about the written procedure, and opinions were expressed in the sense that this stage prolonged the trial duration, neglecting the obvious usefulness of this filtering stage, in terms of shortening and streamlining the stage of the judicial investigation. In fact, in the case of the written stage there was only the necessity of making some corrections in order to make the act of justice more effective, aspects, largely done by the latest legislative changes, at least in the aspects considered in our approach.

In conclusion, we welcome the amendments to the New Civil Procedure Code in the matter of sue petition regulation, especially regarding procedure acceleration and creation of additional procedural safeguards for the plaintiff in order to achieve the final stage of the written procedure and to reach settling on the merits of the case.

References

- Elena Ablai, ,"*The sue petition regulation – an instrument for imposing a procedural discipline or a filter to prevent the trial?*", www.avocatura.com.
- Gabriel Boroi, "*Civil procedural law. 3rd edition, revised and added"*, Hamangiu Publishing House, Bucharest, 2016.
- Traian Cornel Briciu, Claudiu Constantin Dinu, "*Civil procedural law. 2nd edition, revised and added*", Naţional Publishing House, Bucharest, 2018.
- Traian-Cornel Briciu, Mirela Stancu, Claudiu-Constantin Dinu, Gheorghe-Liviu Zidaru, Paul Pop, "*Comments on the amendment of the new Civil Procedure Code by Law no. 310/2018. Between the desire for functionality and the trend of restoration"*, www.juridice.ro.
- Gheorghe Florea, "*New Code of Civil Procedure, commented and annotated. Vol I. - art. 1-526"*, Universul Juridic Publishing House, Bucharest, 2016.
- Bogdan Ionescu, "*Law no. 310/2018. Panorama of amendments and additions to the Code of Civil Procedure"*, Universul Juridic Publishing House, Bucharest, 2019.
- Gabriel-Sandu Lefter, "*Sue petition regulation – a tool for achieving the right to a fair and and a predictible case*', Private Law Magazine, no. 4/2013.
- Andrei Pap, "*Diverting the sue petition regulation procedure from the purpose for which it whas regulated in the NCCP. Incidents of judicial practice"*, www.juridice.ro.
- Mihaela Tăbârcă, "*Civil procedural law. Supplement containing comments of Law no. 310/2018*",Solomon Publishing House, Bucharest, 2019.
- Delia-Narcisa Teohari, Gabriel Boroi (coordinator), "*New Code of Civil Procedure. Comment on articles. 2nd edition, reviewed and added'*, Vol. I, Universul Juridic Publishing House, Bucharest, 2016.
- Viorel Terzea, ,,*New Code of Civil Procedure annotated"*,Universul Juridic Publishing House, Bucharest, 2016.
- Nicolae-Horia Ţiţ, Roxana Stanciu, "*Law no. 310/2018 to modify and complete the Law no. 134/2010 regarding the Code of Civil Procedure"*, Hamangiu Publishing House, Bucharest, 2019.
- Gheorghe-Liviu Zidaru, "*Some issues regarding the sue petition regulation and the new regulation of stamp taxes"*, www.juridice.ro.

”16+1”: PROMISES AND PITFALLS FOR EU-CHINA TRADE NEGOTIATIONS IN THE CONTEXT OF ONE BELT ONE ROAD COOPERATION

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Abstract

This brief presentation aims to increase the understanding of international trade negotiations between China – Central and Eastern Europe region as well as Europe through the framework of One Belt One Road (OBOR) cooperation, with a focus on the legal perspective regarding the rule of law conditionalities, EU external trade relationship on the basis of respect for rule of law and the restoration of trust toward the creation of new rules.

Keywords: *China – CEE cooperation, Europe, OBOR, international negotiations, rule of law, integration, diplomacy, bilateral relations, trade and investment.*

1. International Trade Negotiations between EU and China

The current growing global tensions, increasing protectionism and geopolitical unpredictability offers a prospect for the EU and China to demonstrate their shared commitment to conquering protectionism and safeguarding rule - based multilateral trading system for sustainable economic growth and prosperity[1].

The EU and China have much in common as they are the most externally integrated economies with their GDP's ranking number 2 and 3 in the world, as well as being each other's largest source of imports and second largest exports destination[2]. Therefore, both powers should consider whether deepening their economic relationship could bring mutual benefits in terms of driving economic growth, creating jobs and improving levels of social fare[3].

The EU is commited to develop trading relationships with China that are governed by fair trade, respect of intellectual property rights and in accordance with WTO regulations. When China joined the WTO in

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[1] Anna Saarela, *A new era in EU – China relations: more wide-ranging strategic cooperation*? , Policy Department for External Relations, European Union, 2018, p. 4.

[2] Alicia G. Herrero et. all, *Introduction to EU – China economic relations to 2025. Building a common future.* Chatam House, London, 2017, p. 2.

[3] Alicia G. Herrero, *op.cit.*, p. 2.

2001 it agreed to reform and liberalise important parts of its economy. Even so, there are still problems on the lack of transparency, industrial policies and non-tariff measures that discriminate against foreign companies, strong government intervention in the economy having as a result the dominant position of state-own-enterprises, unequal access to subsidies, poor protection and enforcement of intellectual property rights[4].

In 2013, both parties started the negotiations for an Investment Agreement as a common bond for their long-term bilateral relations, finalized with the EU-China 2020 Strategic Agenda for Cooperation. The agreement aims to improve investment for European and Chinese investors by creating investment rights and guaranteeing non-discrimination, providing a high-level protection for investors and investments and focusing on transparency, licesing and authorisation procedures[5].

Anually there are organized a range of dialogues to discuss policies and issues regarding trade and investment, such as the EU-China Summit, the EU-China High Level Economic and Trade Dialogue, Joint Commitee on Trading, Trade and Investment Policy Dialogue, Economic and Trade Working Group.

At the moment, EU and China does not have any formal bilateral arrangements, although trade represents a key issue on their annual High Level Economic and Trade Dialogue, meeting which has been held since 2008. EU–China trade in goods and services takes place within the framework of multilaterally agreed WTO rules and commitments, but also against the background of a growing number of free trade agreements (FTAs) being negotiated and concluded by both the EU and China, whose FTA strategies are designed to promote trade with numerous partners. [6] The EU strategy on China focusses on promoting effective rule – based international order and multilateralism, human rights, rule of law, as well as respecting international law and universal values.

The negotiations on the EU`s first bilateral Comprehensive Agreement on Investment started in 2013 representing a top priority on rebalancing and deepening the relationships with China. The purpose of this initiative is to reach the same level of openness in Chinese market that is already available in the European market. The 17 rounds of negotiations had the objective to facilitate market access by regulating the discriminatory and quantitative restrictions. The most recent meeting from 22 to 24 May 2018 included issues related to market access and protection, regulatory framework for investment including transparency, licensing and authorisation procedures, sustainable development and dispute settlement.[7]

The new shift in global value chain determined by technology developments, decreasing trade costs and business inovations, influenced the global paterns of production and implicitly the economies that are heavily involved in the 'Asia value chain', giving them competitive pressure[8], as well as determining China to start sourcing more intermediate goods domestically. Regarding this factor, Germany, France and Italy were recently leading the calls for a more proactive EU approach towards China and to support appropriate instruments to safeguard a level

[4] European Commission, Countries and regions - China; this document is available at http://ec.europa.eu/trade/policy/countries-and-regions/countries/china.
[5] *Ibidem.*
[6] Alicia G. Herrero, *op.cit.*, p. 12.
[7] Anna Saarela, *op.cit.*, p. 13.
[8] IMF Working Paper, Quantifying the Spill-overs from China Rebalancing, published on 15.11.2016.

playing field, especially to adopt a symmetric level of openness, particularly on EU policy initiatives, such as the potential EU-wide investment screening mechanism.

On 28 May 2018, the EP International Trade Committee (INTA) adopted a draft legislative resolution on the proposal of the Commission of 13 September 2017, for a Regulation establishing a framework for screening of foreign direct investments (FDI). On 13 June 2018 the EU Council's stance was agreed on the proposed regulation, hence the negotiations between the two institutions are expected to start soon.[9]

On 1 June it took place the eight EU – China High Level Strategic Dialogue that addressed a wide range of issues in preparing the 20th bilateral Summit that took place from 16 to 17 July 2018.[10] The main topic on the agenda was about the on–going EU-China Comprehensive Investment Agreement negotiations, joint engagement to reform the WTO as the centre of the ruled-based multilateral trading system, and to forge synergies between the China's Belt and Road Initiative under the EU-China Connectivity Platform, and the EU Investment Plan Trans-European Networks (TEN-T)[11]. Progress was made on the negotiations for an Agreement on the Cooperation and Protection of Geographical Indications, but contrary to past practice, no joint summit statement were issued. The divergences appeared on key issues such as China's attempt to obtain recognition by the EU on China's Market Economy Status in the WTO and the negotiation of a free trade agreement.

The 13th EU-China Business Summit from July 2018 provided for the European as well as Chinese leaders a good opportunity to exchange views with the business representatives regarding various issues, such as EU-China Bilateral Investment Agreement, connectivity, climate change and digital economy.[12]

According to the EU, the relationship between EU and China have over 70 high-level and senior-level dialogues, steering committees and working groups that are focusing on creating stronger partnerships in areas such as economics, high-tech innovation, cyber, tourism, energy and environment. Both parties have already agreed to further develop exchanges on digital connectivity and legal affairs[13].

However, all this actions and dialogues won't determine the success of the ambitious OBOR project, as most of it depends on the opportunities for regional productivity-enhancing value chains, their mutual benefits not only for China and Europe, but also for third countries involved. To this end, the state-to-state trade project needs to be transparent, open and all-inclusive initiative, which adheres to global and multilateral market rules requirements and standards.

2. Obstacles: Rule of Law Conditionalities

The definition of rule of law

The rule of law can be defined as the political and moral maxim where law is supreme and everyone, including the Government, must comply with law. A violation of rule of law can lead to

[9] Anna Saarela, *op.cit.*, p. 9.
[10] *Ibidem.*
[11] *Ibidem.*
[12] *Ibidem.*
[13] Vincent L. Morelli, The European Union and China, Conforming research service, 26.07.2018.

uncertainty as future cannot be planned and from a business perspective the investment can carry a higher risk, or a violation of rule of law can lead to frustrations as legal expectations are not fulfilled either by a lack of enforcement of law or due to retrospective law[14].

The Charter of the UN also has a clear link to rule of law, stating that " is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency[15].

In a more simple way, the rule of law protects legal certainty and thus provides the agents on the market with expectations that their investments can be protected in accordance with law. For example, an investor cannot expect the market to act in a specific way but the investor can have legal expectations that the investment is safe through law.

In the context of OBOR project, the challenges are transnational as the rule of law can be based in both liberal and socialist systems. It is often considered to be anchored in Western liberal ideologies, but is applied in China with a more authoritarian and collective approach. The cross-border activities between market agents and states along the OBOR can bring different conceptual and normative perceptions of rules of law across the jurisdictions and the question is wether such overlaps between different rules of law will find new ways to overcome potential conflicts and transplant into each other's respective systems.

Rule of law at international level cannot easily be understood in the context of the traditional state definitions as there are situations where power of the state is in position to decide the law on international level but have also to commit under the law. With state sovereignty as basic assumption of international law, states become both law-makers and subjects of law. There must be considered the rule of law from international organizations, as OBOR cross not only a number of state jurisdictions but it also goes across into a number of international organizations, including World Trade Organization[16].

In addition, the ambitious OBOR initiative, with its expected bilateral and multilateral agreements between the participating states, will meet a more rule oriented Europe and it will face already established multilateral frameworks.

EU external trade relationship on the basis of respect for rule of law

The rule of law in Europe has been consolidated in a more complex picture where the principle must be understood separately from the Member states. The EU

[14] Jospeh Raz, *"The Rule of Law and its Virtue, published in The Authority of Law: Essays on Law and Morality"*, Oxford University Press, 2009, p. 12.

[15] United Nations Security Council, *"The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General"*, S/2004/616 dated 23.08.2004, para. 6, p. 4.

[16] Henrick Andersen, *"China's 'One Belt One Road – Transnational and Multilevel Rule of Law Challenges from a European Perspective"*, International School of Law, BISU, Beijing, 2016, p. 6.

is not a state but it has sovereignty to law creation in specified areas, like the EU single market, and a court system with indirect access of EU citizens through the national courts' rights and obligations to forward questions on interpretation of EU law to the EU Court of Justice (ECJ), and direct access to challenge EU acts from the EU institutions if the individual is the addressee of the decision, like the EU Commission's decisions in competition law cases[17].

The concept of rule of law in a European context can be seen in light of rights and protection of the individual against the public[18], as it is provided in the art. 2 of TEU : " 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". National and regional courts throughout Europe - like the Court of Justice of the European Union (CJEU), the European Free Trade Area (EFTA) Court, the European Court of Human Rights (ECHR), and national courts cooperating with these European courts – are all committed to 'constitutional methodologies' aimed at protecting fundamental rights of citizens and transnational rule of law based on coherent 'principles of justice' respecting the legitimacy of 'constitutional pluralism' and of legal diversity.

In the same time, the EU institutions are bound by their international treaty obligations which will prevail over EU law, however that must be seen in relation with EU constitutional law where the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty[19]. Having said that, even though EU institutions are bound by international law, there is a question of the individual's access to apply international law before the EU courts where the approach taken by the ECJ in respect of the direct applicability of international law is mixed[20]. For example, when it comes to applicability of WTO law, the ECJ adopts a more dualistic approach and allow only if the EU intends to implement a specific WTO obligation, because if allowed direct applicability, it "would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners."[21] .

It should be noted that even though EU has been hailed as an effective promoter of democracy and rule of law in Central and Eastern Europen (CEE) countries, the optimistic claims are conflicted with the current situation where internally the rule of law has not improved significantly or has even deteriorated. The stagnating and even declining trends are reflected in the Bertelsmann rule of law index and the Freedom House judicial framework and independence indicator, both of which show no overall improvement, despite the millions of Euros spent on judicial and anti-corruption reforms[22].

The impact of rule of law in CEE countries is often mixed, limited or weak

[17] TFEU, Consolidated version of the Treaty on the Functioning of the European Union. Official Journal C 326, 26.10.2012 P. 0001- 0390.

[18] Henrick Andersen, *op.cit.*, p. 8.

[19] Kadi and Al Barakaat International Foundation v Council and Commission, ECR I-6351, 2008, para. 285.

[20] Henrick Andersen, *op.cit.*, p. 9.

[21] Case C-149/96 dated 23.11.1999, judgment of the EC Court, Portugal v Council, ECR I-8395, para 46.

[22] Martin Mendelski, "*The EU's rule of law promotion in central and eastern Europe: where and why does it fail, and what can be done about it?"*, Bingham Centre for the Rule of Law, London, 2016, p. 9.

where the EU's influence seems to be differential and highly context-dependent, that it varies across countries, country clusters, and dimensions of the rule of law. EU is often able to push judicial, legal, and anti-corruption reforms but is not really effective in promoting the rule of law or only some selective aspects of it, such as judicial capacity, the establishment of formal judicial structures and formal rules. While substantive legality increased in CEE, formal legality, and in particular the stability of laws, deteriorated. The explanation for the differential impact is attributed to diverse domestic conditions including historical legacies, political stability, high institutional and administrative capacity[23].

The fragile jurisdiction and transparency of some CEE countries have been raising critics at the EU level as the Chinese investments might help to rebuilt and stabilize their economies, but in the same time those countries may become reluctant to take positions that would anger Beijing. The European elites believe that appart from building a constructive economic relationship between CEE countries and China, is important to pay attention on the potential risks and require from China's activities a maximum of transparency and openness and to rigorously conform to EU law and regulation in order to avoid the creation of a wedge between the region and Brussels.

The explanation for these reactions came from the fact that the loads made by Beijing to CEE countries create potential for financial instability, specifically for the smaller countries which might lack the institutional capacity to assess agreements. For example, the case of Bar-Boljare motorway in Montenegro, as it is being built by the China Road and Bridge Corporation with an 809 million EUR loan from Exim Bank[24]. The IMF[25] claims that, without construction of the highway, Montenegro's debt would have declined to 59% of GDP, rather than rising to 78% GDP in 2019.

The motorway is one of the many examples of how OBOR projects are built by a Chinese-state owned company and how can create potential instability, by using mostly Chinese materials and workers, with a loan that the governments must pay back, but which a Chinese policy bank will earn interest on[26] .

Others argue that the concern over the potential threat of China's influence on EU decision making and member state solidarity, driven by its economic activities, has not yet become problematic in most EU member states. Even so, because there has been some detection of Chinese influence in a few instances of some member countries, the issue needs to be watched carefully by the EU Commission and others[27].

Internally, this is a fragile situation because might be perceived that EU`s ambitions as a unity are not credible, but the recent Opinion 2/15 of the European Court of Justice has set an example of how the Union and its future deals function. This opinion has informed about the EU`s bilateral investment treaties practice with third "illiberal" countries and thus relevant to the current EU negotiation strategy and

[23] *Ibidem*.

[24] Thomas S. Eder, Jacop Mardell, "*Belt and Road reality check: How to assess China`s investment in Eastern Europe*", Merics, 10.07.2018; this document is available online at https://www.merics.org/en/blog/belt-and-road-reality-check-how-assess-chinas-investment-eastern-europe.

[25] International Monetary Fund, Montenegro – 2018 article IV consultation – press release and staff report. IMF Country Report no. 18/121; this document is available online at https://www.imf.org/~/media/Files/Publications/CR/2018/cr18121.ashx.

[26] Thomas Eder, Jacop Mardell, *op.cit.*

[27] Vincent Morelli, *op.cit.*

rule of law approach in respect of the EU-China economic relationship.

The Commission made a request for an opinion because different conclusions within the Trade Policy Committee appeared regarding the nature of European Union's competence to conclude the envisaged agreement.

In its Opinion, the Court found that the EU had exclusive competence over most of the EU-Singapore Free Trade Agreement (EUSFTA) and shared competence over non-direct investment and Investor-State Dispute Settlement (ISDS). Despite the fact that the EU thus enjoyed competence to conclude the EUSFTA, the ECJ came to the conclusion that the agreement required the involvement of the Member States.

The theory developed by Judge Allan Rosas explains that there are two form of mixity: obligatory and facultative. Obligatory mixity arises where a mixed agreement is required because the EU has exclusive competence over one area of an agreement, but no competence at all over another area. The EU therefore naturally needs the Member States to fill in the remaining areas of competence. Facultative mixity, on the other hand, arises when the agreement falls within shared competence of the EU and the Member States. There is then a political choice as to who exercises this competence, the EU or the Member States.[28]

The action of rejecting the facultative mixity would have significant impact for the EU's ability to conclude international agreements in areas of shared competence as there is still an element of political discretion involved. The Court's Opinion has consequences for future EU deals. Despite the fact that EU has shared competence, the Member States still need to be involved in the ratification process making it a victory for EU powers in confront with the international community.

In the same time, the area of investment has been a source of considerable legal contention where the ECJ came to conclusion that the current EU trade policy is not exclusive. While art. 207 TFEU clarifies that foreign direct investment is EU exclusive competence, it was questioned whether non-direct investment and ISDS fell within EU competence as well. The ECJ rightly dispatched with the rather outlandish argument that since Treaty provisions on free movement of capital would be affected by the EUSFTA, the EU enjoyed exclusive competence pursuant article 3 (2) TFEU, because it removes disputes from the jurisdiction of the courts of the Member States (para. 292).[29]

However, as the Advocate General Sharpson states "this opinion of the Court relates only to the nature of the competence of the European Union to sign and conclude the envisaged agreement. It is entirely without prejudice to the question whether the content of the agreement's provisions is compatible with EU law." (para. 30)[30]

It should be reminded that the European Commission also follows opinion of the ECJ. While such opinion was not requested in respect of its trade negotiations with China, the Opinion 2/15 is a precedent which can guide the European Commission as a matter of policy if at some stage the Commission is necessitated to request such opinion if the political negotiations are stuck. More than that, it is not unusual that executive bodies whether at the national, regional and international level ask for the

[28] European law blog, Opinion 2/15 and the future of mixity and ISDS, 18.05.2017; this document is available online at https://europeanlawblog.eu/2017/05/18/opinion-215-and-the-future-of-mixity-and-isds.

[29] Laurens Ankersmit, Opinion 2/15 and the future of mixity and ISDS, UCL - Europe and the world: a law review blog, 5.06.2017; this document is available online at http://blogs.ucl.ac.uk/europe-and-the-world-journal /2017/opinion215-mixity-isds.

[30] *Ibidem.*

judicial opinion of courts to find a way out of a political impasse and cover their tracks in legal terms.

3. Restoring trust towards the creation of new rules

Since ancient times, legal rules and institutions have proven to be indispensable instruments for international trade (lex mercatoria) and for the peaceful governance of people. In the context of OBOR as a global project, it is necessary to facilitate the transnational activities, cover the legal expectations deriving from national, regional and international law and avoid the cross-border issues by providing legal tools for investors.

Many OBOR cooperation partners will make their transnational economic cooperation with China conditional on respect for the 'constitutional principles' underlying their respective national Constitutions and UN human rights law. Moreover, as constitutionalism is about limiting abuses of power and justifying third-party adjudication regarding the protection of equal rights, the legitimacy of transnational OBOR cooperation is bound to depend on multilevel respect for the existing international legal obligations of participating countries.[31]

The specific economic, cultural and political differences between the systems must be balanced by a transnational guideline that can maintain the transparency and harmony within the legal and political rules.

In this framework, China will try to make use of its soft power, where "power" in the Chinese philosophy is related to morality as an attribute from within that will provide a stronger outside power, totally opposed to the European concept where is perceived as an ability to change the behaviour of someone else[32]. Hence soft power it is a dialogue-based practice where China will try to change the behaviour of the states engaged in the project without exercising hard power like legal, economic or political pressure. The legal challenges along the OBOR must be seen from both – soft and hard power – perspectives where the economic cooperation is from a Chinese angle best served with a policy – led trade facilitation with diplomatic solutions to disputes in contrast to an European approach with dispute settlement system and binding rules[33].

Moreover, trust is an important factor within the EU and vis-à-vis China where the creation of new rules are strengthening their relationship, increasing in the same time the bilateral trade benefits[34].

Currently, the rule of law represents an obstacle for trade deals where the economic interdependence needs a regulatory framework to engage the CEE countries with China and build trust at the sub regional level, in order to move ahead with supranational trade negotiations.

Giving the rule of law situation in CEE countries, the present ambitions of turning into a solid voice at the European level, is only an aspiration. Conversely, as the "16+1" partnership becomes stronger, it will positively contribute more to balanced

[31] Ernst Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, Hart, Oxford, 2018, p. 21.

[32] Yiwei Wang, *Public Diplomacy and the Rise of Chinese Soft Power, The Annals of the American Academy of Political and Social Science, Special issue; Public Diplomacy in a Changing World 616*, 2008, p. 257-263.

[33] Henrick Andersen, *China's 'One Belt One Road', op.cit.*, p. 27.

[34] Delel Peng, "*China's FTA practice in Europe. New features and impacts*" published in Regional Cooperation and Free Trade Agreements in Asia, Jiaxiang Hu Publishing House, Matthias Vanhullebusch, Brill Nijhoff, Boston, 2014, p. 63.

development of EU and to European integration off all member states. This cooperation might become an example of how the framework increased the level of precise collaboration in various particular fields, by adopting a less popular strategy that promoted the adaptation to the market rules and willingness of cooperation. Although it has met different problems and challenges, the achievements outweighed the obstacles, providing a valuable experience as well as future direction for the other sub-regional cooperation between EU and China.

The Chinese strategy of achieving shared growth has been founded in the framework of bilateral cooperation where the ”16+1” countries negotiated equally, strengthened interconnection, exchanged goods and looked for opportunities on the multilateral platform. The partnership promoted by China is characterized by fairness, peace and inclusiveness, without any classification or difference between the participant countries, where everyone discuss and construct together, instead of seeking a higher status than the other.

In the past five years, the strategic partnerships made significant progress in the cooperation with various sub-regions in Central and Eastern Europe[35]. The level of collaboration has been increased on the basis of good bilateral relations, by creating the annual premiers' meeting on the ground of ministerial meeting and the national coordinators' meeting. Currently there are more established coordination mechanism or platforms, covering areas like trade, investment, transportation, logistics, tourism, technical cooperation, think tank etc.[36]

Furthermore, the whole Central and Eastern Europe region that is part of the ”16+1” framework have accomplished successful economic transformation, where according to the data of Ministry of Commerce of People's Republic of China, from 2010 to 2016, the import and export trade between China and 16 CEE countries increased from $43.9 billion to $58.7 billion.[37]

The Balkan area has been gradually boosted. In 2016, Romania became the biggest investment destination, reaching 0.39 billion USD, Montenegro attracted 800 million dollars of concessional loan for North-South Highway construction project, followed by power generating and other type of projects invested by China in Bosnia and Herzegovina, Macedonia and other Balkan countries, which promoted stable and good development of mutual relations.[38]

The local cooperation plays an important role through their strategy, beginning with the China-Europe trains, the organisation of local leaders' summit or the establishment of a series of professional cooperation platforms.

Remarkable achievements are gradually formed through China Railway Express where China and Central and Eastern Europe countries are pushing forward the partnership among railway administrations, inspections and quarantine, customs, strengthening the coordination among the countries along the railway routes, simplifying the procedure and improving the operational efficiency. [39] The connection between various locations of

[35] Hua Ping, Liu Zuokai et. all., The cooperation between China and Central&Eastern European Countries (16+1): 2012 - 2017, China - CEEC Think Thank Network, SSAP, 2017, p. 38.

[36] *Ibidem*, p. 39.

[37] Ministry of Commerce Europe Division, this document is available at http://ozs. mofcom.gov.cn/article /zojmgx/date/201702/20170202520524.shtml.

[38] Hua Ping, *op.cit.*, p. 42.

[39] *Ibidem*, p. 27.

China and CEE countries has been enhanced through the railway express services such as Suzhou to Warsaw, Chengdu to Lodz, Changsha to Budapest, Yiwu to Riga, that promotes trade transportation and facilitation of goods, as well as the construction of a soft trade environment.

More and more direct flights have been opened between China and the CEE countries such as Shanghai to Czech, Beijing to Warsaw, Suzhou to Warsaw, Beijing to Budapest, Beijing to Belgrade and so on, helping them to increase the economic and trade exchanges between both sides.

Last but not the least, local cooperation has gradually become a channel to promote people-to-people exchange in terms of economic cooperation, for instance through the great contribution of Ningbo city by holding China – CEEC Investment and Trade Expo (where they have strengthened their cooperation in customs inspection and quarantine, and further ensured the convenience of countries' products entering in each others market), Chongqing and Hebei hosting the Local Leaders' Meeting of China and Central and Eastern European Countries, the "16+1" Capital Mayor Summit promoted by Beijing, and so forth.[40]

Given the orientation of the "16+1" project, it can be considered a sub-regional cooperation platform under the overall China-EU partnership that brings out new explorations and practices based on local collaboration that can be seen as possible alternative model for overcoming the rule of law conditionalities and help underpin any future trade negotiation between EU and China.

This trade partnership is an important complement of EU-China relations where the favourable development of trade exchanges in Central and Eastern Europe would provide new opportunities of development. The "16+1" cooperation can serve as a more powerful breakthrough point for dialogue and connectivity between Europe and China, participating as a supplement and example which demonstrates that there exist a lot of possibilities to interconnect and engage the trade relationships.

As a future perspective regarding the development of China-CEE cooperation it is expected to have a greater influence for the regional balance of EU, with the Central and Eastern European countries always committed to adhere to the principle of enhancing and supporting the EU-China relations.

Conclusion

The One Belt One Road Initiative will carry out the Chinese dream about rejuvenating the Eurasian cooperation through trade facilitation and exchange of culture, involving public as well as private parties at national, regional and international level.

Since the beginning of this initiative, all countries of Central and Eastern Europe have demonstrated their activeness by being included in the framework, creating new highlights and notable achievements in the field of investment that led to economic development and growth of the region. The example of "16+1" cooperation shows those 17 countries negotiating equally, strengthening interconnection, exchanging goods and creating opportunities on the platform, proving that the Central and Eastern Europe can become an important indicator in the construction of a common destiny between China and Europe. This local cooperation has greatly improved the diversification of the forms of cooperation which implicitly has helped the acceleration of China - Europe relation.

[40] *Ibidem*, p. 42.

If China encourages inclusion and equal possibilities for all stakeholders, and abides by dominant and agreed legal norms and rules, the OBOR initiative will give very positive impetus to global markets and efficient allocation of capital investment. More important is that the strengthening of mutual relationships will involve the implementation of the OBOR, whose objectives outline important prospects for the further growth of economic cooperation[41].

The economic initiative and the confident official relationship offer a favourable environment for development of their investment cooperation, it just remains to be seen how this cooperation will play out once both initiatives have been fully developed[42].

References

- Andersen, H., *China's 'One Belt One Road'* – Transnational and Multilevel Rule of Law Challenges from a European Perspective. International School of Law, International Studies University (BISU), Beijing, 2016.
- Ankersmit, L., Opinion 2/15 and the future of mixity and ISDS, UCL – Europe and the world: a law review blog, 2017; this document is available online at http://blogs. ucl.ac.uk /europe-and-the-world-journal/2017/opinion215-mixity-isds.
- Bailes, A. J. K, China and Eastern Europe: A judgement on the 'socialist community', The Pacific Review, Vol. 3, no. 3, 1990.
- Cheng, Y. et. all., *The Belt and Road initiative in the global arena. Chinese and European perspectives*, Palgrave Macmillan, Singapore, 2018.
- Dollar, D., China's rise as a regional and global power: The AIIB and the 'one belt, one road', Issue no. 4, Horizons, Summer, 2015.
- Eder, T.,S., Mardell, J., *Belt and Road reality check: How to assess China`s investment in Eastern Europe*, Merics, 10.07.2018; this document is available online at https://www.merics.org/en/blog/belt-and-road-reality-check-how-assess-chinas-investment - eastern-europe.
- European Commission, *Countries and regions – China*; this document is available online at http://ec.europa.eu/trade/policy/countries-and-regions/countries/china.
- European law blog, Opinion 2/15 and the future of mixity and ISDS, 18.05.2017; this document is available online at https://europeanlawblog.eu/2017/05/18/opinion-215-and-the-future-of-mixity-and-isds.
- Herrero, G.. et. all., *EU – China economic relations to 2025. Building a common future*, a joint report by Bruegel, Chatham House, China Center for International Economic Exchanges and the Chinese University of Hong Kong, London, 2017.
- IMF Working Paper, Quantifying the Spill-overs from China Rebalancing, published on 15.11.2016.
- International Monetary Fund, Montenegro – 2018 article IV consultation – press release and staff report. IMF Country Report no. 18/121; this document is available online at https://www.imf.org/~/media/Files/Publications/CR/2018/cr18121.ashx.
- Jospeh R., *The Rule of Law and its Virtue, in The Authority of Law: Essays on Law and Morality*, University Press 2nd edition, Oxford, 2009.
- Kadi and Al Barakaat *International Foundation v Council and Commission*, ECR I-6351, para. 285, 2008.

[41] Dollar, D. China's rise as a regional and global power: The AIIB and the 'One Belt, One Road', Issue no. 4, Horizons Summer, 2015, p. 166.

[42] Mireia Paulo, China-Europe Investment Cooperation: a digital silk road, published in The Belt & Road Initiative in the Global Arena, Yu Cheng et. All Publishing House, Palgrave Macmilian, Singapore, 2018, p. 185.

- Mendelski, M., The EU's rule of law promotion in central and eastern Europe: where and why does it fail, and what can be done about it?, Bingham Centre for the Rule of Law, London, 2016.
- Ministry of Commerce Europe Division; this document is available online at http://ozs.mofcom.gov.cn/article/zojmgx/date/201702/20170202520524.shtml.
- Morelli V. L, The European Union and China, Conforming research service, 26.11.2018.
- Peng, D., "*China's FTA practice in Europe. New features and impacts*" published in Regional Cooperation and Free Trade Agreements in Asia, ed. Jiaxiang Hu, Matthias Vanhullebusch, Brill Nijhoff, Boston, 2014.
- Petersmann, E., International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods, Hart, Oxford, 2018.
- Ping, H. et. all., *The cooperation between China and Central&Eastern European Countries (16+1):* 2012 – 2017, China – CEEC Think Thank Network, SSAP, 2017.
- Portugal v Council, Case C-149/96, judgment of the EC Court on 23.11.1999, ECR I-8395, para. 46.
- Saarela, A., *A new era in EU – China relations: more wide-ranging strategic cooperation?, Policy Department for External Relations – Directorate General for External Policies of the Union*, European Union, 2018.
- TFEU. Consolidated version of the Treaty on the Functioning of the European Union. Official Journal C 326, 26.10.2012, p. 0001- 0390.
- United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, S/2004/616.
- Wang Y., Public Diplomacy and the Rise of Chinese Soft Power, The Annals of the American Academy of Political and Social Science, Special issue; Public Diplomacy in a Changing World, 2008, p. 616.

FINANCIAL LAW QUESTIONS ON THE TRANSFER AND UTILISATION OF REAL ESTATE

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Abstract

In our article we analyze the transfer and utilization of real estate from a financial point of view. After the introduction we clarify the main elements of the theme. We overview the basic concepts of the following acts: personal income tax, act on duties, and on local taxes. Then we focus on the tax aspects of the transfer of real estate, especially on the definition of real estate and property rights in the Act on Personal Income Tax and to the determination of the income and profit from real estate transfer from the perspective of personal income tax, on the basis of personal income tax and on the tax rate. We examine the tax reliefs and exemptions for real estate transfers, historically, and under the effective law. In the second part of the article we deal with some issues of the real estate transfer from the aspect of duties, with the duty to be paid in case of the free transfer of the property and its antecedents. Secondly with the regulations of duties related to properties in case of onerous transfer of estates. The third main part is the tax law of short and long-term housing (Airbnb), the taxation of apartment and house rentals and finally taxation of short time apartment and holiday resort rentals.

Keywords: *taxation, real estate, apartment, market value, short and long time housing (airbnb).*

1. Introduction

We can approach the examination of financial legislation on real estate taxation from several sides, and there are many possibilities for regulation in financial law. The subject has been of eternal significance since the introduction of the Personal Income Tax Act of 1988, as we sell, rent, buy, lease and etc., land, property, apartments, and to these, different taxation and tax payment rules are to be applied.

We can examine the definition of the property, provisions on the transfer of immovable property, the provisions of income tax related to the sale of real estate, the tax provisions related to the immovable property acquisition and the tax regulations related to real estate utilization. When renting a property, it is important whether the activity is carried out as a business activity or not, and new opportunities have also emerged in housing utilization, such as the RBNB - short-term apartment renting, which is currently at its peak. This is due to the digital revolution, the spread of on-line programs at light speed, and the development of tourism.

The property can be a land, but also an apartment, a holiday home, a farm, or a garage, which may also have different regulations. It is also important that an

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individual or a legal entity is the seller or the user.

Thus, it can be seen that the financial issues of taxation of real estate provide numerous opportunities for investigating and exploring problems.

Property regulation is always at the center of interest nowadays - when it comes to the recovery and revival of the real estate market - it is very timely to review the key points of the regulations.

In this paper we summarize the tax and levy rules related to the transfer of property.

2. Clarification of concepts: Real estate, apartment, property rights, definition of the land

In the financial legal provisions, we can find the definition of property in several places, on one hand, Act CXVII of 1995 on Personal Income Tax[1]. (Hereinafter referred to as "Szja tv.") And on the other hand in the Act On Duties (Act XCIII of 1990)[2]. (Hereinafter: Itv.)

The definition of the Personal Income Tax Act.:

'Real property' shall mean any parcel of land and all other constituent parts of the land, excluding all standing (not harvested) crops or produce sold without changing owners of the real property (e.g. standing trees).

'*Arable land*'[3] shall mean the landed areas used for agricultural and forestry purposes as defined in the Act on Transactions in Agricultural and Forestry Land[4].

'*Farmstead*'[5] shall mean a parcel of land located outside the limits of the settlement, not exceeding one hectare in size, consisting - apart from the land - of a residential and farm building or buildings for crop and animal production, and the related processing and storage of agricultural products, or any parcel of land registered in the real estate register as a farmstead;

'Estate'[6] shall mean all lands of the right-holder, whether under the title of ownership, usufruct or any other legitimate form of use;

'*Rights in immovables*'[7] shall mean incorporeal rights in property, such as dominant tenement, leasehold, usufruct, use, easement and lease rights.

'Residential suite'[8] shall mean a constructed structure registered, or in the process of being registered in the real estate register as a detached house or a residential suite, furthermore, a structure under construction shown as a detached house in the building permit if the walls and the roof structure are completed, furthermore, any rural house standing on a parcel shown as a homestead in the real estate register.

'Residential lot'[9] shall mean a building plot defined as such in the Act on the Formation and Protection of the Built Environment, if the land is zoned for residential building in the respective structural plan and/or in the local zoning ordinance, also the parcel of land that is

[1] Act on Personal Income Tax Chapter III. Section 3, Concepts and interpretative provisions, point 29.
[2] Act XCIII. of 1990.
[3] Act on Personal Income Tax Chapter III. Section 3, Concepts and interpretative provisions, point 51.
[4] Act CXXII of 2013 on Transactions in Agricultural and Forestry Land.
[5] Act CXXII of 2013 on Transactions in Agricultural and Forestry Land Paragraph 5 point 25.
[6] Act CXXII of 2013 on Transactions in Agricultural and Forestry Land Paragraph 5 point 3.
[7] Act on Personal Income Tax, Chapter III., Concepts and Interpretative provisions, point 31.
[8] Act on Personal Income Tax, Chapter III., Concepts and Interpretative provisions, point 73
[9] Act on Personal Income Tax, Chapter III., Concepts and Interpretative provisions, point 73

registered together with the residential suite, and the parcel of land on which the residential suite has dominant tenement.

According to the Act on Duty (Itv.), the real estate concept is the same as in the Szja (Act on Personal Income Tax), but the ownership of the property has already been exerted in this case:

'*Real estate property'*[10] shall mean any parcel of land and all other constituent parts of the land.

'*Residential property'*[11] shall mean a real estate property built for residential purposes and registered, or in the progress of being registered in the real estate register as a detached house or a residential suite, together with the parcel of land on which it stands. A building structure under construction shown as a detached house in the building permit if the walls and the roof structure are completed shall also qualify as a residential suite. If there is a residential building on a piece of land registered in the real estate register as a homestead, such building shall be regarded as residential property together with the developed parcel on which it stands. Any structure built on the land of a residential building, which is not essential for the residential suite shall not qualify as residential property even if adjoining the residential building (garage, workshop, shop, farm building, etc.), furthermore, any buildings entered in the real estate register as detached houses (residential suites), which have been employed for other purposes for at least five years prior to the time when the duty became chargeable;

'*Right as an object of property'*[12] shall mean dominant tenement, beneficial use or right of use - including the right of use of a holiday resort and the right to use accommodation on a timeshare basis -, asset management, right of operation, and claims in connection with gratuitous rights;

'*Arable land'*[13] means a parcel of land which is situated outside the limits of a settlement (unincorporated) and is registered in the real estate register as cropland, vineyard, orchard, garden, permanent pasture and meadow (grassland), reed bank or forest or woodland or as a fish pond, including any parcel of land registered as taken out of production and that is shown in the Országos Erdőállomány Adattár (National Register of Forests) noted under the legal concept of land registered as forest, and used for either of the purposes listed, excluding any building erected on the land for any reason;

'*Market value'*[14] shall mean the value expressed in monetary terms which can generally be achieved by the sale of an asset as the price thereof, with regard to its condition at the date when the duty becomes chargeable, without taking into consideration any liabilities in connection with the asset and, in respect of real estate properties, without a lease right being terminated at the time of sale on behalf of the party acquiring the property.

According to the Act C of 1990 on Local Taxes:

'*Building*'[15] means structurally detached construction works as defined in the Act on the Formation and Protection of the Built Environment, or a part of a building

[10] Act on Duties Section 102 Paragraph 1 point b.
[11] Act on Duties Section 102 Paragraph 1 point f.
[12] Act on Duties Section 102 Paragraph 1 point d.
[13] Act on Duties Section 102 Paragraph 1 point m.
[14] Act on Duties Section 102 Paragraph 1 point e.
[15] Act C of 1990 on Local Taxes Section 52, point 5.

structure consisting of man-made structures, which is partially or wholly separate from the exterior area, hence providing a confined area for shelter, for long-term, temporary or periodical inhabitance, including any independent structure that is situated, in part or in whole, below the adjacent ground level;

'Building section'[16] means a part of a building consisting of one or more rooms and/or areas with its own function and that is technically separated and has its own entrance from outside or inside the building, and that - according to Points 8, 20, 45 and 47 - is treated as a residential suite, holiday home, commercial establishment or other non-residential building, by virtue of the fact that it is not registered in the real estate register as an independent real estate property;

'Residential suite'[17] means the constructed structures defined as such under Points 1-6 of Section 91/A of Act LXXVIII of 1993 on the Rules Applicable to the Tenement and Alienation of Housing Units and other Premises, and registered, or in the process of being registered in the real estate register as a detached house, residential building, residential suite, castle, estate or mansion;

'Auxiliary area'[18] means any attic or basement area of a residential suite or holiday home, that is designed and intended to function as storage space only, not including garage spaces;

'*Non-residential building'*[19] shall mean a building, building section that is not recognized as a residential suite provided for in Point 8;

'Arable land'[20] means a parcel of land shown in the real estate register as cropland, vineyard, orchard, garden, permanent pasture and meadow (grassland), reed bank or forest or woodland or as a fish pond;

'Holiday home'[21] means the construction works registered, or in the process of being registered in the real estate register as a holiday home (resort building, weekend house, apartment, vacation home, boat house, etc.).

It can be seen from the diversity of the provisions that there is a also a lot of use of terms, which makes the interpretation complicated in itself, but the problem is also that different laws use different terms with different content, which makes it even more difficult to apply uniform law. It would be useful if the concepts were to be explained in more detail in the Act on Personal Income Tax and Act on Fiscal Charges, and should not be clarified by separate references in the interest of the correct application of law.

3. Tax aspects of real estate transfer

The title of the post-tax of real estate transfer in case of onerous transfer can be sale, exchange, adverse possession, and free, in cases of gifting and inheritance. In the case of a property transfer, the seller may be liable for payment of personal income tax, while the acquisition of the property - through the acquisition of pecuniary assets - creates a duty payable by the buyer. The transfer of a property is therefore a transaction where both parties of the legal relationship, the seller and the buyer, are liable for payment for the same transaction

[16] Act C of 1990 on Local Taxes Section 52, point 6.
[17] Act C of 1990 on Local Taxes Section 52, point 8.
[18] Act C of 1990 on Local Taxes Section 52, point 10.
[19] Act C of 1990 on Local Taxes Section 52, point 11.
[20] Act C of 1990 on Local Taxes Section 52, point 17.
[21] Act C of 1990 on Local Taxes Section 52, point 20.

against the state. However, the seller pays tax only if his property generates profit from the transfer of the property, so it is worth clarifying the most important definitions that differ from those used in tax law and other branches of law.[22]

3.1. The definition of real estate and property rights in the Act on Personal Income Tax

As amended several times, in the Act CXVII. on Personal Income Tax of 1995. (hereinafter referred to as "Szja tv.") 'Rights in immovables' shall mean incorporeal rights in property, such as dominant tenement, leasehold, usufruct, use, easement and lease rights.[23] 'Movable property item' shall mean all articles other than real property, with the exception of payment instruments, securities, and all standing (not harvested) crops or produce sold without changing owners of the land (e.g. standing trees).

Thus, according to the Act on Personal Income Tax, the building, the apartment, the residential house, the edifice, the plot and the soil is considered a real estate.[24]

Letters b.) and f.) of Section 102 The Act XCIII of 1990 on Duties (in the following Itv.) offer a different definition of property and of real estate and establishes a more punctual definition of the apartment than the Szja tv. (Act on Personal Income Tax). Property in the meaning of Itv: land and all things connected with land, real estate: real estate registered with the name of a dwelling house or flat or to be listed as such with the corresponding land part. The apartment must be in a state of structural construction license. This rule applies eg. To the roof structure built on it. Apartment - Itv. - the farm, too, if there is a dwelling house, but the property is listed as a farmstead.

In such a case, the dwelling part of the dwelling is considered to be the flat. According to Itv however, a room (garage, workshop, shop, business building), which is not necessary for the proper use of the dwelling, is not classified as a dwelling on the land part of the residential building, even if it is integrated with the dwelling house. A building registered as a dwelling (dwelling) in the real estate register as a dwelling property which has been used for another purpose for at least 5 years prior to the date on which the dues obligation arises shall not be regarded as home ownership.

From the comparison of the definition of the flat, it follows that Szja tv. however, treats the interpretation of the concept in a narrower way, so Itv. can be used to help the referenced interpretation.

3.2. Determining income and profit from real estate transfer from the aspect of personal income tax

In case of a property transfer, the sales price received by the seller will be revenue. The basis for the personal income tax on the transfer of the property will be the income. From the use of concepts, it can be seen that there is a difference between income and profit, therefore it matters what the tax base is: income or profit!

According to the Act on Personal Income Tax, the revenue is generally determined from the income, in three ways[25]:

[22] See for instance Sections 11-13. of the Act CXLI. of 1997.

[23] Section 3, Point 29. of the Szja tv.

[24] Although it should be noted that the Szja Act consistently uses the concept of real estate as a transfer of property and property rights, as well as the concept of a building and housing registered as such. (see Paragraph 6. of Section 62. of Act CXVII. of 1995).

[25] Paragraph 1-2 of Section 4. of the Szja tv.

- profit might mean the whole of the income, so in this case, there is no opportunity to subtract costs (in this instance income equals profit),
- profit can be the part of income reduced by costs, (that is, profit equals the income minus costs),
- profit might be a certain percentage of the income, that is, definite percent of the income determined by law (profit equals certain % of the income)

Revenue is a property value acquired by an individual in any form and by law - money and non-money - under the Szja tv. Income from the sale of real estate is any income that an individual acquires in the context of a transfer. Revenue should be taken into account in accordance with the selling price (the purchase price indicated in the contract) or the exchange value.

In case of exchange, the normal market value of the thing received in exchange will be the revenue. It is important to know if the sales price indicated in the contract or the exchange value at the time of signing the contract exceed the normal market value, since the difference is already considered as other income[26], and in this case, however, this value does not have to be considered as revenue. According to the Szja tv., the exchange of real estate is subject to the judgment of the exchange partners. In this case, the revenue is considered to be the normal market value of the thing received in exchange at the time the income was earned. If the exchange contract does not include the value of the exchanged property, the turnover value on which the fee is based shall be considered as revenue.

The income must be determined by deducting the expenditure from the revenue(costs) incurred by the seller in connection with the sale of the property. Thus, as described above, the income will be a part of the revenue-reduced, and this is the basis of the tax, so the exact determination of income is a very significant issue.

Thus, when determining the income from the transfer of real estate, it is necessary to start from the revenue and deduct the following expenses from the purchase price:

- the amount spent on the acquisition of the property (the turnover value of the property at the time of acquisition, that is to say, the value of the property or the market value of the property at the time of the acquisition, for example in the case of inheritance), and the related costs (eg. the tax paid in the time of acquisition),
- the amount of the value added investment on the property (only that which is permitted by the Szja tv.)[27],
- expenses related to the transfer (such as advertising fee, lawyer's fee, commission of a real estate agent). Also, the duty paid at the time of purchase.

Applying the decrease of the listed expenses, it can be seen that when the property is transferred, the income is generated only if the seller sells the property for more than the price he has purchased, bought it, or as he or she understood when he inherited it for. Thus, the income is not equal to the selling price; the state levies the possible profit, the value increase, as income.

In the case of acquisition of property by inheritance or donation, the amount of property used for the sale of the property is the amount taken into account when determining the tax. The amount spent on acquisition must be determined by the manner in which it was acquired by the

[26] Surányi Imréné: Az ingatlan és a vagyoni értékű jog átruházásából származó jövedelem adózása, Adó XX. évfolyam Issue 2006/6. p. 2.

[27] See Point 32. of Section 3. of the Szja tv.

individual. In case of acquisition by sale purchase price stated on the contract with the property when purchasing the property it, must be regarded as a reverse acquisition amount. If the seller has purchased the property as a municipal tenant, the amount spent on the acquisition will be the actual purchase price included in the sales contract with the municipality.

The date of receipt of the income is the date on which the property transfer contract was submitted to the Land Registry. If the validity of the contract is subject to official approval, the date of receipt of the income will be the day on which the official permit of the authority was submitted to the Land Registry.

3.3. Determining income in another way, the basis of personal income tax, the tax rate

If it is not possible to determine the amount of the property (purchase price of the property at the time of acquisition or the value of the turnover), then the income is, as per the provisions of Szja tv., determined according to the third method described above, that is to say, the statutory rate of income will be profit, ie. the profit will be 25% of the income. In this case, the seller does not have to justify to the Tax Authority any possible expenses incurred during the verification, but the seller can automatically calculate the tax base and amount: 25% of the revenue (sales price, purchase price) is an income, and it will also be the tax base, and 15% of it will be the tax payable. The deductible cost ratio in this case is therefore 75% of the revenue dictated by law, that is, the overhead rate is 75%.

The tax rate is 15% of the calculated income, ie. the tax base.

3.4. Tax reliefs and exemptions for real estate transfers, historically, and under the effective law

The income from the transfer of real estate, and thus the tax base, can be further reduced, depending on the time elapsed between the acquisition and sale of the property. The longer this time is, the less tax is payable on income from the transfer of real estate.

As a rule, before 2010, the tax-exempt and tax-deductible income from real estate and home ownership was separated, the income from the sale of the property acquired or purchased over five years had to be reduced as a function of the acquisition time. If the individual sold the property after six years from the purchase, the income, and thus the tax base, had to be reduced by 10%, and then the percentage of the reduction increased by 10% every year. Accordingly, the income had to be reduced by 20% if the property was acquired 7 years before the sale, 30% if 8 years, 40% if 9 years, 50% if 10 years, 60% with 11 years, 70% if 12 years, 80%, if 13 years, 90%, if 14 years, and 100% if they were 15 years before the sale. This meant that in the case of real estate - with the exception of the apartment - it was no longer necessary to pay tax on income after 15 years, as 100% of the income was deducted due to the reduction of the tax base.

This rule could not be applied to property rights, but in the case of the alienation of a property right acquired before 1982, there is no need to pay tax, it will be tax-free.

In 2010, housing discounts were as follows.

In the case of a dwelling or apartment building, the income and income were determined in the same way as for other properties, ie the expenses, the value of the property at the time of acquisition and other named expenses could be deducted from the income. Thus, the income was a part of the

revenue reduced or, if the value of the property was not known at the time of acquisition, 25% of the income was calculated as income.

Until 2008, the acquisition of housing was known, but after 2008, the family or home purchase allowance was abolished, which could be applied by the seller if the income from the transfer of the dwelling (dwelling house) - or a part of it - within a specified period of time before the income was earned. Within 12 months, or within 60 months of the sale, it was used for home use by you or your close relative or former spouse. Thus, if the seller had turned the sale of the apartment into a new home, in that case it was not necessary to pay the tax after the use of the home income or to reclaim the tax already paid.

The purchase of the dwelling, the acquisition of ownership of the dwelling houses, if it was built within the required time, the increase of the dwelling space of the dwelling with at least one dwelling room, or the acquisition of the right to rent the dwelling, were considered as residential use. According to the Civil Code, close relatives, spouses, close relatives, adopted children, stepchildren, foster parents and foster parents and siblings counted.

It was an important rule that the use of the dwelling for the home could only concern the acquisition of a home owned home. This clause - that it was only possible to use income for domestic purposes and not in any Member State of the European Union - was in breach of European Union law, infringed the right of EU citizens to work and reside freely, and thus the provision constituted a form of discrimination.[28]

The flat-rate home purchase discount was discontinued in 2008 with the introduction of a transitional rule. However, the transitional rule allowed those who had already earned their income from the transfer of real estate before 1 January 2008 to apply the flat-rate allowance for home ownership that year.

The provision of a flat-rate home or home purchase discount in violation of the above-mentioned European Union law has been refined in the course of the amendment of the text of Szja tv..[29] According to this, the tax on the income from the transfer of any real estate or property rights does not have to be paid or recovered if the individual in the year of the transfer or within the next two years, for himself, his close relative or partner in the home of the disabled, in the home of disabled persons, or in other similar nursing homes for the purpose of obtaining housing provided in any Member State of the European Union.[30] It can be seen that in this case the legislator has already restricted the right to use the income for the purpose of home use[31], but incorporated it into the text of the law, in conformity with European Union law, that "home use", ie the elderly, can take place not only in Hungary but also in any Member State of the European Union. You can also buy a place in your home or in a nursing home - subject to the above conditions and time limits - without income tax.

Thus, on the one hand, the discount on housing and tax relief has become limited on the one hand, but in the case of the reduction

[28] See Case C-345/05 Commission of the European Communities v Portuguese Republic. See Dr. Kolozs Borbála: A portugálok, svédek, a magyarok és az adórendszer egységességének elve, a Pénzügyi Jogot Oktatók Konferenciái 2006-2009, Miskolc, Novotni Kiadó, 2010, p. 98.-106.

[29] We understand here the Personal Income Tax Act in force in 2010.

[30] Paragraph 2 of Section 63. of the Szja tv, 2010.

[31] We understand here that you can only use the income tax free to obtain the listed properties, such as for the purpose of housing in a home for the elderly or in a nursing home.

of income depending on the acquisition time - in the case of a dwelling, - it has become more favorable.

According to today's rules - in 2019 - income and income from the sale of real estate and dwellings will be taxed only if five years are not passed between the acquisition of real estate / apartment and the sale. If five or more years elapse between the year of acquisition and the sale, no tax will be payable on the proceeds from the sale. In the years between the acquisition of real estate and the sale, part of the income is exempt from tax, according to the tax relief rule.

When reducing the income from the transfer of housing and real estate, it should be taken into account how many years have elapsed between the acquisition and the transfer of the apartment. The more time it takes to acquire and transfer the apartment, the less tax you will have to pay, or you may not have to pay any tax at all. If more than 5 years elapse between the acquisition and sale of the apartment, the dwelling house or the property, the exchange, transfer, the income from the transfer of the property is completely exempt from tax. In case of transfer within 5 years, the income from the transfer of the apartment and other real estate can be reduced as follows:

- In the year of the acquisition of property and the following year, the income will be 100%,
- in the second year after the year of acquisition, the income will be 90%,
- in the third year following the year of acquisition, the income will be 60%,
- in the fourth year following the year of acquisition of the property, the income is 30%, and
- in the fifth year following the year of acquisition of the property and in subsequent years, the tax base will be 0%.

Accordingly, in the fifth year after the year of acquisition, the tax base disappears in the sense of a discount, so the tax allowance is 10% of the income in the second year after the year of acquisition of the property; - in the fourth year after the year of acquisition, and the tax benefit is 100% of the income in the fifth year after the year of acquisition.

It can be summarized that a flat-rate discount involving the acquisition and sale time difference has been replaced by a flat-rate discount, which does not replace the old house purchase allowance, but in any case reflects the objectives of the legislator's concession for housing.

We can also sum up that there is a big change in the other real estate (garage, holiday home, farm, agricultural land) as the 15-year tax exemption period has also changed for 5 years for these other properties outside the apartment, which is much shorter. The introduction of this new rule for the uniform management of real estate makes it considerably easier not only for the law enforcement officer but also for the taxation of income from the transfer of private property.

4. Some issues of the real estate transfer from the aspect of duties

Together with real estate transfer there is also an obligation of duty payment from the party gaining the estate, thus I will briefly review the regulations considering this.

4.1. The duty to be paid in case of the free transfer of the property, the antecedents of the free property acquisition duty

According to the older regulation, in case of the free transfer of the property party gaining the estate had to pay inheritance or

gift duty, depending on the level of relationship with the legator or the donating party.

The regulation of the Tax on Duties in 2010 categorized the relatives and other persons in three ways:

I. level of relationship: the child of the deceased or the donor, adopted, stepped and raised child, spouse, parent, adoptive, step-parent parent, grandchild
II. level of relationship: granddaughter, grandparent, brother who is not in group I
III. level of relationship: every other inheritor or beneficiary.

The further the relationship between the parties was, the higher the duty payable. In the framework of the older regulations, the straight-line descendants and the ancestors belonged to the first group, but the September 2010 amendment removed them from this circle and established for them a fairer regulation, and even relative relief in certain cases. In the case of inheritance duty, an exemption limit of HUF 20 million was applied to the heirs of the first group.

From 2013, a new rule in the duty law is that straight-line relatives are exempt from the inheritance duty or a gift in the event of any amount, whether it is real estate or movable property or gift.[32] Even the surviving spouse became exempt from the inheritance duty and gift duty at that time, regardless of the amount. Exemptions for children, the spouse and other straight-line relatives established by the legislators have long been awaited by the people affected.

From 2013, the inheritance acquired by a stepchild and stepchildren, or step parents is not entirely exempt, only up to an amount of HUF 20,000,000.[33]

There is also an exemption to pay duty for the plot which is built in within 4 years by any heir or gifted.

In addition, inheritance and gifting of the apartment have also been included in the circle of tax benefit in the past, as distant relatives or heirs have to pay a reduced duty.

In 2019, in the case of the free acquisition of property and connected property rights instead of a general 18% rate of duty, the inheritance and gift duties rate are half of the general rate, that is 9%.

Thus, according to the rules in force today, the exemption from the payment of inheritance and gift duty includes the property of the direct relatives and spouses for all types of properties consisting in property of any value.

We can conclude that the regulation of payment obligation of the duty of free property acquisition became softer and that the preferential payment regulations or exemptions for the apartments - similar to Szja - appeared in the Act on Duties as well.

4.2. Regulations of duties related to properties in case of onerous transfer of estates

Acquisition of a property can be done on several grounds, but we consider buying and replacing and replacing exchange as the primary transaction. The duty is to be paid by the buyer, who however has paid the price of the property from an after-tax income; still, the buyer must pay a duty after the gain of estate.

Even in the case of transfer duty on property, a distinction must be made between the acquisition of home ownership and the acquisition of any other property.

The general rate of the transferable property transfer duty is 4% of the value of

[32] Point i.) of Paragraph 1 of Section 16 and Point p.) of Section 17. of the Act XCIII. of 1990. on Duties (Itv).
[33] Point c.) of Paragraph 1 of Section 16 of the Itv. (applicable from 2013 and today as well).

the property in the event of acquisition of the property. It is important to mention that the value of the turnover, that is, the basis of the duty, is always determined by the state tax authority, so the purchase price indicated in the contract is not relevant in this manner. More specifically, the purchase price is irrelevant for the determination of the duty, but later the purchase price indicated in the contract, at the time of the sale of the property and the calculation of the personal income tax payable thereafter may be of significance. In the case of the sale of the purchased property, only the amount of the purchase price (Szja revenue) received at the time of sale can be deducted from the purchase price included in the purchase contract, which is what was actually paid.

Assuming, while not allowing that the purchase tax be reduced, the reduced purchase price is included in the property purchase contract and not the amount actually paid, this can count a lot later when the buyer wants to sell the property and can therefore deduct less money. In addition, there is no reason for such help, as the basis of the duty is determined by the state tax authority in every instance based on serious market evaluation and comparing.

There are also preferential rules considering properties in the Itv, for instance in the case of an exchange of properties. In the case of an exchange of properties, the base of the duty is the market price of the gained property, while in case of exchange of apartments, the amount of the difference between the market prices of the exchanged apartments gives the base of duty. If more than two apartments change their owners, then the base of the duty will be the amount of difference between the apartment of the highest market value and the lowest.

In the case of acquisition of an apartment ownership in exchange to a municipal maisonette, the base of the duty is the 50% of the market price of the apartment.

In the case of a private individual, the home purchase benefit applies to the onerous estate transfer, similar to the older regulation of the personal income tax. If a private individual buys home ownership and sells his / her other home within one year before the purchase, the basis for the payable property transfer duty will be the difference in the sales value of the home purchased and sold.[34] Before, even in the case of a negative price difference, there was an obligation of duty payment, however, according to the applicable regulation in its current form, and, in case the base of the duty is negative, there is no such obligation to pay. In the event of someone selling his or her apartment and buying an apartment of a smaller price, the base of the duty will be negative, thus, there will be no duty payment obligation arising from such transaction.[35]

A preferential rule with regard to the exemption of straight-line relatives is also applicable, similarly to the preferential regulation considering the succession and donation duty. Exemptions from the duty of onerous transaction in case are applicable if:

- the acquisition of property originates from the transfer of assets between the direct relatives,the estate transaction is concluded between spouses, or
- if it is originating from the dissolution of the marital property community. [36]

First purchase of real estate by young people under 35 years is connected with a benefit, in this instance, the 50% of the general duty to be paid has to be paid in the event of acquiring a full or partial ownership

[34] Point b.) of Paragraph 2 of Section 21 of Itv.

[35] Point y.) of Paragraph 1 of Section 26. of Itv - tax exemption for apartments with a lower turnover value.

[36] Point z.) of Paragraph 1 of Section 26. of Itv.

of the real estate, if the market price of the given real estate does not exceed HUF 15,000,000.[37]

It is also preferable to acquire the ownership of a new apartment built by the entrepreneur for sale at a maximum market value of HUF 15 million. When buying such a new home, the amount of the state subsidy reduces the tax base, so when using the Family Home Benefit (CSOK), the amount of the tax base for the purchase of the newly built apartment must be reduced by the amount of non-refundable housing aid. Those who can use a HUF 10 million CSOK, are able to buy a new apartment worth HUF 25 million free of duty.[38]

From 2018, the land duty exemption changed. Between the cessation of the right to property and the termination of the right, the fee is differentiated by the law, whereas the abolition of the right to property results in a duty on the owner, the cessation of the right does not create a duty. In connection with the acquisition of land by farmers, the use of land is exempt from duty - both from the donation duty and from the transfer duty.[39] The farmer does not have to pay a surcharge as from 2018, if his farmland is in the five-year cultivation period let in at least 25% to the agricultural association owned by him or her and at least 25% to the agricultural association owned by his or her close relative. The association must undertake to utilize the arable land for agricultural and forestry purposes during the five-year cultivation period and the ownership of the farmer – together with the relatives - must not fall below 25% of the shares. If the commitment fails, the farmer has to pay 8% surcharge.

The listed benefits and exemptions unify duty law, are very welcome, and are also aimed at encouraging the mood of real estate purchase. The real estate market is on one hand affected by many economical aspects, mainly the loan terms and purchasing power, and also by the market price, but we can still conclude that the tax and duty payment obligations are also dominant factors. For this reason it is not all the same what kind of burden is taken on by the person buying or actually purchasing the real estate. From the change of the regulation it can be seen that a positive tendency has begun, which will hopefully result in further benefits, exemptions or even cuts in the future.

From the above ascertainments it can also be stated that there is a tight connection between the personal income tax payment and the duty payment obligation in case of purchase of real estate, even if, in certain transactions, the payers are separated from each other. In the acquisition and sale of real estate, the state only wants to tax the newly generated income, which is acceptable and fair from a tax point of view.

However, the same cannot be said about the duty to be paid, because in this case the purchase is made from the income already taxed, and in the case of the acquisition of property, our wealth increases with the purchase of the property, but our income after tax is reduced by the same amount. So here, it is not about the taxation of the newly generated value, but the re-taxation of the taxed revenue, which in principle is hardly able to comply with the basic principle of a just taxation.

[37] Paragraph 6 of Section 26. of Itv.

[38] Point f.) of Paragraph 1 of Section 26. of Itv.; see also Magyarázat az Illetéktörvény évközi és 2018. Január 1-jétől hatályos változásaihoz Adó-kódex Adó- és Pénzügyi szaklap 2017/13-14. p. 170.

[39] Adó Kódex Issue 2017/13.-14., XXVI. p.169. According to Act CXXII of 2013 on Transactions in Agricultural and Forestry Land the acquiring of land use if free of charge.

5. Tax law of short and long-term housing (Airbnb)

Together with the emergence of digitalism and online transactions, certain short term apartment leasing methods appeared which are hard to control, which are on one hand rather profitable from the side of the landlord, on the other hand they provide a much cheaper possibility than the costs of hotel rooms from the side of the tenant.

These apartment leasing methods are named Airbnb. Airbnb is such an online marketplace, through which there is a possibility of renting and booking accommodation on the internet, even for only a few days.[40] Its name originates from "bed and breakfast" and the guest bed "airbed" words, named "Airbed and breakfast"; it is the official name of the accommodation provided via an online booking system. The exchange of private apartments, the rental of apartments or rooms have many advantages, and has become a very fashionable and liked method of seeking accommodation, so Airbnb is becoming more and more widespread in the online space.

Airbnb is a France-based online platform and online hotel reservation company that collects commissions for accommodation booked on its site. Through this, it is possible to book only one room or to book even a whole apartment.

However, there are several rules for taxing an individual who is renting a room or an apartment through Airbnb.

If a private individual does not carry out his / her activity as a housing contractor as a sole entrepreneur, he / she can basically choose between two tax methods. He or she can choose in one of the tax methods if he or she will be taxed according to the tax rules of the income derived from the self-employed income to be consolidated, or according to the other method, will pay tax according to the 'flat-rate tax of a private individual engaged in a private-sector income' tax category.

One of the most common forms of residential use is renting a flat or short-term housing (house, apartment), especially for tourists, which the Act on Personal Income Tax calls accommodation (pay-hospitality).[41]

5.1. Taxation of apartment, house rentals

Let us look at renting the apartment for a longer period.

The Act on Personal Income Tax does not establish the definition of real estate rental, however the Act provides us the definition of the activity of paying hospitality, and by this, it makes a distinction between long-term apartment rental and short-term rental.

Basically, in connection with apartment rentals, the provisions of the Act V of 2013 on the Civil Code have to be taken into account. Thus, we speak about apartment rental if the private individual lets the use of the real estate for a longer period of time – months, years – for counter value.

In this case, the tenant not only uses the apartment, but also keeps it clean, restores its condition, and carries out smaller maintenance tasks as well.[42]

In the case of renting an apartment or holiday home, the taxation of the income from the renting of the dwelling is considered to be the income to be

[40] https://hu.wikipedia.org/wiki/Airbnb (08.03.2019).

[41] See Section 57/A. of Szja tv.

[42] Kopányiné Mészáros Edda: Lakóingatlan hasznosítása Adó, Adó –és Pénzügyi Szaklap, Wolters Kluwer Kiadó, Year XXXII. Issue 2018/11. p. 17.

consolidated, it will form part of the consolidated tax base and the income will be included in the income from the independent activity. Income to be consolidated means that the income from the letting of the property must be calculated first, and the income thus calculated must be added to the other income of this type, or the income of the non-autonomous activity, such as income from employment. Accordingly, the income must be determined from the revenue, which is possible in two ways.

The rental is the actual rent of the rental, without any overhead paid by the tenant to the lessor.[43] According to the Szja tv[44] self-employment income shall comprise all income earned by a private individual in connection with such activities or in consequence of any legal relationship underlying such activities.

The calculation of profit from the income that is the rental fee happens according to the choice of the taxpayer, being either:

a) the 90% of the income qualifies as profit, that is in this instance the law automatically lets 10% to be subtracted as an expense ratio from the income (rental fee) without certification (invoices, vouchers, or other documents) or
b) from the income gained, the landlord might subtract all expenses that have arisen in connection with the rental which are duly justified, or accounted based on the Annex of the Act on Personal Income Tax. In this case, against the income, the private individual landlord might apply itemized cost accounting; the profit will be a result of income minus expenses.

Thus, the method of calculating income from revenue can be done in two ways, either the 10% cost ratio, that is, using the dictated rate or with the itemized cost accounting.

In the case of the rental of an apartment of holiday resort, the private individual landlord might subtract from the income of the rental:

a) the rental fee paid in the same year for rented dwellings in other settlement
b) on the condition that also the duration of both rentals exceeds ninety days,
c) and that the private individual claims no expenses in connection with the rented residential suite from his income from other activities or that the he did not receive any compensation for the rental fee paid as verified.[45]

To compensate the rental fee of the let apartment with the rental fee of the rented real estate these three legal conditions must be met. Rental fee paid by the landlord can also be accounted as an expense against the rental fee of the domestically let apartment. It is significant to note that this subtraction does not qualify as cost accounting, that is, by choosing any of the cost accounting methods, the landlord might deduct the rental fee of rented apartment from the income.[46]

Cost accounting can be applied to the extent of the income from activity of landlord:

- in the interest of continuing the activity, the acknowledged expenses according to the Annex 3 of Szja tv; for example a purchase of tangible fixed assets (refrigerator, furniture) to the extent of value HUF 200,000, that is, in case its total purchase value does not exceed HUF 200,000

[43] Paragraph (3a) of Section 17. of the Szja.
[44] Paragraph 3 of Section 16. of the Szja.
[45] Paragraph 5 of Section 17 of the Szja.
[46] Kopányiné (2018) p. 20.

- according to the Annex 11 of Szja tv, the depreciation and renovation costs of tangible assets used exclusively for the purpose of leasing can be deducted, which is 2% of the purchase price of the property as a building with a long lifetime. For long-lifetime buildings, the annual depreciation rate is 2%. However, no depreciation can be charged on the land and plot belonging to the building.

In a simple example: In the case of an apartment with a purchase value of HUF 10,000,000 is means HUF 200,000 deduction.[47]

Other costs, other actual expenses proven by invoice and incurred in connection with the particular activity of the lessor or may be deducted as costs.

After deducting the costs, the amount remaining from the proceeds will be the profit, which should therefore be added to the consolidated tax base and the tax will be 15%.

Private individual landlords do not have the opportunity to transfer the loss of the tax year (when the expenses exceed the income) to the next year. The tax is payable in the form of a tax advance during the year, and if the rental fee is not received from a company, the tax advance must be paid by the 12th day of the month following the payment.[48]

It is important to note that when choosing individual taxation, an individual can choose only one or only the other taxation method for more than one lease, that is either the itemized cost accounting or the deduction of the 10% cost ratio. This rule also applies if an individual has different types of incomes (e.g. commission) from several independent activities.

Unlike the above, special rules apply to the letting of the flat to the municipality, which is already included in the taxable income and under the statutory conditions, such as the flat-rate housing expenditure must be fixed and must exceed 36 months.[49]

In the case of a land lease, the Szja tv. provides special rules of separately taxed incomes,[50] it falls among the mixed incomes, the taxation of it is the task of the municipal tax authority, the rate of tax is 15%.

5.2. Taxation of short time apartment and holiday resort rentals

Taxation of the short time Airbnb rental is as follows. Airbnb - in the case of short-term home letting via the online platform or other - short-term accommodation service provided by the accommodation service provider, or the private individual in case he or she does not let his or her apartment as an individual entrepreneur to tourists for less than 90 days - and possibly provides other services to his or her guests, such as cleaning and breakfast. The rental of a room, a whole apartment or a house might happen.

The private individual providing accommodation service (Airbnb activity) can let his or her apartment in the framework of an individual entrepreneur, but where it is not the case and he or she chooses to let the apartment as a private individual, he or she can choose from two types of taxation:

a) flat-rate tax of a private person performing pay-hospitality activities, or
b) under the above-mentioned merger, according to the rules of independent activity. He or she here can also choose between two methods of taxation, the individual can choose to deduct the 10%

[47] See the detailed example Kopányiné (2018) p. 20.
[48] Kopányiné (2018) p. 21.
[49] Section 74/A of Szja tv.
[50] Revenue earned by land rental – Section 73. of Szja tv.

unadjusted cost from his income, or choose itemized cost accounting that is duly supported by invoices and documents.

The regulation, considering itemized cost accounting according to the Szja tv. lists to the Chapter X, where we can find the entrepreneurial income tax of the individual entrepreneur, the flat-rate taxation, and the rules of itemized flat-rate taxation. It has to be made clear, however, that the person exerting the paying hospitality activity does not qualify as a private entrepreneur, so the thematic listing must not mystify anyone!

The conditions concerning accommodation service providing are established by another law,[51] but Szja tv. also provides some conditions.

According to the Szja tv. the definition of the private accommodation[52] is: Private individuals providing private accommodation shall mean the provision of accommodation - not in the capacity of private entrepreneurs - within the framework of accommodation service activities in accordance with the government decree on the conditions for the pursuit of accommodation service activities and the procedures for authorization of accommodation service activities, to the same person, for less than ninety days in any tax year.

Thus, its conditions are:

- the private individuals must not provide the service in the capacity of private entrepreneurs,
- the apartment is leased to the same person for a period not exceeding ninety days in any tax year,
- the activity is carried out in maximum 3 apartments or holiday resorts – that do not qualify as professional accommodation service places, and
- a flat-rate taxation is chosen.
- In this case also, the private person landlord is subject to the invoice or receipt obligation.

The *yearly amount* of itemized flat-rate tax is HUF 38,400 per rooms. The yearly flat-rate tax has to be paid in equal portions after every quarter until the 12th day of the following month. In case of termination of activity, after the quarter year of the termination, until the 15th day of following month of the quarter year of termination, the flat-rate tax is due. In case of itemized flat-rate tax, if the conditions change, and the service provider no longer complies with the provisions of private accommodation, then the private individual has to pay his or her tax according to the individual activity.

Because of the carrying out of a business activity, the *commercial accommodation service* qualifies as real estate rental according to the Act on Value Added Tax, and, although the leasing of apartment is primarily a tax-free activity, this tax exemption does not cover the use of real estate for tourist purposes that is the commercial accommodation service. The commercial accommodation service is a taxable activity according to the Act on VAT, according to which the preferential tax rate of 18% is to be applied. In case of the realization of legal conditions, - for example up to HUF 12,000,000 income – the taxpayer might choose subjective tax exemption, in this case, there is no need to pay VAT after the commercial accommodation service.[53]

In the case of private accommodation activities, the private individual lessor is also

[51] Government Regulation 239/2009. (X.20.).

[52] Paragraph 1 and 2 of Section 57/A. of Szja tv.

[53] Taxation of accommodation service provided through NAV Online booking system https://www.nav.gov.hu/prit/ado/afa080101_hatlyos/Online_szallashely_szolgaltatas.html (date of download: 2019-03-08).

subject to the invoice or receipt obligation, and must keep all documents as required by the Szja tv.

6. Summary findings

When reviewing the tax and duty payment rules on the use of real estate, we can conclude that the regulations contain both negative and positive elements.

As a positive point, Airbnb, as a recently adopted concept, is subject to taxation and is known by the regulations, which is a positive merit of the legislature. The regulation is clear: the choice of suitable taxation is the right of the landlord.

However, as a negative point, it can be stated that the placement of private accommodation activities in the Chapter X is thematically disturbing, which is basically about the taxation of sole proprietors.

In addition, we believe that accommodation service provided through the online booking system should also be mentioned as a definition, the short-term rental, and the fact that this is Airbnb accommodation service activity. The conditions are understandable still, logically, it would be easier to identify the concept in the chapter named 'Definitions' in the beginning of the Act.

Overall, it can also be seen that the taxation of real estate shows a not very transparent regulation, many times the definitions are different, there are many cross-references in the law, the definitions (real estate, apartment, land) are present in more places in the Szja tv., and it is a negative fact. We can mention as a positive fact however, that – among real estate – the apartment is present at an emphasized place, and is both preferential from the aspects of both tax and duty paying.

The law is rapidly changing, and coherence could develop as well.

References

- Act CXVII. of 1995 on Personal Income Tax.
- Act CXXII of 2013 on Transactions in Agricultural and Forestry Land.
- Act XCIII of 1990 Act On Duties.
- Act C of 1990 on Local Taxes.
- Government Regulation 239/2009 (X.20).
- Kopányiné Mészáros Edda: Lakóingatlan hasznosítása Adó, Adó –és Pénzügyi Szaklap, Wolters Kluwer Kiadó, Year XXXII. Issue 2018/11, p. 17.
- Surányi Imréné: Az ingatlan és a vagyoni értékű jog átruházásából származó jövedelem adózása, Adó XX. évfolyam Issue 2006/6, p. 2.
- See Case C-345/05 Commission of the European Communities v Portuguese Republic. See Dr. Kolozs Borbála: A portugálok, svédek, a magyarok és az adórendszer egységességének elve, a Pénzügyi Jogot Oktatók Konferenciái 2006-2009, Miskolc, Novotni Kiadó, 2010, p. 98-106.

THE EUROPEAN JUDICIAL PRACTICE REGARDING THE VAT DEDUCTION RIGHT AND ITS IMPACT ON THE HUNGARIAN PRACTICE

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Abstract

The purpose of the below study is to compare the European judicial practice with the Hungarian practice in terms of VAT deduction right. In the meantime, the study gave us the opportunity to get to know the complex requirements of VAT deduction right. In addition, we were also able to assess whether the Hungarian VAT Act is in line with the community legislation.

Keywords*: Value added tax, deduction right, European judicial practice, tax fraud, Hungarian VAT.*

Introduction

The value added tax ('VAT') is often called as the 'queen of taxes' which name has several reasons. One of the most important reasons is that VAT provides the largest amount (appr. 1/3) of tax to the Hungarian budget comparing to other taxes.[1] From an economical point of view, a tax may be considered as good if it meets the following three requirements: (1) it is fair and square, (2) the direct cost of tax administration is relatively low and (3) it hardly impacts on the behaviour of private individuals and businesses. However, the completion of these requirements in case of VAT is argued nowadays. Indirect taxes are generally fair and square thus taxable persons have the right to decide how much they spend of their income and consequently how much tax they pay. The direct cost of tax administration is also considered as low in case of VAT.[2]

After joining the European Union ('EU') taxation became one of the most important and interesting fields. Within taxation, VAT has an especially important role thus the citizens of the EU meet this type of tax every day and the rate of the Hungarian VAT is very high which means

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[1] https://www.portfolio.hu/gazdasag/adozas/kell-e-nekunk-ez-az-afa.192931.html Lentner Csaba:.Az adórendszer és a közpénzügyek egyes elméleti, jogszabályi és gyakorlati összefüggései. Európai Jog: Európai Jogakadémia Folyóirata, 18. évf. 5. szám, p. 30-36. Csűrös, Gabriella: Tax system in Hungary and its changes due to the crisis – pioneer or hazardous method of sectoral taxation? In: Marcin Burzec–Pawel Smolen (eds.): Tax authorities in the Visegrad Group countires. Common experience after accession to the European Union. Wydawnictwo KUL, Lublin, 2016. p. 103–105.

[2] Ercsey Zs. Az általános forgalmi adóról, Jura Kiadó, Budapest 2012, p. 73. Lentner Csaba : The New Hungarian Public Finance System – in a Historical, Institutional and Scientific Context. Public Finace Quaterly, Vol. 60. no. 4. p. 447-461. Zoltán Nagy-Beáta Gergely-Balázs Katona: Problems Relating to Tax Avoidance and Possible Solutions in the European Union's and Hungarian 's Regulation, Curentul Juridic XXI. no 3.(74), 2018.

massive burden for those who eventually become liable for the payment of VAT.

In our study, we examined the regulation in effect currently, focusing on the VAT deduction right which incurs several questions and problems. In order to understand and solve these problems we also examined the practice of the European Court of Justice ('ECJ') which usually gives direction in order to interpret the regulations in question. By doing this, we also got a view in that regard which are the most common problems and questions either in Hungary or in the EU.

According to the Directive[3], those customers have VAT deduction right who are not qualified as the final customer i.e. the subject of VAT but they sell forward the goods or services or build them in into their own goods or services. The deduction of VAT however, has several further requirements. Considering that the examination of VAT deduction right (whether it is deductible or not) is rather long, a large number of tax fraud connects to this process. Consequently, transparency is feasible with the continuous audit of the processes and with very strict administrative requirements (invoice, customs declaration and VAT returns). Administrative requirements should also include the following obligations: economic operators are obliged to notify the Hungarian Tax and Customs Authority ('HTCA') if they commence, cease or amend taxable activities. They are also obliged to issue invoices (the exact content of the invoices is determined in the community and national regulation) and are obliged to submit VAT returns regularly. Based on these VAT returns economic operators are obliged to pay VAT, which is the difference between the VAT payable and VAT deductible. VAT may be deducted promptly if all the requirements are fulfilled therefore the subjects of VAT should not have fiscal burden in a long term (i.e. a taxable person may assess the payable VAT and deductible VAT in the same return which results a financial simplification).[4]

It is also possible that deductible VAT exceeds the amount of payable VAT. In this case, the Member States of the EU have different solutions. In Germany the tax authority reimburses the amount automatically, in Hungary besides reimbursing it, it is also possible to roll over the amount (surplus) in the following VAT period and deduct the amount from the payable VAT.[5] However, we need to differentiate the conditions of VAT deduction and the conditions of reimbursing VAT from the HTCA (the second also depends on the amount of surplus). VAT refund is also another term, which should mean the refund of VAT incurred in another Member State (based on Directive 8th) or in a third country (based on Directive 13th).

Another problem is that the goods or services acquired may serve both taxable and VAT exempt business purposes. Based on the Directive a ratio should be calculated in this case and VAT may be deducted according to this ratio. However, the

[3] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax Article 168: "In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay...".

[4] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax Article 167: "*A right of deduction shall arise at the time the deductible tax becomes chargeable*.".

[5] Nagy Zoltán-Szesztai Zsuzsanna: *Az adólevonási jog gyakorlásának feltételei*, Gazdaság és Jog, 2010./6.sz.

application of this rule causes several problems in practice.[6]

Having reviewed the practice of the ECJ, it may be established that the harmonization of the community and national VAT regulation is not completed yet. This leads us to the question which regulation should be applied.[7] This question was cleared in case Van Gend En Loos[8]. This case declared the direct effect of Directive based on which the rules of Directive concern not solely to Member States but also the citizens (i.e. the primary source of law has direct effect).

1. The problem of state aids

Considering the cases of the Hungarian Court regarding VAT, it may be established that the ECJ has a dominant effect on the national decisions. One of the most important Hungarian cases is the Parat case[9], which concerns to the deduction of VAT in terms of state aids. Parat (acting in the name of the Hungarian Economic and Traffic Ministry) entered into agreement with the Hungarian Bank of Development on 11 May 2005 covering the extension of the capacity of its plant which development was also implemented in that year. Based on the agreement Parat received a non-refundable aid and deducted the input VAT incurred in relation to this development. The HTCA during an audit assessed that Parat should not have deducted VAT due to the non-refundable state aid based on that the Hungarian VAT Act (in effect in 2005) which sets forth that taxable person should differentiate the deductible and non-deductible VAT in its administration. In addition, the VAT of acquisitions paid from the state aid should not be deductible as it should not be qualified as the base of VAT. Therefore, HTCA assessed VAT shortage, tax penalty and late payment penalty. Parat argued the resolution of HTCA thus the national rule in question was not harmonized with the respective provisions of the Directive. Parat referred to the general provisions of the Directive i.e. the acquisitions served taxable business purposes therefore input VAT should be deducible irrespective of the fact that it was paid from the state aid. Based on the former decisions of ECJ this general rule may solely be restricted in very special cases. ECJ assessed that the national provision which restricts the VAT deduction right in case of state aids is not in line with the Directive and Parat is entitled to apply the provisions of the Directive directly.

2. Problems in terms of invoicing

Similarly to the above, ECJ assessed as the restriction of VAT deduction right the following Hungarian rules regarding the too strict rules of the amendment of invoices

[6] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax Article 173: "In the case of goods or services used by a taxable person both for transactions in respect of which VAT is deductible pursuant to Articles 168, 169 and 170, and for transactions in respect of which VAT is not deductible, only such proportion of the VAT as is attributable to the former transactions shall be deductible.".

[7] Veronika Szikora: Company Legislation and Reforms in Europe, Curentul Iuridic XXI: 1(72) 2018, p. 155-171.

[8] C-26-62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, dated: 5 February 1963, issued by ECJ.

[9] C-74/08 PARAT Automotive Cabrio Textiltetőket Gyártó kft v Adó- és Pénzügyi Ellenőrzési Hivatal Hatósági Főosztály Észak-magyarországi Kihelyezett Hatósági Osztály, dated: 23 April 2009, issued by ECJ, Éva Erdős: Law of Public Finance int he EU – The European Tax Harmonization, University "Petru Maior" Publishing House, Tirgu Mures, 2011, p. 134-136.

(case Pannon Gep[10]). The claimant of this case (Pannon Gep Centrum) entered into agreement with Betonut Szolgaltato es Epito Zrt. ('Betonut') covering the implementation of bridge restructuring works to Betonut. The claimant delegated the work to several subcontractors. Subsequent to the completion of the work the certificates (certificate of completion of the work) and invoices were also issued however, HTCA questioned the VAT deduction right of the claimant in a tax audit due to the incorrect date of supply in the invoices. The claimant also recognized its failure and issued corrective invoices including the correct dates. Subsequently, HTCA reviewed the invoices and assessed that the corrective invoices do not fulfil the requirements of invoices (continuous sequence of invoices). The cancelling invoices and corrected invoices are in a different sequence of numbering (cancelling invoices started with '2005' while the correct invoices started with JESB2008). The claimant turned to ECJ with the question whether it is contrary to the community law if the national law restricts the VAT deduction right based on a requirement, which is set forth by the national law. According to the decision of ECJ this provision of the national law which restricts the VAT deduction right based on a formal requirement of invoices is not in line with the Directive provided that the correction of the invoices are performed by the claimant, input VAT should be deductible.

3. Further problems regarding the restriction of VAT deduction right

We should also mention case Mahageben[11] and case Toth[12]. ECJ sets forth in both cases that HTCA might restrict the VAT deduction right if it is able to support with objective evidence that the seller knew or should have known regarding the tax fraud of its customer. In case of Mahageben, the claimant entered into agreement covering transportation services for a fixed period. During this period its business partners issued sixteen invoices to the claimant, including different amount of goods transported. However, the delivery was supported only in case of six invoices with delivery notes. The business partners paid the respective VAT supporting that the transactions were indeed performed. The claimant also declared these transactions and deducted input VAT. The goods transported by the business partners of the claimant were further sold to different companies (which movement of goods was administrated by the claimant). Considering the absence of delivery notes both the claimant and the business partners declared that they did not retain them. However, in a later phase of the tax audit they were able to provide the HTCA with the copies of the delivery notes. HTCA assessed that the claimant has no deduction right in terms of the acquisitions in question due to the fact that it does not have the proper documentation which supports the completion of these transactions. In addition, the claimant did not audit its business partners properly. Based on the decision of ECJ this provision

[10] C-368/09 Pannon Gép Centrum Kft v APEH Központi Hivatal Hatósági Főosztály Dél-dunántúli Kihelyezett Hatósági Osztály, dated: 15 July 2010, issued by ECJ.

[11] C-80/11 and C-142/11 Mahagében kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága and Péter Dávid v Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Adó Főigazgatósága (C-142/11), dated: 21 June 2012, issued by ECJ.

[12] C-324/11 Gabor Toth v Nemzeti Adó- és Vámhivatal Észak-magyarországi Regionális Adó Főigazgatósága, dated: 6 September 2012, issued by: ECJ.

of the national law which restricts the VAT deduction right based on the absence of delivery notes (provided that invoice was issued in relation to the transactions) and the absence of the audit of the business partners is not in line with the Directive.

4. The practice of ECJ in terms of VAT deduction right

ECJ searched for the answer in case Investrand[13] for the question whether taxpayers have right to deduct input VAT if their acquisitions do not have direct and prompt relationship with the sales of the taxpayers (i.e. their business activity) but these acquisitions are part of the general costs therefore are built in the price of the sold products and services. In this case ECJ decided that input VAT may not be deducted if the acquisitions are not in a prompt and direct relationship with the sales of taxpayers i.e. do not serve the business activity.

Contrary to the above decision of ECJ, it granted the right to deduct input VAT in case Inzo[14]. In this case, the taxpayer deducted input VAT before the commencement of its business activity however, eventually the taxpayer was not able to start its activities at all but performed several preparatory transactions. Surprisingly, ECJ decided that in this case the taxpayer has VAT deduction right in spite of its non-existing business activity (the direct and prompt relationship between the acquisitions and the business activity may not be determined).

ECJ reached the same conclusion in case Fini[15]. Fini H provided catering services to its customers for which it leased several premises. The lessor leased the premises for a fixed period of 10 years which contract might not be terminated during the 10-year period. However, Fini H ceased its activities before the end of the lease agreement and was not able to terminate the contract. Fini H was registered for VAT purposes until the end of the lease contract and deducted input VAT incurred in relation to the maintenance of the premises (utilities, phone charges etc.). ECJ agreed with the practice of Fini H due to the fact that there should be no connection between the performance of economic activity and the VAT deduction right. VAT may be deducted in case of preparatory activities as well as in case of disposal activities since these activities are related to the business activity of the taxpayer.

As discussed earlier, ECJ examined the VAT deductibility of general costs several times. Contrary to case Investrand, ECJ assessed the VAT deduction right in case Kretztechnik[16]. The taxpayer (seated in Austria) asked for the admission to Frankfurter listing and deducted input VAT incurred in relation to this process despite of the fact that issuing shares should be qualified as VAT exempt transactions. Based on this the Austrian Tax Authority rejected the VAT deduction right of the taxpayer. According to the opinion of ECJ, the taxpayer admitted itself to listing due to financial reasons (capitalisation) which serves its taxable business activity. For this reason, these acquisitions in question are built in the price of the goods and products of the taxpayer as a consequence input VAT may be also deducted. The condition of the direct and prompt relationship between the

[13] C-435/05 Investrand BV kontra Staatssecretaris van Financiën, dated: 8 February 2007, issued by ECJ.

[14] C-110/94 Intercommunale voor zeewaterontzilting (INZO) kontra Belgische Staat, dated: 29 February 1996, issued by ECJ.

[15] C-32/03 I/S Fini H kontra Skatteministeriet, dated: 3 March 2005, issued by ECJ.

[16] C-465/03 Kretztechnik AG és a Finanzamt Linz, dated: 26 May 2005, issued by ECJ.

acquisition and the business activity of the taxpayer is granted in this case.

However, several question arises in case of office equipment – being the general costs of taxpayers. Generally, it is very difficult to determine whether this equipment serves the taxable business activity of the taxpayers or not. Based on the Hungarian practice, VAT may not be deducted in case of office equipment, which unambiguously serves the private needs of the employees except protective drinks.

We should also examine one of the most important conditions of VAT deduction right: an invoice issued to the name of customer, which should be in line with the requirements set forth by the Hungarian legislation.

However, ECJ reached the conclusion in case Genius Holding[17] that an invoice in itself should not establish the right of VAT deduction. The performed sale of service / good itself should be examined based on which it should be determined whether the VAT deduction right exists or not. However, ECJ empathised that in several cases (Gabalfrisa SL and Others and Agencia Estatal de Administración Tributaria) that the national legislation may not prescribe additional requirements in order to assess the VAT deduction right (e.g. additional declaration from the taxpayer regarding its deduction right).

Problems regarding free of charge transactions

Taxpayers are generally think that input VAT may not deducted in case of free of charge transactions, however, the general rules should be applied in these cases either. This means that it should be examined first whether the acquisition serves the taxable business activity of the company or not. A relevant decision was issued in case Kuwait Petroleum[18] in this regard. Kuwait Petroleum Ltd. sold fuel to private individuals in its own and in its business partners' fuel stations. Kuwait Petroleum organised a sales promotion based on which customers get voucher after every 12 litres of fuel. The price of the fuel was independent from the fact that the customer accepted the voucher or not. After a definite number of vouchers the customers might choose products from a catalogue or 'buy' services. Kuwait Petroleum deducted input VAT in relation to these products and services. However, the tax authority stated that 'buying' products with the vouchers should also create VAT payment obligation. Kuwait Petroleum stated that the price of the products and services was incorporated in the price of the fuel and paid by the participants of the promotion. ECJ reached the conclusion that the promotion served the taxable business purposes of Kuwait Petroleum therefore it has the right to deduct input VAT.

However, the above case should be differentiated from the VAT treatment of donation for public purposes, low-value gifts and samples. These transactions should not be considered as sale of goods for consideration. In these cases, we should apply the general rules either, i.e. it should be determined whether the transactions served the taxable business activity of the taxpayer.

5. VAT deduction right in case of VAT proportionate

VAT proportioning is necessary if the acquired goods or services serve both the taxable and VAT exempt business purposes of the taxpayer. If the acquisition serves partly non-business purposes, taxpayers have two options: deducting the whole

[17] C-342/87 Genius Holding BV kontra Staatssecretaris van Financiën, dated: 13 December 1989, issued by ECJ.
[18] C-581/12 Kuwait Petroleum and Others v Commission, dated: 21 November 2013, issued by ECJ.

amount of input VAT or do not deduct input VAT at all. There is no straight answer for that which option should be generally applied. The VAT deduction right should be analysed on a case by case bases.

In case C-434/03. (P. Charles and T. S. Charles-Tijmens contra Staatssecretaris van Financiën) ECJ had to decide in that if the taxpayer buys premises for either private and lease purposes, VAT may be deducted or not. The Dutch Tax Authority stated that, taking into account the private use of the premises the taxpayer did not have VAT deduction right as it did not serve the taxable business activity of the taxpayer. Based on the opinion of ECJ, if tangible assets are used for both private and business purposes the taxpayer should decide whether the asset should be considered as (1) a business asset, (2) a private asset (in this case the use of the asset falls outside of the scope of VAT) or alternatively (3) proportionate the asset. In the first case, the taxpayer has VAT deduction right provided that the general conditions of VAT deduction are fulfilled. However, in this case the taxpayer should pay VAT (as the use of asset for private purposes should be considered as a taxable transaction based on the Directive). In the second case, the taxpayer is not entitled to deduct input VAT; however, it is not obliged to pay VAT after the private use. In the case in question the taxpayer applied, the first case therefore was entitled to deduct input VAT. In some cases, option (3) should be applied such as in case C-291/92. (Finanzamt Uelzen contra Dieter Armbrecht). ECJ empathized that the Directive does not contain any restriction considering this option; only the correct ratio should be determined and applied.

VAT deduction right in case of transactions falling outside of the scope of VAT

These transactions should not be considered as sale of goods or services therefore fall outside of the scope of VAT. However, this fact should not mean that input VAT might not be deducted. For example there are some transactions which are excluded from the scope of VAT e.g. transfer of going concern in which cases the general rule should be applied (i.e. whether it serves the taxable business activity of the taxpayer).

Based on the currently applicable regulation, community transactions consist of two transactions: a VAT exempt sale in the country of dispatch and a taxable acquisition in the country of destination. In this system, local VAT rate should be applied (i.e. country of destination).[19] VAT may be deducted in the month of determination of payable VAT which should be the date indicated on the certificate of completion or the 15th day of the month following the actual performance. There is a simplification in such reverse charge transactions based on case Gerhard Bockemühl C-90/02. In the case of reverse charge transactions taxpayers may deduct input VAT even if they did not receive the respective invoice which is a condition of VAT deduction.

Contrary to the above simplification, there are additional requirements in case of import of goods. The reason of the strict requirements is that import VAT should not be assessed if the goods enter into the country physically. Import VAT should be paid only if the goods are released into free circulation and the customs authority issues a certificate in this regard.

Summary

Considering the above, we can say that VAT is called as the queen of taxes for

[19] https://www2.deloitte.com/hu/hu/pages/ado/articles/jelentos-valtozasok-az-afa-rendszerben.html.

several reasons and the relevance of this type of tax is constantly increasing. According to the European Commission, Member States lost 150 billion euro value added tax due to tax frauds from which Hungary lost approx. 1.6 billion euro. This amount is considered as low taking into account the numbers of former years. [20]

The three most common ways in case of VAT frauds are related to fictive transactions: absence of economic transaction, not proper business partner and frauds during chain transactions. The first type should be examined by the tax authorities, however, sometimes it is challenging when the proper documentation (contract and invoices) is prepared. In the second type, the tax authorities should examine whether the taxpayer knew or should have known that its business partner was involved in tax fraud.[21]

The most common questions arise regarding the complex requirements of VAT deduction, which has two main essentials: the existence of VAT deduction right and certain objective requirements. The first essential depends on the taxable status of the company and the business activity. The second essential should generally mean the invoice regarding the transaction (and the mentioned certificate in case of import as well as the monitoring of business partners).

The above questions are the most common subjects in the procedures before ECJ. However, it should be also noted that the national courts usually questions the second essential while ECJ generally examines the first essential. Based on this, it should be concluded that ECJ provides assistance primarily in conceptual questions (for example the definition of the used phrases) but no in operative questions.[22] For example, ECJ considered preparatory and disposal activities as part of the business activity.

Based on the practice of ECJ the VAT deduction right should not be restricted generally and tax authorities should have objective evidence in order to be able to reject the VAT deduction right.

There are some outstanding questions however, which should be cleared. One of these questions is the requirement of monitoring of business partners. The exact requirements should be determined either by the community or by the national legislation.

As a conclusion, we can say that both the Hungarian authorities and the taxpayers are paying attention to the decisions of ECJ and trying to operate in line with these rules.

References

- Lentner Csaba:.Az adórendszer és a közpénzügyek egyes elméleti, jogszabályi és gyakorlati összefüggései. Európai Jog: Európai Jogakadémia Folyóirata, 18. évf. 5. szám
- Lentner Csaba : *The New Hungarian Public Finance System – in a Historical, Institutional and Scientific Contex*t. Public Finace Quaterly, Vol. 60. no. 4.
- Csűrös, Gabriella: *Tax system in Hungary and its changes due to the crisis – pioneer or hazardous method of sectoral taxation*? In: Marcin Burzec–Pawel Smolen (eds.): Tax authorities in the Visegrad Group countires. Common experience after accession to the European Union. Wydawnictwo KUL, Lublin, 2016.

[20] https://www.portfolio.hu/gazdasag/adozas/csokkent-a-magyar-afacsalas-merteke-kijott-a-friss-jelentes.298676 .html.

[21] https://piacesprofit.hu/kkv_cegblog/fiktiv-szamlazas-mikor-kapja-fel-a-fejet-a-nav/.

[22] Dr. Erdős Éva: Az általános forgalmi adóztatás jogi alapjai és lehetséges fejlesztési irányai, in Összefoglaló vélemény, Kúria Közigazgatási-Munkaügyi Kollégium Joggyakorlat-elemző Csoport 2014.El. II.JGY.1/2., 2016.június 6-án jóváhagyott összefoglaló véleménye. levonásos ítéletei, 226.oldal, Európa Unió Bírósága számlázási ítéletei 255.oldal https://kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeny.afa_.pdf letöltés dátuma: 2019.05.05.

- Ercsey Zs. *Az általános forgalmi adóról*, Jura Kiadó, Budapest 2012.
- Dr. Erdős Éva: *Az általános forgalmi adóztatás jogi alapjai és lehetséges fejlesztési irányai*, in Összefoglaló vélemény, Kúria Közigazgatási-Munkaügyi Kollégium Joggyakorlat-elemző Csoport 2014.El. II.JGY.1/2., 2016.június 6-án jóváhagyott összefoglaló véleménye.
- Zoltán Nagy-Beáta Gergely-Balázs Katona: *Problems Relating to Tax Avoidance and Possible Solutions in the European Union's and Hungarian 's Regulation*, Curentul Juridic XXI.No 3.(74). 2018.
- Nagy Zoltán-Szesztai Zsuzsanna: *Az adólevonási jog gyakorlásának feltételei*, Gazdaság és Jog ,2010./6.sz.
- Éva Erdős: *Law of Public Finance int he EU – The European Tax Harmonization*, University "Petru Maior" Publishing House, Tirgu Mures, 2011.
- Veronika Szikora: *Company Legislation and Reforms in Europe*, Curentul Iuridic XXI: 1(72) 2018.

THE TERM OF "RELEVANT MARKET", AS ELEMENT OF DOMINANT POSITION PROVIDED BY ART. 102 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

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Abstract

The term of relevant market was used for the first time in the Sherman Act of 1890, condemning monopolies or monopoly attempts. The term of relevant market is analyzed as being the place where demand and supply of products or services, interchangeable with each other, are confronting; however, the term of "relevant market" is much more complex than that, being characterized by fundamental dimensions in connection with the term of product (service) market and geographic market, both in close connection.

Keywords: *relevant market, monopolies, product market, geographic market, dominant position.*

1. Terminology issues

The term of relevant market was used for the first time in the Sherman Act of 1890, condemning monopolies or monopoly attempts which can lead to higher prices and lower production than under normal competition conditions.

Currently, the term of relevant market is defined by art. 102 TFEU (former art. 82 EC), as a primary source of the European Union law[1], which provides that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

In what concerns the term of undertakings, we should note that, although the term is used by art. 101 para. 1 TFEU, a definition of the term cannot be found. The EU courts and authorities in the field of competition adopted a broad concept of the term. In case Hofner, the European Court of Justice noted that the term of enterprise covers any entity engaged in an economic activity, regardless of its legal status and the way it is financed.[2]

In essence, art. 102 TFEU concerns the control of market power by either one company or a number of companies under certain conditions. Within this regulation, not the market power itself is prohibited. What is condemnable in the TFEU view is the abuse of power in the market, therefore, the intention of the European lawmaker is to encourage competition and, in this way, the most efficient participants break apart from others in the market as a result of consumers' choices in relation to the goods or services proposed.

This article aims to analyze the term of relevant market, as well as the term of

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[1] N. Popa coordonator, E. Anghel, C. Ene-Dinu, L. Spătaru-Negură, *Teoria Generală a Dreptului. Caiet de Seminar*, 3rd edition, C.H. Beck Publishing House, Bucharest, 2017, p. 153.

[2] Case C-41/90, *Hofner şi Elser/Macroton GmbH* (1991) ECR I-1979.

market power, determined by the dominant position of a participant to the economic life.

The relevant market is defined as the place where demand and supply of products or services, interchangeable with each other, are confronting. In the economic literature, the relevant market can also be called pertinent market, reference market, sectoral market etc. Global market and relevant market can be distinguished locally, nationally, regionally.

Defined as the place of confrontation between the demand of supply of products and services which are considered by the buyers as interchangeable with each other, but not interchangeable with other goods or services offered, the relevant market is the place where effective competition between economic operators takes place.

Therefore, the term of relevant market is particularly complex, being characterized by three fundamental dimensions: product (service) market, geographic market, both in close connection, as well as time aspect. The dominant position held by an economic agent within the domestic market, position that can affect trade between the Member States, must be assessed in connection with the three elements referred above.

The definition assigned to the term of product market is in close connection with the term of "product". Product analysis must take into account both demand and supply issues. On the demand side, products must be interchangeable, from the point of view of the buyer. The interchangeable nature of products, from the demand perspective, involves checking cross elasticity of product[3]. It is deemed that cross elasticity of product is high if the increase of the price of the product makes a great number of buyers choose another product of the same type. The existence of cross elasticity reveals that the products are, actually, part of the same market.

From the perspective of the supply, the market includes only sellers who manufacture the relevant product or who can easily change their production to provide substitution or related products. Therefore, even if certain companies manufacture different products, it can be easy at a certain point in time for a company to adjust its equipment in order to produce the goods manufactured by a competitor on the market. Under these terms, the two products can be deemed part of the same market.

2. The view of European case law on the relevant market term

From the perspective of the case law, the term of relevant market of the product is analyzed in case Clearstream Banking AG and Clearstream International SA. The statement of reasons provides that, as resulting from Commission Notice on the definition of relevant market for the purposes of Community competition law[4], "a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use". In order to define relevant market, we can also take into account the supply-side substitutability, in cases where it would have effects equivalent to those of demand-side substitution in terms of efficiency and immediate level. This means that the suppliers are able to reorient their production to relevant products and market them on short term without significant additional costs or risks, in response to small

[3] Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene. Comentarii, jurisprudenţă şi doctrină*, Hamangiu Publishing House, Bucharest, 2017, p. 1188.

[4] The European Commission, *Notice on the definition of relevant market for the purposes of Community competition law* (97/C 372/03), published in the Official Journal of the European Union of 09.12.1997, vol 003, p. 60-6.

but permanent variations in relative prices. In this respect, the Commission does not make a manifest error of assessment in holding that there is a specific market for primary clearing and settlement services for securities issued in accordance with the German law, different from the secondary service market, since, due to the fact an undertaking holds a monopoly in fact on the market and is therefore an unavoidable partner for those primary services, there is no substitutability either on the demand side nor on the supply side of those services. Therefore, a secondary market with specific features in terms of the demand and the supply and supplies products or provides services which occupy an essential place and which are not interchangeable on the more general market to which it belongs, must be regarded as a distinct market of goods or services. In this background, it is sufficient for a potential, even hypothetic market to be identified, a situation which occurs when the goods or services are indispensable for the exercise of a particular activity and where there is an effective demand for them from the undertakings pursuing that activity. Therefore, the possibility of identifying two different production stages associated with the fact that the upstream product is an indispensable element for the supply of the downstream product is decisive.[5]

Apparently simple, this definition of the product market raises some issues. First of all, it is necessary to identify the factors that are taken into account in the analysis of the relevant product market.

These were presented as the degree of physical resemblance between the products (services) concerned; the price differences between two products; the cost of switching between two competing products; consumers' preferences for a particular type/category of product to the detriment of another type/category of product; similar or different classifications of the large industry. Secondly, an important element in defining the relevant market is the structure of products demanded by consumers. Therefore, products with the same physical structure are interchangeable (i.e.: butter and margarine). In many situations, consumers may regard certain products as substitutable and therefore classified in the same relevant market, even if they differ in their materiality.

A particular issue is the segment of branded products that typically have a higher price than other less well-known similar products. There are situations where the consumers consider that the products which do not benefit from a reputed brand as substitutes for them, but it should be noted that this will not happen for any type of product. For example, high quality wines are part of the same relevant market, while ordinary table wines will not be in the same category. Therefore, an increase in the price of a high-quality wine cannot lead buyers to move towards a lower quality wine, although it may cause them to buy another high-quality wine. In case France Telecom, the Court of First Instance held that markets of low-speed internet and high-speed internet are distinct, since the possibility of reciprocal replacement of products is insufficient between them.

Therefore, in order to analyze the dominant position of an undertaking in a particular sectoral market, the possibilities of exercising competition must be assessed within the market which groups all the products or services which, depending on their features, can meet constant needs and are hardly substitutable to other products or services. Furthermore, since the definition of the relevant market serves to assess whether the concerned undertaking has the power to prevent effective competition from being maintained and to behave independently

[5] T-301/04, Clearstream Banking AG and Clearstream International SA/Commission (2009) ECR II-3195.

from its competitors and service providers, the limitation to the analysis of the objective features of the services in question is not possible, but it is also necessary to take account of the competition conditions and of the structure of the market demand and supply.

If a product is likely to be used for different purposes and in case these different uses respond to certain economic needs, also different, it must be accepted that the respective product may, where appropriate, belong to different markets, which may have different characteristics, both from the point of view of the structure and the competition conditions. This finding does not justify the conclusion that such a product can form a single market, the same with all the other products which, in the various uses which it may have, may substitute it and compete with it.

The concept of relevant market entails, indeed, that effective competition may exist between the products which are part of this market, which implies a sufficient degree of substitutability for the same use among all the products on the same market.

The Commission Notice on the definition of relevant market for the purposes of Community competition law provides that "a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use". According to this notice, the assessment of the substitutability of demand determines the set of products perceived as substitutable by the consumer.

Therefore, with regard to the internet access sector, as there is not just a difference in comfort or quality between high-speed and low-speed internet, these differences in usage, specificity and performance are supplemented by an important price difference between the two, and even though high-speed and low-speed internet have a certain degree of substitutability, it functions asymmetrically, the migrations of customers from high-speed internet offers to low-speed internet offers is negligible compared to migration in the opposite direction, the Commission was right to find that a sufficient degree of substitutability between high-speed and low-speed access did not exist and to define the market in question as that of high-speed internet access for residential customers.[6]

3. The geographic market, part of the relevant market notion

The relevant geographic market comprises the area of the economic agents specialized in the production and supply of the products included in the product market. It is a territory where all traders operate under identical or sufficiently homogenous competition conditions in connection with relevant products or services. The homogeneity of market conditions is not a concept to be viewed in absolute terms. It is not necessary for the objective competition requirements between economic operators to be perfectly homogeneous. It is sufficient that they are similar or sufficiently homogeneous[7]. Therefore, it cannot be considered that only areas where the objective conditions of competition are

[6] Case T-340/03, *France Telecom SA/Commission* (2007) ECR II-107, confirmed in second appeal case C-202/07 P, *France Telecom SA/Commission* (2009) ECR I-2369.

[7] Judgment of the Court of February 14th, 1978, *United Brands and United Brands Continentaal/Commission*, 27/76, Rec., p. 207, items 44 and 53, and Judgment of the Tribunal of November 22nd, 2001, *AAMS/Commission*, T-139/98, Rec., p. II-3413, item 39.

heterogeneous constitute a uniform market[8]. The establishment of this territorial area takes into account the consumers' behavior regarding the possibility of replacing products manufactured in different geographical areas.

The elements that the Commission considers relevant to define the geographic market[9] in case of a litigation generated by the dominant position within the market, concern, first of all, the aspects in connection with *past evidence of diversion of orders to other areas*. In some cases, evidence could be available in connection with the fact that some price fluctuations between different areas have led to customers' feedback. Generally, quantitative tests used to define the product market can also be used to define the geographic market. However, it should be borne in mind that some price comparisons at an international scale may be more complex as a result of certain factors, such as exchange rate movements, taxation and product differentiation.

Another relevant aspect in defining geographic market is represented by the *basic demand characteristics* for the relevant product, which can determine the dimension of the geographic market. Certain factors, such as national preferences or preferences for national brands, language, culture and lifestyle, as well as the need for local presence, have a great potential to limit the geographical scope of competition.

Furthermore, where appropriate, the Commission will contact the main customers and competitors of the parties in its enquiries, to gather their *views* on the boundaries of the geographic market as well as most of the factual information it requires to reach a conclusion on the scope of the market when they are sufficiently backed by factual evidence.

An examination of the customers' current *geographic pattern of purchases* provides useful evidence as to the possible scope of the geographic market. When customers purchase from companies located anywhere in the Community or the EEA on similar terms, or they procure their supplies through effective tendering procedures in which companies from anywhere in the Community or the EEA submit bids, usually the geographic market will be considered to be Community-wide.

When the number of customers is so large that it is not possible to obtain through them a clear picture of geographic purchasing patterns, information on *trade flows* might be used alternatively, provided that the trade statistics are available with a sufficient degree of detail for the relevant products. Trade flows, and above all, the rationale behind trade flows provide useful insights and information for the purpose of establishing the scope of the geographic market but are not in themselves conclusive.

The absence of trans-border purchases or trade flows, for instance, does not necessarily mean that the market is at most national in scope. Still, *barriers* isolating the national market have to be identified before it is concluded that the relevant geographic market in such a case is national.

The clearest obstacle for a customer to divert its orders to other areas is the impact of transport costs and transport restrictions arising from legislation or from the nature of the relevant products. The impact of transport costs will usually limit the scope of the geographic market for bulky, low-value products, bearing in mind that a transport disadvantage might also be compensated by

[8] Judgment of the Tribunal of October 21st, 1997, *Deutsche Bahn/Comisia*, T-229/94, Rec., p. II-1689, item 92.

[9] The European Commission, *Notice on the definition of relevant market for the purpose of Community competition law* (97/C 372/03), published in the Official Journal of the European Union of 09.12.1997, vol 003, p. 60-64.

a comparative advantage in other costs (labor costs or raw materials).

If they exceed a certain profitability threshold, then the cost of transport becomes a major factor in separating distinct relevant markets. The relevant geographic market does not entail the production of economic goods in the same area or locality, but the accessibility to the buyers. In this connection, in case Napier Brown-British Sugar[10], the Commission decided that, in order to establish if a British company was holding a dominant position in the production and sale of sugar, the relevant market was Great Britain, since imports were very limited and functioned as a supplementation for British space, not as an alternative.

Access to distribution in a given area, regulatory barriers still existing in certain sectors, quotas and custom tariffs might also constitute barriers isolating a geographic area from the competitive pressure of companies located outside that area. Significant switching costs in procuring supplies from companies located in other countries constitute additional sources of such barriers.

The third element that should be taken into account when defining the concept of relevant market is the time factor. By analyzing the time element of the markets, an undertaking, under art. 101 TFEU, may hold a dominant position on the market at some point in the year. This is possible when competition from other products is reduced due to their seasonality.

Furthermore, technological progress and changes in consumer's habits change the boundaries between the markets[11], thus giving a time dimension to the concept of product market.

In this respect, in case Elopak Italia Srl/Tetra Pak[12], the Commission considers that the analysis used to define a market should cover only a short period, due to the fact that over a long period, during which technological progress may occur and consumer habits evolve, structures will change and the very boundaries between the various markets shift. A short period corresponds more to the economic operative time during which a given company exercises its power on the market and, consequently, on which one must concentrate in order to assess that power. In connection to the case, the replacement on the market of one type of packaging material by another is essentially the result of changes in consumer habits, changes that are the result of a long-term process.

The Commission does not deny that producers can, to a certain extent, hasten or delay the evolvement of consumer habits through measures aimed at influencing the consumer in his choice of packaging but, this is a costly and long-term process, the outcome of which remains uncertain.

4. Conclusions

It is unanimously accepted at European level that art. 102 TFEU seeks to protect consumers and not certain competitors. This goal requires the protection of the competition process against market foreclosure phenomenon. Although the practice in the field is rich, the settlement of a case based on art. 102 TFEU entails difficult issues in defining relevant market,

[10] *88/518*/EEC: Commission Decision of July 18th, *1988*, Napier Brown c. British Sugar, published in Official Journal *L 284*, 19.10.*1988*, p. 41.

[11] Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene. Comentarii, jurisprudenţă şi doctrină*, Hamangiu Publishing House, Bucharest, 2017, p. 1193.

[12] Decision 92/163, *Elopak Italia Srl/Tetra Pak* (1992), published in Official Journal L72/1 of 18.03.1992, p. 0001-0068.

establishing domination and the notion of abuse.

The limits of the special liability of the dominant companies are not yet clear in the case-law, making it difficult for the dominant company to know what is allowed and what is not. The approach based on the legal form of art. 102 TFEU must be supplemented by the analysis of the economic effect entailed by the liability under this article.

References

- N. Popa coordinator, E. Anghel, C. Ene-Dinu, L. Spătaru-Negură, *Teoria Generală a Dreptului. Caiet de Seminar*, Edition 3, C.H. Beck Publishing House, Bucharest, 2017.
- P. Craig, G. de Burca, Dreptul Uniunii Europene. Comentarii, jurisprudenţă şi doctrină, Hamangiu Publishing House, Bucharest, 2017.
- Case C-41/90, Hofner şi Elser/Macroton GmbH (1991) ECR I-1979.
- The European Commission, *Notice on the definition of relevant market for the purpose of Community competition law* (97/C 372/03), published in the Official Journal of the European Union of 09.12.1997.
- T-301/04, Clearstream Banking AG and Clearstream International SA/Commission (2009) ECR II-3195.
- Case T-340/03, France Telecom SA/Commission (2007) ECR II-107, confirmed in second appeal case C-202/07 P, France Telecom SA/Comisia (2009) ECR I-2369.
- Judgment of the Court of February 14th, 1978, United Brands and United Brands Continentaal/Commission, 27/76, Rec., p. 207, items 44 and 53, and Judgment of the Tribunal of November 22nd, 2001, AAMS/Commission, T-139/98.
- Judgment of the Tribunal of October 21st, 1997, Deutsche Bahn/Comisia, T-229/94.
- The European Commission, Notice on the definition of relevant market for the purpose of Community competition law (97/C 372/03), published in Official Journal of the European Union of 09.12.1997.
- 88/518/EEC: Commission Decision of July 18th, 1988, Napier Brown c. British Sugar, published in Official Journal L 284, 19.10.1988.
- Decision 92/163, Elopak Italia Srl/Tetra Pak (1992), published in Official Journal L72/1 of 18.03.1992.

FREEDOM OF SPEECH. CONSIDERATIONS ON CONSTITUTIONAL COURT'S DECISION NO. 649/2018

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Abstract

Pursuant to article 30 paragraph (1) of the Constitution, freedom of expression is inviolable, but according to article 30 paragraphs (6) and (7) of the same Constitution, it cannot prejudice the dignity, honour, private life of the person and nor the right to one's own image, being forbidden by the law the defamation of the country and the nation, the exhortation to war of aggression, national, racial, class or religious hatred, incitement to discrimination, territorial separatism or public violence, as well as obscene, contrary to good morals. The limits of freedom of expression fully accord with the notion of freedom, which is not and cannot be understood as an absolute right. The legal and philosophical concepts promoted by democratic societies admit that a person's freedom ends where the other person's freedom begins.

Keywords*: freedom of speech, freedom of expression, limits, Constitutional Court, decision.*

1. Introduction

In the autumn of 2018, some changes to the Chamber of Deputies' Regulations, which essentially concerned the following issues, were subjected to the Constitutional Court's analysis:

a) the imposition of a ban on MPs concerning the adoption of defamatory, racist or xenophobic behaviour and languages and the holding of placards or banners in parliamentary debates;
b) the imposition of a sanction for deviations from the Regulation, worded as follows: "without prejudice to the right to vote in the plenary sitting and subject to a strict compliance with the rules of conduct, temporary suspension of the MP's participation in all or part of the activities of the Parliament for a period of two to thirty working days".

The decision of the Constitutional Court in question[1], whose considerations will be given below, has brought to the attention of law specialists, as well as the general public, the complex content[2] of the freedom of expression, enshrined at constitutional level by the provisions of article 30 of the Basic Law[3], which is why

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[1] Judgment of the Constitutional Court no.649/2018, published in the Official Journal of Romania, Part I, no. 1045 of 10 December 2018.

[2] In this regard, see, widely, Muraru, Ioan and Tănăsescu, Elena Simina (coord.), 2008, p. 89 et seq.

[3] According to article 30 of the Romanian Constitution, with the marginal name "Freedom of expression": " (1) Freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, whether by spoken words, in writing, in pictures, by sounds or any other means of communication in public, is inviolable. (2) Any kind of censorship is prohibited. (3) Freedom of the press also involves free founding of publications. (4) No publication may be suppressed. (5) The law may require that the mass media disclose their financing sources. (6) Freedom of

we believe that the legal community will find the use of a paper which addresses, in a systematic manner, the emphasis added in the case-law of the Constitutional Court of Romania.

2. The political dialogue and the freedom of expression

With regard to the above-mentioned prohibition, the Court held that by its Decision no.77/2017 regarding the Code of conduct for deputies and senators, the legislator has established in article 1 para. (3) that "Deputies and Senators have the duty to act with honour and discipline, taking into account the principles of separation and balance of powers in the state, transparency, moral probity, responsibility and obedience of the reputation of the Parliament". As to the conduct to follow, article 6 of the Code provides that "Deputies and senators must ensure, through attitude, language, conduct and carriage, the solemnity of the parliamentary meetings and good progress of the activities conducted into the parliamentary structures" [para.(1)] and "not to use offensive, indecent or calumnious expressions or words" [para. (2)].

Thus, through this decision of the Parliament of Romania, the reputation of the Parliament is recognized as a value protected through regulations and rules of conduct, alongside with the principles of separation and balance of state powers, transparency, moral probity and accountability. The reputation of the Parliament, as the sole legislative authority of the country is valued, according to the conditions in which the deputies and senators act with honour and discipline, adopting the attitude, language, conduct and the outfit that would ensure the solemnity of the parliamentary meetings and the good progress of activities into the parliamentary structures.

Also, according to article 232 of the Regulation of the Chamber of Deputies, as it was amended through the single article point 5 of the Decision of the Chamber of Deputies no.47/2018, "Deputies, as representatives of the people, exercise their rights and meet their duties throughout the whole time of the legislature for which they were elected. Deputies are obliged, through their behaviour, to keep the dignity of the Parliament, to follow the values and the principles defined in the Statute of the MPs, in the Code of Conduct of Deputies and Senators, as well as into internal regulations. The behaviour of the deputies is characterized by mutual respect and should not compromise the ongoing parliamentary works, the maintaining of the security and internal order" [para. (1)]; "In parliamentary debates, deputies are bound to obey the rules of conduct, of courtesy and parliamentary discipline, to refrain from committing deeds that prevent or hamper the activity of other MPs, from using or showing provocative, injurious, offensive, discriminatory or calumnious expressions" [para.(2)].

Based on the constitutional provisions of article 61 on the role and the structure of the Parliament and of article 64 on the internal organization of each Chamber of the Parliament, the Constitutional Court underlined, in its case-law, that "each Chamber is entitled to set, within the limits and with respect of the constitutional provisions, the rules of organization and

expression shall not be prejudicial to dignity, honour, privacy of person, nor to one's right for his own image. (7) Defamation of the Country and Nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination, territorial separatism, or public violence, as well as any obscene conduct contrary to morals are forbidden by law. (8) Civil liability for any information or creation released for the public falls upon the publisher or producer, author, producer of an artistic performance, owner of copying facilities, or radio or television stations, subject to the law. Indictable offences of the press shall be established by law".

operation, which, in their substance, make up the Regulation of each Chamber. As a result, the organization and functioning of each Chamber of the Parliament are established through its own regulations, adopted through the decision of each Chamber, with the vote of the majority members of that Chamber. Thus, in virtue of the principle of regulatory autonomy of the Chamber of Deputies, established in art.64 paragraph (1) first sentence of the Constitution, any regulation concerning the organization and the functioning of the Chamber of Deputies, who is not provided by the Constitution, may and must be established through its own Regulation. Consequently, the Chamber of Deputies is sovereign in adopting the measures considered needed and advisable for its good organization and operation"[4].

The Court also retained that, "in the field of parliamentary law, the main consequence of the elective nature of the representative mandate and of the political pluralism is the principle suggestively enshrined by the doctrine as *the majority decides, while the opposition expresses itself*. The majority rules whereas by virtue of the representative mandate received from the people, the majority opinion is allegedly presumed that reflects or meets the majority opinion of the society. The opposition expresses itself as a consequence of the same representative mandate, underlying the inalienable right of the minority to make known its political options and to oppose, in a constitutional manner, the majority in power. This principle assumes that through the organization and the functioning of the Chambers of the Parliament, it is ensured that the majority decides only after the opposition had a chance to express itself, and the decision which it adopts is not obstructed within the parliamentary procedures. The rule of the majority involves necessarily, in the parliamentary procedures, the avoidance of any means that would lead to an abusive manifestation on the part of the majority or of any means which would have as scope the prevention of normal conduct of the parliamentary procedure. The principle of *the majority decides, while the opposition expresses itself* necessarily implies a balance between the need to express the position of the political minority on a certain issue and the avoidance of use of means of obstruction for the purpose of ensuring, on the one hand, the political confrontation in Parliament, respectively the contradictory character of the debates, and, on the other hand, the fulfilment by the Parliament of its constitutional and legal powers.

In others words, parliamentarians, either from the majority or from the opposition, must refrain themselves from abuse in exercising their procedural rights and respect a rule of proportionality, that would ensure the adoption of decisions following a debate public beforehand. As regards the legislative process and the parliamentary control on the Government or the realization of the other constitutional powers, parliamentarians, in exercising of their mandate, are, according to the provisions of article 69 paragraph (1) of the Basic Law, «in the service of the people». The parliamentary debate of the important issues of the nation must ensure the compliance with the supreme values enshrined in the Basic Law, such as the rule of law, political pluralism and constitutional democracy". This is the reason for which the Constitutional Court found that "it is necessary the exercise in good faith of the constitutional rights and duties, both by the parliamentary majority and the minority, and

[4] Judgment of the Constitutional Court no. 667/2011, published in the Official Journal of Romania, Part I, no. 397 of 7 June 2011.

the cultivation of a conduct of the political dialogue, which does not exclude beforehand the consensus, even if the motivations are different, when the major interest of the nation is at stake"[5].

Just for realization of this wish of political dialogue, it is forbidden the use, in the parliamentary works, of offensive, indecent or slanderous expressions or words, as well as the adoption of a hostile behaviour that would remove any possibility of communication between political entities, having some politically different views, sometimes even to the contrary. So being, not only occurs as natural, but as needed the regulation brought into the Regulation of the Chamber of Deputies, according to whom 'it is prohibited the disruption of the parliamentary activity, the uttering of insults or slander both from the tribune of the Chamber and in the hall of the plenary, of the committees or of the others working bodies of the Parliament". Apart from the fact that it determines the violation of the duties regarding the compliance with the rules of honour and discipline incumbent to each deputy, the manifestation of an inappropriate or offensive behaviour may determine the prevention or the impairing of the activity of other parliamentarians, thus constituting the premise for the disruption of the activity of the entire legislative forum. In conditions in which the statement of reasons in support of a legislative initiative, the proposal of amendments, the presenting of pros and cons opinions, their debate, therefore the political dialogue at the tribune of the Parliament or in committees, or the activities through which the Parliament fulfils its constitutional functions, represent issues related to the essence of parliamentarism, the prohibition of the disruption of parliamentary activity by uttering insults or slander or through adoption of denigrating, racist or xenophobic behaviour and languages give phrase to the need to discipline this dialogue and to create the premises for the compliance with the principle *the majority decides, while the opposition expresses itself*.

On the other hand, the principle cited ensures the right of the opposition to freely express itself, to make known its opinions, to express criticism on the positions adopted by the parliamentary majority. In exercising their mandate, deputies and senators are in service of the people and, respecting in good faith the constitutional rules and the parliamentary procedures established through the Regulations of the two Chambers, are obliged to defend the interests of the citizens they represent, by adopting an active, advised and responsible behaviour, to comply with the general interest.

Moreover, such as any citizen of Romania, the parliamentarian has the freedom of expression, guaranteed by article 30 of the Constitution, and, according to article 72 paragraph (1) of the Basic Law, he does not respond legally for the vote or for the political views expressed into the exercising of the mandate. But he/she is called to find the best suitable means of expression, which, on the one hand, ensure the exercising of the mandate with objectivity and probity and which, on the other hand, do not hinder the progress of the activities of the legislator.

3. Limitation of the parliamentarian's freedom of expression and the sanction by suspending his/her activity

Regarding the newly introduced provisions, namely the thesis that, in

[5] Judgment of the Constitutional Court no. 209/2012, published in the Official Journal of Romania, Part I, no. 188 of 22 March 2012.

parliamentary debates, deputies "do not carry placards or banners", the Court has determined that they do not contradict the provisions of article 30 of the Constitution.

In order to determine as such, the Court has held that, given the definitions of the Explanatory dictionary for *placard* and *banner*, these are ways of expressing ideas in visual, written or drawn form, used in public areas, sometimes with the occasion of public demonstrations, for the purpose of transmitting a message, a slogan or a catchphrase.

It is true that under article 30 para. (1) of the Constitution, freedom of expression is inviolable, but it is not an absolute right. In this sense, article 57 of the Constitution provides for the express duty of the Romanian citizens, of foreign citizens and of stateless citizens to exercise their constitutional rights in good faith, without breaking the rights and freedoms of others. An identical limitation is also provided in article 10 paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary", as well as in article 19 paragraph 3, of the International Covenant on Civil and Political Rights, which sets that the exercise of the freedom of speech involves special duties and responsibilities and that may be subject to certain restrictions which are to be expressly provided by law, taking into account the rights or reputation of others. Being a norm with a restrictive character, to circumscribe the framework in which the freedom of expression can be exercised, the enumeration made by art. 30 para. (6) and (7) is strict and restrictive[6].

By regulating the duty of deputies that, in parliamentary debates, they do not adopt denigrating, racist or xenophobic behaviour and languages, and neither to carry out placards or banners, the Chamber of Deputies, in virtue of its autonomy of regulations, transposed at an infra-constitutional level the limits of the freedom of speech established by the constitutional norm. In other words, the statutory provision prohibits the denigrating, racist or xenophobic behaviour and language, regardless of the way in which they manifest themselves, including the written way by posts displayed on placards or banners. The ban does not target the wording of the political message itself through the placard or banner, but only the content of the message, that should not circumscribe to the 'denigrating language, racist or xenophobic". The use of different forms of expression of political opinions must circumscribe the framework, the purpose and the reputation of the legislator, must respect the solemnity of the plenary sittings of each Chamber and must not harm the image of the Parliament and, even less, its activity. Therefore, it is necessary for the freedom of expression, the limits of which are set only by the Constitution, to find appropriate forms of manifestation, that, on the one hand, answer the imperative of the parliamentary right of the opposition and of each deputy or senator, individually, to express themselves and to make known their

[6] Judgment of the Constitutional Court no. 629/2014, published in the Official Journal of Romania, Part I, no. 932 of 21 December 2014.

opinions , political positions and, on the other hand, are not just a declaration of rights, without being followed by a real debate on political opinions, legal arguments presented by MPs into the formal framework of the activity of the legislator.

As such, the Court found that the provisions of art.153 par. (3) of the Regulation of the Chamber of Deputies meet the requirements, on the one hand, of the freedom of expression of deputies, enshrined in article 30 paragraph (1) of the Constitution, and on the other hand, the constitutional limits of this freedom, provided by article 30 paragraphs (6) and (7) of the Basic Law.

Regarding the sanctioning of the deputy by prohibiting him/her from participating in the activities of the Parliament for a certain length of time, the Constitutional Court retained its unconstitutionality. Analysing the criticism of unconstitutionality, the Court held that, in principle, some legal obligations must be matched by legal sanctions, in case of failure of their observance. Otherwise, the legal obligations would be reduced to a simple goal, without any practical result into the social space relations, thus being cancelled the very reason for the legal regulation of some of these relationships. If the Regulation of the Chamber states the actions of deputies which constitute deviations from the parliamentary discipline, it imposes the establishment, in same framework, of sanctions applicable to the guilty person.

Thus, the new regulation provides as disciplinary sanction, applicable to MPs, the temporary suspension of his/her participation at a fraction of or at all activities of the Parliament, for a period contained between two and thirty working days. The rule provides, however, that the temporary suspension "Does not bring touch to the right to vote into the plenary session", being taken "subject to the strict compliance of the rules of conduct".

Upon the disciplinary penalties applicable to members of the Parliament, the Constitutional Court ruled, during the *a priori* constitutionality review exercised on a law for the amendment and supplementing of Law no.96/2006 on the Statute of MPs[7]. With that occasion, the Court found that the regulation of disciplinary sanctions of the MP found in conflict of interest, consisting of the "ban on the participation in the works of the Chamber he/she belonged to, for a period of no more than six months", affects the parliamentary mandate. The Court held that "the parliamentary mandate is a public dignity acquired by members of the Chambers of Parliament through election by voters, in view of exercising through representation their national sovereignty, a conclusion based primarily on the following constitutional provisions: article 2 paragraph (1) – "National sovereignty belongs to the Romanian people, who shall exercise it through their representative bodies established as a result of free, periodic and fair elections, as well as by means of a referendum", article 61 paragraph (1) first sentence – "Parliament is the supreme representative body of the Romanian people [...]" and article 69 paragraph (1) – "In the exercise of their authority, Deputies and Senators are in the service of the people". The Constitution also establishes, in article 63, the duration of the office of the Chamber of Deputies and of the Senate , and in article 70, the moment when deputies and senators enter on the exercise of their office, respectively "upon the lawful convention of the Chamber whose members they are, provided that credentials are validated and the oath is taken... ", as well the time/ cases of termination of the office, respectively

[7] Judgment of the Constitutional Court no. 81/2013, published in the Official Journal of Romania, Part I, no. 136 of 14 March 2013.

"when the newly elected Chambers have lawfully convened, or in case of resignation, disenfranchisement, incompatibility, or death".

Therefore, the Court found that the newly introduced provisions into the Law no.96/2006 contravene "the constitutional provisions on the rule of law and of those who configure the legal regime of the parliamentarian office". In this respect, the Court held that "the representativeness of the parliamentary office, as it is established by the provisions of the quoted provisions of the Basic Law, has important legal consequences. One of these refers to the duties of the MP, which are exercised continuously, from the moment when he/she enters into office until the date of the termination of office, the legislator having the duty not to hinder their fulfilment by means of the regulation it adopts. Participation in the sittings of the Chamber is a duty which relies on the essence of the parliamentary office, as it results from the whole set of constitutional provisions that enshrine the Parliament, included into the Title III, Chapter I of the Basic Law. This is regulated specifically by Law no.96/2006 on the Statute of MPs in article 29 paragraph (1) – a text that did not suffer any change through the law subject to the constitutional control, being characterized by the legislator as a legal and moral obligation. Consequently, preventing the MP to attend the sittings of the Chamber he/she is part of, for a period of time which represents half a year out of those four years of mandate of the Chamber constitutes a measure likely to prevent him/her to accomplish the office given by voters. Taking into consideration that every MP represents the nation in its entirety, the conditions for the effective exercise of the office must be provided for, conditions which must be considered when regulating disciplinary sanctions".

For these considerations, the Court found that the provisions of Law no.96/2006, as subsequently amended and supplemented, are unconstitutional.

Given the identical hypothesis that targets the matter of the disciplinary sanctions applicable to deputies, the Court appreciated that the arguments on which it based the admission solution pronounced beforehand by the Court are applicable in full to this situation. So, since the duties of the MP are exercised continuously, from the moment when he/she enters into office until the termination of the office, the legislator, through the regulations it adopts, whether laws or regulations, cannot prevent their fulfilment. Just as the Court held into the decision cited above, the participation in the sittings of the Chamber he/she belongs to is a duty of the essence of the parliamentary office, as it results from the whole set of constitutional provisions and rules that govern the Parliament, so that any norm or regulation that affects the way in which the MPs meet their legal and constitutional duties constitutes a violation of his/her constitutional statute.

The criticized norm provides for the thesis according to which the disciplinary sanction "does not touch the right to vote within the plenary". But this provision is not likely to remove the unconstitutional effect of the temporary suspension. The duties of the MP, inherent to the constitutional office are not limited to the exercise of the right to vote into the sittings of the Chamber, and since the sanction concerns the suspension of the participation of the deputy to a part or to all activities of the Parliament for a period contained between two and thirty working days, it is obvious that this would prevent him/her to exercise the office in fullness of his/her rights and duties.

4. Conclusions

As stated above, the freedom of expression cannot be understood as an absolute right. Moreover, the Romanian Constitution, in article 53, as well as the international documents on human rights, such as the Convention for the Protection of Human Rights and Fundamental Freedoms or the International Covenant on Civil and Political Rights, admit the possibility of reasonable lowering of the level of protection offered to certain rights in certain circumstances or moments, subject to certain conditions, as long as the substance of the rights is not attained[8].

References

- Judgment of the Constitutional Court no. 649/2018, published in the Official Journal of Romania, Part I, no. 1045 of 10 December 2018.
- Judgment of the Constitutional Court no. 629/2014, published in the Official Journal of Romania, Part I, no. 932 of 21 December 2014.
- Judgment of the Constitutional Court no. 81/2013, published in the Official Journal of Romania, Part I, no. 136 of 14 March 2013.
- Judgment of the Constitutional Court no. 209/2012, published in the Official Journal of Romania, Part I, no. 188 of 22 March 2012.
- Judgment of the Constitutional Court no. 667/2011, published in the Official Journal of Romania, Part I, no. 397 of 7 June 2011.
- Judgment of the Constitutional Court no. 1414/2009, published in the Official Journal of Romania, Part I, no. 796 of 23 November 2009.
- Muraru, Ioan and Tănăsescu, Elena Simina (coord.), 2008, *Constituția României. Comentariu pe articole*, Bucharest: C.H. Beck Publishing House.

[8] Judgment of the Constitutional Court no. 1414/2009, published in the Official Journal of Romania, Part I, no. 796 of 23 November 2009.

CYBERTERRORISM: THE LATEST CRIME AGAINST INTERNATIONAL PUBLIC ORDER

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Abstract

Cyberterrorism has become the latest global threat that highlights security leaks in the digital world and its outcomes.

Nowadays economic and social context as well as the advances in the field of information technology facilitated individuals, private entities and governments to become increasingly interconnected through computer structures.

Cyber-attacks have seen an alarming development, and they have been successfully used in paralyzing activities, such as rail, naval and air traffic, being even used by some state entities in military and economic espionage.

Moreover, cyber-attacks have been able to block activities of state institutions, corporations, financial and banking institutions, cross-border trading companies, as well as individuals, viewed as single end users of products or services.

Thus, it would be an understatement to say that cyber terrorism has become a worldwide menace; it is a live global phenomenon that spreads fear whilst being impressively effective in terms of seriousness and widespread damages.

Given the significance of this global negative phenomenon with potential devastating effects, depending on the severity with which it manifests, cyberterrorism has been chosen as the subject matter of this paper.

The aim of the paper is to go into the depth of this global phenomenon, starting from the economic, political, social and technological factors that favored the emergence and hasty development of cyber-terrorism.

Keywords*: cyberterrorism, cybercrime, international public order, Internet, victim.*

1. Introduction

In the current social and economic background and taking into account the progress in the field of information technology, individuals and private and governmental entities, in the course of their current activities, are increasingly interconnected by means of IT structures.

There were many cases when cyberattacks have been able to block the activities of state institutions, corporations, financial and banking institutions, cross-border trading companies, by taking on different proportions on individuals, considered as *ut singuli* in the capacity of final users of certain products or service.

Furthermore, in 2017, cyberattacks increased alarmingly, being successfully used in activities carried out in order to block transportation means, respectively rail, naval and air traffic, being used by certain

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state entities in military and economic espionage.

It should be noted that, given their damaging effects, cyberattacks have begun to be preferred even by terrorist organizations in place of classical assaults, with an even greater impact on society, being able to affect a wider range of individuals (natural persons/legal entities) by means of the immediate effect of these types of criminal activities.

Therefore, the protection of the information systems integrity has become, both for the states and for the individuals, a real concern, *on the one hand*, by the need to provide networks for effective protection of information systems, and, *on the other hand*, at legislative level, by creating a regulatory framework that includes the widest range of illicit activities in order to prevent and protect information systems from "*cybercrime*" activities.

2. Cybercrime and cyberterrorism

In order to be classified as cyberterrorism, virtual space activity must have a '***terrorist'*** component, which means that it must include terror and have a political motivation. Therefore, we have to make the distinction between terrorism that uses information technology as weapon or target and terrorism that simply exploits information technology, this side being the most visible and intensely used at the time being.

At this level, a distinction should be made between *cybercrime* and *cyberterrorism*, the essential tiebreak criterion being represented by the "*terrorist component"*.

The notion of "cybercrime" defines all the deeds committed in the area of information technologies, within a certain time period and on a certain criterion. As any social phenomenon, cybercrime represents a system with own properties and functions, distinct from those of the constituent elements in terms of quality.

Although at the international level there is no unanimously accepted legal definition on cyberterrorism, a number of definitions have been formulated at the conventional level, among which we will mention that of the US Federal Bureau of Investigation, which is the most eloquent: cyberterrorism is a phenomenon that is "*a premeditated, politically motivated attack against information, computer systems, programs and data which results in violence against noncombatant targets by subnational groups or clandestine agents*"[1].

Cybercrime is one of the fastest-evolving branches of the criminal spectrum, given its specificity, namely:

- the speed that perpetrators can exploit in committing cybercrime through internet;
- the comfort these perpetrators can enjoy at the shelter of anonymity in committing a wide range of illicit activities that do not know physical or virtual boundaries;
- the magnitude of the consequences of these unlawful actions and
- the potential benefits that can be gained from the commission of such crimes.

As far as the European Space is concerned, an important step in identifying, qualifying and attaining criminal responsibility for cyberattacks was made by the adoption of the Directive on attacks against information systems ("*Directive 2013/40/EU*") in 2013, establishing minimal rules on the definition of criminal offences and penalties in the field of the attacks against information systems and providing

[1] White, Kenneth C., *Cyber-terrorism:Modern mayhem*, U.S. Army War College, 13 March 2015.

operational measures to improve cooperation between authorities.

Although Directive 2013/40/EU has led to significant progress in terms of the criminalization of cyberattacks at a comparable level in all Member States, the improvement of the way it is implemented by the national transposition regulations is possible by updating them with the continuous evolution of the cybercrime, this process being certainly achievable with the assistance of the European Commission (the "*Commission*").

Directive 2013/40/EU of the European Parliament and of the Council of August 12th, 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA of the Council, published in the Official Journal of the European Union L 218/8 of August 14th, 2013.

Furthermore, as of 2018, the Commission has been adopting concrete proposals to facilitate rapid cross-border access to electronic evidence, nowadays practical measures being taken to improve cross-border access to electronic evidence for criminal investigations, including the financing for training on cross-border cooperation, the development of an electronic platform for the exchange of information within the European Union and the standardization of forms of judicial cooperation between Member States (*Joint Communication to the European Parliament and the Council: Resilience, Deterrence and Defence: Building strong cybersecurity for the EU*[2].

At the international level, according to INTERPOL, cybercrime can be classified into two major categories of cybercrimes, namely:

Advanced cybercrime (or high-tech crime) – sophisticated attacks against computer hardware and software;

Cyber-enabled crimes – many "*traditional*" crimes have taken a new turn with the advent of the Internet, such as crimes against children, financial crimes, theft, fraud, illegal games, sale of counterfeit medicines and even terrorism.

According to the INTERPOL data, cybercrimes have seen an impressive evolution, their authors changing their profile with the evolution of the crimes: from individuals or small groups, cybercrimes are nowadays committed by complex cybercriminal networks bringing together individuals from across the globe in real time to commit crimes on an unprecedented scale. Such organized criminal groups use increasingly the internet as a means to facilitate their activities and to maximize profit in the shortest time possible[3].

Most importantly, cybercrime is characterized by internationality and a rapid evolution, both at the organizational level in what concerns the perpetrators and at the level of crimes complexity, leading to worsening the consequences resulting from the commission of such crimes, therefore, the security of IT networks and systems appears to be a necessity for any of the "*potential victims*".

3. Relevant international documents on cyberterrorism

Foremost, the Resolution 2133 (2014) adopted by the United Nations Security Council within its 7101st meeting of January 27th, 2014 is one of the most important text to have ever been drafted on cyberterrorism. This document refers to the general phenomenon of terrorism, including the

[2] Available here: http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52017JC0450&from=EN).
[3] Please see: https://www.interpol.int/Crime-areas/Cybercrime/Cybercrime.

manifestation of cyberterrorism, as follows: "*reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed and further reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts*". It also reveals, among other things, that: it "*reaffirms its resolution 1373 (2001) and in particular its decisions that all States shall prevent and suppress the financing of terrorist acts and refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of member of terrorist groups and eliminating the supply of weapons to terrorists*."

Another significant document is the Report that the United Nations Office on Drugs and Crime (UNODC) published in 2012, in Vienna. This Document aimed at helping and advising countries in the fight against '*terrorists'* using Internet (cyberterrorism) to plan attacks, to recruit and to make propaganda.

In respect of cyberterrorism as a Psychological Weapon in *Modern War*, Army corps general Fabio MINI, former commander of the General Staff of UN Command for South Europe, coordinator of *Comando Interforce for Balkan operations*, commander of UN peace operations in Kosovo-KFOR stated that: "*The war has changed, we can no longer be tributaries of the concept of traditional war when they shot each other. The war has changed not only because the people directly involved in this process and those collaterally interested are numerous, but especially because control systems are multiple: we no longer refer to traditional weapons, but to a multitudine of other types of weapons. A fundamental weapon of the modern war is the PSYCHOLOGICAL WEAPON, the weapon of influence being exerted on all and by all means, especially by computer, IT means […]. In 45 years of career, working all around the world, I have seen a lot of aspects that cannot even be described […]*"[4].

4. The notion of cyberterrorism

The concept / notion of cyberterrorism was certified for the first time in November 1794;

Initially, it defines the "*doctrine des partisans de la Terreur*", the doctrine of partisans of terror, representing the exercise of power by means of intense and violent struggle against those who acted and manifested against the revolutionaries – the French Revolution. It was a way of exercising power, not a way of acting against it, as defined today.

The term evolved during the nineteenth century and currently defines not a state action (the revolutionary state), but an action against it (terrorism). Its use, in anti-governmental respect, is attested in 1866 in Ireland and in 1883 in Russia (the nihilist movement-doctrine or attitude, based on denying all values, beliefs and opinions.

As François-Bernard Huyghe stated, "*Terrorism, in a modern sense, is born simultaneously with the emergence of current media institutions*"[5].

"*Criminal acts of political or other purposes intended or calculated to provoke a state of terror in the general public, from a group of persons, regardless of the reasons behind such political, philosophical, ideological, racial, ethnic, religious or any other kind are unjustifiable and condemnable*" (the United Nations).

[4] Please see: www.libertaegiustizia.it.

[5] *Think tanks: Quand les idées changent vraiment le monde,Vuibert*, 2013.

4.1. Cyberterrorism – definition

"*Cyberterrorism*" is a controversial term, which is difficult to be defined, especially due to the lack of clear clarifications on terrorism itself.

Certain authors define it as being "*the multitude of attacks against information systems in order to destroy them and to generate a state of alarm and panic*". According to this limited definition, "*it is difficult to identify all actions and activities of cyberterrorism*".

As Kevin G. Coleman (*The Technolytics Institute*, article 6/23/2017) detailed, "*Premeditated actions / activities aimed at destabilizing information media / systems, with the intention of causing social, ideological, religious, political or any other kind of damage, with the ultimate goal of intimidating individuals or a group of individuals in order to force them or other groups / groups of individuals; to act / react in a certain sense*".

5. Cyberterrorism – the context of occurrence

The issue of cyberterrorism actually came into being with the events of September 11th, 2001, when the US administration announced it would implement a new defense strategy.

One month after the events of September 11th, 2011, US President George W. Bush signed *The Patriot Act, (i.e. "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001"*), the first global document that provides for legislation on terrorist activities[6].

The Patriot Act is an exceptional law the provisions of which initially extended for 4 (four) years. In July 2005, The American Congress permanently endorsed 14 of the 16 provisions.

After a long dispute, the American Congress, during the winter of 2005-2006, permanently endorsed most of the tasks assigned to the police and security forces.

Briefly, The USA Patriot Act:

- strengthens the power of government agencies– FBI, CIA, NSA and the army, thus reducing the right of defense;
- introduces the status of 'enemy combatant' and "*illegal combatant*";
- provides that any kind of intervention within an information system can be assimilated to a terrorist act;
- authorizes FBI to intercept all electronic messages and to preserve any trace of web navigation of persons suspected of terrorism or of contact with a person suspected of terrorism;
- authorizes the phone interception of any person suspect of having close or distant links with a person suspected of terrorism. In August 2006, a federal judge found the inconvenience of telephone interceptions and ordered the cancellation of the secret interception program run by the National Security Agency (NSA).

Under these circumstances, associations for the protection of human rights started strong advertising campaigns on the consequences of the US Patriot Act, such as: attenuation of the right to defense or the violation of the right to privacy by authorizing electronic interceptions of any kind and telephone interceptions. They draw the attention on the risk of the agencies to interfere in the act of justice.

"*The problem is that all these derogatory procedures introduced in the name of the fight against terrorism have ended up by becoming rules. If they prove to be effective in combating this monster, which*

[6] Amitai Etzioni, *How Patriotic is the Patriot Act?: Freedom Versus Security in the Age of Terrorism*, Routledge, 2004.

is the terrorism, therefore being used to fight against it in several areas, they have ended up contaminating the whole criminal law"[7].

6. European Regulation. VIGIPIRATE

Starting with 2002, the European Union starts to issue framework decisions "*inviting*" Member States to adjust national legislation to the concept of prevention and fighting against terrorism.

For example, France adopted the VIGIPIRATE – an anti-terrorism plan drawn up in 1978 after the attack of Orly, of May 20th, 1978, and the taking of hostages at the Embassy of Iraq in Paris. The plan was completely rebuilt after the events of September 11th, 2001 and is continuously maintained at red level after the attacks of London.VIGIPIRATE is a set of measures applied in any context and circumstances: *"…even in the absence of precise threat signals*".

In 2007, the latest version of VIGIPIRATE plan was released, founded on a clear principle: *"terrorist threat must be considered permanent"*. This instrument was updated in 2016.

In 2006, the Law on combating terrorism (LCT) presented by the Ministry of Foreign Affairs of the Republic of France, based on the articles of The USA Patriot Act, widen the obligation to preserve traffic data, even in case of '*cybercafés'*[8]

The law allows intelligence services operating in the field of preventing and combating terrorism to obtain access to the control of the information media – electronic surveillance – in the lack of a judicial authorization.

The surveillance on the internet is thus placed outside the judicial control.

VIGIPIRATE represented the source of inspiration for the European legislation in the field.

The amendments of 2014: widen the area of the operators involved – territorial communities and economic operators; decodes part of the plan of measures; restores the action plan[9]

Figure 1

Source: https://upload.wikimedia.org/wikipedia/commons/thumb/f/f0/Vigipirate-web-07_-_en.png/800px-Vigipirate-web-07_-_en.png

[7] Christophe André, Maître de conférences à l'Université Versailles-Saint-Quentin (UVSQ). Il dispense également un cours de Droit de la répression à l'IEP de Paris.

[8] Tristan Nitot, Surveillance: Les libertés au défi du numériques:comprendre et agir.

[9] Please see: https://www.gouvernement.fr.

7. Regulations on prevention and combating terrorism in Romania

Terrorism offences are regulated, in the Romanian criminal law, by Law no. 535/2004 on the prevention and combating terrorism.

Such provisions are included in the current Criminal Code, in Title IV, as being the offences "*committed for the purpose of seriously disrupting public order, by intimidation, by terror or by creating a state of panic*".

As far as cyber space and its reference relations are concerned, the Romanian legislator did not at any time question the existence of terrorist actions.

The computer and the cyber media are considered by the lawmaker as simple instruments by which terrorist offences and acts can be committed.

The amendments of 2018 of Law no. 535/2004 refer to, *inter alia*, the notion of terroism: *"Terrorism is the ensemble of actions and/or threats that represent a public danger affect life, body integrity or human health, the ensemble of social relations, material factors, international relations of the states, national or international security, are politically, religiously or ideologically motivated and are committed for one of the following purposes: intimidating population or a segment of it, by producing a strong psychological impact, compelling a public authority or international organization to fulfill, not to fulfill or to refrain from the fulfillment of certain act, serious destabilization or destruction of fundamental political, constitutional, economic or social structures of a state or international organization".*

Terrorist propaganda materials are defined as follows: "*any material on hard copy, on audio, video media or other information data, as well as any other form of expression that makes the apology of terrorism or exposes or promotes ideas, concepts, doctrines or attitudes to support and promote terrorism or terrorism entity"*.

The legislator provides the offences which are taken into account in this field, as follows:

a) the offences of homicide, second degree murder and first-degree murder, bodily injury and serious bodily injury, as well as illegal deprivation of freedom, all provided by the Criminal Code;
b) the offences provided by art. 106-109 of Government Ordinance no. 29/1997 on the Aerial Code, republished;
c) the offences of destruction provided by the Criminal Code;
d) the offences of non-observance of the regime of arm and ammunition, non-observance of the regime of nuclear materials and other radioactive matters, and of non-observance of the regime of explosives, provided by the Criminal Code;
e) production, acquisition, possession, transportation, supply or transfer to other persons, directly or indirectly, chemicals or biological arms, and research in this field or development of such arms;
f) introducing or spreading into the atmosphere, on the soil, into the subsoil, or into water, products, substances, materials, micro-organisms or toxins that are likely to jeopardize the health of persons or animals or the environment;
g) threatening with the commission of the acts in a)-f).

Other offences are provided by Articles 33-39 of the same law – offences assimilated with terrorist acts (Article 33), acts of terrorism committed on the board of ships or aircraft (Article 34), the deed of a person who leads a terrorist entity (Article 35), making available to a terrorist entity movable or immovable assets (Article 36), terrorist threats (Article 37) and terrorist

alarming (Article 38), the administration of the assets belonging to a terrorist entity (Article 39).

8. Cyber Space Attacks

The main actions performed by ISIS, Al Qaeda and Hamas groups were mainly focused on propaganda, fundraising by cryptocurrency, as well as recruiting by social media and messaging applications (especially those protected by cryptography, such as *Telegram*);

If we analyze ISIS groups, these activities are declining, especially after the loss of '*capital'* Raqqa in Syria. Nevertheless, despite the forced abandonment of their neuralgic center for the production of information materials for propaganda purposes, the external communication of '*black flags'* was not completely disrupted, because of cells dispersion and their renewed autonomy allowed the maintenance of an operational continuity.

By analyzing action methods: *propaganda, fundraising and recruiting*, these are activities generally addressed to a mass audience and are therefore transmitted through the social media.

Nevertheless, Deep Web and Dark Web are spaces where certain actions are performed, such as such as the sale of arms – as in case of the attacks of Paris, in 2015.

Military equipment and materials pose a limited risk of being intercepted by the authorities on the internet. Jihadist terrorism, mentioned in the annual report of TIC presented by Eitan Azani, Deputy Executive Manager of the *International Institute for Combating Terrorism*, uses fundraising activities by means of cryptocurrency that guarantees the anonymity of the payer.

Several campaigns, such as Jahezona, of the Akhbar al-Muslim site or of Aaaq Foundation, remain alive and contribute to maintaining the work of the Islamic State.

The Isis-coins.com website invites users to change circulant currency on the territory of the caliphate – now dismantled – into virtual currency.

The existence of encrypted messaging applications facilitates communication: in addition to classical applications, some programmers who support Jihadists developed an encryption program called '*Muslim crypt'*, distributed by Telegram MuslimTech channel.

As far as the propaganda carried out in the *social media* is concerned, ISIS is committed to teach militants to protect online identity, as Bahaa Nasr, the manager of Lebanese project *Cyber Arab* explains.

The Justpaste.it platform provides manuals of the Caliphate in order to use Vpn (such as: http://justpaste.it/2ip); or advice collection on information security, from browser navigation to mobile phone (such as: http://justpaste.it/itt3).

The Global Islamic Media website uses source instruments and "*Islamize*" them: among them, an encrypted messaging program with Arabic and English tutorials.

ISIS has been lately focused on software and encryption programs for Android and Symbian that encrypts files, text messages, and emails.

Scott Terban, expert in cyber security and terrorism declared for '*Il Espresso'* that: "*Besides classical propaganda, the main IT activity of ISIS is to personalize such programs (encryption). Malware Hunters of Citizen Lab of the University of Toronto found in December evidence of the software delivered by e-mail to the anti-ISIS Syrian activists behind site «Raqqah is Slaughtered Silently». The program, if downloaded as a harmless attachment, can locate the victim. It is a rudimentary instrument, not as sophisticated as the one used by the pro-Assad Syrians (who have violated «Le*

Monde» Twitter profile by exploiting OpFrance visibility, but that are not part of the cyber jihad). ISIS is, therefore, the number one suspect".

In June 2017, hundreds of thousands of computers of Europe, America and Asia were hit by one of the most aggressive cyberattacks in history, performed by one of the most advanced malware programs ever created.

The scope of the hackers was above all the networks and systems of the medium and large companies including TNT, Reckit-Benkiser, Maersk and others. Hackers hit victim devices by using a redemption program, a program that, after infecting target computers, delete the entire content, unless the owner agrees to pay a redemption.

According to estimations, NotPetya (the name of the ransomware), costed companies more than EUR 1 billion, including the amounts paid and the damages caused to the production activities. NotPetya expands by exploiting a vulnerability in Windows operating systems: according to the investigations performed by ESET, the antivirus software manufacturer, the attack started in MEDoc servers, a program extended in Ukraine for the management of tax payments.

9. Forecasts

Ariel Levanon, vice-president of Cyber & Intelligence group stated that "*The challenge of Western intelligence agencies is not only to find terrorists, but to fully understand their capacity and motivation. Performing cyberattacks and transmitting messages over the Internet will, in fact, become more and more simple, with the increase in digitization of every aspect of life. At the same time, it will be more and more difficult to ensure the protection of the cyber space. It is expected that in the next five years, terrorist attacks in Western countries take place against the transport system and it is expected that an IT component support these attacks. There are no realistic solutions that do not take much time. It is essential to protect the information ecosystem by legal regulations, by the involvement of private companies, but above all, by teaching these problems in school*".

According to computer security experts, ransomware is one of the fastest cyberattacks to be multiplied in the future.

The European Union, by Directive 541/ 2017, included attacks against information systems in the category of "*terrorism offences*", by adopting a third legislative approach.

References

- Amitai Etzioni, *How Patriotic is the Patriot Act? Freedom Versus Security in the Age of Terrorism*, Routledge, 2004.
- Tristan Nitot, *Surveillance: Les libertés au défi du numériques:comprendre et agir*.
- Kenneth C. White, *Cyber-terrorism:Modern mayhem*, U.S. Army War College, 13 March 2015.
- http://eur-lex.europa.eu/legalcontent/RO/TXT/PDF/?uri=CELEX:52017JC0450 &from=EN).
- https://www.interpol.int/Crime-areas/Cybercrime/Cybercrime.
- www.libertaegiustizia.it.
- https://upload.wikimedia.org/wikipedia/commons/thumb/f/f0/Vigipirate-web-07_-_en.png/800px-Vigipirate-web-07_-_en.png.

THE BENEFITS OF A SPECIAL CRIMINAL PROCEEDINGS *IN ABSENTIA*

Ioan-Paul CHIȘ*

Abstract

A criticism of the national legislator's decision not to introduce a shortened hearing as a special criminal procedure in absentia, which would exclude the Preliminary Chamber and would leave the civil action unsolved. In our opinion, such a procedure would definitely contribute to the efficiency of the judiciary system by significantly reducing the duration of trials, seeing that the evidence of the case would not be administrated in the absence of the accused and, as a consequence, the witnesses and the victim would not be repeatedly subjected to the stress of the hearings. Moreover, not solving the civil action would be a measure of protecting the interests of the civil party, seeing how a simple request of the defendant would suffice to invalidate the court's decision given in absentia, and with it, the ruling on the civil claims of the case.

Keywords: *special criminal procedure, trial in absence, in absentia, abbreviated procedure.*

1. Context

The perpetration of an offense gives rise to the *exercise* of criminal proceedings, and in the case of offenses resulting in damages, the criminal proceedings can be joined by the civil action. The relation between the public and the civil (private) action has seen several systems, the Romanian legislator preferring as early as 1864, *the hybrid system*, namely the system allowing the two actions to be exercised jointly within a single criminal trial[1].

Therefore, within our legal system, the party injured by the perpetration of a deed stipulated by the criminal law is entitled to choose between seizing the civil court and joining the civil action to the criminal proceedings exercised concerning that unlawful deed.

I find that the reason for joining the two actions is twofold. Thus, first of all, regard must be taken to the more favourable terms under which the civil action is settled, in this case the evidence is the same for the two actions and it can even be ordered by the court *ex oficio* or at the prosecutor's application, the proceedings unfold with greater celerity etc. At the same time, it must not be neglected the fact that the direct opponent of the civil party, the defendant, might be interested in paying the civil claims in order to benefit from this conduct in the criminal aspects of the trial by nearing some mitigating circumstances stipulated by the criminal law, a resort unavailable in the hypothesis of settling the civil action by a civil court.

From another point of view, I believe that the state might have a real interest for the civil party to bring the civil action in front of the criminal court, given that in this

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[1] I.P. Chiș, *Soluționarea laturii civile în procesul penal în caz de dezincriminare. Situații tranzitorii, in the Magazine "Caiete de drept penal*" no. 4/2014.

context he/she might submit evidence unknown to the judicial bodies which might serve for the correct settlement of the criminal aspects, especially as far as the individualisation of the penalty is concerned.

1.1. Introducing the civil action in the criminal proceedings and the options of the injured party

According to the criminal procedural law, the civil action seeks to establish the civil liability in tort of the persons responsible for the damage produced by the perpetration of the deed subject to the criminal action. To this end, the injured party must express his/her wish to bring the civil action in the criminal proceedings, a step which implies becoming a civil party; this indication of will can be made at any time throughout the criminal trial but no later than the commencement of the judicial inquiry.

Note that the injured party is entitled to choose between becoming a civil party in the criminal trial, thus joining the individual civil action to the criminal action exercised by the prosecutor, or seizing directly the civil court, one choice excluding as a matter of principle, the other *(electa una via non datur recursus ad alteram)*. Thus, in case the injured party has become a civil party within the criminal trial, he/she can seize the civil court only if the criminal court has not settled the civil action [article 27 paragraph (2) of the Criminal Procedure Code], if the criminal trial has been suspended [article 27 paragraph (3) of the Criminal Procedure Code] or if the damage has not been fully repaired [article 27 paragraph (5) of the Criminal Procedure Code] or if the damage was generated or discovered after becoming a civil party [article 27 paragraph (6) of the Criminal Procedure Code].

It follows that the injured party who chose to bring the civil action in front of the criminal court will not be able to leave this court regardless of the fact that he/she finds useless the settlement of the private action by the criminal court.

1.2. The trial in absentia of the defendant

Further, it must be reminded that the Romanian criminal proceedings allow the trial *in absentia* of the defendant, regardless of what the penalty he/she is facing on the criminal side of the trial, *i.e.* fine, imprisonment or life detention, as well as regardless of the amount of the civil damages to which he/she might be held liable on the civil side of the trial. At the same time, it does not matter whether the criminal court could order certain security measures against the defendant, *e.g.* special confiscation, extended confiscation etc., the criminal trial can lawfully take place without them.

Obviously, for the trial *in absentia* of the defendant to be possible, the summoning procedure must be fulfilled according to the law, irrespective of whether the communication to the defendant concerning the criminal trial has been successfully accomplished or not.

Indeed, the law makes no distinction in this regard, between the three possible situations, the continuation of the criminal judicial proceedings being possible when the accused has actually taken note of the criminal trial but waived his/her right to appear before the judicial bodies either *i)* explicitly, by formulating an application to be tried *in absentia* or *ii)* implicitly, by the unjustified absence after being summoned by the judicial bodies; as well as when *iii)* the accused has not been formally informed about the criminal trial against him/her, the summons procedure being accomplished by a mere legal fiction such as posting the notice/summons.

In the first case, if there is evidence pointing that the accused has actually taken note of the criminal trial against him/her, we are in the presence of a waiver to the right to appear in front of the judicial bodies, the accused thus disposing of his/her right to participate to trial.

If to the contrary, there is no evidence that the accused has actually been informed about the criminal proceedings against him/her, the trial *in absentia* shall continue and in the case of a conviction solution the law stipulates the possibility of reopening the criminal trial by merely formulating an application to this end within a month from the communication of the final criminal ruling.

Note that in the case where the accused tried *in absentia* has knowledge about the criminal proceedings and refuses to respond to the summons of the judicial bodies, as well as in the case where the accused has no knowledge about these proceedings, the criminal trial shall take place according to the general trial procedure, following the preliminary chamber procedure and assessing during the trial all the evidence of the case as if the accused had been present for trial.

The legal assistance is guaranteed throughout the criminal trial and in the case where the accused is underage, admitted to a detention centre or an educational centre, detained or arrested even in a different case, where the accused is subject to a safety measure or placed in a medical institution, even in a different case or where the offense brought to the accused charge is punished by life detention or an imprisonment penalty exceeding 5 years, the legal assistance shall be provided *ex oficio* (article 90 of the Criminal Procedure Code).

1.3. The preliminary chamber procedure

The preliminary chamber procedure is the phase of the criminal trial[2] ensuring the judicial context for verifying the lawfulness of the criminal investigation acts. Within this procedure, after checking the court's competence, the preliminary chamber judge examines the lawfulness of receiving the indictment, the lawfulness of evidence-gathering and of the performance of the criminal investigation acts.

The preliminary chamber procedure is essential to the economy of a criminal case given that this is the only procedural moment where the accused can criticise the lawfulness of the criminal investigation acts, the result of this procedure influencing the continuation of the criminal trial or the return of the case to the prosecutor's office.

2. Reopening of the criminal trial in the case of trial in absentia

Reopening the criminal proceedings in the case of a trial in the absence of the convicted person[3] is a procedural remedy, at the convicted person's disposal, which can be used after the criminal ruling pronounced *in absentia* has become final, but no later than a month from its communication. Thus being, in our legal system, reopening the criminal proceedings is considered an extraordinary legal remedy, limited to points of law, within the jurisdiction of the court that issued the challenged ruling, of

[2] For solid arguments for the qualification of the preliminary chamber procedure as a pre-trial stage, see A. Zarafiu, *Procedură penală. Parte generală. Partea specială,* C.H. Beck Publishing House, Bucharest, 2015, p. 376-378. In arguing this view, the author shows that the stages of the criminal trial must be represented as those sections of the criminal trial where the competent judicial bodies exercise one of the main judicial functions (investigation or trial) and where one of the solutions of cease of the criminal action can be ordered or pronounced.

[3] Further, to ensure the flexibility of the commentary, whenever I will refer to this legal remedy, I will use the wording *Reopening of the criminal trial.*

withdrawal, designed to ensure the compatibility of the Romanian legislation with the standards imposed by the conventional block, as well as by the right to a fair trial in the broadest meaning of the term.

If the court finds grounded the application for reopening the criminal proceedings, it will admit it in principle, the final ruling pronounced *in absentia* being thus reversed by the law itself, both concerning the solution pronounced on the criminal side of the case and the solution pronounced on the civil side of the case, the trial being resumed from the stage of the trial in first instance, with all its consequences: reassessing the evidence of the case, the taking of a new first instance ruling, the pronunciation of a ruling in appeal and the enforcement of the new final ruling.

3. The criticisms of the present system

The criticisms can be divided in two: criticisms concerning the conceptual aspect of the notion of reopening the criminal proceedings and criticisms concerning the incompatibility of the national system with the conventional block, as well as with the right to a fair trial.

As a matter of principle, any legal remedy takes the form of procedural remedies aimed at removing the mistakes that the courts might have made in impairing justice. Therefore, these procedural remedies are based on the idea of a mistake that can be made by the lower judicial body, an error which the judicial review court, placed on a higher level and being composed of more experimented judges, is presumed to eliminate.

Even if the reopening of the criminal trial is placed by the Romanian legislator among the extraordinary legal remedies, the idea of a mistakes on which such a remedy should be based, is not in all cases true.

Indeed, the premise of this procedural remedy does not necessarily reside in the court's failure to summon the accused to the trial or in a summoning procedure which was not dully accomplished.

Truly, the hypothesis of procedural error must not be *de plano* excluded, in the end, justice is achieved by an eminently human activity which is by nature, subject to error *(errare humanum est)*. Therefore, the accused who has never been summoned nor informed officially about the criminal trial or the accused concerning whom the summoning procedure has not been duly fulfilled is entitled to apply for the reopening of the criminal trial, with the consequence of resuming the trial stage starting from the first instance trial.

Nevertheless, in most cases of reopening the criminal trial, the premise shall not reside in an error related to the summoning of the accused, but in the lawful conduct of the criminal procedures in the absence of the accused who has not been genuinely informed about it.

The summoning procedure is lawful because in these hypothesis, the judicial bodies usually use the legal fictions stipulated by the law, such as considering legally summoned the person concerning who a notification about the summoning has been posted at the seat of the judicial body or who, having changed the procedural address during the criminal investigation, has been summoned at the address previously chosen although it was no longer up to date.

Transposed into practice these situations are met in the case where the accused is not found at the addresses where the state bodies have information that he/she might be (the legal domicile or the residences irregularly used etc.), the summoning procedure and the

communication of the procedural acts being accomplished by posting a notice at the seat of the judicial body.

As a first conclusion, it must be remembered that the reopening of the criminal trial is wrongly regulated as a legal remedy while it has the appearance of a procedural remedy characteristic for a special trial procedure as I shall demonstrate.

From the perspective of the right to a fair trial, it must be highlighted that the premise for reopening the criminal trial is the justified absence of the accused from the criminal trial. This justification resides on the fact that the accused had no knowledge about his/her criminal trial. Thus being, starting from this premise, it can be said that as far as the accused is regarded, the proceedings that follow the reopening of the trial is the first he/she has knowledge of, the first in which he/she can defend himself/herself using the whole range of procedural rights and guarantees.

For all this, reminding as well the fact that resuming the procedure shall only take place with the first instance trial, the preliminary chamber procedure *in absentia* remaining final, the criticism focuses on the obvious reduction of the possibilities of the accused to defend himself/herself, especially concerning the possibilities to criticise the lawfulness of the criminal investigation acts, from the clarity of the wording of the accusation to the rightness of the administration of certain evidence.

4. Positive aspects that the regulation of a special procedure of trial in absentia would entail

Starting from the premise that our legal system accepts the trial in the absence of the accused, whatever the reason of this absence might be, a deliberate absence as a result of the explicit or implicit waiver to the right to participate to one's own trial, or an absence which is not based on an informed choice, one wonders whether a special procedure for the trial of the accused absent should not be regulated.

Note that our legal system acknowledges several special trial procedures based either on the procedural conduct of admission of guilt adopted by the accused (the plea of guilt), or on the special situation of the accused (the defendant is underage or is a legal entity).

Therefore, once accepted these special procedures by the legislator, the question arises whether the absence from the trial of the accused implies a necessity to embody a set of rules derogating from the general procedure. In other words, it must be established whether in the case of the trial *in absentia* the general trial procedure is sufficient from the perspective of the procedural guarantees and, otherwise, whether a special procedure is fully justified[4] by number, content, systematization and operation.

4.1. The trial in absentia according to the general procedure

I have previously pointed out why in the case of the trial *in absentia,* the general procedure does not meet the minimum guarantees of the right to a fair trial.

It is thus noted that the trial *in absentia* gives the accused the right to apply for the reopening of the criminal trial but the procedure shall be resumed not from the preliminary chamber, but from the trial stage. Thus being, starting from the premise of reopening the criminal trial, namely the trial in the justified absence of the accused, it is clear that he/she did not have the

[4] N. Volonciu, *Drept procesual penal*, Editura Didactică și Pedagogică, Bucharest, 1972, p. 502-503.

genuine possibility to contest the evidence and the criminal investigation acts, this essential part of the trial being finally settled in his/her absence. Under these circumstances, reopening the criminal trial should not be limited to the reopening only of the trial stage, the reopening of the preliminary chamber procedures being necessary as well.

At the same time, as regards the civil side of the trial, it is quite clear the violation of the civil party right to the settlement of the case within a reasonable period. I have a slight reservation making this statement given that the time necessary for the settlement of the civil action can be either shorter or longer according to the difficulty and the complexity of the evidence brought, as well as according to the choice of the accused during retrial: the general procedure implying the reassessment of all the evidence and necessitating more trial dates in the case, or the abbreviated procedure implying the settlement of the case based on the evidence assessed during the criminal investigation, the activity usually taking place in a single trial date. In the case where the accused wishes the reassessment of the evidence, the time elapsed between bringing the civil action within the criminal trial and the final settlement of the action, to which the time elapsed between the admission of the application for reopening the trial and the final settlement of the action is added, can easily exceed the party's right to a fair trial as regards the reasonable period.

On the same note, one can retain the precariousness of the final ruling given by the criminal court for the settlement of the civil action. Indeed, the right of access to court necessarily calls for the right to a final ruling and, furthermore, the right to the actual enforcement of that ruling. Or, if the civil aspects of a criminal trial are settled through a final ruling subject to reversal *ipso jure* by the mere application of the accused, there is a problem concerning the fairness of the procedures towards the civil party, especially in the context that he/she can only leave the criminal trial in order to claim damages in a civil court under extremely restrictive conditions. Therefore, the very settlement of the civil action under these circumstances appears as an activity not only lacking efficiency (the ruling being subject to reversal), but also likely to unjustifiably delay the obtainment of a final ruling issued by the civil court.

On another note, concerning the first procedural cycle, it can be seen that the criminal court assesses the evidence with a view to ensuring an adversary procedure for the defendant, even if he/she is absent from the proceedings. Therefore, it seems that within the first procedural cycle unfolded in the absence of the accused, the adversarial principle is merely simulated, the main character, the accused, being absent to this procedure.

Also as regards the accused, I find that a procedure which necessitated high efforts on the part of the judicial bodies is an extremely costly one, the legal costs being then borne by the accused. From this angle too, the lack of any culpable absence from the accused and holding him/her liable for the payment of the legal costs generated precisely by this absence appears as a contradiction of terms.

In conclusion, it must be remembered that the general trial procedure closes in a final manner the preliminary chamber procedure so that, during the retrial, the accused has no genuine possibility to contest the criminal investigation acts. At the same time, the absolute precariousness of the ruling pronounced on the civil side of the trial must be noticed as well as the fact that, under certain circumstances, the settlement of the civil action might exceed a reasonable period by resuming the procedures.

The foregoing are all reasons that justify the regulation of a special trial procedure eliminating all the deficiencies identified, through derogating provisions.

4.2. The special criminal proceedings in absentia.

The special criminal proceedings *in absentia* must be a rapid, abbreviated one allowing the examination of the case within an extremely short time, without going through the preliminary chamber procedure and without settling the civil action.

I find thus that procedural cycle *in absentia* must start by observing the absence of the accused from the criminal trial, the special trial procedure being accordingly open. Under these circumstances, the criminal proceedings shall be taken directly to the trial stage, the court adopting a solution strictly based on the evidence collected during the criminal investigation. Of course, the procedure *in absentia* shall imply the representation of the absent defendant by a lawyer, either chosen or designated *ex oficio* (a case of mandatory legal assistance).

Further, irrespective of the solution pronounced by the court on the criminal side of the trial, the possible civil action shall be left unsettled, the right to choose of the injured party being thus reactivated. Therefore, according to the special procedure, the civil action shall not be settled, the right of the injured party to seize the civil court to receive damages being immediately reinstated.

After the criminal ruling of conviction pronounced following this procedure, the possibility to apply for the reopening of the criminal trial shall be open, the trial resuming from the preliminary chamber procedure with all that this entails, the procedure unfolding as if the accused had never been absent.

Conclusions

The judicial activity in the preliminary chamber and of trial imposed by the current regulation in the case of the trials with absent accused is not only time consuming and unfair, but also useless. This is why I consider that a special procedure having the foregoing as its main landmarks must take its place into the substantive law.

Such a procedure would be capable of settling the conflict of law within a short period, without too much effort from the judicial bodies or high expenses and it will allow the injured party to switch a moment earlier to the other option, the bar to leave the criminal court no longer existing within this procedure.

References

- Chiș, Ioan-Paul, *Soluționarea laturii civile în procesul penal în caz de dezincriminare. Situații tranzitorii, in the Magazine "Caiete de drept penal"* no. 4/2014.
- Volonciu, Nicolae, *Drept procesual penal*, Editura Didactică și Pedagogică, Bucharest, 1972, p. 502-503.
- Zarafiu, Andrei, *Drept procesual penal. Partea generală. Partea specială*, ed. a 2-a, CH Beck Publishing House, Bucharest, 2015.

ACTUAL PROBLEMS OF REALIZATION OF THE RIGHT OF PERSONAL PROTECTION OF THE ACCUSED IN THE CONTEXT OF THE REQUIREMENT FOR A TERM FOR PRE-TRIAL INVESTIGATION ACCORDING TO THE BULGARIAN CRIMINAL PROCEDURE CODE

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Abstract

The present scientific publication represents an attempt for clarification the question, how affects the principle of objective truth and the right of personal protection of the accused person to carry out the pre-trial investigation in an explicity regulated by law period of time? For this purpose, is made an obserbance of Art.234, par.7 of the Criminal Procedure Code of the Republic of Bulgaria and the legal consequences. Based on the understanding that the defendant's right to personal protection is in its broadest sense, a recognized and guaranteed opportunity for personal, active participation in criminal proceedings we have mainly dealt with the issue of excluding important evidence of justification only because they were collected beyond the period of investigation and over the forms of limiting the personal activity of the accused person in the preliminary stage of trial through the investigation period itself. In the context of the problems described, a case- law of the European Court of Human rights has also been discussed. In the final part of the report are made theoretical conclusions on the basis of which were formulated proposals for improvement of the Bulgarian Code of Criminal Procedure.

Keywords: *right of personal protection, criminal procedure law, European court of Human right, case-law.*

1. Introduction

The ground for this paper is the latest amendments made 2017 in Art. 234 of the Criminal Procedure Code of Republic of Bulgaria. With these amendments, the legislator finally strengthened his understanding of conducting the pre-trial investigation in absolute term. In my opinion, this normative innovation inadvertently contradicts the disclosure of objective truth and the right to personal protection, which is linked to the requirement for the duration of the study in several different directions: personal protection is exercised at all stages of the process (Art. 122 par. 1 from the Constitution of Republic of Bulgaria; Article 15 of Criminal Procedure Code of Republic of Bulgaria); the accused as a rule presents and is involved in the pre-trial investigation (Art. 206 of the Criminal Procedure Code); the accused has the opportunity to make evidential requests and to lay evidence in the course of the investigation (Art.55, 107 and 230 of the Criminal Procedure Code); the accused has the right to a sufficient time to prepare for his defense (Art. 6 (3) (b) ECHR). The present exposition describes this problem and offers a solution.

2. Content

According to the amended Art. 234, par. 1 of the Criminal Procedure Code "The

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investigation shall be performed and the case forwarded to the prosecutor within two months from the date of its institution."

In par. 2 of the same article is expressly prescribed the possibility of shortening the basic term for investigation by the prosecutor by defining shorter than the two-month period, and in par. 3 - possibility of extending the term under par. 1 in the factual and legal complexity of the case by up to four months, in cases where it can be assumed that the extended term is also insufficient, the administrative head of the respective prosecutor's office or a prosecutor authorized by him may extend the extended term at the request of supervising prosecutor, and the period of any extension may not be longer than two months. In paragraph 4 of Art. 234 of the Criminal Procedure Code, it is stated in particular that " The reasoned request for prolongation of the period shall be sent before expiration of the terms under Par. 1 and 2. Consequently, the timely completion of the pre-trial phase of the process is legally secured, above all with the introduction of a preliminary pre-trial investigation.

The investigating authorities must, as a general rule, clarify the facts and circumstances of the criminal proceedings within the prescribed time limit, and only exceptionally, for a shorter or longer term but always in a clearly specified time, unlike the court which Art. 22, par. 1 of the Criminal Procedure Code empowers the general obligation to consider and resolve the cases within a reasonable time. This dual mode of development and completion of criminal proceedings inevitably leads to a number of both theoretical and practical problems.

It is not clear from the law itself why the court at the stage of a judicial investigation should not be stimulated and accordingly limited in its actions by a deliberate time limit, and the pre-trial authorities must. Although in substance, the investigation activity is identical and with the same procedural importance for the entire criminal process - a concrete act of revealing the objective truth by getting to know the issues relevant to the proper resolution of the case. The described ambiguity is exacerbated when the possibilities for disclosure of the objective truth of the court are compared with those of the investigating police authorities and the investigators who ex lege are obliged in the pre-trial phase of the trial to conduct a full, objective and comprehensive study within the two-month period because the extension and the shortening of the investigation period is not a mandatory one, but only a discretionary option, and secondly an opportunity addressed to the prosecutor, i.e. lies beyond their own discretion and authority - argument Art. 234, par. 2-3 Criminal Procedure Code. In other words, there is no answer to the question why the same criminal case at the pre-trial stage is considered according to the legislator's preliminary assessment of a sufficient time for its solution, and in the court - according to the court's decision, for a reasonable time?! It can be summarized that the pre-trial investigation "ipso iure" should take place and the case should be handed over to the prosecutor within two months of its formation in accordance with Art. 234, par. 1 of Criminal Procedure Code, as "de lege lata" conducting the preliminary investigation within the terms of par. 2-3 of the same article, constitutes an optional deviation from the general text (Article 234, paragraph 1 of the Criminal Procedure Code), i.e. an exception to the general rule and not the basic rule itself. The latest amendments from 2017 in Criminal Procedure Code do not contradict this conclusion. Although, in Art. 234, par. 3 of the Code states that the investigation period may be extended, i.e repeatedly and not

once, it can not be assumed that the extensions themselves can be carried out indefinitely, because, according to Art. 203 par. 2 of the Criminal Procedure Code: " The investigative body shall be obligated within the shortest possible period to collect the necessary evidence required for the discovery of the objective truth, being guided by the law, his/her inner conviction and the instructions of the prosecutor."

From the aboved, it can be safely concluded that the existence of an obligation to carry out the preliminary investigation as soon as possible necessarily implies an obligation to temporarily reveal the objective truth in the pre-trial phase of the trial. This is because the objective truth "de jure" is revealed only through a lawful investigation, that is, in the order and with the means stated in the code – argument- Article 106 of the Criminal Procedure Code. The normative introduction of a deadline for revealing the objective truth is in disharmony with Art. 121, par. 2 of the Constitution of Republic of Bulgaria, according to which: "The proceedings in the cases ensure the establishment of the truth". The constitutional legislator is categorical that all procedure, i.e pre-trial proceedings, is organized and structured in such a way as to ensure that the knowledgeable subjects can reach the objective truth in full and not as far as possible within a certain procedural timeframe. This understanding could be reached in another formally-logical way, namely, it is not possible to fulfill the tasks referred to in Art. 1 of the Criminal Procedure Code without "... establishing the facts and circumstances of the criminal process as they have been in the objective reality"[1]. For example, disclosing the offense and disclosure to the guilty is always a function of clearly illustrating the criminal event and the involvement of the accused in it. The timely discovery of objective truth violates the very principle of objective truth (Article 13 of the Criminal Procedure Code) and leads to conclusions, most of which are absolutely unacceptable:

First of all, it is clear from the obligation that the objective truth be strictly established within the pre-trial investigation period that it must be disclosed on a provisional basis - to the extent that the term has not expired, and not unconditionally, as stated in Art. 13 of the Criminal Procedure Code - with all necessary measures for the purpose.

Second, since the objective truth must be disclosed only within the period of investigation and not according to the need to examine all the circumstances relevant to the outcome of the case, it is permissible and sufficient that it be sought in part rather than in full, exhaustively.

Third, as the objective truth is revealed exclusively within the time limit and not according to the factual nature and legal complexity of the case, it is permissible to derive it entirely according to the diligence, the approach and the subjective possibilities of the investigative bodies to orientate quickly and correctly in time.

Fourth, the requirement for objective truth to be "delivered", that is brought quickly into the process, finally stimulates the investigating authorities to ignore the details of their work, which increases the risk of procedural errors and significantly reduces the quality of their work.

Fifth, the disclosure of objective truth with the judicious speed, but without the necessary quality, excludes the possibility of a proper settlement of the case.

Sixth, according to the practice - the wrongful resolution of the case always comes at the expense of citizens' rights and their trust in the justice system, etc.

From the above, it can be inferred that the disclosure of objective truth within the

[1] С. Павлов, Наказателен процес на Република България – обща част, С. "Сиби", 1996 г., с. 108.

explicitly defined time frame for pre-trial investigation is a factual and formal-legal disagreement with the lawful and proper resolution of the case. This disagreement ultimately reduces considerably the security of state interests and hence of personal interests, because ... "in our criminal proceedings, the interests of the state are harmoniously combined with the interests of the person"[2] Therefore, the timely disclosure of objective truth adversely affects the full exercise of the defendant's right of defense. Personal protection, conceived as a specific subjective right, means the possibility of self-defense of certain rights and legitimate interests in the criminal process - active participation aimed at highlighting those circumstances of the subject of proof that exclude or mitigate the penal liability of the accused i.e. disclosure of objective truth about them from the accused himself. From this point of view, personal protection always helps to properly solve the case. The introduction of a time-limit for disclosure of the objective truth in the pre-trial phase infringes the right to personal protection, so that, through its exercise, the accused reveals the truth of the factual situations in which he is using the case.

The necessity for the objective truth to be revealed exclusively within the term for pre-trial investigation is imposed in Art. 234, par. 7 of Criminal Procedure Code, with the following wording: "... Investigative actions taken outside the time limits under Paragraphs 1 - 3 shall not generate legal effect and the evidence collected may not be used before court for the issuance of a sentence." Consequently, the disclosure of the objective truth by will and by the means described in the code by both the state and the accused outside the term a pre-litigation investigation is inadmissible in nature and the person subject to it should be subject to a procedural penalty consisting in disqualification of the evidence gathered outside the due date. Although the procedural inadmissibility of evidence and evidence attracted outside the term of investigation is not a classical legal sanction, since it neither adversely affects the person of the offender by imposing certain sanctionary consequences on him (burdens, deprivation) nor his property. It is atypical procedural penalty aimed at restoring the situation existing before the offense.

By argument of legal theory, the term is relevant for a certain period of time in which legal rights are exercised and legal obligations are being fulfilled. From the point of view of its realization, it is an event, as the physical exhaustion of time occurs regardless of the presence of human will for that[3]. As an event in certain cases, the term is raised by the legislator as a particular legal fact from the category of legal events, the preliminary manifestation of which is confined to the appearance of certain legal consequences. Considered as a legal fact, the term is part of the composition of the legal phenomenon - a necessary component of it and a separate, independent precondition for the creation, modification or extinction of rights and obligations[4]. In the indicated sense the legislator in Art. 234, par. 7 of the Criminal Procedure Code treats the term of investigation. A careful analysis of the provision shows that the expiration of the investigation period is a legal fact, the manifestation of which exits the pre-emptive environment for a pre-trial investigation. In other words, the expiration of the terms under

[2] Пак там, с. 90.

[3] Р. Ташев, Обща теория на правото, С., "Сиби", 2010 г., с.235-236.

[4] Виж подробно относно строежа на равното явление, В. Ганев, Курс по обща теория на правото – увод и методология на правото, С., "Академично издателство Проф. Марин Дринов", 1995 г., с. 15-20.

par. 1-3 of Art. 234 of Criminal Procedure Code entails the obligation to suspend the investigation, the non-fulfillment of which leads to procedural sanction - the procedural inadmissibility of the collected material and the impossibility of being used by and before the court in the issuing of the sentence. But in order to be an imperative, the law is "... above all- evaluation norm"[5]. This is because "... whoever wants to motivate someone, he must know beforehand towards what he wants to motivate; he must have assessed that thing in a certain positive sense, i.e. to have found it valuable."[6] In this logical sequence, the norm of Art. 234, par. 7 of Criminal Procedure Code should also state what is the state of public law that is behind its imperative, i.e what is publicly worthwhile and what is not to occur or not to be subject to sanction. Obviously, the legislator has considered it to be publicly harmful to use evidence gathered beyond the time-limit for pre-trial investigation, i.e, it is publicly valuable to close the criminal proceedings quickly. This legislative decision can only be justified if the exclusion of evidence formally collected outside the time-limit for pre-trial investigation is in favor and not at the expense of the rights and legitimate interests of the participants in the criminal proceedings and, in particular, the accused as a subject in the pre-trial phase and in the judiciary. Simple verification of the claim that the rapid completion of criminal proceedings corresponds to the effective and efficient protection of the legal good of the accused leads to important results, some of which are considered as significant below.

First, from the literal interpretation of Art. 234, par. 7 of the Criminal Procedure Code, it is remarkable that there is no obstacle to certain justifiable evidence, that they are inappropriate and consequently used in the process, even though the request for their collection was made at the end of the term or shortly after its expiration, only on the pretext that their collection outside the same would not produce the intended legal consequences and would therefore be meaningless. This, in turn, is nothing other than depriving the defendant of free evidence valuable evidence, especially considering the fact that the taking of evidence and the collection of the materials mentioned therein takes place outside his or her personality. It is addressed to the competent state authorities as a procedural obligation (Article 107 of the Criminal Procedure Code), which can not be implemented in a timely manner, even consciously, in general. The omission of the term for unreasonable reasons is irreparable - Art. 186, par. 1 of the Criminal Procedure Code and the disciplinary sanctioning of state bodies for deliberate procedural passivity will in no way remedy the unfavorable consequences of expiry of the term for the accused.

Second, the provision mentioned above precludes the acceptance of any documentary evidence deposited personally by the accused, even when the expiration date is only one day, which is absurd and in violation of his or her effective personal protection. It goes without saying that there is no obstacle to the accused by an active subject of the investigation to be reduced to a passive object of the same by means of purely formal legal arguments.

Third, Art. 234, par. 7 of the Criminal Procedure Code makes it possible to exclude without justification the exculpatory evidence that is included outside the general investigation period by carrying out procedural investigative actions (prequisition, search, seizure, etc.).[7]

[5] Н. Долапчиев, Наказателно право – обща част, С., " Издателство на Българската академия на науките", 1944 г., с.202.

[6] Пак там.

[7] В този см., вж., М. Чинова, Досъдебното производство по НПК – теория и практика, С., "Сиела", 2013 г., с.388.

Fourth, the continuation of the term in the criminal proceedings, according to Art. 185, par. 1 of Criminal Procedure Code is only possible if it is determined by the court or pre-trial bodies in the presence of valid reasons and the filing of an application before the expiration of the term. Probably, because the time for investigation is determined by law, not by a body of pre-trial proceedings or by the court, the legislator in par. 3 of Art. 234 talks about the extension of the investigation period. It is obviously a particular case of extension of the time-limit, since there is no significant difference between the extension and the extension of the time-limit, in both cases an additional period of time is added to one expiration date. But, and the "special" extension of the term within the meaning of Art. 234, par. 3 of the Criminal Procedure Code shall be implemented by decision of the prosecutor or of the administrative head of the respective prosecutor's office. Then, what is the guarantee that the extensions of the pre-trial time will not be carried out systematically for the prosecution's needs and too little, or at least for those of the defense?

Fifth, the availability of time-limits for pre-trial investigation encourages public authorities to transfer the evidence-based process primarily to the judicial phase, where the judicial investigation is conducted within a reasonable, not exactly specified, time. This inevitably leads to the occurrence of a probative incompleteness, which is in some cases absolutely insurmountable to the accused, even due to the nature of the evidence itself, which can be erased, destroyed or damaged by the beginning of the judicial investigation. On the other hand, probative deficiency is a basic prerequisite for raising and introducing unjustified and unlawful charges. It fills the environment for making erroneous conclusions about the existence of the necessary and sufficient grounds for drafting and filing the indictments in court (Article 246 of the Criminal Procedure Code), as the prosecutor is deprived of "... all the evidence that could be objectively gathered and investigate in the pre-trial investigation."[8]

Sixth, according to Art. 234, par. 7 of Criminal Procedure Code, the materials gathered outside the term for pre-trial investigation can not be used, but only when the sentence is handed down. Therefore, per argumentum a contrario, they could be used in the enforcement of other judicial acts. For example, when deciding to approve a settlement agreement - Art. 382 of the Criminal Procedure Code, or in the adoption of a decision to convict the accused, by releasing him from criminal responsibility by imposing an administrative penalty - Art. 378 Criminal Procedure Code. The conclusion is that the same evidence may be admissible or inadmissible depending on the requirements of the case, or in other words there is no obstacle to surrendering the probative value of the evidence in the case - something incompatible with the philosophy underlying in the Constitution of Republic of Bulgaria and the Bulgarian Criminal Procedure Code.[9]

Seventh, literal interpretation and application of Art. 234 par. 7 of the Criminal Procedure Code raises serious gaps in the practice, for example, is it unclear, should it be disqualified from the evidence in the case of certain protocols with justification for the accused only because the compulsory means of obtaining them (certification, perquisition, search etc.) were carried out within the time limit for pre-trial investigation, but the approval of the records by the court occurred later, after its expiration? In the Criminal Procedure Code, there is no specific answer to the question

[8] Н. Манев, Развитие на реформата на наказателния процес, С., "Сиела", 2018 г., с. 103.
[9] Вж в този см., пак там., с. 102.

what happens when the pre-trial proceedings are initiated against an unknown perpetrator (Article 215 of the Criminal Procedure Code) and no action has been taken within the prescribed timeframe to investigate the crime, but after the expiry of the time a person accused of being charged with the minutes of the first investigative action against him.

Eighth, the short deadlines for the pre-trial phase of the trial encourage pre-trial authorities to "look for" at the cost of all the confessions of the accused, in order to guarantee their accusation. The extraction and use of the confessions of the accused de lege lata is facilitated by the legislator with the institute of the interrogation of the accused before a judge - Art. 222 of the Criminal Procedure Code. The adoption of this procedural figure has the following meaning: "... after confession has been reached, the accused is interrogated before a judge, and the relevant protocol is drawn up. If in the course of the judicial investigation he gives a substantially contradictory explanation, only the record of the interrogation before a judge /to which he or she is given a prior power/ ... from what has been said so far ... the interrogation before a judge in the pre-trial proceedings is an institute of investigation /inquisitorial/. It introduces a preliminary force of evidence and reabilitates the accused's confession as the queen of evidence."[10] In summary, the short deadlines for investigation, especially of a complicated criminal activity, the preliminary proceedings motivate their position by compensating the insufficient time with methods from the inquisitorial process.

Ninth, the provision of an explicit deadline for pre-trial investigation is also contrary to european standards of protection. Under Article 6 (1) of the ECHR, every person is entitled to request that his case be dealt with within a reasonable time. The requirement of reasonableness of the term in European theory and practice aims not to accelerate the criminal proceedings but to prevent uncertainty in the situation of the accused for too long[11]. In criminal cases "... the guarantee for reasonable time is valid from the moment when the person is accused wich means from the moment it is significantly affected.[12]" Therefore the guarantee time applies as early as in the pre-trial proceedings. Under the ECHR, criminal cases are not dealt with in absolute terms[13]. The reasonableness of the time-limit depends always on specific circumstances such as the complexity of the case (number of accusations against one person, number of accused persons, amount of evidence, legal complexity of the concerned issues, etc.), the applicant's behavior and the behavior of the competent administrative and judicial authorities[14]. Thus, the European legislator appealed for a criminal trial that takes into account the needs of the defendant to fully counter the indictment according to the nature and peculiarities of each individual case and not to the expense of them in pursuing a speedy resolution of criminal cases because of the very speed as a value.

Tenth, the existence of a special term for pre-trial investigation also contradicts the right to sufficient time for the preparation of the protection provided in Art. 6, item 3, letter "b" of the ECHR. Ensuring sufficient time to prepare the

[10] И. Сълов, Актуални въпроси на наказателния процес, С., "Нова звезда", 2014 г., с. 46.

[11] Харис, О' Бойл, Уробрик, Бейтс, Бъкли, Право на европейската конвенция за правата на човека., С., "Сиела", 2015 г., с. 523.

[12] Пак там.

[13] Пак там., с. 524.

[14] Pedersen and Baadsgaard v. Denmark [GC], no. 49017/99, judgment of 17 December 2004, Reports 2004-XI.

defense is designed to protect the accused from a quick trial[15]. By analyzing the case law of the Court of Human Rights, there would be no violation of Art. 6 (3) of the Convention if, within the time-limit for pre-trial investigation, the accused has sufficient time to take full account of the facts of the case, provided that his competence, his need for further training, authorization of a defense counsel, for a longer discussion meeting with a lawyer[16].

3. Conclusions

In our view, the written above is sufficient to justify the understanding that the introduction of an absolute time-limit for pre-trial investigation runs counter to both the principle of disclosure of the objective truth and the right to personal protection. Therefore, "de lege lata" in Art. 234 form Criminal Procedure Code terms is necessary to be understanded and treated as instructive and disciplining, and in no way fatal. In agreement with this conclusion, we propose 'de lege ferenda' to amend the text in line with the broader (European) requirement for a reasonable period or to build a new, more flexible, procedure for extending the time-limits for investigation in the preliminary phase. It is in the interest of the participants in the criminal proceedings that the legislator should strive for the complete elimination of the pre-trial investigation periods rather than for their extension or even less to their reduction.

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References

- С. Павлов, Наказателен процес на Република България – обща част, С. "Сиби",1996 г.
- Р. Ташев, Обща теория на правото, С., "Сиби", 2010 г.
- В. Ганев, Курс по обща теория на правото – увод и методология на правото, С., "Академично издателство Проф. Марин Дринов", 1995 г.
- Н. Долапчиев, Наказателно право – обща част, С., "Издателство на Българската академия на.
- М. Чинова, Досъдебното производство по НПК – теория и практика, С., "Сиела", 2013 г.
- Н. Манев, Развитие на реформата на наказателния процес, С., "Сиела", 2018 г.
- И. Сълов, Актуални въпроси на наказателния процес, С., "Нова звезда", 2014 г.
- Харис, О' Бойл, Уробрик, Бейтс, Бъкли, Право на европейската конвенция за правата на човека., С., "Сиела", 2015 г.
- Darryl K. Brown, Jenia Iontcheva Turner, Bettina Weisser, The Oxford Handbook of Criminal Process, Published: 14 April 2019 ISBN: 9780190659837.
- Иванов М.М. Специалните служби и политическата класа.// Professional, 2015, брой 13.

[15] *Müller and Others v. Switzerland*, 24 May 1988, § 35, Series A no. 133.

[16] Харис, О' Бойл, Уробрик, Бейтс, Бъкли, Право на европейската конвенция…, цит съч, с., 561-562: X vs Austria, Le compte vs Belgium, Samer vs Germany, Kremzow vs Austria и др.

ISSUES OF CONTROVERSIAL PRACTICE REFERRING TO THE CRIME OF FALSE TESTIMONY

Mirela GORUNESCU*

Abstract

The crime of false testimony is one of the crimes which are traditionally found in our criminal legislation, the judicial practice recording also specific situations which required the application of the incrimination text which defined this crime. It can be considered that we are dealing with a crime which can no longer present any difficulties in relation to the interpretation and application of the incrimination norm with regard to the particular deeds committed. However, many elements are still encountered with respect to the interpretation of the incrimination norm, which generate different solutions of application, a fact which –in accordance with the rigors of the criminal law- is not to be desired. This study approaches two of these issues, namely the juridical significance of the refusal of the person heard as a witness to give any statements in such capacity and, on the other hand, the possibility of the realization of a formal concurrence of crimes when the person summoned as a witness, through his/her false or incomplete statement intends to create a situation more favorable to a person regarded by the factual situation.

Keywords: *false testimony; crimes against the service of justice; witness' refusal to give a statement; the privilege against self-incrimination; favoring through a false testimony.*

1. General Issues

The crime of false testimony is provided under Art. 273 of the Criminal Code in a standard version and in an aggravated version. According to Art. 273 para. (1) of the Criminal Code, standard false testimony is represented by *the deed perpetrated by a witness who, within a criminal case, civil case, or any other procedure wherein witnesses are heard, makes deceitful statements or fails to tell everything s/he knows in relation to the facts or essential circumstances s/he is questioned about.*

The aggravated version constitutes, according to para. (2), *the false testimony given: a) by a witness with protected identity or found in the Witness' Protection Program; b) by an undercover investigator; c) by a person who prepares an expert appraisal report or by an interpreter; d) in connection with a deed for which the law provides the penalty by imprisonment or imprisonment for 10 years or longer.*

In accordance with doctrinarian opinions, the crime of false testimony has as its special juridical object the social relations regarding the proper service of justice. The crime can also have a secondary juridical object, consisting in the social relations regarding certain essential attributes of the person (dignity, liberty) or in the social relations with a patrimonial character,

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because such relations can also be breached through the perpetration of the deed[1].

In accordance with the provisions of the legislation in force, a witness is the person who, being informed of certain facts, data or circumstances which constitute evidence within a judicial lawsuit, is called to be heard. Also, the jurisprudence stated that the persons who are parties in a lawsuit[2], as well as the main subjects of the lawsuit cannot have the capacity of witness and, therefore, they cannot be active subjects of the deed of false testimony [Art. 115 para. (1) of the Criminal Procedure Code]. It is considered that the lawmaker instituted the incompatibility between the capacity of a party or of a main lawsuit subject within a lawsuit and the witness capacity, considering that, since the parties or main lawsuit subjects can be heard in such capacity, and their statements constitute evidentiary means, the accumulation of the capacity of party or main lawsuit subject and of the witness capacity cannot be justified[3]. If a person loses the capacity of party or main lawsuit subject within the lawsuit, such person may be heard as a witness.

According to Art. 117 of the Criminal Procedure Code, the following persons shall have the right to refuse to be heard as a witness: the spouse, direct ascendants and descendants, as well as the siblings of the suspect or of the defendant, and the persons who were the spouses of the suspect or of the defendant. Instead, if the abovementioned persons agree to make statements, the provisions regarding the witnesses' rights and obligations shall be applicable to such persons.

According to Art. 116 para. (3) of the Criminal Procedure Code, those facts or circumstances whose secret or confidential nature may stand good under the law in relation to the judicial bodies cannot form the object of the witness' statement. These are the facts or circumstances which came to the knowledge of the witness within the exercise of his/her profession. By exception, such facts or circumstances may form the object of the witness\ statement when the competent authority or the entitled person expresses its consent in this respect or when there is another legal cause for removing the obligation to keep the secret or maintain the confidential nature (for instance, the obligation to incriminate).

False testimony is punished in a more severe manner if it is perpetrated by a witness with protected identity or found in the Witness Protection Program, by an undercover investigator, by a person who prepares an expert appraisal report or by an interpreter. The reason for aggravation in relation to the capacity of the active subject refers to the special position of such a person in the criminal lawsuit, based on relations of trust (in case of the undercover investigator, expert or interpreter, who are specialists in certain fields and must assist the court of law in the process of finding the truth and serving justice). In the case of protected witnesses, the additional effort of the judicial bodies to ensure their protection in exchange for their testimony justifies the aggravation of the punishment in case the trust in their *bona fide* is breached.

The witness with a protected identity is the threatened witness, according to Art. 125 of the Criminal Procedure Code, in relation to whom any of the protection measures provided under Art. 126 para. (1) letters c) and d) of the Criminal Procedure Code was taken. Thus, if there is any reasonable suspicion that the life, bodily integrity,

[1] V. Dobrinoiu, I. Pascu, M.A. Hotca, C. Păun, I. Chiş, M. Gorunescu, N. Neagu, M. Dobrinoiu, M. Sinescu, *Noul Cod penal comentat, Partea specială*, Universul Juridic Publishing House, Bucharest, 2014, p. 249.

[2] Braşov Court of Appeal, Criminal Section, Dec. no. 198/A/2000, on *www.ctce.ro*.

[3] Gr. Theodoru, *Tratat de drept procesual*, Publishing House Hamangiu, Bucharest, 2007, p. 371.

freedom, assets or professional activity of the witness or of a member of the witness' family might be endangered as a result of the data provided by such witness to the judicial bodies or as a result of his/her statements, in relation to the respective person shall be ordered the measure of the protection of the data regarding his/her identity, by giving to such person a pseudonym under which such witness shall sign his/her statement, or by hearing the respective person in his/her absence, by means of audio-video communication devices, with distorted voice and image, when the other measures are not sufficient.

The witness found in the Witness Protection Program is subject to the regulations of the Witness Protection Law[4]. The Witness' Protection Program represents the specific activities conducted by the National Office for Witness Protection, with the support of the central and local public administration authorities, for the purpose of protecting the life, bodily integrity and health of the persons who obtained the capacity of protected witnesses, under the conditions provided by the law. The protected witness is the witness, the members of the witness' family and the persons close to the witness, who are included in the Witness' Protection Program, according to the provisions of the law.

According to Art. 148 of the Criminal Procedure Code, undercover investigators are operative agents of the judicial police. In the case of investigating crimes against national security and crimes of terrorism, the operative agents of the State bodies which conduct, under the law, information activities in view of ensuring national security can also be used as undercover investigators. The authorization to use undercover investigators may be issued by the prosecutor under the conditions of Art. 148 para. (1) of the Criminal Procedure Code. Undercover investigators can be heard as witnesses within the criminal lawsuit under the same conditions as threatened witnesses.

The objective side of the crime of false testimony is realized in terms of the material element by means of two alternative methods: either deceitful statements are made, or not everything that is known about the essential circumstances in a case in which witnesses are heard is told, and we are dealing with a manifestation liable to mislead judicial bodies.

So, in the first case, we are dealing with an action, in which case the witness, expert or interpreter makes deceitful statements, while, in the second case, we are dealing with the situation when not everything that is known about the essential circumstances for the judicial case is told[5].

The normative method which is of interest for this study is "[*the witness*] *is not telling everything that she knows"* , which means manifesting reticence as far as what s/he stated is concerned, keeping quiet, concealing all or part of what the witness knows. Keeping quiet must refer to something that was known to the witness, and not what the witness might have known[6].

A criminal significance shall be attached only to that omission liable to mislead the judicial body. A person's refusal to testify is not the equivalent of the omission in terms of attitude, which

[4] Law no. 682/2002 on the witness protection, published in The Official Journal no. 964 of December 28, 2002, as subsequently amended and supplemented.

[5] V. Dobrinoiu, I. Pascu, M.A. Hotca, C. Păun, I. Chiș, M. Gorunescu, N. Neagu, M. Dobrinoiu, M. Sinescu, *op.cit.*, p. 249.

[6] V. Dongoroz and others, *op. cit*., vol. IV, p. 182-183, p. 183.

can be the manifestation of the material element of a false testimony.[7]

The statements or omissions of a witness must refer to essential circumstances.

Essential circumstances must represent those situations and circumstances which refer to the main fact of the case, and not to any adjacent issues which are not related thereto[8]. Therefore, the following can, for instance, be considered circumstances essential to the case: the constitutive elements and the mitigating or aggravating circumstances within a criminal lawsuit; the *de facto* grounds in case of a divorce lawsuit in the civil field; as well as the other evidentiary facts which may serve to the solving of a case and to the finding of the truth.

The essential character must be determined in accordance with the object of the evidence, in the sense that it is conclusive in relation to the charge brought against the defendant or in relation to any other issue liable to influence the defendant's criminal liability.

The realization of the material element of the crime requires that the witness should have been asked by the authorized body (prosecutor's office, court of law, etc.) or by the lawsuit parties or by the main lawsuit subjects with regard to the essential circumstances. Thus, in the judicial practice it was decided that the fact that the defendant declared that she was in another locality for a certain period of time together with her husband, charged with the perpetration of a crime during the same period of time, does not represent a crime of false testimony, since she was not expressly asked whether the defendant was in the same locality as she was at the time when the crime was perpetrated and neither did she state that the defendant would not have left the locality in the mentioned period of time[9].

If, through his/her deceitful statements, the witness tries to avoid that his/her criminal liability be entailed, such fact no longer constitutes a crime (according to Art. 118 of the Criminal Procedure Code, the witness has the right to not accuse oneself). A contrary solution is considered to lead to the conclusion that the obligation of self-incrimination is incumbent on those persons who committed a crime, which conclusion cannot be accepted as long as the obligation to inform on crimes perpetrated by other persons exists only in the cases in which the law expressly provides so[10].

2. Issues Specific to the Crime of False Testimony

Constantly, in the doctrine and in the judicial practice, the issue is raised to establish whether the crime of false testimony may be perpetrated from an objective point of view is the refusal to make statements [*sic!*], namely the maintenance of passivity, given that the crime of false testimony is a crime which implies perpetration in all the cases[11].

With respect to this issue, the specialty doctrine traditionally differentiates between the normative assumption "[*the witness*] does not declare all that s/he knows" and the factual assumption to refuse to make any statements.

[7] V. Dobrinoiu, I. Pascu, M.A. Hotca, C. Păun, I. Chiş, M. Gorunescu, N. Neagu, M. Dobrinoiu, M. Sinescu, *op.cit.*, p. 249.

[8] *Idem.*

[9] HCCJ, Criminal Section, Decision no. 5430/2004, in RDP no. 4/2005, p. 147.

[10] V. Dobrinoiu, I. Pascu, M.A. Hotca, C. Păun, I. Chiş, M. Gorunescu, N. Neagu, M. Dobrinoiu, M. Sinescu, *op.cit.*, p. 249.

[11] V. Dongoroz and a collective of authors, *Explicaţii teoretice ale Codului penal român*, The Publishing House of the Romanian Academy and C.H. Beck Publishing House, Bucharest, 2003, p. 159.

Thus, a doctrinarian opinion indicates that: "*A criminal significance shall be attached only to that omission liable to mislead the judicial body. A person's refusal to testify is not the equivalent of the omission in terms of attitude, which can be the manifestation of the material element of a false testimony. In the juridical literature, the following opinion to which we adhere was expressed, that the explicit refusal of a person who accepted to testify to answer certain questions has no criminal significance either, in the sense of the provisions of Art. 273 of the Criminal Code*[12]*. Such an explicit refusal, clearly expressed, is not, as it was stated, liable to mislead the judicial body, but it draws attention to the necessity of producing new evidence in order to find out the truth*."

The specialty doctrine often indicates that: "*the witness enjoys the right to keep quiet and to not contribute in his/her self-incrimination, to the extent to which, through his/her statement, s/he might incriminate himself/herself [for instance, in the cases in which, as a result of successive severances, a suspect or a defendant in the initial file (the basic file) becomes a witness in a file severed from the basic file; in such capacity, s/he enjoys the right to silence and to not incriminate himself/herself with regard to certain issues which, once reported, might incriminate him/her in the file in which s/he is being charged]*." [13]

Under these conditions, my refusal to make a statement does not have in any case the purpose of encumbering the service of justice, but only the purpose that the witness ***should protect his/her lawsuit situation, representing a bona fide exercise of the right to not incriminate oneself.***

In the same respect, the specialty literature[14] indicates that: "*The privilege against self-incrimination and the defendant's right to keep quiet, implicit guarantees of the right to a fair trial, have been examined, after 1993, in several cases on the dockets of the E.C.H.R. (J.B versus Switzerland, 2001, IJL GMR and AKP versus United Kingdom, 2000, Kansal versus United Kingdom, 2004, Jalloh versus Germany, 2006, Weh versus Austria, 2004, Allan versus United Kingdom, 2002, Muray versus United Kingdom, 1996, Serves versus France, 1997), being constantly revealed the necessity to prohibit the use of any coercion means in order to obtain evidence, against the defendant's will, as well as the fact that, in relation to the autonomous character of the notion of "criminal charge*", consideration should be given to the fact that the witness also enjoys this right to the extent to which his/her statement might lead to self-incrimination.

In summary, the privilege against self-incrimination is a principle according to which the State cannot compel a suspect to cooperate with his/her prosecutors by providing evidence which might incriminate him/her.

Or, under the conditions of hearing a person having the witness capacity, subject to taking an oath and, especially, subject to the criminal punishment of perpetrating the crime of false testimony, with respect to facts or circumstances which might incriminate him/her, E.C.H.R. - in its jurisprudence – has elaborated the so-called "theory of the three difficult choices with

[12] A. Filipaş, *Infracţiuni contra înfăptuirii justiţiei*, The Publishing House of the Romanian Academy, Bucharest, 1985, p. 56.

[13] M. Udroiu, *Drept penal, partea specială,* C. H. Beck Publishing House, Bucharest, 2016, p. 256.

[14] C. Rotaru, A. Trandafir, V. Cioclei, *Drept penal, Partea specială II,* C.H. Beck Publishing House, Bucharest, 2016, p. 102. The author quotes from the considerations of Decision no. 213/2015 issued by the High Court of Cassation and Justice, consulted at *http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=124329*).

which the person is faced", according to which it is not natural that the alleged perpetrator should be asked to choose between being punished for his/her refusal to cooperate, providing incriminating information to the authorities or lying and risking conviction for this reason (case Weh versus Austria, 2004)".

In the recent judicial practice, however, it was deemed that the witness either *makes deceitful statements* which entails *de plano* the fact that the witness accepts to testify but distorts the truth with respect to the essential circumstances of the case in which s/he is heard, case which is not –however- applicable in this cause – or *does not tell everything that s/he knows in connection with the facts or with the essential circumstances s/he is asked about*. Not telling everything that s/he knows means manifesting a reticence as far as his statements are concerned, keeping quiet, concealing all or part of what the author knows"[15].

Also, the court considered that, by looking at the factual method of the refusal to testify, two distinct situations can be again identified. The first is that of the "refusal to have the witness capacity – in which case the respective person refuses to take the oath and to have the witness capacity", a hypothesis in which the court deemed that we cannot be in the presence of the crime of false testimony, but eventually in the situation of committing a judicial default or of any other crime, as applicable.

The second situation concerns: "the case in which, although the oath was taken, the witness refuses to tell anything about certain essential circumstances about which s/he is asked". Against this theoretical background, the court considered that: "the total refusal to testify, given that the witness capacity is a capacity won for the case because the person took the oath, is the equivalent of: *not telling everything s/he knows* in connection with essential elements on which s/he is heard"[16].

Moreover, the court considered that: "it matters not for the existence of the crime whether the refusal is an explicit refusal – when the witness expressly declares that s/he refuses to testify – or an implicit refusal – when the witness, without making any express reference, chooses to keep quiet on certain matters related to the essential circumstances of the case in which s/he is being heard." The argument invoked by the court of law to support this statement is an argument which adds to the law, in the sense that: "it cannot be considered that the crime of false testimony, in this version, would exist only under the conditions of a partial and tacit refusal, but also under the conditions of a total and explicit refusal, because it would be a non-sense that the one who is committing less should perpetrate a crime, while the one who is committing more should not be considered as a deceitful witness."[17]

These arguments, which obviously represent an analogical supplement of interpretation *in malam parte* of a criminal juridical norm, reveal, in the opinion of the merits court that the witness' refusal to make a statement represents the crime of false testimony.

When analyzing the constitutive elements of the crime of false testimony, they should start from the reason for which the lawmaker would have incriminated such a behavior. Obviously, such a legal text was included in the group of crimes against the service of justice, because it allows the punishment of anti-social behaviors whereby a circumstance perceived directly

[15] HCCJ, Criminal Division, Sentence no. 363/2017, final through Criminal Decision no. 13/2018, not published.
[16] HCCJ, Criminal Division, Sentence no. 363/2017, final through Criminal Decision no. 13/2018, not published.
[17] *Idem*.

by a person heard as a witness in a judicial case is presented in a distorted manner. Under these conditions, for a crime of false testimony to exist, there must exist in fact an effort to mislead the body which is conducting the hearing.

Moreover, the existence of the crime of false testimony requires that the person conducting the hearing of the person having the witness capacity, ***should have asked specific questions about the circumstances that s/he considers being essential.***

The argument made by the court according to which "it cannot be considered that the crime of false testimony, in this version, would exist only under the conditions of a partial and tacit refusal, but also under the conditions of a total and explicit refusal, because it would be a non-sense that the one who is committing less should perpetrate a crime, while the one who is committing more should not be considered as a deceitful witness" is, in fact, erroneous. This because the one who is apparently committing less causes more disturbance in the process of serving justice. Through the effort of making a statement which is purposefully elliptical, the person heard as a witness distorts the real facts and makes the judicial body have an erroneous representation of the factual situation, considering that such representation is correct. The behavior of refusing to make another statement is not specifically covered by the incrimination norm under Art. 273 of the Criminal Code.

Moreover, the court highlighted that the crime of false testimony constitutes a special version of favoring a perpetrator since, in the criminal cases; the false testimony can also lead implicitly to the favoring of the perpetrator. Under these conditions, the court of law indicates: "regardless of the fact that, through the false testimony made, the defendant is acting with a direct intention – pursuing to favor a perpetrator – or with an indirect intention – *i.e.* not expressly pursuing to favor the perpetrator but accepting the possibility that such result could also occur – the same deed cannot meet the material elements of two distinct crimes, while only the special crime, that is the false testimony, shall be maintained."

Also in the judicial practice the issue is raised whether the crime of favoring the perpetrator may be committed under the conditions of a formal concurrence of crimes with the false testimony.

In our opinion, such a juridical classification of the deed cannot be accepted, since it is in disagreement with the specific nature of the incrimination of the deed of favoring the perpetrator. Thus, the specialty doctrine indicates that: "The character of general and, therefore, subsidiary norm of the crime of favoring the perpetrator entails that, if the assistance given takes the form of a false testimony, only this latter crime shall be maintained.[18]"

In the same manner, in the judicial practice it is indicated that: "the crime of favoring the perpetrator has a subsidiary nature, and it cannot be maintained if there are other special incriminations of the favoring (such as the false testimony or the facilitation of escape). It is noted that, in the case, there is a special incrimination (Art. 260 of the Criminal Code – the false testimony), so that the crime of favoring the perpetrator and the crime of false testimony cannot be maintained concomitantly, but only the crime of false testimony can be maintained … "[19]

It was correctly considered that the relationship between the two crimes (namely

[18] C.Rotaru, A. Trandafir, V. Cioclei, Drept penal partea specială, C.H. Beck Publishing House, Bucharest, 2016, p. 69.

[19] Timişoara Court of Appeal, Criminal Division, Decision no. 1174/2013 commented in C.Rotaru, A. Trandafir, V. Cioclei, Drept penal partea specială, C.H. Beck Publishing House, Bucharest, 2016, p. 69.

the favoring of the perpetrator and the false testimony) is a relationship of the type genre – species, the testimony being nothing other than a special form of favoring. Under these conditions, maintaining a formal concurrence of crimes between the crime of favoring the perpetrator and the false testimony is in complete disagreement with the specific nature of the incrimination norms included in the Title referring to the crimes against the service of justice from the Criminal Code and does nothing other than breaching the *ne bis in idem* principle.

Thus, the more recent specialty doctrine indicates that: "The character of general and, therefore, subsidiary norm of the crime of favoring the perpetrator entails that, if the assistance given takes the form of a false testimony, only this latter crime shall be maintained[20]". In the same manner, the judicial practice indicates that: "the crime of favoring the perpetrator has a subsidiary nature and it cannot be maintained if there are other special incriminations of the favoring (such as the false testimony or the facilitation of escape).

Conclusion

Although the crime of false testimony is one of the incriminations which have continuity in the field of our criminal legislation, the matters related to such crime are far from being clarified. On the contrary, in our opinion, this crime gained new interpretation and application difficulties, especially by reference to the European standard regarding the witness protection, which witness is also recognized the privilege against self-incrimination. Under these conditions, it is obvious that the refusal to make a statement in witness capacity, especially in case the judicial body hears in this capacity the very person against whom a criminal complaint is submitted, for instance, should not have any criminal valences.

References

- V. Dobrinoiu, I. Pascu, M.A. Hotca, C. Păun, I. Chiș, M. Gorunescu, N. Neagu, M. Dobrinoiu, M. Sinescu, *Noul Cod penal comentat, Partea specială*, Universul Juridic Publishing House, Bucharest, 2014.
- Gr. Theodoru, *Tratat de drept procesual*, Hamangiu Publishing House, Bucharest, 2007.
- V. Dongoroz and a collective of authors, *Explicații teoretice ale Codului penal român*, The Publishing House of the Romanian Academy and C.H. Beck Publishing House, Bucharest, 2003.
- A. Filipaș, *Infracțiuni contra înfăptuirii justiției*, Romanian Academy Publishing House, Bucharest, 1985.
- M. Udroiu, *Drept penal, partea specială*, C.H. Beck Publishing House, Bucharest, 2016.
- C. Rotaru, A. Trandafir, V. Cioclei, *Drept penal, Partea specială II*, C.H. Beck Publishing House, Bucharest, 2016.

[20] C.Rotaru, A. Trandafir, V. Cioclei, Drept penal partea specială, C.H. Beck Publishing House, Bucharest, 2016, p. 69.

REFLECTING THE RIGHT TO PRIVACY IN THE DECISIONS OF THE CONSTITUTIONAL COURT OF ROMANIA

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Abstract

The need to protect has deep roots in the history of law. Paradoxically, the more humanity has endeavored to legislate, the abuse and the lack of real support from those responsible for ensuring security and peace have increased.

That is how society felt that, besides the internal regulation of privacy, it had to appeal to international organisations whose purpose was to persuade states that they alone could be able to resist any abusive interference in the individual's privacy.

The Universal Declaration of Human Rights established in 1948 that no man would be the object of arbitrary interference in his private life, as long as there is legal protection against these intrusions[1].

Article The Right to Privacy written by Samuel Warren and Louis Brandeis, appeared in the Harvard Law Review, volume IV, issue 5 of December 15, 1890, is considered to be one of the most influential essays in the history of American law2, and the right to private life is defined by the authors as the right to be left alone or the right to loneliness3.

The social evolution and the transformations of law have gradually led to an increasing distance between the initial desideratum - that of loneliness - and the real need to ensure a safety and protection environment for each individual.

Even if at the theoretical level any individual has the right to be left alone, in reality this right is not necessarily illusory, but rather impossible to be respected in the way we would probably want each one of us.

Complex threats, from wars, civil movements, terrorism, to cyber attacks, and the need for strong nations to dominate, have transformed the right to private life into a promising slogan whenever interest calls for it, or, worse, have reduced to noticeable dimensions invoking the need for over-protection of the individual by the state.

But what are governments doing in the name of protecting their own citizens? They violate private life, but they do it under the protection of the law, they do not respect fundamental rights, but their action appears justified, they restrict liberties and even suppress any intimacy in the name of the protection of the general good.

What does ultimately mean private life and how much should the state be interested in protecting it?

Of course, the notion itself is all-encompassing, with unspeakable valences and hidden ramifications throughout our existence.

We have a private life from the moment we are born, but others are responsible for it, private is the home with all its dependencies, private information about the state of health, or personal data, at work we have the right to intimacy, even a detainee has the right to ensure and respect his private life in designated spaces and the list can continue.

By making a parallel between private life in the American model and the way it is protected in European law, a fundamental difference emerges.

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[1] http://www.un.org/en/universal-declaration-human-rights/.

[2] Susan E. Gallagher, Introduction to "The Right to Privacy" by Louis D. Brandeis and Samuel Warren: A Digital Critical Edition, University of Massachusetts Press, forthcoming.

[3] Warren & Brandeis, paragraph 1.

If in American law individual autonomy is the expression of absolutism, being the core of the existence of social rights, Europeans did not think this notion as an independent, stand alone, supreme relation to the other rights recognized by the individual but as an important, but not exclusive component or outside any limitations or restrictions.

In European law, the balance between the protection of the general interest and the need to guarantee, within reasonable limits, respect for the right to privacy was maintained.

Although Romania signed the Universal Declaration of Human Rights in 1948, the constitutional right to privacy did not find a distinct regulation either in the 1848 constitution or in 1952 or in 1965.

At present, the Romanian Constitution protects and regulates the right to private life and the authorities have the obligation to respect it.

Keywords: *the constitutional court of Romania, the right to private life, the right to family life, unconstitutionality*.

1. The proper regulation

1.1. The Right to Private Life in the Romanian Constitution

Article 26 of the Romanian Constitution

Intimate, family and private life

1. Public authorities respect and protect their intimate, family and private life.
2. The individual has the right to dispose of himself if he does not violate the rights and freedoms of others, public order or good morals.“

Although Article 26 of the Constitution of Romania recognizes the right to private life with all its valences (intimate, family), it does not define the notions, for the simple reason that a fundamental law does not have the role of limiting the situations that the practice could generate, leaving the lawyer, the courts, the doctrine, the freedom to interpret and create the right.

1.2. The right to privacy in the Civil Code

The Civil Code, which entered into force on 1 October 2011, dedicates a whole chapter (Chapter II) of respect for the human being and its inherent rights, and in Section II deals with respect for the privacy and dignity of the human person.

According to Article 71 of the Civil Code, every person has the right to respect for his private life, just as no one can be subjected to any interference in his or her private, personal or family life, or at home, residence or correspondence without his consent or without complying with the limits laid down in Article 75 of the Civil Code[1].

Particular importance is attached to correspondence, manuscripts or other personal documents, as well as to the personal information of a person, which can not be used without its consent or without observing the limits provided by Article 75 of the Civil Code.

With a wider scope of privacy, Article 58 of the Civil Code speaks about the right

[1] Article 75 Civil Code Limits: (1) Do not violate the rights set out in this section, which are permitted by law or international human rights conventions and pacts to which Romania is a party. (2) The exercise of constitutional rights and freedoms in good faith and in compliance with the international covenants and conventions to which Romania is a party shall not constitute a violation of the rights provided for in this section.

of personality, giving another valence to the protection we are talking about.

Thus, everyone has the right to life, to health, to physical and psychological integrity, to dignity, to their own image, to respect for private life, and other such rights recognized by law.

Let us say that all these regulations would be deprived of practical utility, as long as there were no punitive measures meant to sanction any violation of the values under the protection of the law.

As superficial as it may seem at first glance, or because of excessively long periods in national courts, we can not deny their importance and necessity, because the only way to prevent abuse is by imposing rules and imposing sanctions.

Speaking of civil sanctions, the Civil Code in Article 252 protects the human personality by establishing that every individual has the right to protect the intrinsic values of the human being, such as life, health, physical and mental integrity, dignity, private life, freedom of conscience , scientific, artistic, literary or technical creation.

1.3. The right to privacy in the Criminal Code

We have decided to end with the Romanian Penal Code, which came into force in February 2014, precisely because its regulations should be, in essence, a stepping stone for potential criminals, and coercion measures get more serious, going as far as affecting the freedom of the guilty person and the damage to her property through the imposition of fines or civil damages.

In Chapter IV on offenses against freedom of the person, Article 208 governs the offense of harassment, according to which the action of a person who repeatedly pursues, without right or without a legitimate interest, a person or oversees his home, work or other frequented places by causing it a state of fear, shall be punished by imprisonment from 3 to 6 months or by fine.

Making telephone calls or communications by means of remote transmission which, by frequency or content, causes a person to fear, shall be punished by imprisonment from one month to three months or by a fine if the act does not constitute a more serious crime .

The initiation of criminal proceedings takes place at the preliminary complaint of the injured party .

At first sight, the punishments could be considered ridiculous, but the fact that there was a concern to regulate this kind of acts denotes an anchoring of the current legislation to social transformations and the evolution of inter-human relations.

Even if the state is the one who intervenes to sanction, by bringing to account the guilty ones, it remains to the victim's discretion if they choose to bring the offenders before the law, so that the initiation of criminal proceedings only takes place at the preliminary complaint of the person injured.

Domicile, as a component of privacy, is protected in Chapter IV, Article 224, on Domestic Violence.

Intangible access in any way to a house, room, dependency or enclosure connected to the house without the consent of the person using it or the refusal to leave them at its request shall be punished by imprisonment from 3 months to 2 years or a fine. If the act is committed by an armed person, during the night or by use of lying qualities, the punishment is imprisonment from 6 months to 3 years or a fine.

The initiation of criminal proceedings takes place at the preliminary complaint of the injured party .

And in the case of this crime, criminal liability depends on the injured party's

decision, but sanctions are more drastic, and there is even an aggravating variant.

A new incrimination in Romanian criminal law is the introduction of Article 226 on the violation of private life.

Although, at first glance, it could be considered a reiteration, or even a duplication of other offenses (such as home violence), in fact this offense concerns the attainment of privacy by specific methods, involving the use of techniques more or less sophisticated surveillance, using instruments and means capable of intruding a person's private life in a way that is sometimes inscrutable.

Taking pictures, capturing or recording images, listening with technical means, or recording audio are ways to accomplish this type of offense, and the disclosure, broadcasting, presentation or transmission without right of the sounds, conversations or images provided in the form of a crime, have the character of aggravating, the limits of punishment being increased.

The fact that even in the case of this crime the legislator left the injured person the right to decide whether the offender was to be held criminally liable was originally justified as a guarantee that the individual is free to decide for himself what actions he / she is injuring or not.

In fact, the practice has shown that the number of cases concerning the investigation of this last crime, for example, is low, the victims often choose to remain passive.

The reasons why the passive subjects of this crime decide not to denounce this type of antisocial behavior that affects their right to private life are multiple, starting from the social implications of such an approach, fear of repression, shame, or simply distrust of force government to stop these abuses.

2. Decisions of the Constitutional Court of Romania on the analysis of private life

2.1. DECISION[2] no. 1258/2009 regarding the admission of the unconstitutionality exception of the provisions of Law no. 298/2008 regarding the retention of the data generated or processed by the providers of electronic communications services for the public or public communications networks, as well as for the amendment of the Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector

The subject of the exception of unconstitutionality was Article 1 and Article 15 of Law no. 298/2008 on the retention of data generated or processed by providers of publicly available electronic communications services or public communications networks and amending Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector ", published in the Official Journal of Romania, Part I, no.780 of 21 November 2008.

Article 1. - "(1) This law establishes the obligation for the providers of public electronic communications networks and services to retain certain data generated or processed in the framework of their activity of providing electronic communications services, for making them available to the competent authorities for use in research, discovery and prosecution of serious crimes.

(2) This law applies to the traffic and location data of natural and legal persons as well as related data necessary to identify the subscriber or the registered user.

[2] Text published in the Official Journal of Romania, in force since November 23, 2009.

(3) This law shall not apply to the content of the communication or the information consulted during the use of an electronic communications network.

(4) The enforcement of the provisions of the present law is done in compliance with the provisions of the Law no. 677/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data, as subsequently amended and supplemented, as well as of Law no. .506 / 2004 on the processing of personal data and the protection of privacy in the electronic communications sector, with further additions. ";

Article 15. - "Providers of public communications networks and providers of publicly available electronic communications services shall, at the request of the competent authorities, on the basis of the authorization issued in accordance with the provisions of Article 16, transmit immediately the data retained under this law, except in cases of force major. "

The author of the unconstitutionality exception criticized the retention of the data generated or processed by the providers of publicly available electronic communications services or public communications networks and the amendment of the Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector .

These regulations, claimed the author of the exception affect the exercise of the right to free movement, the right to private life, private and family life, affect the secrecy of correspondence and freedom of speech.

Regarding the clarity and precision of the regulations under consideration, the Constitutional Court has found that they give rise to abuses in the retention, processing and use of data stored by providers of publicly available electronic communications services or public communications networks.

Even if it is remembered that the right to privacy, the secrecy of correspondence and freedom of expression may be restricted or limited, however, any interference must be regulated in a clear, predictable and unambiguous manner.

Lastly, the Court reminds the importance of the obligation to refrain from any interference in the exercise of citizens' rights and freedoms in the matter of personal rights such as the right to intimate and free speech and the processing of personal data.

2.2. DECISION[3] no. 440 of 8 July 2014 on the exception of the unconstitutionality of the provisions of Law no.82 / 2012 on the retention of data generated or processed by the providers of public electronic communications networks and of the providers of publicly available electronic communications services, as well as for the modification and completing the Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector and Article 152 of the Code of Criminal Procedure

The subject of the exception of unconstitutionality was the provisions of the Law no.82 / 2012 on the retention of the data generated or processed by the providers of public electronic communications networks and the providers of publicly available electronic communications services, as well as for amending and supplementing Law no.506 / 2004 on the processing of personal data and the protection of privacy in the electronic communications sector, republished in the Official Journal of Romania, Part I, no. 211 of March 25, 2014,

[3] Text published in the Official Journal of Romania, in force since September 4, 2014.

and article 152 of the Criminal Procedure Code:

Article 152 of the Criminal Procedure Code: "(1) The criminal investigation authorities, with the prior authorization of the judge of rights and freedoms, may require a provider of public electronic communications networks or a provider of publicly available electronic communications services to transmit retained data under the special law on the retention of data generated or processed by providers of public electronic communications networks and providers of publicly available electronic communications services other than the content of communications where there is reasonable suspicion of an offense; and there are grounds for believing that the requested data constitutes evidence for the categories of offenses provided by the law on the retention of data generated or processed by the providers of public electronic communications networks and the providers of elec- tronic communications services for the public.

(2) The judge of rights and freedoms shall pronounce within 48 hours on the request of the criminal prosecution bodies to transmit the data, through reasoned conclusion, to the council chamber.

(3) Providers of public electronic communications networks and providers of publicly available electronic communications services who cooperate with the criminal investigation bodies are obliged to keep the secret of the performed operation. ".

The author of the unconstitutionality objection said that the criticized texts violate the constitutional provisions of Article 26 on intimate, family and private life.

In 2012, following the defeat to the Constitutional Court by Decision[4] No. 1258/2009, a new transposition of Directive[5] 2006/24 / EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58 / EC in the national legislation, by Law no.82 / 2012, republished in the Official Journal of Romania, Part I, no.211 of 25 March 2014.

According to the Constitutional Court, Law no.82 / 2012 did not bring substantial modifications to the previous unconstitutional law, which provided identical solutions ignoring Decision No. 1258 of October 8, 2009[6].

A second rejection of the law at the Constitutional Court on July 8, 2014 came after, not long before, even the EU Data Retention Directive 2006/24 / EC was invalidated.

"We are aware that on 8 April 2014, the Court of Justice of the European Union invalidated Data Protection Directive 2006/24 / EC from the date on which it was issued, considering that there was a wide-ranging interference and the seriousness of the fundamental rights to respect for privacy and the protection of personal data, without such an interference being limited to what is strictly necessary, "the Court's press release states[7].

Regarding violation of the right to privacy, the Constitutional Court notes that in terms of access and use of data, the issue of unconstitutionality arises, given the access of the judicial bodies and other state bodies with attributions in the field of national security to the stored data.

[4] Text published in the Official Journal of Romania, in force since November 23, 2009.
[5] https://eur-lex.europa.eu/eli/dir/2006/24/oj.
[6] https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-106, 18.09.2014.
[7] http://unbr.ro/wp-content/uploads/2014/04/CP140054EN.pdf.

As such, the law does not provide the safeguards necessary to protect the right to intimate, family and private life, the secrecy of correspondence and the freedom of expression of persons whose stored data are accessed. "(Paragraph 61)

This decision has sparked vehement reactions both from the Romanian Intelligence Service and from the representatives of the prosecutor's offices, going to the assertion that the national security of Romania is jeopardized and the criminal investigations can no longer run in good conditions, because, overwhelmingly, criminal investigations were based on data stored by operators.

On September 18, 2014, the Constitutional Court of Romania issued a statement[8] attempting to justify taking the above-mentioned decisions: "We mention that other Constitutional Courts or European Courts have already declared unconstitutional national laws on data retention, in this situation - with Germany, Austria, Czech Republic or Bulgaria, with the same object appearing in the role of the constitutional courts in other states. On the other hand, as it appears from the motivation of the decision establishing the unconstitutionality of Law no.82 / 2012, the Court does not said unconstitutional data retrieval and storage operations in themselves, but only that access to and use of data is not accompanied by the necessary safeguards to ensure the protection of the above-mentioned fundamental rights, in particular the fact that the judicial bodies with attributions in the field of national security have access to these data without the judge's authorization.

2.3. DECISION[9] No. 580 of 20 July 2016 on the Citizens' Legislative Initiative entitled "Law on the Revision of the Romanian Constitution"

It was through this decision that a citizen's initiative, supported by several non-governmental organizations, was to change the content of Article 48 of the Constitution:

Present as follows: "(1) The family is based on the freely consented marriage between spouses, on their equality, and on the right and duty of parents to ensure the raising, education and training of children. (2) The conditions for termination, termination and invalidity of marriage shall be established by law. Religious marriage can only be celebrated after civil marriage. (3) Children outside the marriage are equal before the law with those in marriage. "

The proposal[10] was in the following sense: "The family is based on the freely agreed marriage between a man and a woman, on their equality and on the right and duty of parents to ensure the raising, education and training of children."

In other words, it was desired to replace the phrase between husbands with the phrase between a man and a woman.

The motivation for this citizens initiative to review the Constitution has come from the fact that in Romania the right to marry belongs only to a man with a woman, being excluded from the same sex.

In the initiators view, the attempt to clarify the term "spouses" in Article 48 of the Constitution was intended to remove any interpretation contrary to that of a woman and a man in a family.

Another argument used has started from the definition of the family as it results from Article 16 of the Universal Declaration

[8] https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-106.
[9] published in the Official Journal no. 857/2016 - M. Of. 857/27 October 2016.
[10] http://www.cdep.ro/proiecte/2017/100/20/7/pl34.pdf.

of Human Rights, namely that of a natural and fundamental element of society.

According to Article 16 (1) of the Universal Declaration of Human Rights adopted by the United Nations General Assembly on December 10, 1948, "men and women have the right to marry and to found a family".

Article 12 of the European Convention on Human Rights[11] states that "From the age of the law the husband and wife have the right to marry and to found a family under the national law governing the exercise of this right."

Romania remains tributary to the old traditions, and society as a whole is not yet ready to cope with changes in perceptions rooted centuries in the culture of this people.

Romania is still in Europe, a country where the marriage rate is among the highest, and this is the fear of embracing innovative experiments, decadent for most and destabilizing for others.

Article 258 (4) of the Civil Code, speaking of spouses, describes them as the man and woman united by marriage[12], and marriage is the freely consented union between a man and a woman (Article 259 of the Civil Code).

Perhaps the large number of citizens who have consented to the Constitutional Court's request to ask the Court to clarify the notion of spouses shows precisely the traditionalism that I mentioned above and the need to preserve the values that have remained unaltered or perhaps, was just a speculated subject of organizations or political actors interested in acquiring notoriety or image capital.

Being a sensitive issue at European level, the European Court of Justice has left the role of regulating permissively or restrictively each state, considering it to be their absolute attribute to decide on the definition of marriage, civil status, the possibility of validating a legal union between same-sex couples.

It is worth recalling the Judgment of the Court of Justice of the European Union of 1 April 2008 in Case C-267/06[13] Tadao Maruko v Versorgungsanstalt der deutschen Bühnen, which established more than eleven years ago that "the civil status and benefits derive from it, are matters which are the responsibility of the Member States and Community law does not affect that competence. '

The same approach we find in the Judgment of 10 May 2011 in Case C-147/08 Jürgen Römer v Freie und Hansestadt Hamburg[14].

The Resolution of the United Nations Human Rights Council on Family Protection of July 3, 2015 defines the family as a natural and fundamental group of society that must be essentially protected by the state.

It must be mentioned some of the arguments of the Constitutional Court in Decision 580/2016 because they describe its concept of marriage, private life, family life: "The Court holds that Article 48 of the Constitution enshrines and protects the right to marry, and family relationships resulting from marriage, distinct from the right to family life / respect for and protection of family life, with a wider legal content enshrined and protected by Article 26 of the Constitution, according to which "(1) Public authorities respect and protect the intimate, family and private life . (2) The individual has the right to dispose of himself if he does

[11] https://www.echr.coe.int/Documents/Convention_RON.pdf.

[12] (4) For the purposes of this Code, spouses are men and women united by marriage.

[13] Repertoriul de jurisprudență 2008 I-01757, https://eur-lex.europa.eu/legal-content/RO/TXT/ ?qid= 1553454942837&uri=CELEX:62006CJ0267.

[14] Cauza C-147/08, Repertoriul de jurisprudență 2011 I-03591, https://eur-lex.europa.eu/legal-content/RO/TXT /?uri=CELEX:62008CJ0147.

not violate the rights and freedoms of others, public order or good morals. "

The notion of family life is complex, including family relationships in fact, distinct from family relationships resulting from marriage, the importance of which the constituent legislator has emphasized distinctly in Article 48 the protection of family relationships resulting from marriage and from the link between parents and children.

2.4. DECISION[15] No.51 of 16 February 2016 on the objection of unconstitutionality of the provisions of Article 142 (1) of the Code of Criminal Procedure

The subject of the exception of unconstitutionality was the provisions of Article 142 paragraph (1) of the Code of Criminal Procedure, according to which "*the prosecutor enforces the technical supervision or may order it to be carried out by the criminal investigative body or specialized police officers or other specialized bodies of the state* ".

The authors of the exception considered that Article 1 (5) on the Romanian State, Article 20 on international human rights treaties, Article 21 on free access to justice, Article 53 on restricting the exercise of rights or freedoms , as well as the provisions of Articles 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the right to a fair trial and the right to respect for private and family life.

As a first conclusion, the Court has held that the phrase "*or other specialized bodies of the state"* is lacking in clarity, precision and predictability, as it does not allow the identification of those competent authorities to carry out measures with a high degree of intrusion into the privacy of individuals.

Also, the lack of clear, precise regulation would lead, in the Court's view, to an abusive violation of some of the essential fundamental rights in a state of law: intimate, family and private life and the secrecy of correspondence.

2.5. DECISION[16] no. 336/2018 concerning the rejection of the unconstitutionality exception of the provisions of Article 231 (2) with reference to Article 229 (1) lit. b) and d) and para. (2) lit. b) the second sentence of the Criminal Code, published in M.Of. of Romania, in force since 6 September 2018

By the Conclusion of June 1, 2016, pronounced in File no. 3.319 / 328/2015, the Turda District Court notified the Constitutional Court, except for the unconstitutionality of the provisions of Article 231 paragrapf (2) with reference to Article 229 (1) letter b) and d) and paragrapf (2) letter b) second sentence of the Criminal Code.

The exception was invoked by the public prosecutor in the case of concerning criminal liability for committing the offense of qualified theft, an offense under Article 228 paragraph (1) in relation to Article 229 (1) letter b) and d) of the Criminal Code.

The prosecutor requested the change of legal classification - by retaining and the provisions of Article 229 paragraph (2) letter b) of the Criminal Code, in the sense that the act was also committed by violation of the professional headquarters of the injured person. In the case, one of the defendants reconciled himself with the injured person.

In justifying the objection of unconstitutionality, the prosecutor, as the author of the exception, claims in essence

[15] Official Journal of Romania no. 190 of 14 March 2016.
[16] Text published in the Official Journal of Romania, in force since September 6, 2018.

that the provisions of Article 231 (2) of the Criminal Code, which establishes the possibility that the reconciliation, which removes the criminal responsibility, also intervenes in the case of theft theft crimes under Article 229 paragraph (1) letter b) and d) and paragraph (2) letter b) second sentence of the Criminal Code - serious crimes and with a very high impact on society - violates the constitutional provisions of Article 1 paragraph (3) on the rule of law, in which citizens' rights and freedoms and justice are the highest and guaranteed values of Article 26 on the intimate, family and private life of Article 27 (1) on inviolability of domicile, Article 44 (1) on the right of private property, Article 53 on the restriction of the exercise of certain rights or freedoms and Article 131 (1), according to which, "*In the judicial activity, the Public Ministry represents the general interests of society and defends the rule of law, as well as citizens' rights and freedoms"*.

In paragraph 21 of the aforementioned decision, which has been called upon to adjudicate on the violation, inter alia, of Article 26 of the Constitution of Romania on Intimate, Family and Private Life, it leaves the legislator's appreciation of the measures necessary to protect the social values invoked by to the author of the exception of unconstitutionality.

It also reminds the Constitutional Court in the same paragraph that the criminal policy of a state is not its attribute, which is a priority of the lawyer according to priorities, opportunity, frequency of violations, gravity and consequences of antisocial acts.

2.6. DECISION[17] No 498 of 17 July 2018 on the unconstitutionality of the provisions of Article 30 (2) and (3) and the phrase "the system of electronic patient patient file" in Article 280 (2) of the Law no.95 / 2006 on health reform

The texts invoked in support of the objection of unconstitutionality were Article 1 (5) on the quality of law, Article 26 on intimate, family and private life, and Article 53 on the restriction of the exercise of fundamental rights and freedoms in the Constitution of Romania, as well as Article 8 The Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the right to respect for private and family life.

This exception was raised directly by the People's Advocate, arguing that in the matter of healthcare provision, the legal regulation must not contravene the fundamental rights provided by article 26 of the Constitution, according to which the public authorities are obliged to respect and protect the intimate, family and private life .

In the opinion of the author of the objection of unconstitutionality, the regulation contained in Article 280 paragraph (2) of Law no. 95/2006 on healthcare reform is of a general nature, without any guarantee of confidentiality of personal data of medical nature, contained in electronic health records.

The views expressed in public space by physicians 'and patients' associations have also been invoked, meaning that the implementation of the electronic health records could seriously violate the intimate, family and private lives of patients, through the possibility of disclosing personal data of a medical nature public.

Even the Constitutional Court in its previous jurisdiction has established that, in order to ensure respect for privacy and the

[17] Published in the Official Journal no. 650 of July 26, 2018.

confidentiality of medical data, it is necessary to limit the access of persons to such data (see, in this regard, Decision[18] No 17 of 21 January 2015 and Decision[19] no.440 of 8 July 2014).

Referring to the violation of the individual's right to privacy, the Constitutional Court considered the personal data and the processing of this information, recalling, inter alia, the case[20] of 4 May 2000 in Rotaru v. Romania, paragraph 43.

The Court recalls a series of judgments handed down by the European Court of Human Rights in the area of patient healthcare protection as follows: (Judgment of 17 July 2008 in Case I v. Finland, paragraph 36) [Judgment of 17 January 2012 in Varapnickaitė-Mažylienė v. Lithuania[21], paragraph 41) (Judgment of 17 July 2008 in Case I v. Finland, paragraph 37) (case of 17 July 2008 in Case C- Finland, paragraph 38) (Judgment of 17 July 2008 in Case I v Finland, paragraph 38, Judgment of 25 February 1997 in the case of Z. v. Finland, paragraph 95, or Judgment of 10 October 2006, pronounced in the LL case against France, par.44]. (Judgment of 6 June 2013 in Avilkina and Others v. Russia, paragraph 45) (Judgment of 25 February 1997 in the case of Z. v. Finland, paragraph 95).

All the arguments that we find in this decision are based on a comparative analysis of the case law of the European Court of Human Rights on the violation of Article 8 of the Convention, concluding that the disclosure of medical data can seriously affect the person's family and private life, such as and its social and employment situation by exposing it to public atrocities and the risk of ostracization (Judgment of 17 January 2012 in Varapnickaitė-Mažylienė v. Lithuania, paragraph 44, or the judgment of 6 June 2013 in Avilkina and others against Russia, p.45][22]

Paragraph 42 of the decision concludes with regard to the issue at stake in the debate, meaning that "if the State has established by law a measure in the application of the right to the protection of the health of a person, it is also incumbent on it to protect and guarantee the confidentiality of information medical treatment, through a normative act of the same level, respectively by law. ,,

Moreover, the Court uses the syntagm of the legislator's silence, in other words, it speaks of a passivity in ensuring minimum guarantees that the right to intimate, family or private life is respected.

In the Court's view, the introduction of electronic health records is only an interference of the state in the intimate, family and private life of the individual.

Such a lack of concern to ensure minimum leverage can not be overlooked by arguments such as the existence of a constitutional obligation to protect the health of the individual, because its accomplishment must not violate other rights, as laid down in the Constitution.

It was therefore found that although the legal interference in the law provided for in Article 26 of the Constitution may have a legitimate purpose (protecting the health of a person by ordering his medical history and holding it by a state authority), it is appropriate and necessary for the purpose does not maintain a fair balance between competing interests, namely the public interest in public health, the interest of the person in protecting his or her health, and the interest of the person in protecting his private, family and private life.

[18] Text published in the Official Journal. of Romania, in force since January 30, 2015.
[19] Text published in the Official Journal of Romania, in force since September 4, 2014.
[20] Text published in the Official Journal. of Romania, in force since 11 January 2001.
[21] http://health-rights.org/index.php/cop/item/case-of-varapnickait%C4%97-ma%C5%BEylien%C4%97-v-lithuania-2012.
[22] https://www.globalhealthrights.org/health-topics/hospitals/avilkina-and-others-v-russia/.

2.7. DECISION[23] no.91 of 28 February 2018 on the objection of unconstitutionality of the provisions of article 3, article 10, article 11, paragraph 1, letter d) and article 13 of the Law no.51 / 1991 on the national security of Romania, as well as the provisions of article 13 from Law no.51 / 1991 on the national security of Romania, in the form prior to the amendment by the Law no.255 / 2013 for the implementation of the Law no. 135/2010 on the Criminal Procedure Code and for the modification and completion of some normative acts containing provisions criminal proceedings

The subject of the exception of unconstitutionality constituted the provisions of Articles 3, 10, 11 and 13 of Law no. 51/1991 on the national security of Romania, in the form before the amendment by Law no. 255/2013, as well as the provisions of Article 13 of the same normative act, in the form in force at the time of notification to the Constitutional Court.

It was argued that the texts of the abovementioned articles contradict the constitutional provisions contained in Article 1 paragraph (5), according to which, in Romania, compliance with the Constitution, its supremacy and the law is mandatory, Article 21 paragraph (3), according to which the parties right to a fair trial and the settlement of cases within a reasonable time, Article 26 on intimate, family and private life, Article 28 on the confidentiality of correspondence, and Article 53 on the restriction of the exercise of rights or freedoms.

This decision is relevant from the point of view of the Court's analysis of the phrase *"seriously undermining the rights and fundamental freedoms of Romanian citizens"* in Article 3 let f) of Law no 51/1991.

In paragraph 79 of the Decision, the Constitutional Court recalls the Joint Opinion of the Venice Commission and the Human Rights Directorate, citing a passage that we consider relevant and exposing it exactly: *"In the Law on the Functioning of the Service, the mandate given to this Service by Article 7 requires defending against actions that "violate the constitutional rights and freedoms of citizens and endanger the state" and against attacks against senior officials, etc. Undoubtedly, both situations can be considered to be clear criminal matters and not just a legitimate aim to protect national security. Therefore, their use in these cases, with no specific safeguards for criminal investigations and trials, can be justified only if the phrase "and jeopardizes the state" is read literally in the sense that only when the threat affects democratic order, in other words, when it is sufficiently concrete and serious that it becomes a matter that can come to the attention of the Service. For example, the Swedish Security Police mandate includes investigating attacks and threats directed against the high dignitaries (when they affect democratic order), as well as actions that undermine the exercise of constitutional rights of citizens. This latter function has the relatively narrow meaning of investigating the activities of organized extremist groups that are hostile to certain groups of citizens or residents, for example of a certain ethnic origin "[Opinion no. 756 of 2 April 2014, paragraph 27, CDL-AD (2014) 009]*.

In essence, in analyzing the provisions criticized by the author of the objection of unconstitutionality, the Court has held that the lack of clear rules providing information on the circumstances and conditions under which national security authorities are

[23] Published in the Official Journal of Romania no. 348 of April 20, 2018.

empowered to resort to the technical supervision measure is violation of fundamental rights, essential in a state governed by the rule of law, concerning intimate, family and private life and the secrecy of correspondence.

Thus, the phrase "*seriously undermines the fundamental rights and freedoms of Romanian citizens"* contained in article 3, letter f) of Law no. 51/1991 on Romania's national security violates the constitutional provisions contained in article 1 paragraph (5) which enshrines the principle of legality , Article 26 on private life and Article 53 governing the conditions for the restriction of the exercise of certain rights or freedoms.

2.8. DECISION[24] No 534 of 18 July 2018 on the objection of unconstitutionality of the provisions of Article 277 (2) and (4) of the Civil Code

The subject of the exception of unconstitutionality was the provisions of Article 277 (2) and (4) of the Civil Code, republished in the Official Journal of Romania, Part I, no.409 of 10 June 2011, according to which:

"(2) Marriages between persons of the same sex concluded or contracted abroad either by Romanian citizens or by foreign citizens are not recognized in Romania. [...]

(4) The legal provisions regarding the free movement on the territory of Romania of the citizens of the Member States of the European Union and the European Economic Area remain applicable "and, in the author's opinion, these texts represent a violation of the right to intimate, family and private life, the criterion of sexual orientation.

By doing a comparative analysis, the Constitutional Court lists the states that have adapted their legislation so that they can provide effective protection of the right to intimate, family and private life as regards homosexual couples.

It reminds the Court that thirteen Member States of the European Union recognized same-sex marriage: the Kingdom of the Netherlands, the Kingdom of Belgium, the Kingdom of Spain, the Kingdom of Sweden, the Portuguese Republic, the Kingdom of Denmark, the French Republic, the United Kingdom of Great Britain and Northern Ireland The United Kingdom (with the exception of Northern Ireland), the Grand Duchy of Luxembourg, Ireland, the Republic of Finland, the Federal Republic of Germany and the Republic of Malta and Austria, which by the Austrian Constitutional Court of 4 December 2017 (G 258-259 / 2017-9) the provisions of the Civil Code limiting the right to marriage to heterosexual couples, and furthermore stated that without the intervention of the legislator before that date, same-sex marriage would be possible from 1 January 2019.

In the Czech Republic, the Republic of Estonia, the Hellenic Republic, the Republic of Croatia, the Italian Republic, the Republic of Cyprus, Hungary, the Republic of Austria and the Republic of Slovenia, there is the notion of registered partnership or civil partnership for homosexual couples, which, although distinct from marriage, recognizes, however, a series of rights similar to those derived from the marriage between a man and a woman.

States such as Canada, New Zealand, South Africa, Argentina, Uruguay or Brazil authorize same-sex marriage by law, and others, through Mexican judgments (Supreme Court Supreme Court ruling no. 155/2015 June 3, 2015), the United States[25] (Supreme Court ruling of June 26, 2015,

[24] Published in the Official Journal of Romania. no. 842 of 3 October 2018.
[25] https://supreme.justia.com/cases/federal/us/576/14-556.

"Obergefell et al. Hodges, Director, Ohio Department of Health, et al., 576 U.S. (2015), Colombia (Constitutional Court judgment SU-214/16 of 28 April 2016, Case T 4167863 AC) Taiwan[26] (judgment of the Constitutional Court of the Republic of China (Taiwan) of 24 May 2017, J.Y. Interpretation N ° 748, on Consolidated Claims of Huei-Tai-12674 and Huei-Tai-12771].

It is important that the comparative analysis which the Court made in the decision, because it led to the suspension of the judgment and to the lodging of a request to the Court of Justice of the European Union for a preliminary ruling on the following questions:

'(1)' Husband 'in Article 2 (2) (a) of Directive 2004/38, in conjunction with Articles 7, 9, 21 and 45 of the Charter, includes the same-sex spouse of a non- , of a European citizen with whom the citizen has legally married under the law of a Member State other than the host State?

2. If the answer to the first question is in the affirmative, Articles 3 (1) and 7 (2) (3) of Directive 2004/38, read in conjunction with Articles 7, 9, 21 and 45 of the Charter, require the Member State host country to grant a residence permit in its territory for more than 3 months to a same-sex spouse of a European citizen?

3. If the answer to the first question is in the negative, the same-sex spouse from a non-Member State of a European citizen with whom the citizen has legally married under the law of a Member State other than the host State may be 'any other family member ...' within the meaning of Article 3 (2) (a) of Directive 2004/38 or 'the partner with whom the Union citizen has a duly substantiated, lasting relationship' within the meaning of Article 3 (2) (b) of Directive 2004/38, with the host State's correlative obligation to facilitate entry and stay, even if the host State does not recognize same-sex marriages or provides for any alternative form of recognition legal partnerships such as registered partnerships?

4. If the answer to the third question is in the affirmative, then Articles 3 (2) and 7 (2) of Directive 2004/38, read in conjunction with Articles 7, 9, 21 and 45 of the Charter, require the host Member State grant the right to reside in its territory for more than three months to a same-sex spouse of a European citizen?"

The reasons justifying this move were that Romania, together with the Republic of Bulgaria, the Republic of Latvia, the Republic of Lithuania, the Republic of Poland and the Slovak Republic, are the only Member States of the European Union which do not offer any form of formal and legal recognition of the established couple relationships between the same sex.

By Judgment of 5 June 2018 in Case[27] C-673/16, the Court of Justice of the European Union (Grand Chamber) answered in the affirmative the first two questions.

Relevant is paragraph 36 of the judgment, according to which a Member State can not rely on its national law to oppose the recognition on its territory, solely for the purposes of granting a right of residence to a third-country national, of the marriage entered into by a citizen of the same sex in another Member State in accordance with the law of the latter State.

It has thus been established that the relationship of a same-sex couple is circumscribed to the notion of "private life" and "family life", with no distinction as to the relationships established between persons of different sex .

[26] http://www.loc.gov/law/foreign-news/article/taiwan-constitutional-court-rules-same-sex-marriage-prohibition - unconstitutional/.

[27] http://curia.europa.eu/juris/liste.jsf?num=C-673/16.

In those circumstances, the State is bound to ensure the protection of both categories of relations by virtue of respect for the fundamental right to private and family life guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union by Article 8 of the European Convention for the Protection of Human Rights and Freedoms Fundamental and Article 26 of the Romanian Constitution (paragraph 41).

3. Conclusions

This article aimed to draw attention to the relevant decisions of the Constitutional Court of Romania regarding the right to privacy, the evolution of its approach in the case law of the Court, and the need to bring the legislation subject to constitutional review into conformity with the Court's rulings.

Regarding the jurisprudence of the Court so far, we can note that, in its decisions, the Court has often replaced the passivity of the legislature or the parliament's refusal to regulate in accordance with the fundamental principles found in the international treaties Romania adhered to, increased attention to the necessity to comply with the Romanian legislation with the European one.

Not long ago, the Constitutional Court had to respond to challenges that generated social, sometimes institutional, discontent, but it is precisely its role - to restore the balance and supremacy of the Constitution by reconciling the law with the fundamental law.

The border between law and politics is a fragile one, and here the role of the Constitutional Court intervenes through actions designed to defeat any attempt to distort the purpose of a law so as to remind the lawmaker that its role is to pass laws respecting fundamental rights of citizens.

References

- http://www.un.org/en/universal-declaration-human-rights/.
- Susan E. Gallagher, *Introduction to "The Right to Privacy*" by Louis D. Brandeis and Samuel Warren: A Digital Critical Edition, University of Massachusetts Press, forthcoming.
- Warren & Brandeis, paragraph 1.
- article 75 Civil Code Limits: (1) Do not violate the rights set out in this section, which are permitted by law or international human rights conventions and pacts to which Romania is a party. (2) The exercise of constitutional rights and freedoms in good faith and in compliance with the international covenants and conventions to which Romania is a party shall not constitute a violation of the rights provided for in this section.
- Official Journal of Romania, in force since November 23, 2009.
- Official Journal of Romania, in force since September 4, 2014.
- Official Journal of Romania, in force since November 23, 2009.
- https://eur-lex.europa.eu/eli/dir/2006/24/oj.
- https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-106, 18.09.2014.
- http://unbr.ro/wp-content/uploads/2014/04/CP140054EN.pdf.
- https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-106.
- Official Journal no. 857/2016 - M. Of. 857/27 October 2016.
- http://www.cdep.ro/proiecte/2017/100/20/7/pl34.pdf.
- https://www.echr.coe.int/Documents/Convention_RON.pdf.
- Repertoriul de jurisprudență 2008 I-01757, https://eur-lex.europa.eu/legal-content/ RO/ TXT/?qid=1553454942837&uri=CELEX:62006CJ0267.

- Cauza C-147/08, Repertoriul de jurisprudență 2011 I-03591, https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:62008CJ0147.
- Official Journal of Romania no. 190 of 14 March 2016.
- Official Journal of Romania, in force since September 6, 2018.
- Official Journal no. 650 of July 26, 2018.
- Official Journal. of Romania, in force since January 30, 2015.
- Official Journal of Romania, in force since September 4, 2014.
- Official Journal. of Romania, in force since 11 January 2001.
- http://health-rights.org/index.php/cop/item/case-of-varapnickait%C4%97-ma%C5%BEylien%C4%97-v-lithuania-2012.
- https://www.globalhealthrights.org/health-topics/hospitals/avilkina-and-others-v-russia/.
- Official Journal of Romania no. 348 of April 20, 2018.
- Official Journal of Romania. no. 842 of 3 October 2018.
- https://supreme.justia.com/cases/federal/us/576/14-556.
- http://www.loc.gov/law/foreign-news/article/taiwan-constitutional-court-rules-same-sex marriage-prohibition-unconstitutional/.
- http://curia.europa.eu/juris/liste.jsf?num=C-673/16.

THE INFLUENCE OF ARTIFICIAL INTELLIGENCE ON CRIMINAL LIABILITY

Maxim DOBRINOIU[*]

Abstract

The nowadays deployment of Artificial Intelligence (AI) and its expected relatively rapid integration into various instances of the socio-economic or governmental life (e.g. household, health, industry, trade and so on) represent a great development opportunity for every nation, as well as a key element for the evolution of the mankind. The elements of AI have already started to take over certain human-type workouts or tasks, while it will take not so long until they will almost completely replace individuals in performing their jobs, and thus evolve from the status of simple tools to the status of "electronic persons" or even subjects of law. During their interaction with the human-dominated world, the AI-driven entities may either be in compliance or a conflict relationship with the law and the society protected by the law, especially when a loss, a damage or a casualty occurs. The article aims at studying the electronic persons' behavior and pointing out whether would be possible or not to further treat the elements of AI as liable against the law, in general, and criminal law, in particular.

Keywords: *Artificial Intelligence, criminal law, criminal liability, electronic person*.

1. The concept of artificial intelligence and its impact on social life

At the European level, the term "artificial intelligence" (AI) was officially referred to as "systems that display intelligent behavior by analyzing their environment and taking actions – with some degree of autonomy – to achieve specific goals".[1]

From its already far deployment in areas like: medicine, transportation, industry, agriculture, military, public order, Cybersecurity, client-interaction, technology research and improvement, Internet of Things – IoT and so on, the AI proved to be "real", to be "live", and to be a significant part of our socio-economic life.

It is worth understanding, in a first phase, what really means both "artificial" and "intelligence". While "artificial" may be regarded as a good "made by people, often as a copy of something natural"[2], "intelligence" has at least the following meanings: "the ability to learn and understand or to deal with new or trying situations", "the skilled use of reason", and "the ability to apply knowledge to manipulate one's environment or to think

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[1] See the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Artificial Intelligence for Europe*, COM (2018) 237 final, Brussels, 25.04.2018.

[2] The Cambridge Dictionary, available at https://dictionary.cambridge.org/dictionary/english/artificial, accessed 25.04.2019.

abstractly as measured by objective criteria"[3].

Other authors[4] define AI as artificially developed intelligence, which is, to some extent, correct and logic.

It is pretty much obvious that AI was created as an alternative to humans, a crafted machine with embedded learning and analysis capabilities, mastered to comply with real-life situations and to perform, as much as accurately possible, the tasks and works once done by men. Thus, the combined above definitions may conclude that an element of AI could be perceived as a unnatural product designed with human-like form of intelligence.

However, as written in the preamble of the Montreal Declaration for a Responsible Development of Artificial Intelligence (2018), AI poses a major ethical challenge and social risks, with intelligent machines that can restrict the choices of individuals and groups, lower living standards, disrupt the organization of labor and the job market, influence politics, clash with fundamental rights, exacerbate social and economic inequalities, and affect ecosystems, the climate and the environment.[5]

The evolution of AI-type entities (such as robots) conducted in time to the development of autonomous and even cognitive features – such as the ability to learn from experiences and take independent decisions, thus evolving them more and more to agents that interact with their environment and are able to alter it significantly. That's why the European experts came to the conclusion that "*the legal responsibility arising from a robot's harmful action becomes a crucial issue*".[6]

In terms of liability, the same EU legal document (mentioned above) states that "the most autonomous robots are, the less they can be considered simple tools in the hands of other actors (such as the manufacturer, the owner, the user, etc.)" and this, in turn, "makes the ordinary rules of liability insufficient and calls for new rules which focus on how the machine can be held – partly or entirely – responsible for its acts or omissions", while "as a consequence, it becomes more and more urgent to address the fundamental question of whether robots should poses a legal status".[7]

Another interesting point driven to the attention of the EU Parliament's Committee on Legal Affairs is that "robot's autonomy raises the question of their nature in the light of the existing legal categories – of whether they should be regarded as natural persons, animals or objects – or whether a new category should be created, with its own specific features and implications as regards the attributions of rights and duties, including liability".[8]

It seems to be commonly agreed at the European level that "the existing rules of liability cover cases where the cause of the robot's act or omission can be traced back to a specific human agent such as the manufacturer, the owner or the user and

[3] The Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/intelligence, accessed on 25.04.2019.

[4] Stuart Russell, Peter Norving, *Artificial Intelligence: A Modern Approach*(3rd edn, NJ Prentice Hall 2009) p. 4-5.

[5] https://docs.wixstatic.com/ugd/ebc3a3_c5c1c196fc164756afb92466c081d7ae.pdf.

[6] See the Committee on Legal Affairs Draft Report with recommendations to the Commission on Civil Law Rules on Robotics 2015/2103 (INL) available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML%2BCOMPARL%2BPE-582.443%2B01%2BDOC%2BPDF%2BV0//EN.

[7] *Ibidem*, pct S on Liability.

[8] *Ibidem*, pct T on Liability.

where that the agent could have foreseen and avoided the robot's harmful behavior".[9]

Among other significant aspects, the experts calls on the European Commission, when carrying out an impact assessment of its future legislative instrument, to explore the implications of all legal solutions related to the AI entities (robots), by far the most important one being the "creation of a specific legal status for robots, so that at least the most sophisticated autonomous robots could be established as having the **status of electronic persons with specific rights and obligations**, …, and applying electronic personality to cases where robots make smart autonomous decisions or otherwise interact with third parties independently".[10]

Some authors[11] developed a scale of AI, based on different forms of intelligence they poses and the implication of humans, such as: level 1 – AI with human supervision, level 2 – AI with deterministic autonomy, level 3 – machine learning-type AI, and level 4 – multi agents systems AI.

2. Doctrine views on Criminal Liability

A crime is the only legal ground for the criminal liability. For a crime to be indicted to a specific person (individual or legal), certain elements must exist, such as: a legal provision (depicting the offence), the commission of one or several material acts (*actus reus*), the mental state (*mens rea*) of the person charged with that offence, the unjustifiable ground for the person's criminal behavior, and the attribution (one's moral involvement in committing a crime).

In the large majority of the national criminal systems, one of the most important elements of a crime is *mens rea* – the mental element[12] which drives a person to commit a crime or to trespass a legal provision.

As all the legal practitioners know, that guilty mind of a culprit consists of three different forms: the intent (with its sub-categories: direct intent – when the person foresees the result of his actions and pursue that result, and oblique intent – when the person foresees the result of his actions, and, while not pursuing that result, only accepts the occurrence of that result), the guilt (with its sub-categories: recklessness – when the person foresees that a particular result may occur and further acts without taking care whether that result happens or not, and criminal negligence – when the person does not foresee the result of his actions while he could or should have foresee it), and the overt intent.

From the Romanian legislation perspective, the guilt or the moral responsibility (involvement) of the person who commit a crime is a subjective process consisting of two factors: the consciousness and the will.[13]

In what regards the consciousness, the culprit has the representation of his actions, of the conditions he acts in, and of the causal relation between the culprit's action/inaction and the result. In his mind there comes the idea of committing the crime and, furthermore, the deliberation of the reasons why he, however, should commit the crime.

[9] *Ibidem*, pct U on Liability.
[10] *Ibidem*, pct 31, p. 11.
[11] Ikenga Oraegbunam, Uguru Uguru, *Artificial Intelligence Entities and Criminal Liability: A Nigerian Jurisprudential Diagnosis*, in African Journal of Criminal Law and Jurisprudence, no. 2, 2018.
[12] Malice aforethought (US Criminal Code).
[13] V. Pasca, *Criminal Law. General Part.* 2nd edition, Universul Juridic Publishing House, Bucharest, 2014, p. 156.

At the end of this process, the culprit takes the decision to commit the crime.[14]

In what regards the will, the culprit moves from the mental state to the physical state of his actions, thus mobilizing his energies (at his disposal) towards realizing the external behavioral acts. This will comes to be very important, because the person, being in full control of its actions and without any (internal or external) constraints (physical or moral), has a free and unconditioned determination to act in the desired manner, thus to also commit a crime.

These above analyzed factors are entirely acknowledged and fully recognized as being human-related. They are specific to any individual, whose conscience and will are not affected in any way by various forces, and there is no clue that they may be associated with any form of machine, even world class high performance computers, run with the most advanced pieces of software and applications.

3. From "electronic person" to active subject of a crime

The human-level AI seems to be the next generation of AI, capable of performing almost all the intellectual tasks an individual can do, and also to have feelings (worries, angers, happiness or maybe love) and to control them through autonomous human-like behavior. Many[15] believes that it is a question of time until the AI will become a true forms of intelligence (or a human-based or human-type intelligence), replacing human judgement, also think independently and act for itself.

As we all know, nowadays, in law, a *person* is identified as *individual* (human) person and *legal* person, both having certain degrees of liability when involved in any way in the commission of a crime.

Different authors identified some particular aspects that shape the elements of AI, and play a significant role in explaining the difficulties of assessing the criminal liability share between the "synthetic person" and the "natural person". And these are: increasing autonomy[16] (that meaning a decreasing control from humans), unpredictability[17] (meaning AI lacks of cognition may lead to reactions totally different than human like), and unaccountability[18] (while not applied with legal personality, AI elements cannot be held responsible for their harmful actions).

In order to analyze the actual and real involvement of an AI entity in committing a crime, it is first needed to clarify the role of different other actors in the *doing* or *undoing* (action or inaction – meaning *actus reus*)[19]. And here the "user", the "supervisor" and the "producer" of the AI entity have an important role in a respective criminal investigation, as being the humans behind the machine, thus firstly questionable about the conditions the AI entity acted upon, the software they designed and implemented into the machine, and the computer

[14] V. Dobrinoiu and colab., *The New Criminal Code Commented. General Part.*, 3rd edition, Universul Juridic Publishing House, Bucharest, 2016, p. 134.

[15] Karel Nedbálek, *The Future Inclusion of Criminal Liability of the Robots and Artificial Intelligence in the Czech Republic*, Paradigm of Law and Public Administration, Interregional Academy for Personnel Management, Ukraine, 2018, available at http://maup.com.ua/assets/files/expert/1/the-future-inclusion-of-criminal.pdf.

[16] Ryan Calo, Robotics and the Lessons of Cyberlaw, California Law Review, 2015, p. 532.

[17] Sherer M, *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies and Strategies (2016)*, Harvard Journal of Law and Technology, p. 353.

[18] Mireille Hildebrandt, *Criminal Liability and "Smart" Environments in R.A. Duff and Stuart P Green (eds) Philosophical Foundations of Criminal Law* (2011), p. 506.

[19] Weaver J F, *Robots Are People Too: How Siri, Google Car and Artificial Intelligence Will Force Us to Change Our Laws* (2014).

instructions they performed on it or even the omission to intervene when they are noticed about the AI element acting wrongfully, harming an individual or damaging goods.

When it comes to autonomous agents or machine learning, the real problem is the way they actually "learn" from the environment or from their own experiences. With little or even no human control of the learning process (in the future), we will have to deal with unpredictable entities, which may turn harmful or at least unlawful in performing their actions.

The doctrine is still reluctant to clearly attribute the responsibility of committing a crime entirely to the AI element, and rather prefers to identify a human being as the offender – the main actor liable (see the "user", the "supervisor" or the "producer" of the AI element).

According to some authors[20], "the harm from the actors' behavior does not occur immediately, but it may occur in the future when the AI acts", while "the launch or use of any AI somewhat presupposes a duty of control and supervision over the AI and its actions".

On the other hand, other authors[21] believe that AI criminal liability requires legal personhood for the AIs, and that would be similar to corporate criminal liability that some legal systems are recognizing. And, therefore, legal personhood for AI is consequently a question whether AIs should have rights and duties in accordance with the law.

Moreover, the general opinion is that, in contrast with corporations, the AI elements should be liable only for their own actions or inactions (behavior), and not for those initially attributed to certain individuals.

There is an idea that a possible solution would be a system enforcing AI criminal liability within a system that accepts only the *actus reus* condition when assessing a crime, but this seems to be unacceptable from the general principles of the criminal law. We agree with the opinion that such a case, when *mens rea* is excluded, would be similar to the involuntary acts that excludes criminal liability at all.

In one of his remarkable articles on this subject, an author[22] envisaged three models of liability concerning the AI entities, that can be considered separately of in conjunction (for better liability solutions): 1) Perpetration-via-Another Liability Model, 2) Natural-Probable-Consequence Liability Model, and 3) Direct Liability Model.

We agree with the author that in the first model, when a crime involves an AI entity, this AI entity should be regarded as "innocent agent" (like in the *longa manus* theory), thus mere an instrument in the commission of that crime, and not an active (principal or secondary) participant. In this case, due to the lack of *mens rea* of the actual perpetrator, the criminal charge will always pursue the producer, the programmer or the end-user of that particular AI entity.

The second model addresses the cases of the "foreseeable offences committed by AI entities", where, in the opinion of the author, the producer or the programmer do

[20] AP Simester, A von Hirsch, *Crimes, Harms, and Wrongs. On the principles of criminalisation*, Hart Publishing, 2011 at https://www.researchgate.net/publication/241643522_AP_Simester_and_Andreas_von_Hirsch_Crime_Harms_and_Wrongs_On_the_Principles_of_Criminalisation.

[21] Ashworth A, *Principles of Criminal Law* (4th edn, OUP 2003) and Mireille Hildebrandt, *Criminal Liability and "Smart" Environments* in the thesis of Matilda Claussen-Karlson, *Artificial Intelligence and the External Element of Crime*, Orebro University, Sweden, 2017.

[22] Gabriel Hallevy, *The Criminal Liability of Artificial Intelligence Entities – From Science Fiction to Legal Social Control*, Akron Intellectual Property Journal no. 4, University of Akron, 2016.

not have any involvement, nor they acknowledge of any offence until this is actually committed by the AI entity they designed, produced or programmed.

In this scenario, we agree that human activity is merely linked to the malfunction of the AI entity in the manner that the producer, the programmer or the user should have thought about (or should have considered the possible consequence of) a crime being committed (in certain circumstances) by that AI entity. Therefore, we support author Gabriel Hallevy that considers the criminal liability of the human factor rather negligence[23], than intention, although there may be situations when the (human) offender foresees the result of its actions (upon AI entity), does not pursue it, while accepting this result to occur one day.

The third model of Gabriel Hallevy focuses on the AI entity itself[24], while considering the direct liability as similar applicable to societal individuals (offenders). While there are argues that AI elements should be put aside of the criminal liability similar to children and mentally ill persons (*doli incapax*), the new technology developments prove that AI entities are able to interpret large amounts of data from its sensors, to make difference between "right" and "wrong", and even to analyze what is "permitted" or "forbidden".

It is still a question whether these capabilities (irrespective they are the result of a good programming or the result of its own learning feature) may be seen as signs of consciousness or internal elements (*mens rea*) needed for the existence of the criminal liability.

If so, we also need to consider the various forms of participation to the crime commission, depending on the relations between the AI entity and the other human perpetrators, and each other's involvement in pursuing the criminal activity. In these scenarios, the AI entity may find itself in the capacity of principal, accessory, accomplice or abettor.

Although some authors believe the contrary, we consider that is beyond reasonable acceptance to consider AI elements as qualifying to all the defenses against criminal liability (e.g. self-defense, necessity, consent, error, physical or mental constraint etc.), due to the fact that, in our opinion, there are more other internal elements to be taken into account when analyzing the possible fulfillment of all the requirements.

Conclusions

Trying to find the best solutions for AI-related legal problems, some authors[25] envisaged various approaches, from a "precautionary" one – in which the autonomous agents are precluded or prohibited due to their associated risks and uncertainties, to a "permissive" one – permitting the deployment and development of AI entities and autonomous agents, while accepting the risks and the social costs until properly regulating the domain.

As revealed by the above analysis, in the crimes committed with the involvement of AI elements, for the criminal liability to exists there is a strong need for both *actus reus* and *mens rea* to exist in the behavior of the respective artificial intelligence agents.

And we observed that at least *mens rea* is hard to be taken into consideration in what regards AI.

But, before "thinking" and "acting", there is a strong need for an AI element to

[23] *Ibidem.*

[24] *Ibidem.*

[25] See Peter M. Asaro, The Liability Problem for Autonomous Artificial Agents, presented to the Association for the Advancement of Artificial Intelligence (www.aaai.org), Spring Symposia 2016.

learn (or to be taught) about the law. Civil and criminal. And if is about a autonomous AI or an advanced machine learning, the producer, the programmer or the user must ensure that the most important routines of instructions comply with the existing laws and regulations, and the entity is (somehow) forced to "learn" the most prevalent principles of the living societies (not to kill, not to harm, not to steal, not to destroy etc.), to abide these laws and regulations and to keep away from any sort of autonomous actions that may be considered as unacceptable harmful behavior.

And this should be the main task of all the future projects involving the development of AI or legal bids to consider (and further treat) AI as "electronic person", with rights and obligations, similar to human beings.

Also, considering that the future will probably belong to the AI elements, the basics of the criminal law must be adjusted according to the principle *nullum crimen sine lege*, assuming that for the new society (electronic) members we may need to create special legal provisions and maybe a new legal system[26].

We share the same views with other authors[27] claiming that the AI entities should be considered as both objects and subjects of legal relations, "perhaps somewhere between legal entities and individuals, combining their individual characteristics with regards to relevant circumstances".

Another system that should be revised in the future is the penalty one, as it is hardly believable that actual criminal sanctions may apply to AI accordingly (such as: imprisonment, penal fine, safety measures or educative measures). There are multiple possibilities to be considered, such as: the destruction, the dismemberment, the decommissioning (partially or totally), the removal from duty or the reprogramming.

In all the cases, we think that there will be no effect on both re-education of the "convicted" AI entity, and the prevention of future crimes – as the principal aims of any penalty system in place, due to the fact that AI existence and behavior rely on computer programs and logic instructions and not on human-like emotions or feelings like shame, fear, care, love, guilt, outrage, regret, suffering, worry, rejection, social connection, need, sense of freedom etc.

For all that, the national criminal justice systems are required to adapt themselves and include clear and comprehensive provisions in order to ensure the public order, the safety of people and their goods and property.

References

- https://www.coe.int/en/web/human-rights-rule-of-law/-/thematic-session-on-artificial-intelligence-and-criminal-law-responsibility.
- https://www.torontopubliclibrary.ca/detail.jsp?Entt=RDM3061779&R=3061779.
- https://www.researchgate.net/publication/321321904_Criminal_liability_of_the_artificial_intelligence/download.
- https://arxiv.org/ftp/arxiv/papers/1802/1802.07782.pdf.
- https://core.ac.uk/download/pdf/55634657.pdf.
- http://www.diva-portal.org/smash/get/diva2:1115160/FULLTEXT01.pdf.
- http://plaw.nlu.edu.ua/article/view/105661.
- https://lawreview.law.ucdavis.edu/issues/51/5/Essays/51-5_Greely.pdf.
- http://maup.com.ua/assets/files/expert/1/the-future-inclusion-of-criminal.pdf.

[26] See also Karel Nedbálek.

[27] Radutniy Olecksandr Eduardovich, *Criminal Liability of the Artificial Intelligence*, in Problems of Legality, issue 138, 2017.

- https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0237&rid=1
- http://journals.ezenwaohaetorc.org/index.php/AFJCLJ/article/view/501.
- http://www.europarl.europa.eu/doceo/document/A-8-2019-0019_EN.html.
- https://www.inverse.com/article/30285-robot-crime-artificial-intelligence-punishment.
- http://brandonmarinoff.com/artificial-intelligence-and-criminal-law/.
- https://www.natlawreview.com/article/legal-ethics-ethical-dilemma-artificial-intelligence.