LESIJ - LEX ET SCIENTIA

International Journal

No. XXVIII, vol. 1/2021

Published by "Nicolae Titulescu" University of Bucharest and
"Nicolae Titulescu" Foundation for Law and International Relations

Indexed by EBSCO-CEEAS Database, CEEOL Database, ProQuest and HeinOnline Database

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”Nicolae Titulescu” University Publishing House

Phone: 004.021-330.90.32, Fax: 004.021-330.86.06

Calea Văcăreşti, nr. 185, Sector 4, Bucureşti, România

E-mail: editura@univnt.ro

ISSN: 1583-039X

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LESIJ - Lex ET Scientia International Journal

THEORETICHAL AND PRACTICAL ASPECTS REGARDING THE CONTENT OF THE DISMISSAL DECISION

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Abstract

Even if 18 years have passed since the adoption of the Romanian Labor Code, in the practice of legal labor relations there are many situations in which employers have major difficulties in establishing the correct content of dismissal decisions. Irregularities in the resolution of individual labor disputes often lead to the annulment of dismissal decisions by the courts. We have proposed that, in the content of this material, we identify and analyze the conditions under which a dismissal decision can be drawn up under legal conditions.

Keywords*: individual employment contract, legal employment relationship, termination of the individual employment contract, dismissal, dismissal decision, motivation of the dismissal decision, annulment of the dismissal decision, individual labor dispute.*

1. Introduction

The dismissal of employees is regulated by the Romanian Labor Code (Law no. 53/2003, republished[1], with subsequent amendments and completions[2]), from the perspective of manifesting the principle of legality, the legislator's option being to allow the employer to dispose unilaterally (as an exclusive expression of his will legal) termination of the individual employment contract only in the cases and under legally defined conditions[3].

In this context, the application of the rules of common law regarding the general regime of termination of the civil contract by unilateral termination (art. 1.321, art. 1.276-1.277, art. 1.552 of the Civil Code) is, in principle, excluded. This is because the specific requirement deduced from art. 278 para. (1) of the Labor Code, regarding the possibility of "completing" the provisions of the Labor Code (and, by extension, of labor law as a whole) with those of civil law only if there is a compatibility of the latter with the specifics of labor relations[4].

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[1] In the "Official Gazette of Romania", part I, no. 345 of May 18, 2011.

[2] The last legislative intervention in this regard (by reporting at the time of finalizing the drafting of this material – 22nd of April 2021) was made by Law no. 298/2020 for the amendment and completion of Law no. 53/2003 - Labor Code, published in the "Official Gazette of Romania", part I, no. 1293 of December 24, 2020.

[3] See I.T. Ștefănescu, Theoretical and Practical Treaty on Labor Law, 4th edition, revised and added, „Universul Juridic" Publishing House, Bucharest, 2017, p. 464.

[4] From the strict perspective of the possibility of revoking the dismissal decision by the employer, the High Court of Cassation and Justice retained, by Decision no. 18/2016 (published in the "Official Gazette of Romania", part I, no. 767 of September 30, 2016), that in the interpretation and application of the provisions of art. 278 para. (1) of Law no. 53/2003 - Labor Code, republished, with subsequent amendments and completions, the provisions of art. 1,324, 1,325 and 1,326 of the Civil Code, republished, can be applied in full of the provisions of the Labor Code, being compatible with the specifics of labor relations; in the interpretation of art. 55 lit. c) and art. 77 of the Labor

It is therefore necessary, both in the course of the procedural steps specific to each dismissal case and in the process of concretely establishing the content of the dismissal decision (by reference to the operating dismissal case)[5], that the employer complies exactly with the substantive and formal requirements provided by the Labor Code, the lack of fulfillment of any procedural condition or its non-compliant fulfillment may lead, as a rule, to the annulment of the dismissal decision.

There is thus a strong need in the practice of employment relationships to identify, in an analytical way, all the content elements of the dismissal decision, depending on the operating hypothesis, and to explain, in a complete way, the reasons whose manifestation determined the employer to finally order the termination of the individual employment contract by dismissal.

2. Legal characterization of the dismissal institution

A. We consider as useful the legal characterization of the dismissal institution from a theoretical perspective, starting from the overall observation of the regulatory solutions retained by the legislator[6]. As a starting point in this approach, art. 58 para. (1) of the Labor Code, defines dismissal as representing the termination of the individual employment contract at the initiative of the employer.

The characteristic legal features of the dismissal institution are, in our opinion, the following:

a) dismissal is a unilateral legal act subject to communication (the provisions of art. 1326 of the Civil Code, which are applicable as a common law being incidental), its author being exclusively the employer;

b) dismissal is a causal legal act[7]; the measure ordered by the employer, having as specific result the termination of the individual employment contract on his own initiative, it implies the existence of the cause by necessary reporting to the reasons for dismissal;

c) the legislator's option is to regulate in the Labor Code imperative and restrictive (limiting) the hypotheses in which the employer can order the dismissal and the conditions in which the dismissal can be ordered; this way of regulating constitutes an embodiment, in the matter of the termination of the individual employment contract, of the stability in work and of the legal protection of the right to work;

d) no other situations of unilateral termination of the contract are applicable, among those resulting from the corroboration of art. 1321 C.civ. with art. 1552 para. (1) C.civ. (unilateral termination of the civil contracts); It should be emphasized that the parties to the individual employment contract may not agree - by contract, at its conclusion, or by an addendum concluded during the existence of the contract - that the employer be granted the legal possibility to order the unilateral

Code, the dismissal decision may be revoked until the date of its communication to the employee, the act of revocation being subject to the communication requirements corresponding to the act it revokes (dismissal decision).

[5] A. Țiclea, Dismissal Decision, in "Romanian Journal of Labor Law" no. 3/2003, pp. 13-17.

[6] Normative solutions that, during the last 18 years since the entry into force of Law no. 53/2003 - Labor Code, remained almost unchanged, proving in this way, against the background of the strong manifestation in practice of some hesitations and doubts, the difficulty for the legislator to intervene to remedy a series of obvious inaccuracies.

[7] G. Boroi, C.A. Anghelescu, *Civil Law Course. General Part*, 2nd Edition revised and added, "Hamangiu" Publishing House, 2012, p. 125.

termination of the individual employment contract in other situations than those expressly and exhaustively provided by the Labor Code;

e) regardless of the case of dismissal and the number of employees affected by the measure ordered by the employer, the dismissal decision is an individual act; how many employees are fired, as many dismissal decisions will have to be issued by the employer;

f) the dismissal must meet, cumulatively: the general substantive conditions regarding capacity, consent, object and cause; the special requirements provided by the Labor Code; the specific condition of form - the written form of the dismissal decision - is an *ad validitatem* requirement;

g) as a rule, for dismissal cases that do not imply the existence of the employee's guilt condition, legal measures are established to protect employees, such as: providing a vacancy corresponding to the employee's training or, as the case may be, with his work capacity; the request by the employer, prior to the issuance of the dismissal decision, of the support of the territorial employment agencies in order to redistribute the employee; active measures to combat unemployment; a notice period, which may not be less than 20 working days; money (or other material) compensations;

h) regardless of the dismissal hypothesis, the (former) employee is entitled to challenge in court the measure ordered by the employer; the employee may request, within this procedural step, the annulment of the dismissal decision, the restoration of the parties to the situation prior to the communication of the dismissal decision, the payment by the employer of some compensations (material, as a rule, but also possible to repair a non-pecuniary damage).

B. There is no perfect overlap between "dismissal" as *negotium iuris* and "dismissal decision", given that the issuance of the dismissal decision by the employer is only the final (and formal) stage of expressing the legal will of the author of the act. The dismissal thus corresponds, in all cases, to a time interval between the moment when the employer was notified about the circumstance (manifestation of a factual situation) that can be included in one of the dismissal hypotheses provided by art. 61 or, as the case may be, art. 65 of the Labor Code.

Concretely and concisely presented, these factual situations are the following:

- the possible commission by the employee of an act which may be qualified as a serious disciplinary offense or the commission by the employee of several acts which may be qualified as repeated disciplinary offenses;

- the employee is absent from work for more than 30 calendar days, due to the disposition of the measure of pre-trial detention or house arrest;

- the non-compliant conduct of the employee in the exercise of his/her duties, possibly determined by the manifestation of a physical and/or mental incapacity, such as to no longer allow him/her to fulfill his/her duties corresponding to the job occupied;

- the non-compliant conduct of the employee in the exercise of his/her duties, possibly due to the manifestation of a professional misconduct;

- the existence of one or more reasons, unrelated to the person of the employee, which would justify the termination of the job held by that employee.

We referred to these circumstances because the employer, in the motivation of the dismissal decision, will have to highlight in the content of the act (as a rule) detailed references in relation to the factual situation of which he became aware and, if applicable, which he analyzed it in a specific legally established procedural framework.

3. Motivation of the dismissal decision

A. The motivation of the dismissal decision is similar, from the perspective of the logical-legal operations necessary to be performed in order to establish the final form of the act, with the motivation of the court decision. Like the judge in drafting the jurisdictional act we referred to, the employer is legally obliged to comply with the requirements regarding the structuring of the content of the dismissal decision (as a formal step) and to indicate the factual and legal reasons that determined the dismissal "solution" (as a substantive element).

Among the content elements of the dismissal decision, common to any hypothesis of dismissal among the five regulated by the Labor Code, the factual motivation of the decision and, in many cases, the correlation of the factual reasons with their legal classification proved to be for employers some of the most problematic steps specific to the proper management of labor relations.

The errors which manifested themselves - and which, in a significant number, still manifest themselves - led, in the event that the decision was challenged in court, to the annulment of the act and, hence, to the most unpleasant consequences for employers, especially when the issue of restoring the parties to the previous situation was raised by reassigning the illegally or unfounded dismissed employee to the position held prior to the disposition of the measure of termination of the individual employment contract.

B. From a practical perspective, the factual motivation of the dismissal decision is necessary to include all the elements specific to the manifestation of that circumstance which may represent one of the causes of dismissal provided by art. 61 and art. 65 of the Labor Code.

a) In the case of disciplinary dismissal, based on the provisions of art. 61 and art. 248 para. (1) lit. e) of the Labor Code, it is necessary to point out that, according to art. 252 para. (2) lit. a) of the same Code, in the content of the decision there must be the very "description of the deed that constitutes a disciplinary violation".

This option of the legislator, different from the one found in the factual motivation of the other types of dismissal decision, presupposes that the employer does not save in presenting all the specific coordinates specific to the occurrence of the misconduct or, as the case may be, to disciplinary misconducts (if the employer has found that the employee has committed two or more acts which constitute culpable breaches of his obligations).

Both the doctrine[8] and the jurisprudence have consistently held that the "description of the deed" in a consistent manner presupposes:

- indication of the factual situation in its materiality, and not in the form of generalities or vague, unverifiable statements, which correspond to a detail of the imputed deed/deeds;

- the explicit presentation of those aspects that may lead to the conclusion that the act of the employee represents a violation of the norms of work discipline;

- individualization in time of the disciplinary violation, otherwise the court cannot verify the observance by the employer of the legal provisions regarding the terms provided by art. 252 para. (2) of the Labor Code;

- indication of the essential elements for individualizing the act imputed to the

[8] I.T. Ștefănescu, *op. cit.*, p. 523 and p. 857; A. Țiclea, *Labor Law Treaty. Legislation. Doctrine. Jurisprudence*, 8th Edition, revised and added, "Universul Juridic" Publishing House, Bucharest, 2014, pp. 777-779.

employee, the date or period of time in which it was committed, knowing that any act of a person takes place in a certain time and place, the spatial and temporal limits characterizing any action, or human inaction, in their absence the existence of a deed cannot be conceived[9].

Along with these useful landmarks, the description of the deed that constitutes a disciplinary violation may also involve:

- specifying that the act constituting a disciplinary violation was committed through a singular manifestation, which corresponds to the possibility of fixing in time and space its production, or, as the case may be, the disciplinary violation is presented as an act committed in a continuous form;

- the fact that the act was committed by the employee as the sole perpetrator or that the act was committed by the sanctioned employee together with one or more colleagues, or with one or more persons who do not have the status of employee of the employer ordering the measure;

- an indication of all the elements and circumstances which, in connection with the manifestation of the factual situation, justify the employer's choice to classify the disciplinary misconduct as a serious one (in which case it is legally possible to apply the most severe disciplinary sanction);

- correlation of the determination of the concrete content of this structural element of the disciplinary sanction decision - "description of the deed" - with the objective circumstantial landmarks (those provided by art. 250 of the Labor Code and, possibly, others established by the applicable collective labor agreement or, in its absence, by the internal regulation); we refer to the "circumstances in which the act was committed" and the "consequences of the disciplinary violation";

- highlighting those factual circumstances that justify the retention by the employer of a certain form of guilt with which the employee committed the disciplinary offense (intent or fault).

The following options do not comply with the requirements of making a proper description of the act that constitutes a disciplinary offense:

- the presentation in the decision exclusively of the statement that the act imputed to the employee consists in breach of one or more provisions of labor law, of the applicable internal regulations or collective bargaining agreement, or non-compliance with one or more obligations arising from the individual employment contract, orders and the legal provisions of the hierarchical managers (in the form of expressions such as: "Disciplinary violation consists in non-compliance by the employee with art. 112 of the Labor Code", given that the employer had found that the employee did not comply with the work schedule);

- the use of generic and in no way circumstantial wording, such as the employee's manifestation of a "non-compliant attitude towards the direct hierarchical boss" or of an "irreverent attitude towards another person" or "repeated non-performance of duties";

- a description - even in detail - of an act which cannot constitute a disciplinary offense (for example, the employer has retained as a disciplinary offense an act of the employee who, outside the actual course of work, gave an interview in which, the right to an opinion, referred to some negative aspects that manifest themselves in the field of activity to which the employer belongs[10]).

[9] Bucharest Court of Appeal, Section VII for cases regarding labor disputes and social insurance, Civil Decision no. 1180/2020, in the "Romanian Journal of Labor Law" no. 3/2020, pp. 220.

[10] Bucharest Court of Appeal, Section VII for cases regarding labor disputes and social insurance, Civil Decision no. 1203/2019 (unpublished).

From a documentary point of view, we share the opinion according to which the requirement established by art. 252 para. (2) lit. a) of the Labor Code is complied with by the employer in the situation where the dismissed person has become concretely and certainly aware of the facts invoked for dismissal (such as a report or report)[11]. We specify that, at present, it is necessary to attach that document to the dismissal decision and that this mode of operation is mentioned in the decision itself (using, for example, a formula such as: "The description of the act which constitutes a disciplinary presented in the report annexed hereto, by which the undersigned was notified in connection with the deeds committed by the employee").

The requirement to describe the act constituting a disciplinary offense as a mandatory content element of the disciplinary dismissal decision must be correlated with the content of the final report of the disciplinary investigation (the act of "disinvestment" of the person who has been appointed to carry out the disciplinary investigation or of the disciplinary investigation commission). We refer to the need for the deed described in the content of the decision to be identical to the one that was investigated disciplinary. One or more facts that have not been the subject of disciplinary investigation cannot substantiate the application of the sanction consisting in the disciplinary termination of the individual employment contract, given the violation of art. 251 para. (1) of the Labor Code, even if regarding this or these (uninvestigated) facts the employer would comply with all the requirements corresponding to a compliant description.

b) If the employee is fired as a result of pre-trial detention or house arrest for a period longer than 30 days, under the Code of Criminal Procedure [hypothesis regulated by art. 61 lit. b) of the Labor Code], the content of the dismissal decision is established according to art. 62 para. (3) of the Labor Code. As such, the decision "must be motivated in fact".

The motivation in fact in this situation is limited to the indication by the employer of the interval in which the employee was absent (thus justifying compliance with the requirement that the employee's absence be longer than 30 calendar days) and the manner in which the employer became aware, concretely, of the preventive measure ordered in connection with the employee in question.

The fact of arrest of the employee or his house arrest may be brought to the notice of the employer by using any means of proof to this effect, including by indicating by the employer the information available to any interested person on the court portal (portal. just.ro).

c) The motivation in fact within the dismissal decision ordered pursuant to art. 61 lit. c) of the Labor Code (when, by decision of the competent bodies of medical expertise, the physical and/or mental incapacity of the employee is found, which does not allow him to fulfill his duties corresponding to the job) is a well-founded requirement on the provisions of art. 62 para. (3) of the Labor Code.

Considering also the resolutions given by the High Court of Cassation and Justice by Decision no. 7/2016[12], according to which in interpreting the provisions of art. 61 lit. c) of Law no. 53/2003 - Labor Code, republished, with subsequent amendments and completions, by decision of the medical expertise bodies (which establishes the physical and/or mental incapacity of the employee) is understood the result of the evaluation of the occupational medicine

[11] I.T. Ştefănescu, *op. cit.*, p. 523.
[12] Published in the "Official Gazette of Romania", part I, no. 399 of May 26, 2016.

specialist on fitness for work, consisting in the aptitude sheet, uncontested or become final after the appeal, by issuing the decision by the entity with legal attributions in this respect, the factual motivation of the dismissal decision implies in this situation:

- the indication (without the need for detailing) by the employer of the medical condition from which the employee suffers, according to the findings made following the occupational medicine specialist's assessment of occupational fitness, highlighted in the aptitude sheet or in the aptitude sheet and in the issued decision by the county or Bucharest public health directorate, following the contestation of the aptitude file by the employee, pursuant to art. 30 of Government Decision no. 355/2007 on the surveillance of workers' health[13], with subsequent amendments and completions;

- a specific indication of the duties established by the employee's job description, which can no longer be performed properly, and the causal link between the employee's state of health and the fact that his existence no longer allows him to perform those duties.

It is also possible, in this case, for the employer to comply with the requirement to include in the content of the dismissal decision the factual motivation of the measure by attaching to the decision the aptitude sheet or, as the case may be, the aptitude sheet and the decision issued by the management. of public health of the county or of the municipality of Bucharest pursuant to art. 33 of Government Decision no. 355/2007, specifying in the dismissal decision that the document or documents in question constitute its annex.

d) In the case of the dismissal decision based on the provisions of art. 61 lit. d) of the Labor Code (professional misconduct), being applicable accordingly art. 62 para. (3), it is necessary that the employer actually motivates his measure.

The motivation in fact in this situation will include:

- the manner in which the employer became aware of the fact that, as regards the dismissed employee, indications were received that he no longer professionally corresponded to the job in which he was employed, which led to the prior professional assessment procedure [the one in which refers to art. 63 para. (2) of the Labor Code and which is normatively developed by the applicable collective labor contract or, in its absence, by the internal regulation, or - in the absence of both regulatory landmarks - is established by the employer in an *ad hoc* manner];

- how the professional mismatch manifested itself in a concrete way (as the case may be: possible: non-fulfillment of the work norm, defective development of the activity, accomplishment of some works of poor quality[14]); what were the attributions, established by the job description, that the employee did not fulfill in a compliant way and how the result of these non-conformities was manifested;

- what was the time interval in which this non-conformity manifested itself;

- presentation of the way in which the prior professional evaluation procedure was organized and the concrete way in which it was carried out; in this respect, the decision must include references to the person appointed to carry out the professional evaluation or, as the case may be, to the composition of the evaluation committee, the evaluation criteria used, the evaluation method or methods used, the result of the evaluation. and the explanations given by the employee on the occasion of the

[13] Published in the "Official Gazette of Romania", part I, no. 332 of May 17, 2007.
[14] I.T. Ștefănescu, *op. cit.*, p. 741.

evaluation and/or on the communication of the result of this approach;

- justification of the impossibility of maintaining the employment relationship, given the serious or significant nature of the professional misconduct in relation to the volume and/or importance of specific tasks that the employee, due to professional misconduct found after the assessment, can no longer perform properly.

e) The content of the decision to dismiss the employee for reasons not related to his person is regulated by art. 76 and art. 63 para. (2) of the Labor Code. According to lit. a) in art. 76, the dismissal decision must contain "the reasons for the dismissal". Correlating this formal requirement with the provisions of art. 65 of the Code, it follows that the reasoning in fact in this case of dismissal implies that the employer has to:

- indicate in detail the reason or reasons unrelated to the employee's person that led to the termination of his / her employment (usually circumstances in the general sphere of economic difficulties, technological changes or reorganization of activity), as well as the causal and temporal landmarks related to the manifestation of the reason or motives in question (why did the respective situations appear, when their manifestation started, the interval in which they manifested, the fact that a moment of the cessation of the manifestation cannot be anticipated their circumstance that they have an irreversible effect);

- specify the manner in which he was informed of the circumstances which manifested itself on the basis of the disposition of the post occupied by the employee (note or report of the functional compartment in which the post was abolished; note or report of the financial department or the human resources department, etc.);

- concretely justify the necessary relationship between the manifestation of the reason or reasons unrelated to the employee and the termination of employment, from the perspective of fulfilling the requirement of the existence of a real and serious cause;

- indicate the internal act (decision or decision of the person or body which has the power to institute measures concerning the organizational and functional structure of the employer's entity) by which the employment has been abolished and by which the establishment plan has been amended accordingly and the employment status of that employer.

4. Conclusion

From the point of view of compliance with the rules on the content of the dismissal decision, an employer must act with the utmost diligence in motivating the dismissal decision and, in general, in drawing up this document on which the existence of the legal employment relationship depends. A possible reserve of economy or detail is not justified in any situation.

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INTERNATIONAL LAW: PERFECT STATUS OF STATES, RELATIONS, MACHINERY

Maria KAURAKOVA[*]

Abstract

In this paper an enquiry is instituted into the idea of (positive) law in connection with which notice is taken of the nature, character, function and effect of law as well as of rights as the product of the law and not without reason. If we say that the positive law is the product of the supreme power of states as the main form of life of men, then the said power may not be restrained by the law, nothing may determine their actions and these actions should not be made strictly in accordance with any rules of law laid down by such states, but states are free to decide how to act. Such a freedom is natural and absolute. It is a fundamental right of all sovereign states, which may neither be waived nor abridged.

However, this power is exercisable within strict territorial boundaries. Within these boundaries such states are free to decide which conduct of their subjects is compatible or incompatible with the rule of law. Incompatibility is excluded when nothing precludes distinct subjects of law from using their rights, provided that this use does not come in conflict with the rights and interests of other subjects of law. However, beyond these boundaries, this supreme power of states is restrained by the supreme power of other states and may never be exercised without their free, clear and unequivocal consent to this end affecting the force and effect of their international obligations.

The world comprises a great number of states entering into different types of relations. These relations require that to ensure predictable cooperation and communication among them, they should act in accordance with the rules made by them specifically to attain the aim to ensure growth and development of the states, which take place in their contact and interaction with one another. But the question is what we may say of states as modern subjects of international relations governed by the international law? It is also important to know whether this law may ever be found useless in respect of questions arising between the states?

Amid the manifold discussion concerning the status, relations and machinery in the realm of international law, the one that we propose in the present paper should not be treated as vain. As a result of the present research the reader will know what the perfect status of sovereign states as subjects of international law is, how to distinguish perfect relations from the imperfect ones in this realm and how the perfect machinery of the international law should operate. This knowledge should be put to work in building harmonious international relations among the states and the whole international community.

In this paper we tried to gather and summarize many facts to illustrate as briefly as possible the truth or the way to this truth in this realm. This should save the space and time of all those interested in the study of different phenomena of international law as well as of the manner of operation of well-recognized rules and principles laid down in appropriate international treaties. Because the whole thing appears to be a kind of efficiency of international law, efficiency of international relations and efficiency of states as the main form of life of all men.

Keywords: *International Law, Status of Sovereign States, International Law Machinery, Sovereign Rights, Sanctions.*

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1. Introduction to a problem of the status, relations and machinery in the realm of International Law

To prepare the way for a general treatment of the status of states, relations and machinery in international law as the law functioning based on a number of natural and positive law rules and principles, a preliminary discussion of the legal questions most discussed at present, is needed. We are inclined to believe that in determining a relation between different phenomena of international and domestic law giving life and strength to various types of relations, nothing new may be found. Everybody will agree upon the said point. However, there are many matters of controversy, upon which we would like to put particular emphasis. First, that is the idea of the rule of law, which we think should be treated properly by all in order to place these phenomena in their true position and to show how they should be held by sovereign and non-sovereign subjects of law.

The fact is that we simply cannot think differently on this subject of the rule of law, but the problem is that we do think differently. By way of illustration, please have a look at the text of the Preamble to the European Parliament resolution of 13 March 2014 on Russia: sentencing of demonstrators involved in the Bolotnaya Square events (2014/2628(RSP)), where it is given that: "whereas the Russian Federation, as a full member of the Council of Europe and the Organisation for Security and Cooperation in Europe, has committed itself to the principles of democracy, the rule of law and respect for human rights; whereas as a result of several serious violations of the rule of law and the adoption of restrictive laws during the past months, there are increasing concerns with regard to Russia's compliance with international and national obligations…".

Here it does not need to be explained that the law is the product of the sovereign power and as soon as the rule of law is laid down by a competent institution of a sovereign state, other competent institutions of such a state bear obligations to treat appropriate subjects and objects of law in pursuance of this rule of law and for the purpose of the said rule of law. And if this rule of law says that all national and foreign natural and legal persons should be treated as subjects of law, capable to enter into different type of relations, their normative status should be recognized by the sovereign state on an equal footing with other sovereign and non-sovereign subjects of law. Hence, we see that the problem of the violation of the rule of law is closely connected with a problem of misrecognition of natural and legal persons as subjects of law with a known scope of fundamental rights and duties.

For example, the rule of law says that A has a power when A is able to change his or other persons' status. If A is able to change his or other persons' status, then A has a power and the state that laid down this rule of law should recognize A as a holder of this power and should treat A appropriately. Other sovereign states know that this state should recognize A as a holder of this power, because thus it is given in a correspondent domestic legislative enactment of this state or its international treaty. It therefore means that the recognition of the power of A is the obligation of the sovereign state, which this state bears starting from the time when this rule of law was laid down by such a state in its domestic legislative enactments or international treaties.

But this recognition should not take place if the power of A when recognized by a sovereign state presents a great obstacle to the power of other subjects of law or the power of this sovereign state. Should this be the case, the said rule of law should not have

any effect, for it is the purpose and the main function of the said rule of law to ensure the balance of power and rights of all subjects of law. On this ground, the misrecognition is preferred by the sovereign states to recognition of the status of A as a subject of law and a subject of power. And this point is of particular practical value to all those dealing with such matters.

Next, it is quite natural that there is no superiority of one state over the rest and the main responsibility for maintaining world peace, premised on the idea of the rule of law, falls heavily on the states vested with the power of veto in the United Nations and accepting appropriate duties of founding members of this world organization set up specifically to build a better world through harmonizing the actions in the attainment of the said end. When taking up their duties the states assume that there is the United Nations represented by competent organs so having jurisdiction over the matters pertaining to their status as subjects of international law and exercising their functions with effect in any part of the world.

However, we must not attribute to this and other international organizations the most prominent role in the realm of the international law and international relations. This role belongs to those, who established it and whom this organization represents: these are sovereign states as distinct politically organized communities adapting this and other international organizations to secure the unity and continuity of their status as a number of elements like rights, duties and liabilities, making them what they really are and showing their true position in international law as well as in domestic law.

Most of the law dealing with various matters of international and domestic law is based on the natural law. This law is immutable and makes sovereign and non-sovereign subjects of law their duty to conform to this law and its principles, which may either be accepted or rejected by them in their actions. Both spheres presume the existence of many different subjects of law. The structure of these spheres is premised on the rights and duties of their sovereign and non-sovereign subjects, which may neither be granted nor given over by these subjects to other subjects by their exercise, but are used for the good of these subjects.

This brief is the summary of what is necessary to be known of the said problem. It has the beginning in its main aim, which is to elicit inquiry into the matter of the effect of any action in this realm on the status of states for the most part currently relying on the international trade and commerce (as the main cause), without which their wealth and power would not increase (as the main effect). To settle this problem we must study international law as the law binding the states to their commitments to one another and the international community and supplying the basis of certainty, which is necessary to maintain international peace and security.

Let us now proceed to consider briefly but inclusively a number of important points, which we have singled out in the present paper, giving clear explanations on them for the readers to be able to conceive them in a proper way. We hope that the name of all these points will be accepted by them as distinctive and appropriate.

2. The main function of sovereign rights

In the present part of the paper we would suggest to describe and define international law as a body of rules and principles (a) having reference to the nature, character, function and effect of sovereignty and correspondent rights produced by the law of nature and bearing its stamp and character; (b) giving explanations of many processes of different kind in the sphere of

international relations suggesting melioration or deterioration of the status of subjects of international law (sovereign states, international organizations) as well as subjects of domestic law (natural and legal persons) and (c) having implication for any portion of any processes we see around us in the world of politics, making them predictable for all.

Our aim in this part of the paper is to place the subject of our main concern, which is the law and the rule of law, in its true position in the sphere of international relations; the intention being to show a relation between such phenomena as (a) the law and the sovereignty; (b) the law and nationality; and (c) the law and the subject of law. To accomplish this aim, which is necessarily involved in the idea of international law, we have ventured to select the theory of sovereignty. The earliest systematic exposition of the said theory may be found in the work of the Author of the History of the Council of Trent: "The Rights of Sovereigns and Subjects". This theory is our guide in the study of international law. It may never appear to err when dealing with various forms of international law in their development, the interconnection of all these forms and their true value in this sphere.

Speaking of this relation between above-mentioned phenomena, it is noteworthy that the great idea of this world is that law as the product of the sovereign will and power is very well in its place generously accorded to it by the sovereign states. But let us think (a) what the law is considering that fact that every natural or legal person, sovereign state or international organization is subject to domestic or international law (as the case may be) and all their actions are generally viewed through the lenses of the lawful and unlawful conduct; (b) why it takes the first place in any politically organized community and (c) may the law be detached from the sovereign states? This discussion should serve as a sort of pretext for letting the readers understand conscientiously and industriously, what the whole thing appears to be from the beginning to the end and why it is so important to operate in this and no other way.

There is a close connection between the sovereignty and law. In the most extended sense, sovereignty is the most important power or authority of a person (like "le Roi de France et de Nauarre" in the correspondent Edicts of XVII century or His Majesty the Emperor of all the Russians in Declarations between Great Britain and Russia of the XIX century) or a group of persons (e.g. all modern states) to make laws, to execute them and judge according to them. This power is, otherwise, what may be done by its holder and suggests a plural possibility. Among the things possible are to legislate, to execute and to judge. Speaking of this power, it is for the sole and proper use in the interests of their subjects; it extends its influence over all persons and things being within their jurisdiction and is typically exercisable to the exclusion of the power of any other state. Should we consider states as distinct physical objects, this power (essence) is essential for the existence and identity of states as organized political communities (form) with distinct material, spatial and temporal properties.

The end of sovereignty as the essential quality of all states naturally belonging to them is the order as that truly difficult task undertaken only by those who desires and is capable to approach it. For the order, as that common interest of natural persons, they are brought together. For the order, states as assemblies of such natural persons make laws using different methods to dispose persons and things in our material world in proper relation to one another and permit many things to be done. For the order, these laws of sovereign states are binding upon

their subjects, or all those natural persons that comprise them and/or bear relation to them through the legal institutes of citizenship, domicile or residence, as the case may be. For the order, these laws of sovereign states may not bind subjects of other states within the jurisdiction of these other states.

So now it should be clear what this sovereignty is about. It is a part of states. Actually, it is an essential part of all states, without which they may neither exist nor act as politically organized communities. It is as important for the states as the soul for men. Sovereignty is a compound substance comprising a number of intrinsic properties and it is very well in its place. If to proceed and speak of the framework for cooperation, enabling the states to embark on joint activities to accomplish specific goals that is the first place generously accorded to the sovereignty by the states and the international community in general. And it is quite natural that we address the problem of sovereignty and functions of sovereign rights before entering into the main discussion of the perfect status, relations and machinery in the realm of international law.

Having examined the essence of this phenomenon of sovereignty, now it is time to proceed and speak of what it implies. But first it should be clear enough that different ideas serve as the meaning of different words. Thus, for example, the idea of sovereignty requires that states should be at liberty to do whatever things within their jurisdiction, which they find appropriate and necessary for all those comprising them. However, when there is one sovereign, the other is not; and when there is liberty, the necessity is not. This naturally means that speaking of sovereign subjects of law, these are the sovereign rights of states to legislate, execute and judge rather than their duties to do these things and these are only their rights. And the scope of this liberty is the same for all states. Leaving the states without this liberty, means their perishing.

Should we consider sovereign rights as property or that thing that the sovereign states own by the nature of things, this ownership will last forever. This property gives sovereign states the right to be subject only to the law produced by such states rather than to be subject to any other states, foreign or national natural and legal persons as subjects of law, no matter be it domestic or international law. And all these subjects of law are informed about the nature and effect of such sovereign rights and accept them, for there is nothing better in the world to meet their needs in different spheres of life. Therefore, all these sovereign and non-sovereign subjects of law have to abide as the necessity realized in the domestic or international spheres and do actually abide by the rule of law.

It should be noted further that speaking of the functions of sovereign rights, first, the question is of the main aim of such rights, which are not subject to qualitative change. Inside a system of international law wherein the presence of one sovereign state presents no obstacles to the presence of all other sovereign states, in our opinion, it is to make states exist in the fullness of their sovereign power and aid in building harmonious relations of states with one another. It is attainable when they do things what they can do alone and refrain from doing things, which they cannot do alone but jointly with others. This may be learned by us from different sources of international law as the law arising and abiding in the nature of states and relations between them. See, for example, Article 48 of the UN Charter. However, to ascertain what sovereignty is, we will try to render clear the issue who they are whom we call sovereign persons, what brings them into being and what this sovereignty gives them for production and action.

As it has already been said, states as politically organized communities of men cannot exist without sovereignty as the cause for the production of many different things, which may neither be produced by the nature nor may come into being of necessity. So we may say that having sovereignty is that fundamental property of all such communities as the most perfect form of life of men, necessary for their existence and identity in such a quality. And if sovereignty is for bringing many various things into being, which can either be or not to be; the law is for the action. For a natural person to be regarded as a national of a separate state (or a subject of appropriate domestic law), there should be a close and indissoluble connection of this person with this state. This close and indissoluble connection of this person with a distinct sovereign state is determined by the place where this person ordinarily lives and exercises his civil, socio-economic and political rights.

Hence, we see that the main idea of this part is to show that (a) states exercising their authority over persons within their territories premised on the idea of sovereignty and appropriate systems of law; (b) the law, whether international or domestic law, made for the action and rights as the product of law; (c) actions of appropriate subjects of law (whether of international or domestic law) and their consequences are the things closely connected by nature as the cause and effect. This relation between such phenomena as (a) the law and the sovereignty; (b) the law and nationality; and (c) the law and the subject of law should be readily accepted by the theory and practice as being the solution of many different problems, among which we may distinguish non-recognition (of the equal sovereign rights and duties of all states, fundamental human rights, and so on).

The conclusion is this: these sovereign rights are that thing causing many different things to happen, e.g. rights and duties of natural and legal persons, but may not be caused by such things without undertaking fundamental change leading to its perishing. For it should be clear enough that states are either sovereign or not states. To rephrase it, things which are not sovereign by their nature under no conditions may be found so and things which are sovereign under no conditions may be found lacking sovereignty. The loss of the attributes of sovereignty shall lead to the loss of sovereignty. There is a number of things that we speak of as the attributes of the sovereignty. These attributes are of the value for the states, because for the states to be sovereign, they must not have the same nation, the same territory, the same culture, the same religion etc., but they should have these attributes. Therefore, to alter these sovereign rights of states as direct, original rights of all politically organized communities is not in power of other states rather their unions when there is their consent to this end.

We have now elucidated what the sovereignty is. It therefore follows that sovereign rights of states cannot either alter or diminish with any activities, which are held in conformity with the rule of law, for that is not in their power to do. No law as the product of the sovereign power may turn their liberty of what may be done or accomplished into necessity of what must be done and accomplished in the international sphere. Next let us proceed to consider the equality models of the status and relations in the realm of international law.

3. The equality models of the status and relations in the realm of International Law

The significance of this part of the paper is that it unfolds a true part of international law in modern international

relations where nations confirm their equal sovereign rights and benefits in a domestic sphere:

a) When the State A has the power to legislate, execute and judge within its territory, then the State B may not be without this power or have limited power to legislate, execute and judge within its territory.

b) When the State A has the power to legislate, execute and judge within its territory, then the State B does not have this power to legislate, execute and judge within the territory of the State A.

c) When the State A has the power to legislate, execute and judge within its territory, then the State B may neither have nor exercise any power to the effect to limit this power of the State A to legislate, execute and judge within its territory;

And in the sphere of international law and international relations:

a) When the State A is a sovereign state, then the State A has the same rights as the State B, the State C, the State n as sovereign states to enter into international relations with respect to different things;

b) When the State A is a sovereign state, then the State B, the State C, the State n as sovereign states may never deny the sovereign power of the State A in matters of domestic or international law;

c) When the sovereign power of the State A in matters of domestic or international law is denied by the State B, the State C and the State n as sovereign states, it should be immediately restored by the international community to this State A in accordance with international law rules and principles.

This idea of the perfect equality of persons and their actions in this realm is what is necessary for the assembly of states united by the bounds of common rules and principles to be commonly applied to them all as well as common interests in the maintenance of international peace and security. This idea made international law what it currently is. It may never be more favorable for one state or a number of states and less favorable for the others. The power of this idea is in the appropriate equality-model of international relations and in the equality-model of the status of those entering into them that make sovereign states attain their aims in the international sphere. We cannot help noticing that these models, which represent persons and their actions in this realm, were built by the practice and tested by the time. And there is no reason to revise them, for they show what these persons and actions are, and which things they produce ensuring sovereignty, territorial integrity and political independence of all states.

To rephrase it, if we agree with what is stipulated in the text of the Article 2 of the UN Charter, it is true that:

a) All sovereign states possess and exercise equal sovereign rights; and these rights are inviolable;

b) All sovereign states as subjects of international law and international relations fulfill their obligations in good faith;

c) In case of disputes, all sovereign states ensure their pacific settlement;

d) No force is used against the territorial integrity and political independence of states;

e) All states cooperate and communicate with one another, be them members of the appropriate international organizations or not;

f) In matters being within the jurisdiction of states as sovereign rulers, no international sanctions are imposed and effected, for the main target of all such measures is the wealth and prosperity of natural persons comprising such states.

And taking into view that we may arrive at truth by way of negation, if that is true, the other is not. To put it another way, it is in discretion of all states that all other

rules (e.g. given below) are hereby repealed and may never have any effect on the states as subjects of the international community. Otherwise, this would mean that the sovereign power and rights of separate states appear to be a burden to other sovereign states, when it is not the case:

a) Sovereign states do not possess and exercise equal sovereign rights; the sovereign rights of one or a number of states are more perfect than the rights of other states.

b) Sovereign states as subjects of international law and international relations do not fulfill their obligations in good faith;

c) In case of disputes, all sovereign states do not ensure their pacific settlement;

d) Force is used against the territorial integrity and political independence of states;

e) States do not cooperate and communicate with one another be them members of the appropriate international organizations or not;

f) In matters being within the jurisdiction of states as sovereign rulers international sanctions are imposed and effected.

It is further evident that the purpose of sovereign states in this realm is neither more nor less than to set forth this truth in appropriate international treaties and other acts confirming their basic rights, duties and liabilities and/or establishing extended ones to perfect their status when there is a separate agreement to this effect. For it is necessary for the peace and prosperity of all nations. And in doing so they agree not to fail to honor their commitments, which may never be considered as a hardship. So too, such rules and principles may never require that the United Nations or separate states should intervene in matters, which may never be treated as international rather than domestic or national, because this will never be conducive to the strength and stability of sovereign states: see Article 2 of the UN Charter.

4. The main function of International Law as a perfect system of law

In the present part of this paper, we intend to proceed and speak of the thing, which cannot be allowed to pass unnoticed, namely, what the function of the international law is. First, it should be said that international law is the invention of sovereign states and the product of the sovereign will pertaining to and affecting the operation of appropriate domestic law institutions and instruments.

And the point on which our general view is put forward is that the elements of international law operate properly then and only then when they operate within a distinct system. As to this system, that is the system of international law, which role in the sphere of international relations is definable by its main function. It is to bring order to this sphere. The means by which this order may be brought is the consent or otherwise the act of recognition of the equal sovereign rights and duties of all states giving unity and comprehensiveness to this system. However, no sooner does any question as to the widening of this system arise, trespassing in other systems not their is most decisively avoided by the international law machinery.

The operation of the said machinery is treated as perfect when it suggests effective collective measures to be taken by the UN Security Council or the UN member states when they are called upon to take them. These measures referred to above shall be treated as effective then and only then when no other measures may produce any better result under particular circumstances. It is to attain the balance of power in international relations bringing order to this realm. That is what we mean by the expression “perfect

international law machinery" premised on the idea of the free choice and consent of the states in matters regarding the maintenance of the international peace and security.

If to refer to this idea, the main end of the free choice and consent as two closely connected instruments in hands of sovereign states in the realm of international law is to smooth their road to various peace and security agreements clothed in the language using the terms and notions predictable for all. This consent as determination of their free will with respect to a particular way of acting established in appropriate international treaties. That is the way of acting accepted in its completeness by all the parties to such treaties. Here it is necessary to say that sovereign states are free to agree or disagree with the terms of their cooperation as a "thing alterable", but may never disagree with the principles of their cooperation flowing from the nature of these subjects of law, their personality, which is a "thing unalterable", no matter, be these principles given in appropriate treaties or not, when thus they come into mutual contact to accomplish appropriate results of their cooperation.

In reference to the background of this cooperation, a little explanation is required. There is a firmly established understanding that international law should not cease to play the most prominent role in life of the international community. It is the law for peace and equitable relations established in the former times for all times to restore the equilibrium between sovereign rights and duties to be taken up by the states in fullness based on a number of assumptions, which sometimes seem to be completely forgotten:

(a) there is one system of international law and many different systems of domestic law with no legal rights and duties outside these systems;

(b) all sovereign states and their groups are subject to the same international law offering many different possibilities;

(c) all natural persons and their groups are subject to domestic law, which is different;

(d) there are situations which fall and which do not fall within the domain of international law: see, for example, the text of the Declaration between Great Britain and Russia relative to the disposal of the estates of the deceased seamen of the two nations signed in London in 1880 and of the Merchant Shipping Act Amendment Act of the Great Britain 1862.

International law is the law of nations producing very good results sometimes immediately affecting the status of states as parties to appropriate bilateral and multilateral international agreements. The only question is that when pursuing objectives common to all this law should be maintained within its domain that has been assigned to it by the states characterized by the highest sovereign status, comprising a number of elements. These elements are those things that touch each other in this realm either meliorating or deteriorating the status of states.

Taking this into account, all sovereign states are subject to the same law, which is international law, this comprehensive framework for the most constant protection and strengthening of the international peace and security, reduction of all international tensions and establishment of a continuing flow of trade and commerce as the main ends in which all nations generally share a common concern. If viewed through the lenses of a functional theory and a theory of systems, these subjects are otherwise the elements of the same system. The same qualities are attributed to this system like the equality, similarity and likeness. They are fundamental to these subjects and essential for the international law as the only system

of law to rule throughout the world composed of different nations and the only force to keep this world united.

Now the main question before our mind is that should this statement of the qualities of international law subjects, which may never be thrown into disfavor, be true, it is an error to think that they may ever have any extraordinary qualities and powers. In the realm concerned in which all the differences between states were prevented by virtue of the Peace of Westphalia 1648, the states have the same scope of treaty and non-treaty rights, privileges and immunities, nevertheless suggesting many different possibilities in respective spheres and participate in equal advantages of the international communication and cooperation. Associated with sovereignty, territorial integrity and political integrity these rights are neither more nor less fundamental than any other rights that states may have as subjects of international law whose status is confirmed by the international treaties and other acts of international and domestic law made, interpreted and applied to this effect.

International law is not the arena for insisting rules upon the weaker states by the stronger ones, because there is no prominent sovereign power to this end. As a result, no one may make such rules and regulations that will affect the status of other states, which may never be determined by other states. To add, no state may administer control over the other states' international trade and commerce; and no president or other person at the helm of a separate state may proclaim a right of an international police power by virtue of any doctrine produced by a correspondent school of thought and appropriately influencing the public opinion. No public interests of one particular state may so request and all the attempts to the opposite effect are expressly condemned by the international community as a real community of nations sharing some common beliefs in different matters and answering common needs in the unity of the legal action: see Article 48 of the UN Charter.

Therefore, the main function of the international law is to ensure the balance of power. Narrowly construed this balance of power is that state when sovereign states are able to meliorate and should refrain from deteriorating their and other states' status comprising a number of elements like rights, duties and liabilities. It is noteworthy that this balance of power requires that no state should have and exercise its sovereign power inconsistent with fundamental rules and principles of international law established by the states to promote the climate of enduring peace, sincere friendship and mutual trust throughout the world by means of appropriate international law machinery suggesting effective collective measures to be taken by the UN Security Council or the UN member states when they are called upon to take them.

By way of illustration, please have a look at Article 41 to be read in conjunction with Articles 1 - 2 of the UN Charter, where it is given that the Security Council as a competent organ of the international organization has the right to institute international economic sanctions because the UN member states have duties to other states represented by this international organization. This balance of power has been strenuously supported by many generations before us as a main condition of the world peace for which they have lived and died. This is the reason why the right to impose and effectuate sanctions as a right to make a ruling on a breach of the international obligation may never be conceded to one state or a number of states without being sanctioned by the international community based on the

principles on which international relations are commonly constituted.

5. Modern problems of international relations

When speaking of the perfect international law machinery we do not deem it advisable to separate the problems of the modern international relations from the main body of the present research. And if to proceed and speak of international relations, that is the state of being connected by mutual commitments of two or more sovereign states in the sphere of the international trade and commerce and other spheres closely connected therewith to a particular end. Now it is not difficult to perceive that there is something wrong in international relations between the states, when the great question of international relations to which the rules and principles of international law apply is that of their force, whether these are fundamental rules and principles, which prevail over the rules and principles of domestic law to ensure sovereign rights, liberties and privileges of states or not. It requires no great mental effort to see that a time has come to see the true condition of the international relations and to test this system of international law. We know that public utility and necessity require that the international law machinery at all times and in any circumstances whatsoever should show that ease and steadiness of motion that characterize perfect systems. However, the point is that at a time of conflicts, it is not always an easy task to find proper means to settle them in a peaceful manner. But to find them suggests to remove the cause of all such conflicts.

Among such causes without which removal the consequences of the said conflicts will never cease, is the intention of states to exercise control over other states. But it is obviously not the power of states to control the situation in other states because it is agreed by their unanimous consent that in the realm of international law sovereign states have equal rights and duties, while in the realm of domestic or municipal law they possess the exclusive rights to legislate, execute and judge to avoid all disadvantage and burden to their subjects. Hence, we see that either by constitutions of states and international agreements that these states enter into these are not the right persons to exercise this control; (b) no one may ever authorize them to act in such a capacity upon the matters of the national interest of other states even if they de-facto act in such a capacity[1]; and (c) this power may never be recognized by the international community, for it would be dangerous to enable such states to exercise this control, provided always that the aggregate power of a great number of states is superior to the power of a single state or a small number of states.

To denote this connection referred to above a number of special terms is in use. For the avoidance of doubt the term “international sanctions” is employed in this realm with respect to a specific way of acting which is established in international treaties and should (a) meet the purposes and principles of international law; (b) be premised on diplomacy in public views and shared experience; (c) be just, equitable, predictable, sensitive to human rights and proportionate to infringement; (d) ensure respect for the personal and social welfare of nationals of target states and (e) never depend on the factors being within the control and cognizance of those employing these measures, which may either promote or impede the climate of mutual

[1] See, for example, U.S. Policy and the Future of Cuba: the Cuban Democracy Act and U.S. Travel to Cuba: joint hearing before the Subcommittee on Economic Policy, Trade, and Environment; Western Hemisphere Affairs; and International Operations of the Committee on Foreign Affairs House of Representatives, 1993.

understanding and trust. Beyond all this, since these are the measures to reduce international tensions and strengthen the confidence among the nations, they may neither be imposed for some light or transient causes nor be premised on mutual ignorance and incorrect estimation of facts around their effectuation. So today when clarifying the exact meaning of the term of international economic sanctions, which should neither be changed nor enlarged with political, economic and social changes, it is associated with the reaction of the international community to gross violations of international law undermining its integrity.

Speaking of sanctions, the law governing appropriate relations between states and competent persons representing them, takes a separate part in this system of law exhibited in forms (a) generally standing apart from those of domestic law, for which states are directly responsible; and (b) bringing forth the idea of the general framework of rules and principles to define the nature of conflicts between the states that may bring them to war and ensure their settlement by such competent persons. The main idea behind sanctions law as a branch of the law of nations is to employ its perfect machinery to ensure (a) healthy coexistence of states in case of "threats to the peace, breaches of the peace, and acts of aggression" (see Chapter VII of the UN Charter) and (b) the supremacy of fundamental human rights over any other rights as the main pillar that our world rests upon (see the text of the Preamble to the UN Charter, the Universal Declaration of Human Rights and other acts). But in order that these fundamental human rights be fully exercised, the said acts should be all the more firmly observed by the states in whatever situation. It is therefore the law reflecting the interplay between violation of international commitments to principles of sovereignty, territorial integrity and political independence essential for their existence and identity as well as all those individuals comprising them, and the reaction of the international community to the said violation (see the text of the Preamble to the Security Council Resolution 2253 (2015), expressed by a competent organ of the UN, which is the Security Council: see Article 39 of the UN Charter. These fundamental human rights are otherwise the target object of the equality-models of international relations.

6. Domestic sanctions

We have ventured to select this topic of discussion, because we are convinced that (a) economic sanctions are employed by the international community to settle serious conflicts between the states without their sovereign rights molestation; (b) to observe the international treaties means to refrain from taking measures, which may give rise to differences in the status of subjects of international or domestic (municipal) law, so established and confirmed by the power of states acting as a single body in the realm of international law or by the power of a single state as the only ruler in matters that fall within the realm of domestic (municipal) law; (c) in order to avoid disadvantage and burden to the nationals of other states and hence put in execution what has been agreed to by the states, the effect of such already taken measures should be remedied by the states taking them; (d) to find a proper remedy all facts pertinent to the situation should be known and appreciated.

However, at a time when it has been found essential for the states that the international law is the starting point and the main rule of conduct in their open, just and honorable dealings with one another, domestic sanctions against separate states and their nationals are employed by such

states in a sense adverse to the idea of peaceful international law machinery pursuing the end to promote cooperation and keep the world peace and security[2]. To illustrate this point, through restrictions generally laid upon separate states as well as their natural and legal persons, they are made to coerce these states to a particular way of thinking and acting under a risk of economic disruptions, most notably, at a time of the international trade and commercial activities, which such states mostly rely on for the advantages accruing from them. To serve the end to coerce so as to spread suspicion and fear as between the nations the sanctions-making machinery of such states comprise the following elements:

(a) policymaking – decision making on the measures to be taken at the desired conditions achievable within the set timeframe;

(b) implementation – the process of selecting the type of activity and determining the extent to which it should be held to impede the economic growth and development of target states;

(c) operation – a number of instructions to pursue the end to allocate natural, financial and other resources of target states as a determinative factor in all recent international conflicts in a way the national interest and foreign policy of distinct states so request.

Among the restrictions referred to above we may distinguish the travel ban, an assets freeze, property blocking, exports restriction and other measures with respect to foreign property subject to jurisdiction of such states (see Sec. 203 the International Emergency Economic Powers Act of the United States 1977), which have shown themselves as interfering with foreign states and their nationals. The most arduous problem at this is that by legitimating trade war measures, the said sanctions have a strong counter-productive effect resulting in the internal financial instability beginning to surface immediately after the said measures being taken. Moreover, they tighten financial conditions of target states and weaken the ability of their political regimes to maintain themselves. Therefore, target states no longer domestically focused on trade and commercial issues, tend to be prevented to govern their affairs and try to straighten out the said difficulties in the way they deem adequate in such circumstances.

It has always been the belief of the majority of nations not willing to dissever the factual relations between nations from the law of nations: *"if a government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name, and would afford no protection either to states or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a government can not appeal to its municipal*

[2] "Let me say this is a very important hearing today because we feel that by imposing an embargo on Iran, the President has now fired the biggest economic weapon in our arsenal. In today's hearing we will consider the overriding question: "Will an embargo against Iran work for us or against us?"… An embargo is all about leverage, imposing economic pain to force Iran to drop its nuclear weapon program and stop its terrorism and subversion… In 1993, Iran's total trade was some $29 billion. U.S. exports to Iran were only $616 million, barely a few percent of the total. What is more, Iran's total GNP is some $300 billion. So the question is "where is our leverage? Now, if other countries joined this embargo, we would have a bigger stick. But the United States is still all alone. Iran's biggest trading partners are among our closest allies, but none of them has shown the slightest willingness to follow our lead: not Japan, not Germany, not Italy, not France, not South Korea – and these are Iran's five major top trading partners. Their total trade with Iran is some $13 billion, and they are all trying to increase their trade with Iran, not cut it back": see *U.S. Sanctions on Iran: Next Steps: hearing before the Subcommittee on International Economic Policy and Trade of the Committee on International Relations*. House of Representatives. One Hundred Fourth Congress, First Session, 1995.

regulations as an answer to demands for the fulfilment of international duties"[3]. But despite that, these are truly the measures the best adapted to the needs of separate sovereign states holding the reign of military power to afford immediate negative practical result to target states with rich natural resources subjected to national appropriation by claims of sovereignty. This gives us reasons to notice the character of laws in this realm.

7. The character of laws in this realm

When speaking of the character of laws in this realm, first, we venture to admit that some laws are made for peace; some laws are made for war. The laws comprising the first category are attributed to members of the international community after the First and the Second World Wars when they were generally regarded as a single body. The concerted action was taken then to preserve and increase the well-being of all nations and to perfect international treaties for the peaceful settlement of international disputes to eliminate the very possibility of war, assuming that*"…there is neither great nor small, rich nor poor, in the eyes of justice; that all are equal, that all have equal duties, that all have equal rights, and that the duties and the rights are the same for all; that is what is right for one can not be wrong for another, and that what is inherently wrong can not possibly be right, even although the republic involved be the most numerously peopled and the greatest in physical power"*[4]. At least thus it is kept in the Treaty on arbitration signed at Washington on October 22, 1928 by and between the United States and Albania, where they were *"determined to prevent so far as in their power lies any interruption in the peaceful relations"* necessary for the survival of all states.

Though we have a perfect international law machinery, these times are inevitably gone and states think differently on many affairs of this kind that actually concern all the states and their subjects. When we come to sanctions, we are told that distinct states affirm the supreme importance to be allotted to the rule of law, fundamental rights and freedoms of individuals. However, when measures are taken to the end to block and prohibit completely all transactions and interests in property under the pretext of threatened interests of other sovereign states with free and independent civil governments, when nationals of these states may not use of what is for them or experience any other risk to their freedoms and fundamental civil liberties abroad, we do not think it proper to say that they comply with the said rule of law, fundamental rights and freedoms. They fall into the second category of laws. These are the laws for war with the injustice as the evident principle running through them when showing the reasons for taking, implementing and approaching the results of the said measures in disregard of the fact that under Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 1952: "…the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law

[3] Raoul E.Desvernine, "Claims Against Mexico", Private Edition. 1921.P. 18.

[4] The American Institute of International Law: its declaration of the rights and duties of nations. The American Institute of International Law, 1916, p. 2 – 3.

and by the general principles of international law".

However, such measures are sometimes felt particularly desirable for the states against the states taking all the efforts to prevent the use of force against the sovereignty, territorial integrity or political independence[5] of the states with rich natural resources being in complete and absolute property of their governments to exploit them in the interests of their populations or taking a very important geopolitical kind of part for the North Atlantic Treaty Organization (NATO) or other organizations. But it should be quite clear that for the inherent equality of all states of whatever extent or population and for their autonomy in matters of the national interest generally claimed by the sovereignty; reason, justice and fairness as well as dignity, equality and mutual respect should speak through all nations and no state may establish a practice of punishing other states in a way their internal and external policy so request[6]. Therefore, no punishment may be awarded for the advantage of states in violation of a good international practice of cooperation and communication established between all states. That being the case, the membership in the United Nations has its significance as a distinct type of relations that sovereign states may enter into in the realm of international law as a framework of rules and principles affording room only for the justice, reason, humanity and fraternity to require certain things to be done or rest undone in interests of all nations as a single body without hindering or causing disadvantage to any of its part either directly or indirectly.

8. Conclusions

All the points raised by us in the present research are given with particularity and precision, which this subject requires. We think that in the paper of this size we have succeeded in elucidating and illustrating the problem of the perfect status, relations and machinery in the realm of international law. This brief is our attempt to treat of the issues of special interest for the theorists and practitioners of law:

a) The problem of the status, relations and machinery in the realm of international law is the problem of efficiency of international law, efficiency of international relations and efficiency of states as a main form of life of all men;

b) The main function of sovereign rights is to make states exist in the fullness of their sovereign power and aid in building harmonious relations of states with one another. It is attainable when they do things what they can do alone and refrain from doing things, which they cannot do alone but jointly with others;

c) The idea of the perfect equality of persons and their actions in this realm made international law what it currently is. It may

[5] It is well-known from the history of international law and international relations that "the Russian representatives presented not only a perfectly definite statement of the principles upon which they would be willing to conclude peace but also an equally definite program of the concrete application of those principles. The representatives of the Central Powers, on their part, presented an outline of settlement which, if much less definite, seemed susceptible of liberal interpretation until their specific program of practical terms was added. That program proposed no concessions at all either to the sovereignty of Russia or to the preferences of the populations with whose fortunes it dealt, but meant, in a word, that the Central Empires were to keep every foot of territory their armed forces had occupied – every province, every city, every point of vantage – as a permanent addition to their territories and their power". See: *President Wilson's Fourteen Points of 1918.*

[6] Here it is worth to note that "…the American people are entitled to a foreign policy that seeks to preserve and increase their living standards, and to one that contributes to their sense of national pride". Alan Tonelson, "*The Real National Interest"*, Foreign Policy, 61 (Winter 1985/86): 69.

never be more favorable for one state or a number of states and less favorable for the others. The power of this idea is in the appropriate equality-model of international relations and in the equality-model of the status of those entering into them that make sovereign states attain their aims in the international sphere;

d) The main function of the international law as a perfect system of law is to ensure the balance of power. This balance of power requires that no state should have and exercise its sovereign power inconsistent with fundamental rules and principles of international law established by the states to promote the climate of enduring peace, sincere friendship and mutual trust throughout the world by means of appropriate international law machinery suggesting effective collective measures to be taken by the UN Security Council or the UN member states when they are called upon to take them;

e) When speaking of the perfect international law machinery the problems of the modern international relations should not be separated from the main body of the present research. We know that public utility and necessity require that the international law machinery at all times and in any circumstances whatsoever should show that ease and steadiness of motion that characterize perfect systems. However, the point is that at a time of conflicts, it is not always an easy task to find proper means to settle them in a peaceful manner. But to find them suggests to remove the cause of all such conflicts;

f) We are convinced that (a) economic sanctions are employed by the international community to settle serious conflicts between the states without their sovereign rights molestation; (b) to observe the international treaties means to refrain from taking measures, which may give rise to differences in the status of subjects of international or domestic (municipal) law, so established and confirmed by the power of states acting as a single body in the realm of international law or by the power of a single state as the only ruler in matters that fall within the realm of domestic (municipal) law; (c) in order to avoid disadvantage and burden to the nationals of other states and hence put in execution what has been agreed to by the states, the effect of such already taken measures should be remedied by the states taking them; (d) to find a proper remedy all facts pertinent to the situation should be known and appreciated;

g) When speaking of the character of laws in this realm, we venture to admit that some laws are made for peace, some laws are made for war.

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FISCAL MEASURES ADOPTED BY ROMANIA IN THE COVID-19 CONTEXT IN ORDER TO HELP COMPANIES AVOID INSOLVENCY

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Abstract

The Covid-19 pandemic has been affecting for more than a year all countries' economies, by generating an overall sanitary crisis. In order to prevent the spreading of the Covid-19 virus, countries across the world have limited or even forbidden temporarily several economic activities, which has led to a financial blockage in some industries, especially in the touristic industry. In response to the devastating economic effects, the Romanian Government has adopted several measures and fiscal mechanisms for companies, aiming at preventing their insolvency and therefore revitalizing the national economy.

Keywords: *fiscal measures, insolvency, COVID-19 pandemic, national economy, global economy.*

1. Introduction

The COVID-19 pandemic has generated a sanitary crisis across the world. Therefore, public authorities have been constrained to adopt several measures in order to limit the impact of the COVID-19 virus spreading. Each country has developed its own policy of measures depending on the severity of the pandemic. Because of the necessity of limiting the pandemic's consequences, countries across the world have been limiting social activities, imposing national and regional quarantines. These national policies have had a strong impact on the economy since some of the measures have included limitations or even temporary bans of some economic activities. Whilst these measures have helped the prevention of the virus' spreading, they have also severely affected the economy and the business environment. This paper analyses the measures adopted by the Romanian Government to limit the pandemic's impact upon the national economy and help companies avoid imminent insolvency. The importance of this matter could be justified by the fact that these measures support the efforts made by struggling businesses to overcome their financial distress or state of insolvency. The lack of measures adopted by the Romanian Government could result in a general economic blockage and could easily cause the "death" of the majority of small and medium businesses. This paper also intends to analyse effective measures that have been adopted by other countries and therefore identify the best practices that have had a positive impact. All measures adopted by the Romanian government in order to limit the spreading of the COVID-19 virus have affected, directly or indirectly, a large majority of businesses, which have been unable to keep up with claims' payment, including budgetary claims. As a consequence, the Romanian fiscal authorities have collected a lower rate of taxes. In relation to this matter, a set of

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measures has been needed not only to support businesses, but also to increase the rate of tax collection.

2. Measures adopted by the Romanian Government to support companies during the established state of emergency

The Romanian legislator has adopted numerous mechanisms and measures in response to the devastating effects upon the economy. However, this paper shall only analyze the measures that are relevant regarding preventing companies' insolvency, especially the fiscal measures and mechanisms, since fiscal authorities are the permanent creditor of every business.

2.1. The Emergency Situation Certificate (ESC)

The state of emergency has been established in Romania by the Decree no. 195 of 16th of March 2020[1], which has only mentioned the possibility of affected companies to obtain the ESC. The Government Emergency Ordinance no. 29/2020 regarding some economic and fiscal-budgetary measures[2] had provided clarifications upon the utility of the ESC and the entities that could request its release. Therefore, the ESC is a document issued by the Ministry of Economy, Energy and Business Environment, at the request of economic operators whose activity had been totally or partially interrupted based on decisions issued by the competent public authorities. It must be mentioned that the authorities had issued several military ordinances, interrupting totally or partially several economic activities, such as: (i) educational institutions, units whose activity is the serving and consumption of food and alcoholic / non-alcoholic beverages, (ii) the activity of every entity organizing events that involve the participation of over 100 persons in open spaces, (iii) the activity of dentals clinics, (iv) retail sale of goods and services in shipping centers (with few exceptions), (v) cultural, scientific, artistic, religious, sporting, entertainment or gambling activities, (vi) transport services, (vii) entities that organize collective physical activities, (viii) any other entities that organize and carry out activities involving the formation of groups of more than 3 persons. The ESC had been issued in two forms : (i) Type 1 (blue), issued for the entities mentioned above, whose activity had been totally or partially interrupted, as a result of decisions adopted by the competent public authorities during the declared state of emergency and (ii) Type 2 (yellow), issued for applicants who, based on their declaration on own responsibility, show that they recorded a decrease of income of at least 25% in March 2020 compared to the average income recorded in the two previous months. The type 2 ESC had been issued for companies which were indirectly affected by the COVID-19 pandemic. One of the main advantages of the ESC is the fact that, according to article X of the Government Emergency Ordinance no. 29/2020, entities which have obtained it have had the possibility to postpone payments for utility services (gas, electricity, water, telephone and internet services etc.), and also rental payments for registered offices and secondary offices. However, these measures had been limited to a period equal to the established national emergency state, which has lasted for two months, until the 16th of May 2020. The timeframe granted by the authorities to obtain the ESC had been limited and it cannot be obtained in this moment, but its utility is not limited in time,

[1] Published in the Official Journal no. 212/16.03.2020.
[2] Published in the Official Journal no. 230/21.03.2020.

since it is required for accessing several other benefits, such as facilities for loans granted by financial institutions. Nevertheless, the biggest advantage of obtaining an ESC is the fact that it could be used by its holders to invoke the *force majeure* in ongoing contracts. To the author's knowledge and research, no other state has adopted this measure in this form. One particularity derives from the fact that the simple ownership of an ESC is sufficient to create a *relative presumption of force majeure*. The civil law in Romania does not regulate a *presumption* of force majeure. According to art. 1.351 para. (2) of the Civil Code[3], "*Force majeure is any external event, unpredictable, absolutely invincible and inevitable*" and according to para. (1), "*Unless the law or the parties don't stipulate otherwise, liability shall be removed when the damage is caused by force majeure or fortuitous case*". "The effect of the case of force majeure consists in the total elimination of the civil liability for the damages caused by the non-execution of the (contractual – n.n.) obligations due to the force majeure event."[4] However, the *presumption* of a case of force majeure does not operate in every contractual relationship, since the Romanian law regulates that the contractual parties are able to exclude or limit the cases of force majeure. This is the main reason why owning an ESC generates a *relative presumption* of a force majeure case and not an *absolute presumption.* Also, according to art. 1.634 para. (1) of the Civil code, "*The debtor is liberated when its obligation cannot be executed due to a case of force majeure (…) occurring before the debtor is put in delay.*" In order to establish if the relative presumption of force majeure case operates in a certain case, the party that invokes the pandemic as a force majeure case should clarify if the contract excludes the removal of liability in such cases and if it stipulates limits in time or events. Except the facility granted by the authorities regarding the request of an ESC, companies have the possibility of requesting a notice of force majeure from the Chamber of Commerce, in accordance with art. 4 para. (1) letters j) and i) from the Law no. 335/2007 of Chambers of Commerce from Romania[5]. "However, the two documents should not be confused, being issued by different authorities, under different conditions and having different scope and legal effects."[6] The Romanian jurisprudence has shown that "For the exoneration of liability to occur, it is not sufficient that the event is external to the will of the parties and unpredictable, but it also must not have been reasonably prevented and overcome."[7] The european jurisprudence has shown that "The notion of force majeure contains an objective element and a subjective element. The objective element concerns unusual and foreign circumstances to the person concerned, while the subjective element is related to the obligation of the person concerned to protect himself from the consequences of the event, taking appropriate measures, without accepting

[3] Law no. 287/2009, published in the Official Journal no. 505/15.07.2011.

[4] Niță Carolina Maria, Răducan Gabriela, *Consecințele pandemiei generate de coronavirusul SARS-Cov-2 în raporturile contractuale*, Revista Pandectele Române nr. 2/2020, www.sintact.ro.

[5] Published in the Official Journal no. 836/06.12.2007.

[6] https://www.pwc.ro/en/romania-crisis-centre/legal/force-majeure/force-majeure-and-emergency-situations-in-the-context-of-covid-1.html.

[7] Bucharest Court of Appeal, section VIII administrative and fiscal dispute, Civil Sentence no. 7478/ 09.12.2011.

excessive sacrifices."[8] The possibility of obtaining a notice of force majeure is regulated across many countries. "The force certificate is thus mainly used to demonstrate to the other party the existence of certain factual difficulties that hamper performance and seek understanding to privately settle the dispute. If the disputes are brought to the court, the court should consider whether the outbreak and the relevant emergency measure constitute force majeure events pursuant to the governing law, treating the force majeure certificate as evidence of fact."[9]

2.2. Providing facilities for loans granted by financial institutes to certain categories of debtors

Another measure adopted by Romania in response to the effects of COVID-19 pandemic, which has affected many small and medium entreprises, is the adoption of the Government Emergency Ordinance no. 37/2020 on granting facilities for loans granted by credit institutions and non-banking institutions to certain categories of debtors.[10] While these measures also apply to natural persons (consumers), authorized natural persons, liberal professions and other categories of debtors, this subsection shall only approach small and medium enterprises. According to this normative act, debtors, as they are defined by Article 1 letter b), may request the suspension of due claims related to loans, representing installments of capital, interest and commissions, for up to 9 months, but no longer than the 31st of December 2020. Consequently, the maximum credit period may be exceeded by a period equal to the duration of the suspension of the payment obligation. The interest due by debtors corresponding to the due amounts whose payment is suspended according to art. 2 shall be capitalized at the balance of the credit existing at the end of the suspension period. The capital thus increased shall be paid in installments for the remaining period until the new maturity of the loans, after the suspension period. The normative act, in its first version, requested that debtors should justify their financial difficulties by providing an ESC issued by the authorities, which was the main condition that debtors, other than natural persons (consumers), should had fulfill, along with the condition of not being the subject of an insolvency proceeding. However, since the effects of the COVID-19 pandemic upon the business environment have lasted an unexpected amount of time, causing a systemic risk of insolvencies, the Government has issued the Ordinance no. 227/2020 for the modification and the completion of the Government Emergency Ordinance no. 37/2020[11], which has prolonged the timeframe of this facility until the 15th of March 2021. Because the ESCs have been issued for a limited period of time, debtors had been required to present a declaration on own responsibility instead of an ESC. For these debtors to benefit from the facilities regulated by GEO no. 37/2020, as modified by GEO no. 227/2020, certain conditions must be fulfilled by the requestors: (1) to send a written request to the credit institution or to the non-banking institutions; (2) to present a declaration on own responsibility regarding the decrease of by at least 25% of the average monthly income from the last 3 months prior to the

[8] Order of the General Court (First Chamber) of 22 June 2011, Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission, case T-409/09, ECLI identifier: ECLI:EU:T:2011:299.

[9] Sophia Tang, *Coronavirus, force majeure certificate and private international law*, March 1, 2020, https://conflictoflaws.net/2020/coronavirus-force-majeure-certificate-and-private-international-law/.

[10] Published in the Official Journal no. 261/30.03.2020.

[11] Published in the Official Journal no. 1331/31.12.2020.

request for suspension of payment obligations by reference to the similar period of 2019 or 2020; (3) the debtor shall not be the subject of an insolvency proceeding ; (4) the loan has not reached its maturity and the credit / non-banking institutions has not declared the early maturity at the 30th of December 2020; (5) debtors requesting the facilities shall not be in arrears on the date of their request. Debtors who have initially benefited from this facility were able to file another request, if both requests did not surpass the maximum period of 9 months of payment suspension. Similar measures have been adopted by countries across the world. For instance, according to the International Monetary Fund research[12], most countries which regulated moratoriums have extended this facility to a maximum period of 6 months : Bulgaria (6 months), Croatia (3 months), Czech Republic (6 months). Countries such as Italy and Cyprus have extended the moratoriums for a larger period, which is justified by the fact that the effects of the COVID-19 pandemic were more severe due to the impact on tourism. This facility regulated by most countries is especially important for businesses having a reduced rate of liquidity. "The slowdown of economic activity caused by the COVID-19 outbreak and related lock-down measures implemented to tackle the health crisis have led to severe difficulties for companies to meet their financial obligations."[13] By stimulating companies' liquidity through measures suitable for different types of difficulties, fiscal authorities are able not only to support the business environment overall, but also collect a higher rate of taxes, helping to avoid the systemic risk of insolvency.

3. Fiscal mechanisms adopted in order to help companies avoid financial distress and insolvency

One of the most important measures adopted by the Romanian Government in order to avoid the systemic risk of insolvency are found in Article VII of the Government Emergency Ordinance no. 29/2020. According to Article VII para. (1), for the fiscal obligations due starting with the 21st of March 2020 and not paid until the 25th of December, authorities have not calculated and instituted interest and penalties for the delay, by derogation from the Fiscal Procedure Code, approved by Law no. 207/2015[14], with subsequent amendments and completions. Furthermore, according to para. (2), unpaid fiscal obligations in this period of time have not been considered to be due. This measure has been extremely helpful, especially for companies whose activities have been restricted, most of them having faced the risk of insolvency. The Romanian law considers a company to be in a state of insolvency when it has an insufficiency of available cash to pay its undisputed, liquid and enforceable debts. By postponing the due date of fiscal obligations up until the 25th of December 2020, Romania has achieved the direct avoidance of small and medium enterprises. In the meantime, since the due date of fiscal claims had been delayed, fiscal authorities had also suspended or delayed the enforcement of budgetary claims.

[12]https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19#I.

[13] Apedo-Amah, Marie Christine; Avdiu, Besart; Cirera, Xavier; Cruz, Marcio; Davies, Elwyn; Grover, Arti; Iacovone, Leonardo; Kilinc, Umut; Medvedev, Denis; Maduko, Franklin Okechukwu; Poupakis, Stavros; Torres, Jesica; Tran, Trang Thu, *Unmasking the Impact of COVID-19 on Businesses : Firm Level Evidence from Across the World. Policy Research Working Paper*, no. 9434. World Bank, Washington, DC, October 2020, p. 9, https://openknowledge.worldbank.org/handle/10986/34626.

[14] Published in the Official Journal no. 547/23.07.2015.

However, these safeguard measures are no longer applicable in this very moment, and the pandemic does not seem to end soon. "Smaller firms tend to face more severe financial constraints during COVID-19 even in advanced countries."[15] This is why, starting with the date on which these facilities were no longer in force, authorities have had to regulate new mechanisms to come in distressed companies' support.

3.1. Simplified rescheduling of budgetary obligations

Since the instauration of the state of emergency in the 16th of March 2020 in Romania, small and medium enterprises have faced difficulties in paying budgetary taxes. The authorities have raised the issue that these companies also face the risk of accumulating new debts, which could bring them in a state of insolvency. Therefore, in order to provide opportunities for an economic recovery, the Government Emergency Ordinance no. 181/2020 on some fiscal-budgetary measures, for amending and supplementing some normative acts, as well as for extending certain deadlines[16] has been issued. This normative act allows debtors to reschedule their budgetary debts for a period of maximum 12 months, without providing any guarantees, as long as the due date of these debts begins with 16th of March 2020. According to Article 1 para. (1), both main and accessory fiscal obligations may constitute the subject of simplified rescheduling. However, debtors intending to access this fiscal mechanism need to fulfill several conditions: (1) to file a request until the 30th of September 2021; optionally, debtors may propose a rescheduling program; (2) to not be the subject of an insolvency proceeding; (3) to not be dissolved; (4) to not have budgetary debts that were due before the date on which the national emergency state was instaured; (5) to not have been held liable according to insolvency and fiscal regulations; (6) to have filed all fiscal declarations. It needs to be mentioned that the possibility of rescheduling budgetary claims has been regulated in the Code of fiscal procedure since 2015; however, the classic rescheduling of budgetary claims regulates debtors' obligation to provide guarantees when the claims surpass an amount of 20.000 lei (aprox. 4.000 euros). The mechanism of simplified rescheduling of budegtary claims does not require debtors to provide guarantees. Moreover, one of the greatest advantages of this facility is the fact that debtors may request a differentiated payment of the installment rates. This possibility is especially suitable for seasonal businesses, whose repayment capacity is higher in certain periods of the year. However, each montly rate must be at least equal to 5% of the total amount due. The fiscal authorities analyze the debtor's request in 5 business days from the date of its registration, issuing a decision of payment rescheduling or a decision of rejection of the debtor's request, as the case may be. If the debtor's request is approved, the decision of payment rescheduling shall establish the amount and terms of payment of the installment rates. Since the installments' due date is modified by the fiscal authorities' decision, for the amounts that are subject of the rescheduling, the enforcement proceedings shall not begin or shall be suspended, as the case may be. However, debtors are still obliged to pay current fiscal claims, along the debts that are rescheduled. This fiscal mechanism has helped debtors to stabilize their financial state and to consolidate their business' ongoing concerne principle, reducine the

[15] Ibid 14, p. 10.
[16] Published in the Official Journal no. 988/26.10.2020.

risk of systemic insolvencies. Several countries have adopted a similar fiscal mechanism, or have even extended the suspension of tax payments. For example, Hungary has regulated a fiscal mechanism that allows debtors to reschedule or even extend deferred payments.[17] In Latvia, the tax administration is entitled to reschedule or postpone the performance of the delayed tax payments for a period of up to three years.[18] According to the author's research, countries across the world have adopted fiscal facilities that were available for a limited amount of time, but were subsequently prolonged.

3.2. Restructuring of budgetary claims

One of the most complex fiscal mechanism adopted by the authorities consists of a restructuring of budgetary claims, based on the Government Emergency Ordinance no. 6/2019 on the establishment of fiscal facilities.[19] Initially, in 2019, authorities had issued this normative act for debtors who registered budgetary debts of more than 1.000.000 lei (aprox. 200.000 euros), and that were due on the 31st of December 2018. However, this fiscal facility had been available for a very short time, starting with the 8th of August 2019, until the 25th of September 2019. The deadline for submitting an intention of restructuring budgetary claims by debtors has then been extended to the 31st of October 2019. Concerns of a new virus spreading rapidly worldwide had already began at that point. Thus, the fiscal facility had been once more extended to an amount of time, starting with the 1st of February 2020 until the 31st of July 2020, the latter date being furtherly extended until the 30th of September 2020. The pandemic and the length of the restrictions imposed by authorities had generated the need for the repeated extension of the deadline of this particular fiscal mechanism. At this time, the deadline for debtors intending to access this mechanism is the 30th of September 2021, but may be extended once more, depending on the evolution of the sanitary crisis. Initially, this fiscal mechanism had been applied to companies owing more that 1.000.000 lei that were due. However, because small and medium enterprises had also needed alternatives to restructure their budgetary debts, the simplified rescheduling of debts not providing enough time for some SMEs, the authorities have eliminated the limit of at least 1.000.000 lei in budgetary debts and therefore the scope of the law had extended to any debtor, regardless of the amount of due budgetary claims. According to Article 1 para. (1), the purpose of the law is avoiding the opening of insolvency proceedings of certain categories of debtors, except for public institutions. Of course, several conditions must be fulfilled by debtors in order to access this fiscal mechanism: (1) to not meet the conditions to acces the classic payment rescheduling regulated by the Code of fiscal procedure; (2) to present a restructuring plan and a private creditor test, prepared by an independent expert; (3) to not be the subject of an insolvency proceeding; (4) to not be dissolved; (5) to have submitted all fiscal declarations, according to their fiscal vector; (6) to fulfill the private creditor test, in accordance to this normative act. The private creditor test is also defined in the Law no. 85/2014 on pre-insolvency and insolvency

[17] CIAT/IOTA/OECD (2020), Tax Administration Responses to COVID-19: Measures Taken to Support Taxpayers, OECD, Paris, https://read.oecd-ilibrary.org/view/?ref=126_126478-29c4rprb3y&title=Tax_administration_responses_to_COVID-9_Measures_taken_to_support_taxpayers.

[18] Ibidem.

[19] Published in the Official Journal no. 648/05.08.2019.

proceedings, according to which it is a method to compare the manner in which budgetary claims may be satisfied by reference to a diligent private creditor in a pre-insolvency or reorganization proceeding and the manner in which they may be satisfied in a bankruptcy procedure; this comparison is based on a valuation report prepared by a chartered valuator, member of ANEVAR (Romanian National Association of Chartered Valuators), appointed by the budgetary creditor, and addresses inclusively the duration of a bankruptcy proceeding by comparison to the proposed payment schedule; the event in which the private creditor test confirms that the amounts which the budgetary creditor would receive in a pre-insolvency or reorganization proceeding are higher than the amounts it would receive in a bankruptcy proceeding, shall not be deemed to be an event of state aid (Article 5 point 71). The GEC no. 6/2019 however provides a slightly different definition of the private creditor test, since the subject of a restructuring plan should not simultaneously be in an insolvency proceeding. Therefore, in the fiscal perspective, the private creditor test is an independent analysis, performed based on the premises considered in the debtor's restructuring plan, which shows that the state behaves similarly to a private creditor, sufficiently prudent and diligent, which would obtain a higher recovery degree of receivables in the version of restructuring compared both with the version of enforcement and the opening of the bankruptcy proceeding. If debtors fulfill all the requirements, they need to file a notification regarding their intent to benefit from this fiscal mechanism, and to address an independent expert drafting the restructuring plan and the private creditor test. After receiving the debtor's notification, the competent fiscal body verifies if the debtor has fulfilled its declarative obligations according to the fiscal vector until the respective date, performs the settlements, compensations, and any other operations necessary in order to establish with certainty the budgetary obligations that may be subject to restructuring. This particular fiscal mechanism presents numerous similarities with the insolvency proceedings and with the judicial reorganization proceedings, in means of filing an intention to benefit from these mechanisms, fulfilling the private creditor test in some cases, the suspension of enforcements proceedings, applying the so-called *haircuts* translated in cutting a part of the due debts, under the condition of successfully executing the restructuring plan and, of course, the restructuring plan itself. However, the restructuring plan prepared by the debtor needs to approach and detail information regarding: (1) the causes and the extent of the financial difficulty, as well as the measures implemented to overcome them; (2) its patrimonial state; (3) information regarding the causes why the debtor cannot benefit from the classic payment rescheduling in accordance with the Code of fiscal procedure and (4) presenting planned restructuring measures having clear deadlines, ways to restructure budgetary claims, as well as relevant economic-financial indicators to demonstrate the debtor's viability restoration. The normative act exemplifies several restructuring methods which may be integrated in the restructuring plan. One of the greatest advantages provided by this fiscal mechanism is the fact that the restructuring plan may establish a reimbursement period of 7 years which, in some conditions, may be extended with 3 more years, reaching a total of 10 years. Moreover, the restructuring plan may also establish a cancellation of up to 50% of the main budgetary claims, under some conditions, except those concerning the

main budgetary and ancillary obligations representing State aid to be recovered. The independent expert drafting the restructuring plan also needs to supervise the debtor's activity and the execution of the plan, periodically drafting and submitting reports to the debtor and the fiscal body. Also, the head of the competent tax authority may designate one or more persons to carry out the supervision of the plan's execution; in the author's opinion, the other person besides the independent expert drafting the restructuring plan could be the members of the management and / or supervisory bodies in the company that is subject of the fiscal restructuring proceeding. During the restructuring plan's unfolding, if the supervisors find that the debtor has not fulfill an obligation in due time, they shall notify the debtor, granting a reasonable amount of time for adjustment which may be extended for justified reasons, but no longer than 6 months. If debtors face yet again difficulties during the restructuring plan's unfold, they may modify the initial restructuring plan but under some conditions such as to do so before the unfulfillment takes place and to present an adjusted restructuring plan and a private creditor test. For the budgetary obligations contained by the restructuring plan, the competent fiscal authorities shall suspend or shall not begin enforcement proceedings. Clearly, this fiscal mechanism is highly flexible and consists of a valuable instrument for the business environment. Nevertheless, as considered in the insolvency law, the claims that are subject of the restructuring plan are considered to be historical claims and, since this fiscal mechanism ensures the debtors' ongoing concern principle, debtors will likely generate current claims, which are to be paid according to the documents they derive from and at specific terms, which means that debtors should have a high reimbursement capacity or liquidate a part of its patrimony, in order to be able to meet all assumed obligations. In cases in which debtors may not carry out the restructuring plan as foreseen, the fiscal restructuring plan shall fail. The plan's failure generates the fiscal authorities' obligation to file a request of opening the insolvency proceeding against the debtor. This provision of the law may be considered as a sanction applied upon the debtor for the restructuring plan's failure, since the debtor itself had suggested its planned recovery measures in the first place. Even if the debtor would become the subject of an insolvency proceeding in this scenario, it may notify its intent of accessing the judicial reorganization proceeding, having one last chance to try to recover from financial distress. However, the judicial reorganization proceeding is extended to an initial period of 3 years, without having the possibility to surpass a total period of 4 years, while this fiscal mechanism provides an initial period of maximum 7 years, which may extend up to a total of 10 years. Considering these aspects, it is without a doubt that the fiscal mechanism of restructuring budgetary obligations is more flexible and could ease the debtor's financial distress, meaning that if the debtor may not execute the restructuring plan, its recovery chances are uncertainly low in the scenario of converting to the judicial reorganization proceeding.

4. Conclusions

This paper has analysed some of the mechanisms adopted by Romania in order to avoid systemic insolvency among small and medium enterprises, greatly affected by the COVID-19 pandemic and numerous measures of businesses' activity limitation or restriction. Since the pandemic has had a worldwide impact, each country has adopted an economic policy in response to the negative effects upon the business

environment. In the author's opinion, Romania has been adopting economic and fiscal mechanisms that are suitable to each type of business, regardless of its size. These mechanisms concerned debtors' temporary incapacity of fiscal obligations and loans' reimbursement, the situation of their ongoing contracts, as well as other aspects which may have consisted of a difficulty risking becoming a state of insolvency. The author believes that the effects of the COVID-19 pandemic upon the economy are yet to unfold but, when the fiscal mechanisms presented in this paper (any many others) shall no longer apply, numerous businesses would file for insolvency. This is why the author believes that these mechanisms should apply for an extended period of time, calculated in years. It is yet uncertain how long will the pandemic last and, even if it comes to an end in the near future, its effects upon the economy would last for years, which is why the fiscal mechanisms presented in the second section of this paper should become permanent. Another reason would be the fact that the mechanism of budgetary obligations' restructuring is perfectly compatible with the preventive composition, a special proceeding aiming at the prevention of the state of insolvency. Of course, in addition to the mechanisms presented in this paper, Romania has adopted numerous other measures and mechanisms for businesses affected by the effects of the COVID-19 pandemic, which may form the subject of further research work given the fact that corporate recovery from financial distress or insolvency is a general topic of interest.

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STILL IN DISCUSSION: HABITUAL RESIDENCE OF THE CHILD

Anca Magda VOICULESCU[*]

Abstract

The notion of "habitual residence" of the child is referred to in different juridical instruments, belonging to both national and international areas, which nevertheless do not define the notion. Given that the habitual residence must be determined in concreto in case of litigations, courts worldwide (national and international) have been forced to shape their own standards.

The purpose of the article is to analyse this notion in the particular situation of international child abduction, given the continuously increasing number of cases where children are moved from one state to another, in the context of both free movement of citizens, but also respect for family life.

Hence, the objectives of the present study are to identify legal instruments applying in case of an international child abduction and also the case law of both national and international courts, relevant in connection to the notion of "habitual residence".

Furthermore, in the context of lack of definition, absent juridical criteria and divided case-law, the study aims to identify the criteria that should be taken into consideration by national courts when establishing the state of habitual residence of the child.

Keywords: *best interests of the child, parental authority, domicile of the child, habitual residence of the child, respect for family life.*

1. Introduction

Starting from the increase of international abduction cases and the difficulties encompassed by courts in solving them, the present study aims to make an inquiry into the relevant juridical texts and also the case-law, in order to identify a definition of the notion of "habitual residence" of the child, or at least the criteria upon which to rely in order to determine it.

The subject has great importance, as the principle in case of international child abductions stipulates the prompt return of children who have been wrongfully taken from their state of habitual residence or wrongfully retained outside the state of their habitual residence.

In this context, establishment of the habitual residence of the child is a key element in solving these cases.

To reach this aim, the study will concentrate on legal provisions relevant for cases of international child abduction and also the case – law, both national and international, as lack of legal definition led to a consistent body jurisprudence of overwhelming importance in shaping the standards to be considered when establishing the habitual residence of the child.

Doctrinal opinions will also be identified and presented, with the necessary note that preponderance goes to studies from abroad, as in Romanian juridical literature the subject has not yet been discussed.

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2. Content

2.1. Juridical instruments

From the investigation in the legal area, it results that the notion of "habitual residence" of the child is referred to (but not defined such as) in a multitude of juridical instruments, which are different in nature.

These legal instruments can be organized in three main categories, belonging to the area of international private law, EU law, respectively national law.

The present study does not aim to present an exhaustive list of all juridical instruments, but only the most significant for the topic in discussion[1].

2.1.1. Private international law instruments

The most important juridical instrument of private international law is the **Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction**[2], to which Romania is a member state[3].

Although the Convention does not provide a clear definition of the notion of "habitual residence" of the child, the concept is at the very heart of the return mechanism provided for in the Convention and several articles repeatedly make explicit reference to the notion[4].

Juridical literature[5] underlined that "Despite the importance that determining a child's habitual residence plays in Child Abduction Convention proceedings, it is a tradition of the Hague Conferences not to define this term."

Given the variety of national laws and traditions of states, it would indeed have been a very difficult task to formulate a precise definition. Also, it seemed more appropriate to leave a margin of appreciation to contracting states. In addition, the diversity of circumstances that may occur in every specific case resulted in failure of any attempt to establish a precise definition.

The Explanatory Report on the 1980 Hague Child Abduction Convention[6] seeks to underline and explain the principles which form the basis of the 1980 Hague Convention and also provides a detailed commentary on its provisions.

Nor in this Explanatory Report is to be found any definition of the notion in discussion, the author explaining in para. 66 of the same report that a definition was not necessary, as the notion of habitual residence was already a "well-established concept": "(...) the notion of habitual residence, a well-established concept in the Hague Conference, which regards it as a

[1] For a list of juridical instrument applicable in international child abduction cases, see ECtHR, Decision adopted on 26 November 2013, Application no. 27853/09, case *X v. Latvia*.

[2] Intergovernmental agreement concluded at The Hague on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, which entered into force on December 1, 1983.

[3] Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 243/30.09.1992.

[4] E.g., Article 3, Article 4, Article 5, Article 13 of the 1980 Hague Convention.

[5] Tai Vivatvaraphol, *Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention*, in Fordham Law Review, vol. 77, no. 6/2009, pp. 3325 – 3369, p. 3338, available at the following link: https://ir.lawnet.fordham.edu/flr, last accession on 21.01.2021, 15,08.

[6] Drafted by Eliza Pérez-Vera, Madrid, April 1981, published in 1982 and available online at the following link: https://www.hcch.net/en/publications-and studies/publications2/explanatory-reports, last accession on 28.02.2018; 17,57.

question of pure fact, differing in that respect from domicile"[7].

Although the report provided no definition, it underlined an important principle, namely that habitual residence was always a question of fact, to be established individually from case to case.

Also, the Report identified another crucial principle to be taken into consideration, namely the bests interests of the child (paras. 21-25).

Still, no clues were construed regarding the standards to be considered when applying these principles for establishing the habitual residence of the child.

Another important private international law instrument, the **Convention on the Rights of the Child**[8]**,** does not make any explicit reference to the notion of "habitual residence", acknowledging nevertheless in a implicit manner the main elements in discussion in case of international child abduction and habitual residence of the child.

The UN Convention stipulates that any child "should grow up in a family environment, in an atmosphere of happiness, love and understanding"[9] and stress the idea that both parents have common responsibilities for the upbringing and development of the child, who shall not be separated from his or her parents against their will[10].

Neither does the **European Convention for the Protection of Human Rights and Fundamental Freedoms** [11] contain any definition or even reference to the notion of "habitual residence".

The inquiry in the texts of this Convention is justified, as the ECHR case law points out the close connection between the Hague Convention 1980, the Convention on the Rights of the Child and the ECHR Convention (particularly art. 8 of ECHR Convention – respect for family life).

As to the „relationship between the Convention and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980, the Court reiterates that *in the area of international child abduction the obligations imposed by Article 8 on the Contracting States must be interpreted in the light of the requirements of the Hague Convention (…) and those of the Convention on the Rights of the Child of 20 November 1989* (…), and of the relevant rules and principles of international law applicable in relations between the Contracting Parties (…)"[12] (our underline).

Conclusion is to be drawn that private international law offers neither a definition of the notion, nor criteria upon which it is to be established.

[7] The difference between notions of habitual residence and domicile was also acknowledged by ECtHR, Decision adopted on 07 July 2020, Application no. 10395/19, case *Michnea v. Romania:* "The Court of Appeal's decision does not explain why that court gave precedence to what appears to be the parents' Romanian domicile over the clear factual elements before it indicating that the family had been living in Italy".

[8]Adopted by United Nations General Assembly, signed in New York on November 20, 1989, which entered into force on September 2nd, 1990. Law no. 18/1990 for the ratification of the Convention on the Rights of the Child was published in the Official Gazette of Romania no. 109/28.09.1990 and republished in the Official Gazette of Romania no. 314/13.06.2001, subsequent to differences in translation from English to Romanian in the content of the Convention.

[9] Preamble of the Convention.

[10] Articles 9 and 18.

[11] European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe in Rome, on November 4, 1950, which entered into force on September 3, 1953. Romania ratified the Convention by Law no. 30/18.05.1994, published in the Official Gazette of Romania no. 135/31.05.1994.

[12] ECtHR, Decision adopted on 26 November 2013, Application no. 27853/09, case *X v. LATVIA*, precited.

2.1.2. EU instruments

Council Regulation (EC) no. 2201/2003 of 27 November 2003[13], known as "the Brussels II bis Regulation" is of the highest significance in the area of EU law instruments.

Similar to the conventions in the area of international law, the Regulation does not include any definition for the notion of "habitual residence".

Although not providing a definition, it makes references to it in Article 10 and Article 11, thus explicitly acknowledging the term.

Charter of Fundamental Rights of the European Union[14], by contrast, contains only indirect references to elements specific for the notion of "habitual residence", namely respect for family life[15] and the right of the child to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests [16].

Therefore, the conclusion is the same as in case on texts of private international law: no definition or legal criteria.

2.1.3. National instruments

In Romanian law, references to the notion of "habitual residence" appear in provisions of Law no. 369/2004 on the enforcement of the Hague Convention[17], respectively Article 11 (3) and Article 14.

Such as in case of the juridical instruments of private international law and EU law, this national legal instrument does not provide a definition of the notion in discussion or even criteria to be considered when applying the notion.

2.2. Case-law

As research into the relevant legislation has not led to any conclusive result as to the notion or even guiding criteria, an investigation of the jurisprudence may prove useful.

To this respect, the study will take into discussion the case-law pronounced in contracting states under Hague Convention 1980, jurisprudence of European Court of Justice and the European Court for Human Rights, and also national decisions (including Romanian decisions).

2.2.1. Case-law in contracting states of 1980 Hague Convention

Although the drafters of the 1980 Hague Convention considered that a flexible approach would ensure a reasonable margin of appreciation for the courts, the lack of definition lead in practice to ambiguity and uncertainty.

In these circumstances, a consistent case-law had to be developed regarding not a precise definition, but criteria upon which

[13] Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, published in the Official Journal L 338/1, 23 December 2003.

[14] Proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission and entered into force with the Treaty of Lisbon in December 2009.

[15] Article 7.

[16] Article 24.

[17] Law no. 369/2004 on the application of 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 888/29.09.2004 and republished in the Official Gazette of Romania no. 468/25.06.2014.

a court should determine a child's habitual residence[18].

Moreover, as there was no international court invested with interpretive powers, this difficult task had to be accomplished by national courts of signatory countries during the years that followed the conclusion of the 1980 Hague Convention.

Unfortunately, this resulted in a divided case-law and a variety of factors taken into consideration.

In United States, jurisprudence[19] based either on subjective criteria in relation to the parents' last common intention in establishing the child's residence[20], or on objective indicators of the child's acclimatization[21]. Common or "middle" approach was difficult[22].

Analysing the case-law of other states, it is clear that, generally, the objective approach was considered better suited to meet the need for uniformity in application among contracting states.

To this end, a part of juridical literature[23] pointed out that few jurisdictions place much emphasis on parental intent. "Generally, other common law countries focus on objective evidence. (...) Many civil law jurisdictions also use an objective, child-centered method of analysis. Argentinian courts have defined habitual residence as the place that provides the child with stability and permanence. In Sweden, courts have held that the analysis requires an examination of all objective evidence that would show a permanent attachment to a nation. Finally, Italian courts have found that habitual residence is the place where the child spends most of his or her time."

Another part of doctrine[24] opposed to the subjective approach in very categorical terms: „Any analysis that focuses on the shared subjective intentions of parents is not only illogical, but rigid, inconsistent, and wrought with uncertainty. Where a court is presented with a Child Abduction Convention proceeding, it must act with

[18] "It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions." (Jeff Atkinson, *The meaning of "habitual residence" under the Hague Convention on the civil aspects of international child abduction and the Hague Convention on the protection of children*, in Oklahoma Law Review, University of Oklahoma College of Law Digital Commons, vol. 63, no. 4/2011, pp. 647 – 661, p. 649, available at the following link: https://digitalcommons.law.ou.edu/olr?utm_source=digitalcommons.law.ou.edu%2Folr%2Fvol63%2Fiss4%2F3&utm_medium=PDF&utm_campaign=PDFCoverPages, last accession on 21.01.2021, 13,25).

[19] For a very detailed presentation of US case-law, see Tai Vivatvaraphol, Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention, op. cit., pp. 3325 – 3369.

[20] In any circumstances, there must be a firm intention of parents to establish in the territory of the new state of residence in order to consider the latter as the state of habitual residence.

[21] E. g.: school enrollment, participation in social activities, length of stay in the country, child's age.

[22] Jeffrey Edleson, Taryn Lindhorst, Battered Mothers Seeking Safety Across International Borders: Examining Hague Convention Cases involving Allegations of Domestic Violence, in The Judges' Newsletter on International Child Protection - Vol. XVIII / Spring-Summer 2012, available at the following link: https://assets.hcch.net/docs/7624595a-b207-464b-b95d-8222e9ce8d56.pdf, last accession on 22.01.202118,44, pp. 22-24, p. 23 ("U.S. courts are divided on whether to evaluate the shared intent between parents to reside in a certain place as indicative of habitual residence").

[23] Morgan McDonald, Home Sweet Home? Determining Habitual Residence Within the Meaning of the Hague Convention, in Boston College Law Review, Law Journals at Digital Commons @ Boston College Law School, vol. 59, no. 9/2018, pp. 427 – 443, p. 442, available at the following link: http://lawdigitalcommons.bc.edu/bclr?utm_source=lawdigitalcommons.bc.edu%2Fbclr%2Fvol59%2Fiss9%2F24&utm_medium=PDF&utm_campaign=PDFCoverPages, last accession on 21.01.2021, 14,53.

[24] Tai Vivatvaraphol, Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention, op. cit., pp. 3325 – 3369, p. 3365.

restraint, focusing only on the objective evidence, and avoid reverting to more comfortable concepts, such as best interests."

The best interests of the child are though the main directing vector in any decision concerning children and could therefore not easily be ignored.

In spite of the various concrete manifestations of the principle of best interests of the child, we are of the opinion that it should always be considered and, due to its broadness, may encompass both objective and subjective factors.

Supreme Court of Canada has emphasised to this respect that the "hybrid" approach is to be preferred to the approach focused solely either on the acclimatisation of the child or the parental intention[25].

Even US jurisprudence has recently changed divided criteria for a uniform legal standard, as the US Supreme Court held for the first time in a decision pronounced on 2018 that a child's habitual residence depends on the totality of the circumstances specific to the case.[26]

As part of the 1980 Hague Convention, Romania has at present a unified case-law, based on a unified jurisdiction[27], which supports the opinion expressed above focusing on the "hybrid approach".

Romanian jurisprudence[28] establishes the habitual residence of the child based on both subjective and objective factors, which are considered and weighed *in concreto* depending on the specificity of the case.

2.2.2. Court of Justice of the European Union

Court of Justice of the European Union (CJEU) first analysed the notion of "habitual residence" in the context of assessment of the habitual residence of children for the purposes of Article 8 (1) of the Regulation in case *A*[29].

CJEU appreciated that the concept of "habitual residence" must be interpreted as meaning that it corresponds to "the place which reflects some degree of **integration by the child in a social and family environment.** To that end, in particular the **duration**, **regularity**, **conditions and reasons for the stay** on the territory of a Member State and the family's move to that State, the **child's nationality**, the place and conditions of attendance at **school**, **linguistic knowledge** and the family and social **relationships of the child** in that State must be taken into consideration"[30].

These considerations were reiterated and developed in the well-known *Mercredi* case[31], of which the most relevant considerations are to be found in the following.

[25] Supreme Court of Canada, decision pronounced on 20 April 2018, case Balev, paragraphs 50 to 57.

[26] US Supreme Court, decision pronounced on 25 February 2020, case Monasky v. Taglieri.

[27] Romania has unified territorial competence on international abduction cases by Law no. 369/2004 (Bucharest Tribunal – first instance court and Bucharest Court of Appeal – recourse court).

[28] Bucharest Tribunal, Fourth Civil Section, decision no. 1272/11.09.2020, case no. 19673/3/2020, definitive, not published ("The Tribunal notes that the common intention of both parties was to establish with the child in France (…) the parties lived in France at the time of the birth of the child and throughout the period following this time and until August 2019 (…) the minor was enrolled in kindergarten (…) benefited from the medical service repeatedly (…) the plaintiff is employed in France").

[29] ECJ, Decision adopted on 02.04.2009, C-523/07, case *A* ("the case-law of the Court relating to the concept of habitual residence in other areas of European Union law (…) cannot be directly transposed in the context of the assessment of the habitual residence of children for the purposes of Article 8(1) of the Regulation.").

[30] Para. 44.

[31] ECJ, Decision adopted on 22.12.2010, C-497/10 PPU, case *Barbara Mercredi v. Richard Chaffe*, paragraphs 47 to 57.

"To ensure that the **best interests of the child** are given the utmost consideration, the Court has previously ruled that the concept of 'habitual residence' under Article 8 (1) of the Regulation corresponds to the place which reflects some **degree of integration by the child in a social and family environment**. That place must be established by the national court, taking account of **all the circumstances of fact specific to each individual case** (see *A*, paragraph 44).

Among the tests which should be applied by the national court to establish the place where a child is habitually resident, particular mention should be made of the **conditions and reasons for the child's stay on the territory of a Member State**, and the **child's nationality** (see *A*, paragraph 44).

As the Court explained, moreover, in paragraph 38 of *A*, in order to determine where a child is habitually resident, in addition to the **physical presence of the child** in a Member State, other factors must also make it clear that that **presence is not in any way temporary or intermittent**.

In that context, the Court has stated that the **intention of the person with parental responsibility** to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, may constitute an indicator of the transfer of the habitual residence (see *A*, paragraph 40).

In that regard, it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a **certain duration which reflects an adequate degree of permanence**. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character.

(…)

The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the **age of the child**.

(…)

An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently (…) it is necessary to assess **the mother's integration in her social and family environment**.

(…)

If the application of the abovementioned tests were (…) to lead to the conclusion that the child's habitual residence cannot be established, which court has jurisdiction would have to be determined on the basis of the criterion of the **child's presence**, under Article 13 of the Regulation". (our underline)

It appears from considerations presented that the European Court of Justice favours the "hybrid approach". Also, the principle of best interests of the child was referred to as of the "utmost consideration" at the very beginning of the reasoning, thus encompassing both subjective and objective factors discussed further on by the Court.

2.2.3. European Court of Human Rights

In the recent case *Michnea v. Romania*[32], the ECHR firmly supported the principle of **bests interests of the child** as paramount in all decisions concerning

[32] ECtHR, Decision adopted on 07 July 2020, Application no. 10395/19, case *Michnea v. Romania*, already cited.

children, aligning with the drafters of the 1980 Hague Convention and the EU case-law.

The Court stated that there was no indication in the national court's decision in case under discussion that "court identified the best interests of the child and appropriately took them into account in making its assessment of the family situation, as required by Article 8 of the Convention".

Also, the Court underlined that "article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this respect: when assessing an application for a child's return, the courts must make a ruling giving specific reasons in the light of the circumstances of the case".

Again, the pattern adopted by 1980 Hague Convention and ECJ was followed, as habitual residence was explained as a factual element, to be established after consideration of the circumstances of the case.

Subsequently, the Court argued the breach of Article 8 of the Convention as follows: "it appears that the Court of Appeal relied on the CJEU findings in the *Barbara Mercredi* judgment without making any assessment of the contextual difference between that case and the case brought before it by the applicant. (…) The Court considers that the particular circumstances of that case, which were significantly different than those of the case currently under examination, did call for a more in depth examination".

Also, the Court had obviously in mind the **parents'** shared intention to establish their and the child's residence in Italy (subjective factors) when pointing out that "the family had been living in Italy at the time of the child's birth and until her removal and had made all the arrangements upon her birth to register her in Italy and to allow her to benefit from the Italian welfare system".

Furthermore, reiterated that "draws inspiration from the principles of the Brussels II bis Regulation as interpreted by the CJEU in its case-law and cannot but note that prior to her removal from Italy, the child had been, at least to a certain degree, integrated in a social and family environment" in Italy (objective factors).

For reasons above presented, the Court concluded that the interpretation and application of the provisions of the Hague Convention and of the Brussels II bis Regulation by the Romanian national court failed to secure the guarantees of Article 8 of the Convention and that the interference with the applicant's right to respect for his family life had not been "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention.

2.3. Going deeper: determination of the habitual residence of the child

2.3.1. Criteria

As it resulted from ECJ and ECHR case-law presented before, it is for the national court to establish the habitual residence of the child, taking account of two sets of factors, both subjective and objective.

Neither one set of factors or yet one factor alone is decisive, and therefore national courts should pay attention to multiple (and often conflicting) indicators, both subjective and objective, when making a decision on habitual residence.

Nevertheless, it should be kept in mind that all these different factors are acting under the common and large umbrella of the concept of the best interests of the child, and therefore this concept should be the standard

vector when determining the habitual residence of the child[33].

Also, the list of factors to be presented and discussed as follows is not exhausting and courts should take account of all the circumstances of fact specific to each individual case[34].

Not least, it is important to bear in mind the proximity criterion, which means that the courts of the child's habitual residence are, owing to their proximity to the child's environment, the best placed to assess its situation.

Subjective criteria

This category refers to the parents' shared intention in establishing the child's residence in one state (or transfer it to another).

Generally, the importance of the subjective criteria was argued in the sense that children lack the material and psychological background to decide where they will reside, and therefore a child's habitual residence is consistent with the intentions of those entitled to exercise parental authority (which includes fixing the residence of the child).

In making the appreciation upon the intent, the courts should look not only (and primarily) at declarations, but also at actions and facts.

Juridical literature[35] and case-law included in this area factors such as:

- ***parental employment*** – decision to maintain a job in a state after divorce was appreciated as indicating the intent of holding to the pre-existing habitual residence[36]; on the contrary, decision to leave an employment in a state and gain of a job in another was considered a factor showing the intent to permanently move to another state
- ***purchase of home*** – more likely to express a long-term stay, in opposition to rental of a lodging
- ***moving of belongings*** – partial moving of belongings may nevertheless express incertitude towards the intent of a permanent movement to another state
- ***citizenship*** - if parents and child come to a country on a tourist visa and do not ask for a more permanent residency status, the habitual residence in the prior country may not have been abandoned
- ***location of bank accounts*** – importance of this factor is diminished, as at present on-line transactions may easily be activated and option to have accounts in different states may also be taken in relation to financial opportunities
- ***purpose of movement to the new state*** –journeys for vacations do not express the intent to change the habitual residence and are considered temporary[37]
- ***obtaining professional licenses*** specific to the new state is a factor that indicates intention to gain a new habitual residence.

[33] Bucharest Court of Appeal, Third Section Civil and for minors and family matters, decision no. 720/24.11.2020, case no. 19673/3/2020, definitive, not published: "The Court points out that the best interests of the child are presumed to be in favour of his return to the country of residence.".

[34] ECJ, Decision adopted on 02.04.2009, C-523/07, case *A*, already cited, para. 37.

[35] Jeff Atkinson, *The meaning of "habitual residence" under the Hague Convention on the civil aspects of international child abduction and the Hague Convention on the protection of children, op. cit.*, pp. 654 – 655.

[36] Bucharest Tribunal, Fourth Civil Section, decision no. 1522/27.10.2017, case no. 24670/3/2017, defintive, not published.

[37] Bucharest Court of Appeal, Third Section Civil and for minors and family matters, decision no. 720/24.11.2020, already cited: "The Court finds the temporary nature of the stay in Romania to which the applicant consented, being only a holiday.".

Objective criteria

This set of criteria ponder generally on inquiry whether children have "gained roots" in the new environment (the degree of the child's integration in a social and family environment).

It looks for indicia of the child's connectivity to a place through criteria such as school, extracurricular activities, social activities, significant relationships with people in that place, registrations concerning the child, physical presence of the child.

•***school enrolment*** is considered a key factor in determining if the child has acclimated to a new residence[38]

•***medical enrolment*** usually accompanies school inscription[39]

•***registration of birth*** in official registers[40]

•***participation in social activities*** – social life at school or outside is also considered as an indicator that the child has adapted to the new surroundings

•***length of stay in the country*** **-** the length of time is not fixed and the courts appreciate depending to the specific circumstances in each case[41]

•***the age of the child*** - different nuances are to be considered related to the child's age.

On the one hand, the age of the child is closely connected to the degree of maturity.

On the other hand, the factors to be taken into account in the case of a child of school age are not the same as those relevant for an infant. The environment of an infant (or even young) child is essentially a family environment, determined by the reference person(s)[42]

•***integration of the child's person(s) of reference*** **–** depends on the degree of the child's dependence (which varies according to his or her age), and also languages spoken by parents, geographic and family origins[43]

•***child's physical presence*** - if the child's habitual residence cannot be established by applying the tests above-mentioned, under Article 13 of the Regulation, the physical presence of the child should be taken into consideration (although it is not sufficient by itself to establish the habitual residence of the child[44]).

[38] Bucharest Tribunal, Fourth Civil Section, decision no. 1996/10.12.2020, case no. 16406/3/2020, not published.

[39] Bucharest Court of Appeal, Third Section Civil and for minors and family matters, decision no. 753/07.12.2020, case no. 21763/3/2019, definitive, not published. Also, Bucharest Tribunal, Fourth Civil Section, decision no. 432/23.02.2018, case no. 46495/3/2017, definitive, not published.

[40] Bucharest Tribunal, Fourth Civil Section, decision no. 472/14.03.2019, case no. 3813/3/2019, definitive, not published. Also, Bucharest Tribunal, Fourth Civil Section, decision no. 1215/16.10.2014, case no. 22913/3/2014, definitive, not published.

[41] Bucharest Court of Appeal, Third Section Civil and for minors and family matters, decision no. 753/07.12.2020, already cited: "the fact that the minor was born in Romania and lived in this country with the mother from 24.01.2018 until 06.04.2018 is not such as to lead to the conclusion of the establishment of the residence of the minor in this country.".

[42] Bucharest Court of Appeal, Third Section Civil and for minors and family matters, decision no. 753/07.12.2020, already cited: "In relation to the age of the child at the time when the father brought him to Romania, respectively 11 months, it is clear that the integration of the child targets the family and social environment determined by the reference persons in whose care the minor is (in the case, the mother) and assumes as such the evaluation of the integration of the reference persons".

[43] The logic of this approach is most evident when the habitual residence of a newly-born child is involved, who by definition had no time to become himself/herself integrated in any place at all and would be deprived of an habitual residence.

[44] ECJ, Decision adopted on 02.04.2009, C-523/07, case *A*, already cited, para. 33. Also, Bucharest Tribunal, Fourth Civil Section, decision no. 857/25.06.2015, case no. 40891/3/2014, definitive, not published. Related to this

2.3.2. (More) habitual residences

It is generally agreed that one person can have only one habitual residence at a time.

To this respect, Article 2570 of Romanian Civil Code stipulates for general relations under private international law that: "the habitual residence of a natural person is in the state where the person has his principal place of residence, even if he has not fulfilled the legal registration formalities. (…) For the determination of the main dwelling, account shall be taken of those personal and professional circumstances which indicate lasting connections with the state concerned or the intention to establish such connections"[45].

Albeit the case-law in this respect is also divided, practical experience has proved that there are situations when an alternate habitual residence was considered (persons who split time more or less evenly between two locations).

Juridical literature[46] underlined that the approach of the courts differs in how they handle cases in which there are elements which may lead to the conclusion that the child has more than one residence.

Reference was made to decisions pronounced by Australian courts (which agreed that the notion of dual habitual residence was inconsistent with the wording and the spirit of 1980 Hague Convention), whereas courts from United Kingdom found it was possible for habitual residence to change periodically if "that should be the intended regular order of life for parents and children".

We share the opinion already expressed by the doctrine that the Hague Convention "does not contemplate more than one habitual residence and was not intended to deal with such a circumstance"[47].

Similarly, case-law considered that "the Hague Convention enshrines the principle of exclusive recourse to the attachment to the child's habitual residence, which prevents a child from having several simultaneous habitual residences."[48]

Nevertheless, as cases where courts accepted a dual residence have already appeared, we consider that an amendment of the Hague Convention and the Regulation might be taken into consideration, so that a legal solution should be agreed upon.

In absence of a legal solution, situations of alternate habitual residences of the child are very difficult to be solved in the framework of international child abduction in case of transfer of the child between two (or more) states of habitual residence.

Indeed, one might easily consider that no international child abduction occurred at all, since no wrongful movement or retain of the child could be argued, as both states are considered habitual residences.

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factor, there were also argued opposed opinions that a child's physical presence in a particular state is not even a prerequisite for determining that it is habitually resident in that state (Advocate General Saugmandsgaard Øe, Opinion delivered on 20 September 2018, C-393/18 PPU, case *UD v XB*).

[45] From the wording of the text, it follows that the legislator took into account both subjective and objective factors.

[46] James Marks, *The application of the Hague Convention where there is more than one habitual residence*, p. 6, available at the following link: http://www.jamesmarks.ca/files/Hague-Paper.pdf, last accession on 22.01.2021, 15,26.

[47] James Marks, *The application of the Hague Convention where there is more than one habitual residence*, *op. cit.*, p. 14.

[48] Federal Supreme Court of Switzerland, decision no. 5A_846/06.11.2018, case no. C/21206/2018; DAS/190/2018, available at the following link: id1448-full-text-fr.pdf, last accession on 29.01.2021, 16,13.

3. Conclusions

Following the adoption of the 1980 Hague Convention and even after the Brussels II bis Regulation, as no legal definition was provided for the notion of "habitual residence", courts all over the world have struggled to structure the criteria upon which to establish the habitual residence of a child in international abduction cases.

The omission to provide a definition was indeed intentional, aimed to ensure a margin of appreciation for the courts and avoid rigid and formal determinations, which might have excluded circumstances specific to each case.

On the contrast to these "good intentions", the lack of clarity resulted in divergent views of jurisprudence, emphasizing solely either the child's (objective) or the parents' (subjective) perspective.

We argue that a "hybrid perspective" is more fitted to serve the bests interests of the child, as the question of the child's habitual residence is far more complex than a simple application of tests elaborated on the basis of case-law criteria (which are exemplificative and non-exhaustive).

Both the child's acclimatization and the parents' intention are important factors, albeit the weight given in particular to objective or subjective factors can vary from case to case.

The use of multiple factors from both perspectives, without pre-assigned weight, would also be consistent with the 1980 Hague Convention's and the Regulation's approach not to have a precise definition of "habitual residence".

Analyse of all factors related to the issue of habitual residence should be explored and settled by national courts taking into account the principle of bests interests of the child and also all circumstances of the case.

Amendment of the 1980 Hague Convention and the Regulation would be a solution for cases where dual (or more) habitual residences of the child are accepted.

Finally, as case-law is (still) divided, greater importance should be attached to a consistent and uniform application of the criteria of habitual residence both within the European Union and all the states signatories to the 1980 Hague Convention.

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THE ELECTRONIC SIGNATURE: A CONTEMPORARY TOOL FOR CERTIFICATION OF IDENTITY AND INFORMATION CONTENT?

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Abstract

The accelerated and continued development of information technology and telecommunications led to an unprecedented growth of the possibilities to conduct activities in any field, especially in the economic, financial, administrative and legal areas.

Currently, we can remotely access information resources, conclude contracts, we have and use electronic payment methods, we use systems to electronically transfer money and trade and many of the like. Thus, development of a trusted context is a prerequisite, given the potential risks, which may occur when we perform activities using on-line electronic systems: party identification, data transfer, securing payments, also taking into account the legal framework still insufficiently clear about consumer protection.

Any economic activity is prone to fraud, so issues arise when it is found that resolving these conflicts requires increased attention, especially in the field of electronic trade.

At European Union level, these issues have been and are being hotly debated, with the Union aiming to provide a common basis for secure electronic interactions between citizens, businesses and public authorities, in order to increase the efficiency of online public and private sector services, e-business and e-commerce in the Union.

This paper proposes a brief foray into the Union and national legislative framework governing the use of electronic signature and an overview of the most important risks that its use may raise, especially from the perspective of cybercrime.

Keywords: *electronic signature, digitization, trust services, signatory, electronic identification..*

1. Introduction

1.1. What is the theme of this paper?

Given the difficulties that the contemporary society faces in the fight against the SARS -CoV2 virus and the need to adapt the activities carried out in all areas to the strict rules on social distancing and quarantine or self-isolation, as the case may be, teleworking has become a key point in the process of adapting to the new living conditions.

Thus, to ensure continuity of economic activities and the exercise of legislative and executive state power in the context of the current pandemic, it was imperative to focus the efforts to create the technical and legal conditions required to work remotely, in order to observe the rules on isolation or quarantine.

A problem exacerbated when working remotely / teleworking is therefore represented by the ways in which the identity of the parties and the content of the sent

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documents could be certified, so that electronic documents could have the same value as the documents submitted in original/transmitted by hand.

The solution to this problem is not new, because we are talking about a tool that has been used for more than two decades, especially at international and European level, and that is: the electronic signature. However, as the world was gripped by the COVID -19 pandemic, even the most " *traditionalist* " activities carried out, especially by the institutions of the administrative and judicial apparatus in Romania, where personal presence and submission of documents by hand was mandatory, have adapted and started using the electronic signature in their work, perhaps more intensely than ever.

Thus, it is the context of the current pandemic that has brought back into the " *spotlight* " the electronic signature, in the situations when it is required the submission / transmission / communication of official/original documents in electronic format, reason why an in-depth research of the new regulations concerning it and an analysis of the risks involved in its use are necessary and timely, and also represent the subject of this paper.

1.2. What is the importance of the topic under discussion?

The topic under discussion in this paper is of special importance, in relation to the risks that each user of an electronic signature, be it the staff of an institution or public authority, or a private company, a self-employed person or a freelancer must be aware of, especially if the use of this mean of identification was caused by the COVID-19 pandemic, in other words it was a necessity and not an option for the user.

Why, though, would there be issues raised by the understanding and proper use of an electronic signature by a new user in the current global context? Firstly, it is because, in some cases, there was not enough time available to the new user to understand how to properly use an electronic signature, which could increase the risk of use. Secondly, with the increase in frequency of the use of electronic signatures and of the number of users of such signatures, it also increases the risk of spreading of the phenomenon of cyber-crime concerning data theft, unlawful access of databases, etc. Thirdly, the electronic signature must not be confused with an infallible means of identification, in the sense of ensuring the certainty or, at least, an increased degree of confidence in the veracity of the signatory's identity.

1.3. How do the authors intend to respond to the issues raised by the theme addressed?

This paper presents the analysis of the legal framework applicable in the field of electronic signatures, both from the perspective of the European Union and from national perspective, and then it explains by comparison certain technical issues in order to understand how different types of electronic signatures work, and the degree of risk the use of each of them involves.

Finally, the paper relates the detailed information present in its content to the offenses set forth by the national law that may be committed through the use of or in connection with the use of the electronic signature, in order to highlight the highest risk issues faced by both the certification service providers and by their beneficiaries (regardless of their capacity or the category to which they belong) which they should pay increased attention to.

1.4. How does this paper relate to the existing literature?

In the current pandemic context, the regulation of the electronic signature has changed in terms of legislation, at least nationally. In addition, given the exponential increase in the use of this method of identification, we deem that this paper, by its structure, differs from other specialized articles published on this topic precisely by presenting the legislative and practical aspects, in relation to current events regarding the health crisis the society has been through (and still goes through today) and, equally to the risks of criminal nature that improper use of it could pose.

2. National and European law regarding the use of electronic signature

2.1. Regulation (EU) no. 910/2014

In the general world context of digitalization of most of the activities in society, which is a tendency caused by the spread of the phenomenon of " *Internet of things* " (IoT), the European Union has set a number of targets in this respect, which it has conceptualized since 2010, through the Communication from the Commission of 26 August entitled " *The Digital Agenda for Europe* "[1]. This document claims, amongst others, "*to achieve 'smart growth' – that is, a European economy based on knowledge and innovation. The production and consumption of digital ICTs are deeply implicated in this*"[2].

Throughout the Communication, the Commission has identified a number of issues that prevent European citizens from benefiting from a digital single market and from cross-border digital services. Among these problems, the following were identified as major obstacles to the implementation of a digital single economy: fragmentation of the digital market, lack of interoperability and increasing cybercrime.

At the present, a number of legislative instruments have been adopted at European level to mitigate and even eliminate the problems highlighted, at least at the level at which they have been identified and analysed so far.

The regulation (EU) no. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the singlr market and repealing Directive 1999/93 / EC[3] [*Regulation (EU) no. 910/2014* " or" *Regulation*"] is among the instruments aimed at achieving the objectives of development and implementation of the digital single market in the European Union, especially in terms of mutual cross-border recognition of electronic identification means , which involves a high level of security of electronic identification systems .

It can therefore be synthesized to that, the Regulation, by its provisions, aims to remove barriers to the use of electronic identification systems in the Union European in the broader context of the creation and implementation of the digital single market. In addition, it establishes the

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Digital Agenda for Europe, available at: https://eur-lex.europa.eu/legal-content/RO/ALL/?uri = CELEX: 52010DC0245, accessed on 5th of November 2020.

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[3] Regulation (EU) no. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93 / EC, available at: https://eur-lex.europa.eu / legal-content / RO / TXT /? uri = celex: 32014R0910 , accessed on 6th of November 2020.

obligation for the Member States of the European Union to cooperate, thus establishing an interoperability framework. This framework requires that the programs of national electronic identification be interoperable, in a technologically neutral system, which does not favour any specific national technical solution for electronic identification.

In addition, Regulation (EU) no. 910/2014 aims to improve confidence in electronic transactions at Union level, in order to achieve its objective of increasing the efficiency of online services in the public and private sector, as well as e-commerce.

With regard to its regulatory object and addressees, it is noteworthy that the Regulation applies, on the one hand, to electronic identification systems (IDEs) notified to the European Commission by Member States and, on the other hand, to trust service providers from the Union.

Overall, the European legislative act defines and establishes the scope of coverage of the notions and basic concepts used in regulating the use of electronic signatures in a clear and comprehensive way, in order to eliminate, as far as possible, any disagreement or misunderstandings. By way of example, for all types of electronic signatures are defined the notions of: authentication, trust services, product, electronic seal, signatory, means of electronic identification, beneficiary, electronic identification data and the like.

Thus, the electronic signature represents *"data in electronic format, attached to or logically associated with other data in electronic format and which is used by the signatory to sign"*. Basically, the electronic signature is nothing more than " *data* " attached to the content of a document in electronic format, with the role of attaching the respective collection of data to a specific identity, namely that of the signatory of the document.

To narrow the circle of persons to whom the Regulation grants legitimacy to use an electronic signature, we must analyse the term "beneficiary ". According to art. 3 point 6 of the Regulation, the beneficiary is any " *natural or legal person benefiting from a service of electronic identification or a trust service* " , meaning they do not require a certain qualification in order to become user of an electronic signature , thus benefiting both people working in the public and private sectors .

However, the Regulation sets strict trust services, stating that they are paid services that include activities of creation, verification and validation of the various categories of objects of certification, namely: electronic signatures, electronic seals or electronic time stamps, registered e-delivery services and certificates relating to such services or certificates for the authentication of a website.

Trust services may also include the storing of electronic signatures, seals or certificates for those services.

In other words, trust services are services involving, *inter alia*, personal data operation, regardless of how that is performed, reason why it applies the provisions of Regulation (EU) 679/2016 of the European Parliament and the Decision of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46 / EC[4] ["Regulation *(EU) no. 679/2016"*or " *General Data Protection Regulation "*] . Moreover, trust services providers are, as a

[4] Regulation (EU) 679/2016 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46 / EC available on: https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A32016R0679, accessed on 9th of November 2020.

rule, personal data operators in the sense established by the provisions of art. 4 point 7 of Regulation (EU) 679/2016. In connexion to the beneficiaries, targeted persons are, in the sense of the provisions of art. 4 point 1 of the General Data Protection Regulation, the identified or identifiable natural persons that benefit from an electronic identification service or a trust service[5].

Going back to the trust service providers in the European Union, the Regulation states that are "qualified " those providers that meet the applicable requirements therein. They have the legal right to provide qualified trust services (e.g. qualified electronic signatures, seals or certificates) in all Member States .However, if the provider of trust service is located in a country outside the European Union, in order for its services to be considered " *qualified* " , there must be an agreement between the European Union and third party State third party state or " *an international organization in accordance with Article 218*"[6] of the Treaty on the Functioning of the European Union (" *TFEU* ").

The Regulation also sets out a number of key aspects on electronic identification. In this regard, it is noteworthy that it establishes the obligation of mutual recognition of electronic identification by and between Member States from 28 September 2018, in particular to facilitate secure electronic transactions at union level. At the same time, it is mandatory to mention the level of assurance of the electronic identification system (i.e. low, substantial or high) for the form of electronic identification issued within that system, with the mention that the mutual recognition is mandatory only when, in the relevant public sectors, one of the ' *substantial* ' or ' *high* ' levels is used to access that online service.

States are required to provide the Commission, when it notifies them, with a series of information concerning the levels of assurance and the electronic identification issuer within that system; surveillance systems and the liability applicable and the bodies that manage the registration of unique personally identifiable information.

Moreover, in case of system or authentication security breach, Member States are under the obligation to immediately suspend or revoke authentication or compromised parts of the system throughout the Union and to inform other Member States and the Commission.

The regulation also states the contractual liability in case of transactions between Member States where the obligations set in the Regulation are violated. Thus, they shall be held liable for any damage caused to any person or body, whether intentional or negligent, as follows: a notifying Member State; the party issuing the electronic identification or the party managing the authentication procedure.

From the perspective of supervision, all trust service providers are subject to supervision and risk management and notification obligations in case of security breach, according to art. 17-19 of the Regulation, but in a differentiated way, depending on their qualification category. Thus, unqualified trust service providers are subject to loose supervision loose, meaning that the surveillance body only reacts if the provider is suspected of improper behaviour. Instead, qualified trust service providers established in the Union are strictly supervised and in that, they must obtain prior authorization from a supervisory body and must be audited at least every two years by

[5] Ciprian Săraru, *Processing of personal data A matter of principle*, in *General Data Protection Regulation. Comments and explanations*, Hamangiu, Bucharest, 2018, p. 12.

[6] See, in this regard, art. 14 para. (1), final thesis of the Regulation (EU) 910/2014.

an organization to assess whether they meet the requirements of Regulation (EU) 910/2014.

In connexion with the legal effects of the electronic signature, the Regulation states that it takes effect *ad probationem* , and can be used as evidence in litigations, regardless if we are talking about a qualified electronic signature qualified or not . At the same time, the Regulation expressly provides for the equivalence of the qualified electronic signature with that of the holograph signature, within the provisions of art. 25 para. (2).

It also established the recognition in all the other Member States of qualified electronic signatures based on a qualified certificate issued by a Member State.

Art. 26 of the Regulation sets out the requirements that an advanced electronic signature must meet, namely: to refer exclusively to the signatory; to allow his/her/their/its identification; be made using electronic signature creation data that the signatory can use, with a high level of trust, which is exclusively under his/her/their/its control; and to be connected with data used for signature such a way that any subsequent change of data could be detected.

For online services provided by a public body, the Regulation provides that advanced electronic signature based on a qualified certificate and qualified electronic signature used in these services is acknowledged, if it uses at least formats or technical methods provided in the Regulation. Also, for these online services provided by public sector bodies, it will not be required an electronic signature at a level of security higher than the level of security of the qualified electronic signature employed for cross-border use of an online service rendered by a public service body, as per the provisions of art. 27 para. (2).

From the perspective of the categories of electronic signatures, it should be noted that there are currently three types of electronic signatures, according to the legislation in force, namely: simple signature; advanced signature and qualified signature.

In practice, they provide different levels of security and recognition for the person who uses them in his/her/their/its relations with other persons or entities (companies or public institutions). For this reason, the three types of electronic signatures cannot be considered identical and must be used depending on the risk associated with the documents to be signed.

It is appropriate to reiterate that electronic signatures are currently regulated by Regulation (EU) 910/2014. This normative act applies, directly[7], in all member states of the European Union, therefore also in Romania. In other words, all persons and entities using electronic signatures must comply with the provisions of this single European legal framework.

In essence, the three types of electronic signatures have different levels of security. Thus, the simple electronic signature has a low level of trust, the advanced electronic signature has a medium level of trust, and the qualified electronic signature has a high level of trust.

Therefore, it can be deduced that the qualified signature is the only one that can be considered the same as the holograph signature.

It should also be noted that electronic signatures are closely linked to the context in which they are used, in order to ensure a certain level of trust and recognition.

European legislation allows the use and recognition of the three types of electronic signatures and regulates that only the qualified electronic signature, issued by

[7] Augustin Fuerea, *The European Union Handbook, 6th Edition*, Universul Juridic, Bucharest, 2016, p. 235.

a qualified trust service provider accredited under Regulation (EU) 910/2014, is equivalent to the holograph signature.

In detail, it can be seen that electronic signatures can be used, depending on the context of their use and the type of signature, as follows:

- **simple electronic signature** (low level of trust): contact details entered in the email signature, biometric signature (made on a tablet). This type of signature can be used to sign e-mails or low-risk electronic documents, such as receipts or acknowledgements;
- **advanced electronic signature,** which requires a simple digital certificate (medium level of trust): e-mails, medium-risk electronic documents (for example, leave applications, expenses reimbursement sheets or other forms can be signed inside a company), enclosed documents (endorsements, estimates or minutes). Usually, the advanced signature is used in a context that involves other actions that can confirm the existence of the will of the parties (for example, the signing of a lease and the related payment);
- **qualified electronic signature**, which requires a qualified digital certificate (high level of trust): signing high-risk e-mails or documents, such as credit agreements, commercial or service contracts, employment contracts and addendums, power of attorneys, mediation contracts, tax invoices, medical documents (analysis bulletins, hospital admission or discharge forms) or documents relating individuals and companies with the state.

Therefore, it is recommended that the first two types of electronic signatures be used in relationships that involve a low risk for the parties (in other words, in those cases where a minimum guarantee is needed that the signatory is who he/she/they/it claims to be).

Usually simple or advanced electronic signatures, can be used in operations with low risk, *i.e.* where potential disputes or the applicable law do not require taking actions through mechanisms binding the parties (handwritten signature or its equivalent).

Thus, a series of internal document flows are identified that can be issued with these types of signatures or in relation to third parties to whom the information transmitted does not require binding, but only a minimal guarantee that they are transmitted by the issuer.

This confirms that a qualified electronic signature is required in high-risk relationships, where the identity of the signatory must be beyond doubt. For example, when applying for a loan or submitting, within the legal deadline, a tax return, the qualified electronic signature ensures that it is the real person using the electronic signature in question. In other words, the real identity of the signatory is closely linked to his/her/their/its electronic identity.

In the case of the qualified signature, we are of the opinion that, in the case of operations that present a higher risk of disputes or litigations, this type of signature is the optimal choice, given the fact that the qualified signature has the value of the holograph signature. Thus, the financial-banking area (loans especially), employment procedures, commercial relations (*business to business*, *business to consumer*, *consumer to business*), forms, applications in relation to state institutions (*business to government* , *citizen to government)*) are areas of practice that generate volumes of documents , in which the rate of incidence of disputes is high .

Therefore, the qualified electronic signature is at the highest level of recognition and trust and is presumed to be binding to the parties.

In order to clearly highlight the differences between the three types of electronic signature, it is appropriate to detail the essential elements for each type of signature, so that the assessment of the areas in which they can be used, depending on the degree of risk, is easier.

On the one hand, the simple electronic signature is essentially data in electronic format, attached to or logically associated with other data in electronic format and used by the signatory to sign, according to Regulation (EU) no. 910/2014.

On the other hand, the advanced electronic signature is an electronic signature that meets the following requirements[8]:

- refers exclusively to the signatory;
- allows the identification of the signatory;
- it is created using electronic signature creation data that the signatory can use, with a high level of trust, exclusively under his/her/their/its control; and
- is linked to the data used for signing, so that any subsequent changes to the data can be detected.

Last, but not least, the qualified electronic signature is an advanced electronic signature that is created by a qualified electronic signature creation device and is based on a qualified certificate for electronic signatures.

Consequently, it is the qualified device and the qualified certificate that make up the difference between the advanced signature and the qualified signature. These two additional tools provide a direct and undoubted link between a person's real identity and electronic identity.

Therefore, the qualified electronic signature is considered, according to the Union regulations currently in force, as the only one that is equivalent to the holograph signature.

2.2. Law no. 455/2001

In Romania, the use of electronic signatures has been regulated by law since 2001, so that the adoption of Regulation (EU) no. 910/2014 determined the amendment and supplement of the existing legal framework , to align them with and put the European norm into correct and complete application.

In this regard, Law no. 455/2001 on the electronic signature[9] (" *Law No. 455/2001"*) is the main normative act establishing the legal regime of electronic signatures and electronic documents, including the conditions for the provision of electronic signature certification services. It entered into force on 31 July 2001, republished on 30 April 2014, with the necessary amendments and completions for the application of the aforementioned Regulation.

Thus, Law no. 455/2001 establishes the legal regime of the electronic signatures and of the documents in electronic format as well as the criteria for providing electronic signature certification services, the law

[8] George Hari Popescu, *What you need to know about the electronic signature, given that the new bulletins will contain one - legal value, recognition in other states and technical issues*, published on 14th of August 2020, available on: https://www.avocatnet.ro/articol_55547/Ce-trebuie-s%C4%83-%C8%99tii-despre-semn%C4%83tura-electronic%C4%83-avand-in-vedere-c%C4%83-noile-buletine-vor-con%C8%9Bine-una-valoarea-juridic%C4%83-recunoa%C8%99terea-in-alte-state-%C8%99i-aspecte-tehnice.html, accessed on 6th of November 2020.

[9] Law no. 455/2001 regarding the electronic signature, in the version republished in the Official Gazette, Part I, no. 316 of April 30, 2014, with subsequent amendments and completions, available on: https://lege5.ro/App/Document/gm4tmnjuha/legea-nr-455-2001-privind-semnatura-electronica, accessed on 6th of November 2020.

being completed with the national legal provisions
regarding the conclusion, validity and effects of legal acts.

This has been amended and supplemented, the current version being republished on April 30, 2014, in order to align with the provisions of EU Regulation no. 910/2014. In addition, the changes introduced by the urgent measures adopted, at governmental level, due to the COVID-19 pandemic have led to the additional amendment and completion of Law no. 455/2001, by: Emergency Ordinance no. 39/2020 for the completion of Law no. 455/2001 on the electronic signature[10] („*OUG 39/2020*").

Thus, given the need to move the country to work from home or teleworking, including for civil servants, it was necessary to adopt a set of rules specifically devoted to this purpose, regulating a new authority for certification services destined exclusively to this type of personnel.

In this sense, art. 3^1 newly introduced establishes in para. (1) that the Special Telecommunications Service is designated to provide qualified certification services destined exclusively to the authorized personnel of the institutions and public authorities in Romania, in order to carry out their duties. These services will be provided free of charge both to institutions and public authorities in Romania.

In addition, para. 2 of art . 3^1 provides that the Regulatory and supervision authority will have to update the register of certification services providers by adding the Special Telecommunications Service as qualified certification services provider destined exclusively to the personnel of the institutions and authorities public .

However, unlike other providers, in the case of the Special Telecommunications Service, the information will not refer to fees, contract conditions for the issue of the certificate, including limitations of the liability of the certification service provider and the ways of resolving disputes.

Also, in the case of the Special Telecommunications Service, the provisions of art. 22 setting, *in substance*, that qualified certification service providers should have financial resources to cover the damages that could cause during the performance of the activities relating to electronic signature certification.

Last, but not least, the Special T telecommunications Service shall notify the Regulatory and supervisory authority specialized in this field about the commencement of activities related certification of electronic signatures 3 days before the start thereof, which is an exception to the deadline for other providers, who have a deadline of 30 days.

Section II of Law no. 455/2001 introduces the definitions given by the legislator to certain expressions and terms for a better understanding of the law. Thus, the following notions are defined, among others:

- **the electronic document** is a collection of data in electronic format between which there are logical and functional relationships and which render letters, numbers or any other characters of intelligible meaning, intended to be read by means of a computer program or other similar procedure;
- **Electronic signature** means data in electronic format which is attached to or logically associated with other electronic data and which serve as a method of identification;

[10] Published in the Official Gazette, Part I no. 281 of 03 April 2020, available on: Ordonanța de urgență nr. 39/2020 pentru completarea Legii nr. 455/2001 privind semnătura electronică (lege5.ro) accessed on 10th of November 2020.

•**Extended electronic signature** is the electronic signature which meets all the following conditions :

a) is uniquely related to the signatory;
b) ensures the identification of the signatory;
c) is created by means controlled exclusively by the signatory;
d) it is linked to data in electronic form, to which it relates in such a way that any subsequent modification thereof is identifiable;

• **Signatory** is the person holding a signature-creation device, who acts either personally or on behalf of a third party .

Regarding the legal regime of documents in electronic form, art. 5 of Law no. 455/2001 expressly provides that the electronic document, to which an extended electronic signature has been incorporated, attached or logically associated, based on a qualified certificate, not suspended or revoked at that time and generated by means of a secure electronic signature creation device, is assimilated, in terms of its conditions and effects, with a document under private signature.

The electronic document, with an electronic signature incorporated, attached or logically associated, and which the opposing party acknowledges, has the same effect as the authentic instrument between those who signed it and those who represent their rights.

Also, in cases where, according to the law, the written form is required as a condition of proof or validity of a legal act, an electronic document fulfils this requirement if has an extended electronic signature incorporated, attached or logically associated with it, based on a qualified certificate and generated by a secure signature-creation device.

If one of the parties does not acknowledge the document or the signature, the Court shall always order that the verification be made by specialized technical expertise and an expert or specialist appointed to the case shall request qualified certificates as well as any other documents necessary, according to the law, to identify the author of the document, the signatory or the holder of the certificate.

In addition, the party invoking before the court an extended electronic signature must prove that it meets the following conditions:

•is uniquely related to the signatory;

•ensures the identification of the signatory;

•it is created by means controlled exclusively by the signatory;

•it is linked to data in electronic form, to which it relates in such a way that any subsequent changes to them are identifiable.

It is important to emphasize that it establishes a legal presumption that the extended electronic signature based on a qualified certificate issued by an accredited certification service provider meets the conditions mentioned above.

Moreover, with reference to the burden of proof in case of disputes, the Romanian legislator has established that the party invoking before the court a qualified certificate must prove that the certification service provider that issued the certificate meets the legal conditions provided in art. 20. Also, in this case, there is a legal presumption that concerns the accredited certification service provider, in the sense that it meets the conditions provided in art. 20 of Law no. 455/2001.

It is noteworthy that one of the most important advantages of the electronic signature, especially in the current pandemic, is the fact that the electronic signature can be used for signing documents both in relation to some state institutions and authorities (ANAF, ONRC, ANCPI, CNAS, ITM , ANOFM, SEAP, CSSP, M. Of., BVB,

UAT, etc.), as well as in relation to persons under private law (natural or legal persons in office or in insolvency). Additionally, as the specialized literature claims, the electronic signature ensures the authenticity of the person who signed the document, respectively the integrity of the document, *ie* the fact that it was not modified after signing. The signature can only be used by its owner, being forbidden to borrow and alienate the kit [containing 3 components: a device (token) that has an associated PIN code to be accessed, a qualified digital certificate and an application / software program)] to another person[11].

Signing documents (contracts, tax returns, invoices, etc.) is done safely [5], remotely, efficiently, quickly, saving time and money.

As far as offences are concerned, the provisions of art. 44 of Law no. 455/2001 provide that it is an offence, if, according to the law, it is not a crime , and is sanctioned with a fine from 500 lei to 10,000 lei, the act of the certification service provider, who:

- omits to make the notification provided in art. 13 para. (1) , *i.e.* it is the obligation of the persons who intend to provide certification services to notify the regulatory and supervisory authority specialized in this field 30 days before the start of activities related to the certification of electronic signatures ;
- omits to inform the regulatory and supervisory authority specialized in the field on the security and certification procedures used, under the conditions and in compliance with the terms provided in art. 13;
- fails to fulfil with its obligation to facilitate the exercise of control by the staff of the regulatory and supervisory authority in the field, especially designated for this purpose;
- performs the transfer of activities related to the certification of electronic signatures without complying with the applicable legal provisions .

It is also an offence and is sanctioned with a fine from 1,000 lei to 25,000 lei, the act of the certification service provider who, *inter alia*:

- does not provide to the persons requesting a certificate or, as the case may be, to a third party who holds such certificate, the obligatory information provided in art. 14 para. (3) or does not provide all such information or provides inaccurate information ;
- breaches the obligations regarding the processing of personal data;
- issue certificates, presented to holders as qualified, which do not contain all mandatory particulars ;
- issues qualified certificates that contain inaccurate information , information that is contrary to law, morals or public order, or information whose accuracy has not been verified under the law or issues qualified certificates without verifying the identity of the applicant, under the law ;
- fails to take measures to ensure confidentiality during the process of generating signature-creation data, if the certification-service-provider generates such data;
- does not keep all the information regarding a qualified certificate for a period of at least 5 years from the date of expiry of the certificate;
- stores, reproduces or discloses to third parties the data used to create an electronic signature, except for when the signatory so requests, if the provider issues qualified certificates;

[11] Andreea-Maria Maxim, *Brief considerations on electronic signature*, published on 16th of Aprilie 2020, available on: https://www.juridice.ro/680239/scurte-consideratii-privind-semnatura-electronica.html, accessed 6th of November 2020.

- stores qualified certificates in a form that does not comply with legal requirements;
- uses electronic signature creation devices which do not meet the conditions provided by law , if the certification service provider issues qualified certificates;
- does not suspend or revoke the certificates issued, in cases where suspension or revocation is mandatory, or revokes them in violation of the legal deadline;
- continues to carry out activities related to the certification of electronic signatures in the event that the specialized regulatory and supervisory authority in the field has ordered the suspension or cessation of the activity of the certification service provider;
- issues certificates or carries out other activities related to the certification of electronic signatures, using, without being entitled, the status of accredited certification service provider, by presenting a distinctive mention referring to this quality or by any other means.

Finally , the violation, by the approval agency, of the obligation to facilitate the exercise of powers of control by the staff of the regulatory and supervisory authority in the field, especially designated for this purpose, constitutes an offense and is punishable by a fine of 1,500 lei to 25,000 lei.

2.3. The technical and methodological norms for the application of Law no. 455/2001

The technical and methodological norms for the application of Law no. 455/2001 on the electronic signature of December 13, 2001 ("*Norms for the application of Law no. 455/2001* " or " *Technical norms* ") were published in the Official Gazette, Part I no. 847 of December 28, 2001, the variant currently in force including the amendments brought by Decision no. 2303/2004 on the amendment of normative acts in the field of information technology (" *HG no. 2303/2004* ").

The technical norms establish, *ab initio* , their recipients, namely: any person, natural or legal, located in Romania, in relation to the fact that this category can benefit from certification services in order to use the electronic signature in the sense of art. 4 of Law no. 455/2001 regarding the electronic signature.

From the beginning, the technical norms establish and expressly defines the meaning of certain terms used, in order to avoid potential misunderstandings.

With regard to the legal mechanism for regulation and supervision, the Technical Rules provide that the regulatory and supervisory authority generates or acquires a functional pair of private key-public key pair and must protect its private key, using a reliable system and taking the necessary precautions to prevent the loss, disclosure, alteration or unauthorized use of its private key. In this respect, it is noteworthy that in no way can the private key be deducted from its paired public key.

The same authority has the obligation to manage the Register of certification service providers (hereinafter referred to as the "*Register*") , which Law no. 455/2001 refers to.

Reporting to the Registry, the authority has the exclusive task of updating it, this update having as object all changes in the status of the provider, namely: accreditation, end of the accreditation period, suspension, additions to the types of certificates offered.

With regard to voluntary accreditation, the Technical Rules expressly provide that providers wishing to operate as accredited providers must apply for accreditation from the authority, meaning that the applicant provider must meet all the conditions necessary for the issuance of qualified

certificates and use secure electronic signature-generating devices approved by an approval agency agreed by the Authority.

Verifications are made both on the statements contained in the documentation submitted to the authority and on the concordance between the systems, procedures and practices stated and those that actually exist.

The duration of the accreditation is 3 years and can be renewed, through a procedure similar to the one provided for obtaining the accreditation.

At the same time, it is important to note that, from the perspective of speed, the Technical Rules expressly provide that the duration of verification of the information present in the application and the issuance of the certificate may not exceed, as appropriate: one working day for simple certificates; respectively 5 working days for qualified certificates. These time limits shall be calculated from the time the concerned provider receives all the information required for this purpose.

It is particularly important that the certification service provider cannot issue a certificate without the express consent of the one on whose behalf it is issued. The validity period of a certificate is maximum 1 year from the date of communication to the customer.

3. Conclusions

The development of a trustworthy context is a mandatory condition taking into account the possible risks that may arise when conducting online electronic activities: identification of parties, data transmission, security of payment methods, legislation still insufficiently clear on consumer protection.

Any economic activity is prone to fraud, therefore issues arise when it is found that resolving these conflicts requires increased attention in the field of electronic trade.

It is about, first of all, the huge volume of transactions that take place every day on the Internet, but also the fact that most transactions take place between entities that do not know each other beforehand and probably will not have contacts after completing the contractual obligations in which they are currently involved.

Moreover, these are transactions between entities under different jurisdictions. Here is the most important issue that needs to be resolved legally. The confidence and future of e-commerce in high security conditions depends on the evolution of the electronic signature.

For these reasons, the electronic signature is a way of authenticating the content of electronic documents and will play a decisive role in e-commerce-specific transactions.

In recent years, in developed countries, paper has become only a medium for presenting information and not for archiving or transport. These last two functions have been taken over by computers and their interconnection networks.

That is why a series of solutions were needed to replace the seals, stamps and holograph signatures from the classic documents with their digital variants, based on the classical cryptography and using public keys.

Improving the security of information systems must be an important goal of any organization. However, it must be taken into account the assurance of a good balance between the related costs and the actual advantages obtained.

The measures must discourage attempts at unauthorized access, make them more expensive than legally gaining access to these programs and data.

To ensure information security that are critical for businesses or business

organizations, each company must develop an IT security policy, to ensure that when something happens, there are processes to resolve the situation.

This is an endless process, a process for the development of an IT security policy is like a circle, which always returns to the starting point to increase security: new technologies and ideas call for a continuous update of the IT security policy.

Information security is an issue that is becoming more stringent and current with the development of networks and computer systems industry. One of the basic methods of ensuring information security is the cryptographic method.

Therefore, there are, theoretically, multitudes of types of concrete advanced signatures, as many technologies that meet the four conditions of art. 26 of Regulation (EU) no. 910/2014 could be identified.

Therefore, an organization that aims to accept / use the "*advanced signature*" without specifying the technology / technologies with which it is created, which it accepts / uses, will have big problems both in terms of creating electronic signatures and especially in terms of their verification.

However, Regulation (EU) no. 910/2014, regarding electronic signatures in public services, recommends the use of technology based on public keys, or, if other technologies are used, imposes clear conditions that must be met by those technologies, as we will show when we detail the formats of electronic signature.

In conclusion, the electronic signature is a personal attribute, being used to recognize the identity of a person in certain operations. Also, the electronic signature solves the problem of the person's identity and of the authenticity of the document better than the holograph signature. On the other hand, the costs and potential consequences of inaction or delayed action can be significant.

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FOOD SOVEREIGNTY AND FOOD SECURITY IN HUNGARY: CONCEPTS AND LEGAL FRAMEWORK

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Abstract

Within the European Union, the institutions have recently started to refer to concepts such as food security or the right to food, concepts which we have formerly not seen in documents of similar level related to land governance in the European Union. The significance of this phenomenon goes way beyond land law, with its origin in the FAO-inspired "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT)" of the Committee on World Food Security (CFS) of 12 May 2012. Since several issues arise as to implementation on the ground this policy initiative, the following study searches for answers as to the relationship between the newly promulgated theoretical concepts and their appearance in the Hungarian national law and legal practice. This study examines how the concepts of food sovereignty and food security are transposed/interpreted in the Hungarian national law (both legislation and implementation), and the extent to which the right to food finds effect in the legal system of Hungary. The study also focuses on the implementation of certain dispositions of the VGGT in the Hungarian national law.

Keywords: *food sovereignty, food security, food safety, right to food, agricultural law, Hungarian national law.*

1. The appearances of the right to food at the Hungarian national law

Hungary's Fundamental Law which came into force on the 1st of January 2012, has placed the constitutional regulations on agriculture to a completely new basis. Unlike the previous constitution, the new Hungarian code contains a number of provisions that regulate the subjects of agricultural law.[1] Within the constitutional framework thus changed Article XX. of the

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[1] For details on this topic, see: Hojnyák Dávid: Az agrárszabályozási tárgyak megjelenése az Európai Unió tagállamainak alkotmányaiban, különös tekintettel a magyar Alaptörvényben megjelenő agrárjogi szabályozási tárgyakra. *Miskolci Jogi Szemle* (14) 2, pp. 58-76.; Hojnyák Dávid: Az Alaptörvény agrárjogilag releváns rendelkezéseinek értékelése az Európai Unió tagállamainak alkotmányos szabályozása tükrében. *Diáktudomány* (11), pp. 153-159.; Szilágyi János Ede: Változások az agrárjog elméletében? *Miskolci Jogi Szemle* (11) 1, pp. 47-49.; Csák Csilla: Constitutional issues of land transactions regulation. *Journal of Agricultural and Environmental Law*, 13 (24), pp. 5-7.

new constitution which declares the right to food, therefore this subchapter is primarily the detailed analysis of this section of the Fundamental Law that will be undertaken.

Article XX. is contained in the Fundamental Rights chapter of the Fundamental Law that is entitled Freedom and Responsibility. Paragraph (1) of this section declares that everyone has the right to physical and mental health. Paragraph (2) sets out the ways and means by which the State promotes the right to health, thus defining the objective institutional protection side of that right. On this basis Hungary shall enforce this constitutional right through agriculture free from genetically modified organisms (GMO-free agriculture), access to healthy food and drinking water, the organization of healthcare, ensuring safety at work, the promotion of sports and regular physical exercise, and by protecting the environment. It can thus be concluded that the right to food is not recognized directly by the Fundamental Law as an autonomous social right but rather indirectly as part of the right to physical and mental health[2], in essence similar to the right to water, it is an *expressis verbis* type task of the state. And by enshrining the right to food in the Fundamental Law, Hungary has fulfilled its obligations under international treaties.[3]

At the same time, it can be seen that the section of the Fundamental Law declaring the right to health has undergone significant changes compared to the previous Constitution.[4] In the case of current legislation we can find that the objective institutional protection side of this right has been expanded. In addition to the right to food which is the main subject of this analysis the Fundamental Law also includes the concept of the right to water[5], and the concept of the GMO-free agriculture.[6]

[2] See Szemesi Sándor: Az élelemhez való jog koncepciója a nemzetközi jogban. *Pro Futuro* (3) 2, pp. 97-98.; T. Kovács Júlia: *Az élelemhez való jog társadalmi igénye és alkotmányjogi dogmatikája.* PhD Thesis, Pázmány Péter Catholic University, Budapest, 2017, pp. 89-90.

[3] Among all the international treaties the International Covenant on Economic, Social and Cultural Rights, adopted in 1966 shall be highlightened. Although the right to food has already been recognized in the Universal Declaration of Human Rights of 1948 [25. Article 1 (1)], but to define the content of this fundamental human right in the Convention [Article 11 (1)] and in its General Comment No 12 on the right to food, drawn up by the Committee on Economic, Social and Cultural Rights.

[4] See 70/D of the Constitution of the Republic of Hungary Paragraph (1): *People living in the territory of the Republic of Hungary have the right to the highest possible level of physical and mental health.* Paragraph 2: *The Republic of Hungary exercises this right by organizing occupational safety, health institutions and medical care, providing regular physical exercise, and protecting the built and natural environment.*

[5] As far as this provision of the Fundamental Law on water is concerned, it is worth noting that a narrower concept of the right to water has been enforced by the constitutional power by declaring the right to drinking water, as an *expressis verbis* state task, at the constitutional level. For more information on the topic see: Fodor László: A víz az Alaptörvény környezeti értékrendjében. *Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica* (31), pp. 329. and 344., Raisz Anikó: A vízhez való jog egyes aktuális kérdéseiről. In: Csák Csilla (ed.): *Jogtudományi tanulmányok a fenntartható természeti erőforrások témakörében*, University of Miskolc, Miskolc, 2012, pp. 156-157.

[6] With regard to the regulation of genetic engineering, it is to be noted that the provisions of the Fundamental Law on GMO-free agriculture are unclear. In Hungarian jurisprudence, several interpretations have emerged as to the binding nature of this provision of the new Hungarian constitution, its behavior and product ranges, and its relation to EU law. For more information on the topic see: Fodor László: A GMO szabályozással kapcsolatos európai bírósági gyakorlat tanulságai. In: Csák Csilla (ed.): *Jogtudományi tanulmányok a fenntartható természeti erőforrások körében*, University of Miskolc, Miskolc, 2012, pp. 74.; Fodor László: A precíziós genomszerkesztés mezőgazdasági alkalmazásának szabályozási alapkérdései és az elővigyázatosság elve. *Pro Futuro* (8) 2, pp. 42-64.; Raisz Anikó: GMO as a Weapon – a.k.a. a New Form of Aggression? *Hungarian Yearbook of International Law and European Law 2014*, Eleven International Publishing, The Hague, pp. 275-276. and 279-281.; Szilágyi János Ede – Raisz Anikó – Kocsis Bianka: New dimensions of the Hungarian agricultural law in respect of food

However, it is important to note that the Constitutional Court has stated in it's decree no. 3132/2013. (VII.2.) that Article 70/D of the Constitution, and Article XX. of the Fundamental Law, and based on this, its previous jurisprudence is laid down within Article XX. of the EC Treaty.[7] In a somewhat contradictory way, constitutional judge András Zs. Varga pointed out a *contra legem* state in his separate opinion no. 13/2018. (IX.4.). In this separate opinion he stated that the Constitutional Court practice of justifying decisions taken under the Fundamental Law by recalling former constitutional decisions and interpreting constitutional texts should be abolished. A petition shall be judged solely on the basis of the Fundamental Law, which in practice, in his view, may be departed from only in exceptional cases and under certain circumstances.[8] He based his position on the Fourth Amendment to the Fundamental Law, after which it was established that decisions of the Constitutional Court made before the new Fundamental Law came into force shall cease to apply.[9]

At the same time the Hungarian Fundamental Law is unique among the constitutions in which this right is explicitly reflected as a task of the state. The reason for this is that in most constitutions (including the constitutions of non-EU states) the declaration of this right is linked to hunger and poverty as serious social problems, while the Hungarian Fundamental Law defines this right as a state responsibility for promoting the right to health. In other words, the Hungarian Fundamental Law approaches the right to food from its quality side, with the aim of providing food of sufficient quality, while other constitutions enshrining such a right focus primarily on its quantitative side.[10] However, regarding the right to healthy food, its fundamental nature is questionable since different positions have emerged with regard to the constitutional recognition of this right: some see it as a state task or a state objective while others see it as a fundamental right.[11] For our part we agree with the former view that the concept of the right to food – thus emphasizes the qualitative dimension of this right – is considered to be a state task or a state objective which this way does not confer a subjective right on the addressee and cannot be enforced.

The statement above is reinforced by the fact that judicial enforcement of the right to food is limited not only in the Hungarian legal practice (meaning the jurisprudence of

sovereignty. *Journal of Agricultural and Environmental Law* 12 (22), pp. 160-180.; Szilágyi János Ede – Tóth Enikő: A GMO-mentes mezőgazdaság megteremtésének újabb jogi eszköze: A GMO-mentes termékek jelölése Magyarországon. *Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica* (35), pp. 482-483.; Tahyné Kovács Ágnes: Gondolatok a GMO szabályozás alaptörvényi értelmezéséhez, az új európai uniós GMO-irányelv, valamint a TTIP tárgyalások fényében. *Journal of Agricultural and Environmental Law* 10 (18), pp. 88-104.; T. Kovács Júlia: A GMO-mentes Alaptörvény hatása a mezőgazdaságra - különös tekintettel a visszaszerzett EU tagállami szuverenitásra és a TTIP-re. In: Szalma József (ed.): *A Magyar Tudomány Napja a Délvidéken*, pp. 308-309.; T. Kovács Júlia: Az Alaptörvény GMO-mentes mezőgazdaságra vonatkozó rendelkezése. In: Cservák Csaba – Horváth Attila (ed.): *Az adekvát alapjogvédelem*, Porta Historica, Budapest, pp. 147-150.

[7] For more details, see 3132/2013. (VII.2.) Constitutional Court Judgment, Reasoning [57].

[8] For more information see 13/2018. (IX.4.) Constitutional Court Judgment, point 132. It should be noted that two other constitutional judges, Béla Pokol and Mária Szívós, joined the dissenting opinion of András Varga Zs.

[9] See Article 5 of the Fundamental Law, Final and Mixed Provisions.

[10] See T. Kovács Júlia: *Az élelemhez való jog társadalmi igénye és alkotmányjogi dogmatikája.* PhD Thesis, Pázmány Péter Catholic University, Budapest, 2017, pp. 77-78.

[11] See Juhász Gábor: A gazdasági és szociális jogok védelme az Alkotmányban és az Alaptörvényben. *Fundamentum* (16) 1, pp. 43.; T. Kovács Júlia: *Az élelemhez való jog társadalmi igénye és alkotmányjogi dogmatikája*. PhD Thesis, Pázmány Péter Catholic University, Budapest, 2017, pp. 73-75.

the Constitutional Court or the Supreme Judicial Forum of the state, the *Kúria*) but also in the international legal practice. Moreover, in Hungary, neither in the case law of the Constitutional Court nor in the case law of the *Kúria* can we find a single case in which the provision of the right to food enshrined in the Fundamental Law appears.

Although it has been stated above that the former Constitution did not establish the right to food in any way, still the case law of the Constitutional Court had raised the issue of food and nutrition on one occasion. The Constitutional Court has concluded in its no. 42/2000. (XI. 8.) decree that no specific sub-entitlements (such as the right to housing, the right to adequate food, sanitation, clothing) were expressly identified with regard to the right to social security, nor the obligation and consequently liability of the state.[12]

The concept of the right to food cannot be found *expressis verbis* at other forms at the level of Hungarian national law, but there is no reference to this right at any other documents (such as various sectoral strategies, declarations, etc.).

2. The emergence of concepts of food security and food sovereignty at the level of Hungarian national law

The concept of food security[13] is not *expressis verbis* either in the Fundamental Law or at the level of other legislations but neither on the level of the Constitutional Court jurisprudence or at the Supreme Court, the *Kúria*. However, food security appears in several domestic strategy papers dealing with agriculture of which we consider it important to highlight and briefly analyze the following two: the *Hungarian National Rural Strategy*[14] (hereinafter: NRS) and the *Hungarian Food Development Strategy*[15] (hereinafter: FDS).

The NRS sets out global challenges which the Hungarian countryside faces, setting rural policy objectives, including the particular issues of climate change, drinking water and food supply, environmental sustainability, biodiversity, the changing rural-urban relationship and the rural context of the demographic crisis were regulated.[16] Responding to the unfavorable changes the document identified the Hungarian rural population's ability to improve the capacity of rural areas to maintain their numbers as an overarching objective.[17] In order to achieve this overarching objective the NRS sets five additional strategic objectives, one of which

[12] Paragraph 70/E of the Constitution of the Republic of Hungary Paragraph (1): *Citizens of the Republic of Hungary have the right to social security; in the event of old age, sickness, invalidity, widowhood, orphanhood, and unemployment beyond their control, they shall be entitled to the subsistence allowance.*

[13] Given that we cannot speak of a single concept in terms of food security, we consider it important to record what we mean by this category in the context of this study. The definition is based on the definition adopted by the Food and Agriculture Organization of the United Nations (FAO) at the World Food Summit in 1996. Based on this, food security means the situation where every person has physical and economic access to sufficient, safe and nutritious food at all times to ensure an active and healthy life, in accordance with their nutritional needs and eating habits.

[14] The National Rural Strategy known as the "constitution of the Hungarian countryside", was adopted by the Government in 2012, which contains Hungary's rural development concept for 2012-2020.

[15] The strategy adopted by the Government in 2015, which contains Hungary's medium and long-term food industry concept for 2014-2020.

[16] See NRS pp. 9-17.

[17] See NRS pp. 57-58.

is to ensure food and food security.[18] However, the NRS is inconsistent in separating the two categories – which is necessary and justified. Within the objective relevant to our subject the following priorities shall be identified as priorities: (a) environmentally-friendly food production based on high quality and diversity of food, based on domestic and local raw materials; (b) the production of good quality and sufficient food for export; (c) increasing the presence of the internal and external market in the food industry; (d) improving the prestige of Hungarian food.[19] With these – and among other things too – the NRS goes beyond rural areas and the interests of industry by producing healthy food and guaranteeing food security, and thus the regulation affects the lives of all residents of the country. In the context of this strategyc paper it is important to mention that in order to achieve these goals the document attaches a great importance to the cooperation with the FAO and the participation at international agricultural and food realted programs based on Hungary's interests.[20] In FDS the issue of food security arises within the context of the national importance of the food processing industry. The FDS identifies the national importance of the food processing industry under three circumstances: the sector's share of GDP production; the sector is the largest upstream market for agricultural inputs; and the prominent role of the sector in food security.[21] Thus, the sector plays a central role within the security of domestic food supply (ie. guaranteeing *food security*) and in the supply of safe food (ie. guaranteeing *food safety*). Like the NRS, the FDS attaches great importance to the promotion of national and even European interests on various international forums. The FDS identifies the interests of the European and Hungarian food economy properly represented and defended at EU and WTO level negotiations as a priority, which ultimately has one main purpose: to maintain food security at European and national level and to prevent potentional dependency. On central government level, care must be taken not to sacrifice sectors important to the European agricultural economy and food security for the benefit of other sectors.[22]

Regarding the concept of food sovereignty we also consider it important to record its main conceptual elements. In this sense food sovereignty means that states and citizens have the right to decide independently on their own agricultural, food, and farmland regulations, while respecting their ecological, social, economic and cultural conditions.[23] Examining this definition two important conclusions can be drawn: on one hand, the realization of food sovereignty is a prerequisite for the food security discussed above, that is, the content of the two categories overlaps within several cases. On the other hand, it can be seen that from the viewpoint of constitutional law and international public law this category is closely related to the issue of state sovereignty. In Hungary, food sovereignty also appears only at the level of strategic documents, emphasizing the sovereignty of the concept, but it is not consistently

[18] Protecting natural values and resources has been identified as another strategic objective; creation of diverse and viable agricultural production; ensuring the foundations of the rural economy and increasing rural employment; and strengthening rural communities and improving the quality of life of rural populations.

[19] See NRS pp. 58-59.

[20] See NRS pp. 92.

[21] See FDS pp. 18.

[22] See FDS pp. 84.

[23] This definition is the concept of food self-determination in the Nevelan Declaration, adopted at the World Forum on Food Self-determination which was held in Mali, 2007.

separated from the category of food security in each document. If successfully implemented, the FDS predicts a strengthening of the country's food sovereignty, that is, the reduction of the domestic population's exposure to imported food.[24] Thus, it appears as a priority that the Hungarian food industry must respond to the increasing import pressure from the European Union and global markets, as well as the strategic goal of regaining domestic markets. The NRS mentions food sovereignty within two areas. On the one hand, the document treats food as a strategic thing that has the greatest impact on the health and quality of life of the population. It is therefore a national interest to ensure that the population is provided with safe and high-quality food primarily from domestic sources – at this point we see the concept of food sovereignty being linked to the categories of ensuring food security and food safety.[25] On the other hand, with regard to the regulation of the European single market and the Common Agricultural Policy, the NRS urges that the issue of food sovereignty should be considered and regulated at EU level.[26]

3. International obligations and Hungarian relevance

Our international legal obligations consist primarily of human rights conventions[27], but in our view, they also include provisions on the right to food of conventions for the protection of special groups. In this context, reference may be made to Articles 24 (2) and 27 of the New York Convention on the Rights of the Children, Article 28 of the UN Convention on the Rights of Persons with Disabilities and Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women. Both the 1951 Refugee Convention and the 1954 Convention on the Status of Stateless Persons refer to the right to food, regardless of nationality, as a right guaranteed to all.[28]

Pursuant to Article 2 of the International Covenant on Economic, Social and Cultural Rights, States Parties are required to progressively secure the rights enshrined in the Covenant, including the right to food, by all means at their disposal and by any appropriate means, including in particular legislative measures. However, the category of eligible assets for these second-generation rights does not only mean the application of legal instruments: the effective reduction of public debt or inflation in Hungary, for example, can also help to promote economic and social rights. Although this wording does not imply an obligation to provide immediate food rights, it is possible to derive an obligation to take immediate action in respect of some of the elements and even to enforce them before a judicial body. Such an immediate obligation to act is that states, including Hungary, are required to prevent any discrimination in access to food between certain social groups or individuals based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other situation. However, the prohibition of discrimination does not, of course, preclude it, but rather requires the temporary

[24] See FDS pp. 3-5.

[25] See NRS pp. 34. It should be noted that Hungary still has about 120% self-sufficiency in basic foods. This level could be raised to 150% by developing our production potential, which would be a major national economic advantage for the country with the expected significant increase in global food demand.

[26] See NRS pp. 121.

[27] See Footnote 5.

[28] See T. Kovács Júlia: *Az élelemhez való jog társadalmi igénye és alkotmányjogi dogmatikája.* PhD Thesis, Pázmány Péter Catholic University, Budapest, 2017, pp. 53.

preference of certain, particularly disadvantaged groups. Hungary, like other states, is also required to take steps to progressively secure the right to food on the basis of international obligations, including the adoption of appropriate legislation, the development of national strategies or regular monitoring of the rule of law. It is also required to ensure that remedies are available to remedy any violation.[29]

The relevant case law of the European Court of Human Rights cannot be invoked in the direct form of the right to food, as it is not mentioned in the European Convention on Human Rights or its additional protocols. At the same time, however, the possibility cannot be excluded, in principle, that the European Court of Human Rights examines the infringement of the right to food in the context of other rights under the Convention. In particular, the right to life, the prohibition of torture, inhuman or degrading treatment or punishment, the right to respect for private and family life, and property rights can be taken into account in this regard. So far, however, issues of access to food in Hungary have so far arisen solely in the context of detention conditions (and thus in violation of the prohibition of torture) in the practice of the Strasbourg court. In these cases, it was not a question of classically enforcing the right to food, but rather of steps taken to defy testimony of persons subject to proceedings.[30]

There was one case (Case of Béláné Nagy V. Hungary), where the applicant referred to right to food indirectly in connection to the disability pension. The applicant complained that she had lost her source of income, previously secured by the disability pension, because under the new system, in place as of 2012, she was no longer entitled to that, or a similar, benefit, although her health had not improved; and she submitted that this was a consequence of the amended legislation, which contained conditions she could not possibly fulfil. She contended that between 2001 and 1 February 2010 she had had a possession, in the form of an existing pecuniary asset, specifically the disability pension. She had subsequently retained an assertable right to disability benefit for as long as she satisfied the criteria that were applicable in 2001; in other words, she had a legitimate expectation stemming from various sources. In her view, the former Constitution had conferred on disabled persons an entitlement to social-welfare benefits as of right. According to the Constitutional Court's interpretation, she, as a disabled individual, had an assertable right to some form of welfare benefit. At the hearing, she referred to decisions no. 37/2011 of the Hungarian Constitutional Court and no. 1 BvL 1/09 of the German Federal Constitutional Court, both confirming, in her view, the existence of a right to a social allowance for those in

[29] However, this obligation is far from being a peculiarity of the right to food: a state that respects the rule of law and the living conditions of its citizens (irrespective of its political system) is generally responsible for their establishment and operation. The work of the Special Rapporteur on the Right to Food, subordinated to the UN Human Rights Council, should be highlighted with regard to ensuring the right to food. See Szemesi Sándor: Az élelemhez való jog koncepciója a nemzetközi jogban. *Pro Futuro* (3) 2, pp. 92-93.

[30] See Szemesi Sándor: Az élelemhez való jog koncepciója a nemzetközi jogban. *Pro Futuro* (3) 2, pp. 96. These relevant cases are: Case of Varga And Others V. Hungary, Case of Süveges V. Hungary, Case of Javor And Others V. Hungary, Case Of Á.R. V. Hungary, Ján V. Hungary, Molnár And Others V. Hungary, Hunyadi And Others V. Hungary, Fortuna V. Hungary, Kocsi And Others V. Hungary. In Case of Varga, Mr Varga was held at Baracska Prison which, he claimed, was severely overcrowded at the time of his detention lasting from 17 January to 3 September 2011. In particular, the cell in which he was detained measured 30 square metres and accommodated seventeen prisoners (that is, 1.76 square metres gross living space per inmate). The quality and quantity of the food provided were poor, as a result of which he claimed to have lost 20 kilograms.

need, to the extent that this is required for basic subsistence.

Moreover, she relied on Article 12 § 2 of the European Social Charter, which contains a reference to ILO Convention no. 102, setting forth minimum standards in the field of social security, as well as on the United Nations Convention on the Rights of Persons with Disabilities. In her view, these texts, forming part of Hungary's obligations under international law, also provided for an assertable right to disability benefit.[31]

4. The VGGT and its European and Hungarian relevance

The FAO-inspired VGGT[32] has important relevance in point of view of the Hungarian land policy. Taking this into consideration, it is worth stressing the following.

The Act CXXII of 2013 on transfer of agricultural and forestry lands, which is the essential law of the Hungarian land regime, does not contain *expressis verbis* reference to the relationship between the "right to adequate food" and the "governance of tenure of land, fisheries and forests". However, in the parliamentary proposal (draft bill) of the Act CXXII of 2013,[33] there was a direct reference that the new act wants to fulfil the goals of the Hungarian National Rural Strategy, which strategy is connected, in an above-mentioned way, to the food security and food sovereignty. Nevertheless, the Act CXXII of 2013 determines goals, for the fulfilment of which the lawmaker could restrict the acquisition of agricultural lands in a legally acceptable way. Among these goals, there are numerous objects directly connected to the concepts of food security and food sovereignty.

One of the most significant measure of the Hungarian land regime is the provision generally restricting the acquisition of agricultural lands by legal persons. Among others, because of this provision, the European Commission launched an infringement procedure (No. 2015/2023) against Hungary.[34]

The EU's great-significant soft law documents concerning land-acquisition policy and law – i.e. EESC 2015,[35] EP 2017[36] and EC 2017[37] – approach differently to the issue on the acquisition of ownership by legal persons and to other regulatory issues related to it, such as transparency and traceability. In the following part of this

[31] Article 28 on Adequate standard of living and social protection.

„1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:…".

[32] Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT), Committee on World Food Security (CFS) of 12 May 2012.

[33] Bill No T/7979 on the transfer of agricultural and forestry lands, Hungarian Parliament, Budapest, July 2012.

[34] Raisz Anikó: Topical issues of the Hungarian land-transfer law. *CEDR Journal of Rural Law* (3) 1, pp. 73-74.

[35] European Economic and Social Committee (EESC): Opinion: Land grabbing – a warning for Europe and a threat to family farming, NAT/632-EESC-2014-00926-00-00-ac-tra (EN), Brussels, 21 January 2015.

[36] European Parliament (EP) resolution of 27 April 2017 on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers, P8_TA(2017)0197.

[37] European Commission (EC) Interpretative Communication on the Acquisition of Farmland and European Union Law, 2017/C 350/05, OJ C 350, 18.10.2017, pp. 5–20.

assessment, these approaches will be summarized by the citation of the article Ede János Szilágyi.

"*[T]he European Economic and Social Committee clearly highlights the issue of transparency with regard to legal persons, emphasizing that '[i]t is difficult to obtain reliable data on the extent of land grabbing as not all land transactions are recorded and there is often insufficient transparency on land transactions between companies, for example in the case of purchases by subsidiaries and partner companies.'*[38] *In other parts, the European Economic and Social Committee adds that 'there are now increasing indications that the legal entities are particularly vulnerable to non-agricultural investors.'*[39] *Thereafter, the European Economic and Social Committee puts forward a proposal to address the issue of transparency; it is another matter that, in my opinion, the proposal would be able to guarantee the transparency of the relations arising from the ownership chain of legal persons, taking into account, in essence, the limited possibilities of the Member States, only to a certain extent: 'EU Member States should have state institutions with an overview of agricultural land ownership and use structures. To this end, national databases should include information not only on landowners but also on users.'*[40] *I note that the problem of traceability has been acknowledged also by the European Commission (see below).*[41] *In respect of the subject hereof, it is a further substantive*[42] *issue in relation to the acquisition of ownership by legal persons that the European Economic and Social Committee, while requesting the European Parliament and Council to discuss 'whether the free movement of capital should always be guaranteed in the case of alienation and acquisition of agricultural land and agribusinesses',*[43] *also sets out the task that '[w]e need an answer to the question whether the free movement of capital and free markets are compatible with equal access to land acquisition for all natural and legal persons.'*[44]

In the resolution of the European Parliament, there are several important findings concerning the acquisition of ownership by legal persons. On the one hand, the European Parliament itself recognizes that a group of legal persons as owners can establish, in essence, an unlimited number of legal persons, thus, certain rules apply completely otherwise in respect of such owners as compared to a natural person; therefore, the European Parliament concludes that 'existing rules on the capping of direct payments above EUR 150 000 become inoperative if legal persons own multiple agricultural subsidiaries, each of which receives less than EUR 150 000 in direct payments'.[45] *Applying this finding of the EP 2017 in an analogous way, the Hungarian position, according to which the provisions on the ceilings set for the acquisition of land and for the ownership of property (considered to be EU-compliant also by the European Commission in respect of the Hungarian legislation*[46] *and*

[38] Point 2.7 of EESC 2015.
[39] Point 3.6 of EESC 2015.
[40] Point 6.18 of EESC 2015.
[41] Point 1. c) of EC 2017.
[42] For example, a proposal that concerns legal entities, but is less important in terms of the Hungarian legislation: Point 6.15 of EESC 2015.
[43] Point 6.9 of EESC 2015.
[44] Ibid.
[45] Point W. of EP 2017.
[46] On the other hand, cf. Point 4. h) of EC 2017.

supported also by the EESC[47] and EP[48]) could not be controlled and would become meaningless if legal persons would acquire ownership, can be strengthened. In respect of the ceilings set for the acquisition of land ownership by legal persons, another important finding of the EP 2017 is that the European Parliament considers it an acceptable restriction and even encourages its application; namely '[the European Parliament] encourages all Member States to use such instruments to regulate the market in land as are already being used successfully in some Member States, in line with EU Treaty provisions, such as state licensing of land sales and leases, rights of pre-emption, obligations for tenants to engage in farming, restrictions on the right of purchase by legal persons, ceilings on the number of hectares that may be bought, preference for farmers, land banking, indexation of prices with reference to farm incomes, etc.'[49] Of course, this part of the EP 2017 should be interpreted in its entirety, which means that the European Parliament places a requirement in respect of all the aforementioned measures that they are applied 'in line with EU Treaty provisions'. Nevertheless, for Hungary, it can be interpreted as significant support that the restriction of land acquisition by legal persons is considered by the European Parliament to be compliant with EU law. This can be considered a serious feat of arms for Hungary in the light of the fact that the European Commission, on the other hand, almost conceptually denies the conformity of the institution with EU law, as detailed below.

The interpretative communication of the European Commission, which is based on the case law of the Court of Justice of the European Union (CJEU), goes through the restrictions on the acquisition of lands applied by the new Member States and disputed by the European Commission. In this assessment, the European Commission pays special attention to the prohibition of the sale to legal persons and concludes, in this context, that 'a national rule prohibiting the sale of farmland to legal persons is a restriction on the free movement of capital and, where applicable, the freedom of establishment. It can be concluded from the CJEU's jurisprudence that such a restriction is unlikely to be justified… It can be concluded from the CJEU's considerations that such a prohibition is not justified because it is not necessary to achieve the claimed objective. In this context, the CJEU also referred to examples of less restrictive measures, in particular making the transfer to a legal person subject to the obligation that the land will be let on a long lease.'[50] In the light of the fact that one of the grounds for initiating the infringement procedure against Hungary was this restriction, the abovementioned opinion of the European Commission does not contain any novelty. For my part, with regard to this issue, I would highlight – beyond what I pointed out with regard to the anomaly of the monitoring of restrictions to acquisition – that in the case law of the Court of Justice of the European Union, a general restriction to acquisition such as the Hungarian one has not yet been assessed. Moreover, the question also arises how the Court of Justice of the European Union will ultimately decide on such an issue, which includes strong elements of sovereignty (or, in this respect, policy elements), in the interpretative framework at the crossroads of the negative and positive integration

[47] Point 6.15 of EESC 2015.
[48] Point 22 of EP 2017.
[49] Point 22 of EP 2017.
[50] Point 4. g) of EC 2017.

models, having regard to the resolution of the European Parliament which is revolutionary in many respects and has moved towards the positive integration model in this regard."[51]

The transparency of the ownership background of land transfers appears even in the VGGT:

"*As indicated previously, cross-border acquisitions of land often appear in international law as investment issues. Accordingly, the relevant guidelines of VGGT, principally set out in Point 12, are also of paramount importance. In this regard, VGGT defines, inter alia, the concept of 'responsible investment',*[52] *which ensures the improvement of food security, as an objective to be achieved, in relation to which it formulates guidelines for the states, especially the states which are investors,*[53] *and also for investors.*[54] *Important elements of responsible investment are, inter alia, the issues of land grabbing and land concentration.*[55] *Finally, in this work, I wish to refer in more detail only to a specific element of VGGT, namely transparency. In this regard, VGGT considers it important that all forms of transactions in tenure rights as a result of investments in land should be done transparently, and the (registration and licensing) systems, which ensure the transparency thereof, should also contain the ownership background.*[56] *Since the accurate mapping of the ownership background of legal persons, in the context of the current conditions of globalization, present serious difficulties (here, the term 'impossible' could also be used) for such a small country as Hungary, therefore, in my view, the guideline laid down in VGGT could also strengthen the Hungarian position in our EU legal disputes concerning the restrictions on the acquisition of land ownership by legal persons.*"[57]

The Hungarian land policy includes definite elements from the concept of food sovereignty. From this point of view, the more characteristic appearance of food sovereignty in the VGGT might be supportable by the Hungarian land policy. The acquisition of the ownership of lands by legal persons is especially important issue for the Hungarian land policy. The significant elements of this issue are the transparency of the ownership background of the transfers[58] (especially in connection with the cross-border acquisition) and furthermore the measureless and limitless multiplication of legal persons by its owner. These features of the legal persons enable the real owners of the legal persons to neutralize and evade the restricting measures

[51] Szilágyi János Ede: Agricultural land law: Soft law in soft law. In: Szabó Marcel – Láncos Petra – Varga Réka (ed.): *Hungarian Yearbook of International and European Law 2018*. Eleven International Publishing, The Hague, pp. 201-202.

[52] Points 12.1, 12.4 and 12.8 of VGGT.

[53] Points 3.2 and 12.15 of VGGT.

[54] Point 12.12 of VGGT.

[55] See, in particular: Points 12.5, 12.6, 12.10 and 12.14 of VGGT.

[56] Point 17.1 of VGGT.

[57] Szilágyi János Ede: Agricultural land law: Soft law in soft law. In: Szabó Marcel – Láncos Petra – Varga Réka (ed.): *Hungarian Yearbook of International and European Law 2018.* Eleven International Publishing, The Hague, pp. 212.

[58] Tamás Andréka and István Olajos determined a similar opinion in their article (Andréka Tamás – Olajos István: A földforgalmi jogalkotás és jogalkalmazás végrehajtása kapcsán felmerült jogi problémák elemzése. *Magyar Jog* (7-8), pp. 422). In connection with the Hungarian legislation, they stressed that the „*aim of this institution is to avoid the uncontrollable chain of ownership which would be in contradiction with keeping the population preserving ability of the country, since it would be impossible to check land maximum and the other acquisition limits*"; the thoughts of Andréka and Olajos were summarized and translated by Raisz (Raisz Anikó: Topical issues of the Hungarian land-transfer law. *CEDR Journal of Rural Law* (3) 1, pp. 74.).

of national land laws via the nature of legal persons. However and unquestionably, the form of legal persons provide even a good opportunity to prevent the atomization of agricultural holdings deriving from the death of natural persons and its consequence, i.e. from the succession of the agricultural holdings. Nevertheless, the prevention of this atomization also may be solved by other measures existing in the national law of numerous states; namely, the proper solution does not demand the legal person's form. In Hungary, the adoption of specific rules concerning succession of agricultural lands and agricultural holdings has been delayed for years. It means that the Hungarian constitution (i.e. Fundamental Law) includes the special rules how to adopt these specific agri-succession rules but the adoption of specific agri-succession rules has not happened yet. Taking the above-mentioned circumstances into consideration, in our opinion, it would be important to declare in the VGGT (a) the possible legal institute of specific agri-succession rules and (b) a more characteristic determination of the national possibility to restrict the acquisition of the ownership of agricultural lands by legal persons in connection with the enhancement of the transparency of the ownership background which transparency-guideline is already determined in the VGGT.

As far as the EU law's aspect of the topic is concerned, we consider important to assess the opportunities raised in Commission II of the CEDR Congress in 2015.[59] Similarly, there are numerous estimable proposals among the thoughts determined in the frame of Hungarian Association of Agricultural Law (HAAL).[60] It is worth noticing that in the Eurasian Economic Union (EAEU), which – similarly to the EU – bases its common market on free movement of goods, services, labour and capital, the Member States are enable to apply reservation in connection with agricultural land market;[61] namely, the Treaty on the Eurasian Economic Union might also provide an considerable example for the EU. Consequently, if the European Commission's recommendation adopted by virtue of the Point 28 of the EP 2017 will launch substantive and real initiations covering the above-mentioned potential directions (CEDR Congress 2015, HAAL and EAEU), the European Commission's initiations might be supportable by the Hungarian land policy.

5. Conclusions

Hungary's Fundamental Law which came into force on the 1st of January 2012, has placed the constitutional regulations on agriculture to a completely new basis. Unlike the previous constitution, the new Hungarian code contains a number of provisions that regulate the subjects of agricultural law. Within the constitutional framework thus changed Article XX. of the new constitution which declares the right to food. It can thus be concluded that the right to food is not recognized directly by the Fundamental Law as an autonomous social right but rather indirectly as part of the right to physical and mental health, in essence similar to the right to water, it is an *expressis verbis* type task of the state. The Hungarian

[59] Szilágyi János Ede: Conclusions (Commission II). *Journal of Agricultural and Environmental Law* 10 (19), pp. 91-95.

[60] Papik Orsolya: "Trends and current issues regarding member state's room to maneuver of land trade" panel discussion. *Journal of Agricultural and Environmental Law* 12 (22), pp. 143-145.; Szilágyi János Ede: Cross-border acquisition of the ownership of agricultural lands and some topical issues of the Hungarian law. *Zbornik Radova Pravnog Faculteta Novi Sad* 51 (3/2), pp. 1067-1069.

[61] Szilágyi János Ede: The international investment treaties and the Hungarian land transfer law. *Journal of Agricultural and Environmental Law* 13 (24), pp. 202-203.

Fundamental Law approaches the right to food from its quality side, with the aim of providing food of sufficient quality, while other constitutions enshrining such a right focus primarily on its quantitative side. In Hungary, neither in the case law of the Constitutional Court nor in the case law of the *Kúria* can we find a single case in which the provision of the right to food enshrined in the Fundamental Law appears. However, the Constitutional Court has concluded in its no. 42/2000. (XI. 8.) decree that no specific sub-entitlements (such as the right to housing, the right to adequate food, sanitation, clothing) were expressly identified with regard to the right to social security, nor the obligation and consequently liability of the state.

The concept of food security is not *expressis verbis* either in the Fundamental Law or at the level of other legislations but neither on the level of the Constitutional Court jurisprudence or at the Supreme Court, the *Kúria*. However, food security appears in several domestic strategy papers dealing with agriculture of which we consider it important to highlight and briefly analyze the following two: the Hungarian National Rural Strategy and the Hungarian Food Development Strategy. In Hungary, food sovereignty also appears only at the level of strategic documents, emphasizing the sovereignty of the concept, but it is not consistently separated from the category of food security in each document.

The relevant case law of the European Court of Human Rights cannot be invoked in the direct form of the right to food, as it is not mentioned in the European Convention on Human Rights or its additional protocols. At the same time, however, the possibility cannot be excluded, in principle, that the Court of Justice examine the infringement of the right to food in the context of other rights under the Convention. In particular, the right to life, the prohibition of torture, inhuman or degrading treatment or punishment, the right to respect for private and family life, and property rights can be taken into account in this regard. So far, however, issues of access to food in Hungary have so far arisen solely in the context of detention conditions (and thus in violation of the prohibition of torture) in the practice of the Strasbourg court. In these cases, it was not a question of classically enforcing the right to food, but rather of steps taken to defy testimony of persons subject to proceedings. There was only one case (Case of Béláné Nagy V. Hungary), where the applicant referred to right to food indirectly in connection to the disability pension.

The Act CXXII of 2013 on transfer of agricultural and forestry lands, which is the essential law of the Hungarian land regime, does not contain *expressis verbis* reference to the relationship between the "right to adequate food" and the "governance of tenure of land, fisheries and forests". However, in the parliamentary proposal (draft bill) of the Act CXXII of 2013, there was a direct reference that the new act wants to fulfil the goals of the Hungarian National Rural Strategy, which strategy is connected, in an above-mentioned way, to the food security and food sovereignty. Nevertheless, the Act CXXII of 2013 determines goals, for the fulfilment of which the lawmaker could restrict the acquisition of agricultural lands in a legally acceptable way. Among these goals, there are numerous objects directly connected to the concepts of food security and food sovereignty. One of the most significant measure of the Hungarian land regime is the provision generally restricting the acquisition of agricultural lands by legal persons. Among others, because of this provision, the European Commission launched an infringement procedure (No. 2015/2023) against Hungary. The Hungarian land policy includes definite elements from the concept of food

sovereignty. From this point of view, the more characteristic appearance of food sovereignty in the VGGT might be supportable by the Hungarian land policy. The acquisition of the ownership of lands by legal persons is especially important issue for the Hungarian land policy. The significant elements of this issue are the transparency of the ownership background of the transfers (especially in connection with the cross-border acquisition) and furthermore the measureless and limitless multiplication of legal persons by its owner. These features of the legal persons enable the real owners of the legal persons to neutralize and evade the restricting measures of national land laws via the nature of legal persons. However, and unquestionably, the form of legal persons provide even a good opportunity to prevent the atomization of agricultural holdings deriving from the death of natural persons and its consequence, i.e. from the succession of the agricultural holdings.

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CONCESSION, A WAY OF MANAGING PUBLIC DOMAIN

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Abstract

The concession, viewed in terms of civil law rules, is a real right corresponding to public property, this legal qualification being conferred by the provisions of article 866 of the civil Code.

From the point of view of the administrative law, the concession is seen as a way to capitalize on the assets that make up public and private domain.

The object of this contract is represented by public or private properties belonging to public or private domain of the state or of administrative-territorial units, these properties following to be registered in the land book before concluding the concession contract of public properties, under the sanction of absolute nullity of the contract, according to the provisions of article 305, paragraph 2 and paragraph 3, of the administrative Code.

Three fundamental stages can be distinguished in the development of the concession procedure:

- the initial stage, of preparing the documentation necessary to start the tender procedure, characterized by the initiation of the concession proposal and the elaboration of the specifications that include the criteria for awarding the concession contract;

- the procedure for conducting the auction, in which the bids of natural or legal persons of private law are submitted and assessed, a stage completed by the statement of the winning bid;

- the stage of concluding the concession contract, the regulatory part containing the elements determined in the specifications.

Concession of services and works is defined as an agreement by which a public person entrusts the provision of a public service to a private company, which ensures the financing of works, their operation and which is remunerated from royalties collected from statutory undertakers.

Concession of mining activities it is a special form of concession, which consists in concluding an agreement called a license, this representing the legal deed by which concession of mining exploration / exploitation activities is granted.

The legal nature of concession of forest lands, the public property of the state is that of the species of the service concession contract.

Keywords: *public property, concession, administration, auction.*

1. Introduction

In the current socio-economic context, marked by a generalization of global trade operations and a marked interoperability of markets for goods, services and capital, the way of valuing goods belonging to public or private domain of public administration authorities, established by the Romanian Constitution, at a central or local level, has experienced, in the last 12 years, a real structural and conceptual revolution and, obviously, of a legal approach, worthy of an emerging society, such as the Romanian nation, in full process of modernization and adaptation to the traditions, the vision and the European normative rigors.

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Or, from this point of view, that of the administration of public or private property, state or local, the Romanian legislation has known a constant evolution and a remarkable improvement, thanks to the obligatory European norm, which stimulated the Romanian legislator to keep up with the European Union legislation.

Capitalization, in compliance with constitutional and infra-constitutional provisions, of the goods that are the object of public and private domain at a national, county and local level implies a wide range of legal ways of exercising the right of public property and of introducing in the civil circuit the goods that the object of this modality, without disregarding, of course, the principle of inalienability, imprescriptibility and immunity from seizure of public property goods, ruled by the provisions of article 136, paragraph 4, thesis I, of the Romanian Constitution, as well as by the provisions of article 861, paragraph 1, of the civil Code of 2009.

One of the main forms of valorisation of state public domain assets is, unequivocally, the legal institution of the concession.

2. Concession of public property

The concession of public property is a legal institution established by legal norms of constitutional value, being established by the provisions of article 136, paragraph 4, the second sentence, of the Romanian Constitution, according to which "*Under the conditions of the organic law, they can be given in administration to autonomous administrations or public institutions or they can be conceded or rented; they can also be given free of charge to public utility institutions.*"

The concession, viewed in terms of civil law rules, is a real right corresponding to public property, this legal qualification being conferred by the provisions of article 866 of the civil Code, according to which *"The real rights corresponding to public property are the right of administration, the right of concession and the right of free of charge use."*

From the point of view of the administrative law, the concession is seen as a way to capitalize on the assets that make up public and private domain, therefore as an effective and useful legal tool for introduction into the economic circuit, in strict compliance with legal rules in this case and of the clauses of the concession contract, of state assets and of territorial administrative units.

A prestigious author [1], by quoting the interwar doctrine, points out that, historically, concession is the traditional means of capitalizing on public property, which has played a special role in the creation and the development of the modern state and its organization, because natural resources have been capitalized, non-productive assets from public domain were used and, thus, the development of civilization was facilitated.

Viewed with a broader sense, concession is a form of management of public service, and, consequently, of general interest, to which the notion of public service is inextricably related.

As pertinently noted in the doctrine, the public interest designates the material and spiritual needs of citizens at a given time, stating that this phrase is a concept that depends on political goals, its meaning may change with the change of concepts in the event of an alternation of powers[2].

[1] Verginia Verdinas, Administrative Law, the 12th edition, Universul Juridic Publishing House, Bucharest, 2020, p. 532.

[2] Marta Claudia Cliza, Administrative Law, part I, ProUniversitaria Publishing House, Bucharest, 2017, p.11.

The logical consequence of the syllogism created is that the concession contract must always be concluded in the public interest. Only in this way can the principle of balance between the general interest and the desire of the individual to obtain benefits be applied.[3]

As stated in the doctrine [4], concession of assets can be defined as that contract by which a public authority allows a private natural or legal person to exercise possession and use, under the law and the concession contract, an asset belonging to the public domain of the state and of administrative territorial units.

A particularly structured definition of concession can be found in the provisions of paragraph 11 of the recitals of the Directive number 2014/23/UE of the European Parliament and of the Council of 26 February 2014 regarding the award of concession contracts[5], according to which *"Concessions are onerous contracts concluded in writing by the intermediary of which one or more contracting authorities or contracting entities entrust the performance of works or the provision and management of services to one or more economic operators. The object of such contracts is the purchase of works or services by the intermediary of a concession, the compensation of which consists in the right to operate works or services or in the right to operate and a payment. It is possible, but not mandatory, for such contracts to involve the transfer of ownership to contracting authorities or contracting entities, but contracting authorities or entities always obtain the benefits of the works or services in question."*

It is also noted in paragraph 68 of the preamble to the same directive that *"Concessions are usually complex, long-term agreements in which the statutory undertaker undertakes responsibilities and risks traditionally borne by contracting authorities and by contracting entities and which enter normally within their area of competence. For this reason, subject to compliance with this directive and the principles of transparency and equal treatment, contracting authorities and contracting entities should have considerable flexibility to define and organize the procedure for selecting the statutory undertaker..."*

Based on these doctrinal and normative considerations, we understand to define concession as representing the administrative onerous contract, bilateral or multilateral, essentially temporary and solemn, by which a public authority, called grantor, transmits, in *public power* and for a limited period, the attributes *ius utendi, ius fruendi, ius possidendi and ius abutendi*, but only from a material point of view, from the content of the property right on public or private domain assets of the state or of administrative-territorial units, as well as the correlative obligation to exploit these goods or by which the right and obligation to perform works or to provide and manage services is assigned to a natural or legal person, exclusively of private law, hereby referred to as a statutory undertaker, who acts on his / her risk and responsibility in the performance of the contract, in exchange for a royalties.

In terms of terminology, the regime of public power is the regime in which the general interest prevails, when it is in

[3] Dana Apostol Tofan, Le Parteneriat public-privé, Annals of the University, Series: Law, number II / 2005, p. 51.

[4] Gabriel Boroi, Carla Alexandra Anghelescu and Bogdan Nazat, a Civil law course, Main real rights, Hamangiu Publishing House, Bucharest, 2013, p. 58.

[5] Published in the Official Gazette of the European Union number L94/08.03.2014.

conflict with the particular interest, through the prerogatives granted by the Constitution and by the laws[6].

Therefore, concession, as a form of exercising the right of public property, implies the conclusion of a concession contract, but legal relations between the parties do not only belong to the field of civil law, but must also take into account the elements of public law, which are present within their framework.[7]

The characteristics of the concession contract are as follows:

- concession is an agreement assimilated to administrative acts, concluded by two or more parties, one of which, called the grantor, is represented by a public authority, and the other party / the other parties is / are represented by a natural or a private law person; therefore, concession cannot be concluded by two (or more) public administration authorities;[8]
- in the development of the concession contract, the achievement of public interest, national or local, is preemptive to the particular one, with the observance, within the limits of the law and of contractual clauses, of contractual balance between the grantor and the statutory undertaker; The administration of the public service by an individual must always be aimed at satisfying a public interest, even if that individual obviously seeks to obtain a personal profit. In other words, the achievement of desired gain must not contradict general interest and concession must not lead to the destruction of public wealth and national heritage;[9]
- it is concluded for a limited period of time, concession being an essentially temporary contract;
- the performance of the concession contract is carried out at the risk and the exclusive responsibility of the grantor;
- concession does not entail the alienation of the asset, the owner retaining the right to legally dispose of the asset, and the one who uses the public asset or who exploits the work or public service acquires the attributes of material provision, possession, use and usufruct;[10]
- the onerous nature, concession implying the pursuit by each party of obtaining a certain patrimonial advantage in exchange for the undertaken obligations;
- the grantor always reserves the right to repurchase concession, in certain circumstances, hence the redeemable nature, which is traditional for concession.

Romanian legislation knows a multitude of forms of concession, but three of them are distinguished by their importance: concession of public or private property of the state or of administrative-territorial authorities, concession of works and concession of services.

The distinction between them is not exactly an easy thing in the practical activity, and that is why, in specialized doctrine and in jurisprudence, the problem of determining

[6] Marta Claudia Cliza, *op. cit*., 2017, p. 11.
[7] Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *op.cit.*, p. 58.
[8] Verginia Verdinas, *op.cit.*, p. 533.
[9] Antonie Iorgovan, Treaty of Administrative Law, vol. II, the 4th edition, All Beck Publishing House, Bucharest, 2005, p. 185.
[10] According to the provisions of article 872, paragraphs 1 and 2 of the civil Code, "(1) The statutory undertaker may perform any material or legal acts necessary to ensure the exploitation of the asset. However, under the sanction of absolute nullity, the statutory undertaker may not alienate or encumber the asset given in the concession or, as appropriate, the assets intended or resulting from the performance of the concession and which must, according to the law or articles of incorporation, be handed over to the grantor upon termination. 2. Fruits and, within the limits provided for by the law and in the instrument of incorporation, products of the conceded property shall be incumbent on the statutory undertaker.".

the modality and the criteria of differentiation between these forms of concession was raised, with concrete practical implications, in the sense of identifying incident legal norms in the concrete legal relation established between contracting parties.

In terms of the relationship between the public service concession contract and the public property concession contract, the Romanian interwar doctrine established a fundamental difference between the agreed concession on a property belonging to the private domain or the public domain, on the one hand, respectively the concession of a public service, which is "a special, particular legal operation".[11]

In this sense, we show the fact that, according to the provisions of article 304 of the administrative Code, which regulates the matter of mixed concession contracts, *"(1) The provisions of this section do not apply to works concession contracts and service concession contracts. (2) In the case of a public works contract or services, of a works concession contract or of a service concession contract for the performance of which it is necessary to exploit a public property, the right to exploit that property shall be transferred within the framework and according to the procedure applied for the award of the contract in question. (3) In the case provided for in paragraph (2), the contracting authority concludes a single works or service concession contract, as appropriate, in accordance with the law."*

This legal norm puts an end to a previous doctrinal dispute and establishes a logical and necessary solution in case of meeting in the content of the concession contract to be concluded between the grantor and the statutory undertaker of a combination of characteristics, of the concession of public property and the concession of works or services.

Thus, in this situation, of the event of incidental legal norms in this case, the legislator opted for the solution of applying the special incidental legal norms in the matter of the works concession or service concession contract, as appropriate, the entire legal operation being governed by the special and derogatory norm, meaning that a single works or service concession contract shall be concluded.

The legislator's solution is not only fair, but also natural, given that, in this circumstance, the exploitation of public property is only an inherent way of performing the works concession contract or the service concession contract, the features of these latest contracts being important in this context, which shall coordinate the whole legal operation carried out between the contracting parties.

Consequently, the concession of public property is distinct from the concession of public services, unless assets in question are used for the supply, provision or operation of services which are the subject of delegation of management or concession of public services, where concession of public services includes concession of public property.

However, the stated case is only an exception in appearance, since the public property is not conceded, it is not the object of the statutory undertaker's exploitation. Legal provisions refer to the administration or concession of the asset, the rights recognized in this respect can be exercised only according to the given destination, namely, for the purpose of supplying or providing the service. Thus, the statutory undertaker's right to public property is a real right of use, of an ancillary nature, and it is only a means regarding the performance of

[11] Constantin Rarincescu, Theory of public service, The Lithographed Courses Publishing House, Bucharest, 1941, p. 181.

the public service. We therefore deem that, in addition to a right of exploitation of public service, the statutory undertaker also has a right of use exclusively of the public domain asset, which thus becomes an intrinsic part of the object of the public service concession contract..[12]

Regarding the relationship between the public service concession contract and the public works concession contract, starting from the theory of the public service from the Romanian interwar period [13], it follows that the public service is the basis of both public service concession contracts and public works concession contracts, so that the independent existence of the latter has been disputed.[14]

It was argued that the organization of a public service often involves the need to carry out certain installations, certain works, which, precisely because they are affected in order to operate a public service, have the nature of public works. It turned out that the performance of a public work is possible only for the purpose of performing a public service.[15]

Thus, regarding the determination of the legal qualification of the contract to be concluded, that of a contract having as object the concession of works, respectively the concession of services, with all the legal consequences deriving from this qualification, regarding the rights and obligations of the contracting parties, the delimitation criterion between the two categories of contracts is that of the purpose and the activities carried out, respectively of the predominant nature of the services to be performed, according to the provisions of article 309, paragraph 4, of the administrative Code.

So, if the predominant are the right and the correlative obligation of the statutory undertaker to perform a public service, then the concession contract shall be a service one, and if the effect of performing a public work is preemptive as weight, the contract shall be qualified as a works concession.

In this regard, we note that the main object of the designed concession contract is that which determines the legal qualification and legal features of the convention, respectively if, in this case, we are dealing with a public service concession contract or a public works concession convention.

According to the provisions of article 329, paragraph 1, of the administrative Code, the person who deems that a contract has been qualified as a concession contract for public property by the non-compliance with the legislation regarding works concessions and service concessions may request the point of view of the National Agency for Public Procurement.

According to the provisions of article 303, paragraph 2, of the administrative Code [16], „The public property concession contract is that contract concluded in writing by which a public authority, called grantor, transfers, for a limited period, to a person, called statutory undertaker, who acts at his / her own risk and responsibility, the right and obligation to exploit a public property in exchange for a royalty."

Therefore, this type of concession contract has as its main object the transfer by the grantor of the right and obligation to exploit a public property and which does not involve the exploitation of the property

[12] Ogarca (Dinu) Catalina Georgeta, PhD thesis, https://drept.unibuc.ro/dyn_doc/oferta-educationala/scoala-doctorala/rezumat-teza/ogarca-catalina-georgeta-iul-2015-ro.pdf.

[13] Constantin Rarincescu, Administrative Law, Emil Stanescu Publishing House, Bucharest, 1926-1927, p. 135 and the following.

[14] Ogarca (Dinu) Catalina Georgeta, *op. cit.*

[15] Constantin Rarincescu, *op. cit.*, 1941, p. 183.

[16] Published in the Official Gazette of Romania, Part I, number 555 of 5 July 2019.

within the framework of a complex legal operation of performance of a service or of a public work.

Although the provisions of article 303, paragraph 1, of the administrative Code refers exclusively to public property [17], however, this legal norm is completed by the provisions of article 362, paragraph 3, of the administrative Code, according to which the provisions regarding the concession of assets belonging to public domain of the state or of administrative-territorial units apply accordingly in the case of private properties of these public authorities.[18]

In the case of this concession contract, according to the provisions of article 303 of the administrative Code, the capacity of grantor belongs to the state, represented by ministries or by other specialized bodies of the central public administration, the county, by the president of the county council, or the municipality, city or commune, by the mayor, while the capacity of statutory undertaker may be owned by any natural person or legal person of private law, regardless of its citizenship or nationality, provided that the provisions of article 871, paragraph 2, of the civil Code do not make any distinction in this respect.[19]

The object of this contract is represented by public or private properties belonging to public or private domain of the state or of administrative-territorial units, these properties following to be registered in the land book before concluding the concession contract of public properties, under the sanction of absolute nullity of the contract, according to the provisions of article 305, paragraph 2 and paragraph 3, of the administrative Code.

Sub-concession of public or private properties belonging to public or private domain of the state or of administrative-territorial units is prohibited by law, the sanction being the absolute virtual nullity of the sub-concession contract, but the grantor may also request the termination of the concession contract, with payment of a compensation which is the responsibility of the statutory undertaker, according to the provisions of article 327, paragraph 1, letter d), of the administrative Code.

From the perspective of the regulation of the administrative Code regarding the concession of public or private properties of the state and of administrative-territorial units, the idea follows that three fundamental stages can be distinguished in the development of the concession procedure:

- the initial stage, of preparing the documentation necessary to start the tender procedure, characterized by the initiation of the concession proposal and the elaboration of the specifications that include the criteria for awarding the concession contract;
- the procedure for conducting the auction, in which the bids of natural or legal persons of private law are submitted and assessed, a stage completed by the statement of the winning bid;
- the stage of concluding the concession contract, the regulatory part containing the elements determined in the specifications.

Thus, concession takes place at the initiative of the grantor or following a proposal adopted by him / her, coming from any concerned person, natural or legal.

On the basis on the opportunity study, the grantor draws up the specifications of the concession, which shall contain the minimum elements provided by the

[17] Al.-S. Ciobanu, Inalienability and imprescriptibility of public domain in Romanian law and in French law, Universul Juridic Publishing House, Bucharest, 2015, p. 359.

[18] Verginia Verdinas, *op.cit.*, p. 534.

[19] See Antonie Iorgovan, *op. cit.*, ed. III, p. 223 and the following.

provisions of article 310 of the administrative Code.

According to the provisions of article 312, paragraph 1, of the administrative Code, the general rule established by law for the award of the public property concession contract is that of the application of the public tender procedure.

The award documentation is drawn up by the grantor, after the drafting of the specifications and it is approved by him / her by an order, a ruling or a decision, as appropriate. The grantor has the obligation to specify in the award documentation any requirements, criteria, rules and other information necessary to provide the tenderer with complete, correct and explicit information on how to apply the award procedure.

The auction is initiated by the publication of a tender notice by the grantor in the Official Gazette of Romania, Part VI, in a daily national newspaper and in a local one, on its website or by other media or public channels of electronic communications.

The auction notice is sent for publication at least 20 calendar days before the deadline for the submission of tenders.

The interested party has the right to request and obtain the award documentation.

The auction procedure may be carried out only if at least two valid tenders have been submitted following the publication of the auction notice.

If at least two valid tenders have not been submitted following the publication of the auction notice, the grantor shall be obliged to cancel the procedure and to hold a new auction.

In the event of the organization of a new auction, the procedure shall be valid if at least one valid tender has been submitted.

According to the provisions of article 68, paragraph 1, letters a) and b), of the Law number 98/2016 on public procurement [20], the auction may be open or restricted, each with its own organization and conduct procedure.

The difference between the two forms of auction is that while in the open auction procedure any economic operator has the right to submit a tender following the publication of a contract notice, in the case of the restricted tender procedure any economic operator has the right to submit a request to participate following the publication of a contract notice, following that only candidates who meet the qualification and selection criteria set by the contracting authority have the right to submit a tender at a later stage.

According to the provisions of article 78, paragraph 1, of the Law number 98/2016, the restricted auction procedure is carried out in two mandatory stages: a) the stage of submitting applications for participation and selection of candidates, by applying the qualification and selection criteria, b) the stage of submitting bids by the candidates within the framework of the first stage and their assessment, by applying the award criteria and the assessment factors.

According to the provisions of article 312, paragraph 3, of the administrative Code, the award documentation is prepared by the grantor, after the drafting of the specifications, and it is approved by him / her by order, decision or, as appropriate, by a Government Decision or by the decision of the urban or local county council[21].

The auction is initiated by the publication of a tender notice by the grantor in the Official Gazette of Romania, Part VI, in a daily national newspaper and in a local one, on its website or by other public media or channels of electronic communications.

[20] Published in the Official Gazette of Romania, Part I, number 390 of 23 May 2016.
[21] Verginia Verdinaș, *op.cit.*, p. 535.

The auction notice shall be drawn up following the approval of the award documentation by the grantor and shall be sent for publication at least 20 calendar days before the deadline for the submission of tenders.

Any interested person has the right to request and obtain the award documentation from the grantor, within a maximum of 5 working days from its request.

The auction procedure may be carried out only if at least two valid tenders have been submitted following the publication of the auction notice.

If, following the publication of the auction notice, at least two valid tenders have not been submitted, the grantor is obliged to cancel the procedure and to organize a new tender, in compliance with the procedure provided by the provisions of article 314, paragraphs 1 – 13, of the administrative Code.

In the event of the organization of a new auction, the procedure shall be valid if at least one valid tender has been submitted.

By exception from the general rule of granting by public auction the contact for the concession of assets, the public or private property of the state or of administrative-territorial units, the provisions of article 315, paragraph 1, of the administrative Code regulates the procedure for direct award of the concession contract to national companies, national societies or to companies subordinated, under the authority or coordination of the state, counties, communes, cities or municipalities, which were established by reorganization of the autonomous companies and whose main object of activity is management, maintenance, repair and development of the respective assets, but only until the completion of their privatization.[22]

Therefore, in this special procedure and derogating from the rule of awarding the concession contract by public tender, the capacity of bidder and, at the end of the procedure, of statutory undertaker cannot be held by a natural or legal person of private law, but only by a legal entity of public law among those listed above, precisely this aspect being the basis for which the award of the concession contract is made by a simplified procedure and derogating from the general rules.

Practically, in this situation, assets that are the object of the public domain remain in the exploitation of some institutions of public law, practically, not existing the risk of a scattering or of an irrational management of these assets.

In the case of direct assignments, it is not necessary to draw up the opportunity study and the specifications are not drawn up.

The concession by direct award is approved by a decision of the Government, of local, county councils or of the General Council of the Municipality of Bucharest, as appropriate.

The procedure for submitting tenders is detailed by the provisions of article 316 of the administrative Code, which establishes that the tenderer has the obligation to prepare the tender in accordance with the provisions of the award documentation.

The grantor has the obligation to establish the winning bid on the basis of the award criteria specified in the award documentation, which are the following:

a) the highest level of royalty;

b) economic and financial capacity of bidders;

c) environment protection;

d) specific conditions imposed by the nature of the conceded asset.

[22] *Ibidem*.

The weight of each criterion is established in the award documentation and must be proportionate to its importance assessed from the point of view of ensuring a rational and economically efficient use / exploitation of the conceded asset.

The weight of each of the mentioned criteria is up to 40%, and their amount must not exceed 100%, and the grantor must take into account all the criteria set out in the award documentation.

The winning bid is the bid that meets the highest score following the application of the award criteria.

If there are equal scores between the first ranked bidders, their tie shall be made according to the score obtained for the award criterion which has the highest weight, and, in case of further tie, the tie shall be made according to the score obtained for the award criterion which has the highest weight after it.

In this regard, the Court of Justice of the European Union has held [23] the fact that *"whenever a Member State intends to entrust such an assessment task to judicial authorities, the national system established for that purpose must comply with all the requirements laid down in article 38, paragraph (9), of the Directive 2014/23 and so as the applicable procedure be compatible with the terms imposed by the procedure for awarding concession contracts. Otherwise, and in particular in the event that the judicial authority is not empowered to carry out a detailed assessment of the evidence required by the second subparagraph of article 38, paragraph (9), of the Directive 2014/23 or is not in a position to definitively take a position before the end of the award procedure, the right established in the first paragraph of this provision in favor of the economic operator would have been emptied of substance."*

The grantor concludes the public property concession contract with the bidder whose bid was established as being the winner.

The grantor sends for publication in the Official Gazette of Romania, Part VI, a notice for the award of the public property concession contract, within 20 calendar days from the completion of the procedure for awarding the public property concession contract provided for in this section.

The concession contract for public property is concluded in writing, under the sanction of nullity, according to the provisions of article 322, paragraph 1, of the administrative Code, which determines us to qualify this bilateral legal deed as representing an authentic contract, from the way of regulating this extrinsic condition resulting the fact that the written form represents an *ad validitatem* condition of this convention.[24]

The refusal of the successful bidder to conclude the contract for the concession of public property may entail the payment of damages.

Pursuant to the provisions of article 324 of the administrative Code, the public property concession contract must contain the regulatory part, which includes the clauses provided in the specifications and the clauses agreed by the contracting parties, in addition to those in the specifications, without contravening the objectives of the concession provided in the specifications.

The term for which the concession contract is concluded is of maximum 49 years, starting from the date of its signing.[25]

The duration of the concession is established by the grantor on the basis of the opportunity study.

[23] Case C-472/19 Vert Marine SAS against the Prime Minister and the Minister for Economy and Finance.
[24] Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *op.cit.*, p. 58.
[25] Verginia Verdinas, *op.cit.*, p. 536.

The concession contract for public property may be extended by agreement of the parties, concluded in writing, provided that the total duration does not exceed 49 years.

However, by special laws, concessions with a duration of more than 49 years can be established.

Pursuant to the public property concession contract, the statutory undertaker acquires the right to exploit, at his / her own risk and responsibility, the public property that are the object of the contract, according to the objectives established by the grantor.

The statutory undertaker has the right to use and collect fruits, respectively products of the assets that are the object of the concession, according to the nature of the asset and the purpose established by the parties by the public property concession contract.

According to the provisions of article 872, paragraph 1, of the civil Code, the statutory undertaker may perform any material or legal deeds necessary to ensure the exploitation of the property. However, under the sanction of absolute nullity, the statutory undertaker may not alienate or encumber the property given in concession or, as appropriate, the assets intended or resulting from the achievement of the concession and which must, according to law or articles of incorporation, be handed over to the grantor upon termination, for any reasons, of the concession.

Termination of the public property concession contract may take place in the following situations:

a) at the expiration of the term established in the public property concession contract, insofar as the parties do not agree, in writing, to extend it under the conditions provided by law;

b) in the case of the exploitation, under the conditions of the concession contract of public property, of consumable assets, a fact that determines, by their exhaustion, the impossibility to continue their exploitation before the expiration of the established duration of the contract;

c) by unilateral termination by the grantor, in case the national or local interest so requires, by the payment of a fair compensation for the assignee, if he / she has suffered damage caused by the untimely termination of the contractual relationship;[26]

d) in case of non-compliance with contractual obligations by the statutory undertaker, by termination by the grantor, by the payment of a compensation to the responsibility of the statutory undertaker, pursuant to the provisions of article 1549, paragraph 1, of the civil Code;

e) in case of non-compliance with contractual obligations by the grantor, by termination by the statutory undertaker;

f) upon the disappearance, due to a force majeure cause, of the conceded property or in case of objective impossibility of the statutory undertaker to exploit it, by renunciation, without the payment of a compensation.

3. Works concession and service concession

According to the provisions of article 5, paragraph 1, letter g), of the Law number 100/2016 regarding works concessions and service concessions [27], the works concession contract is that "*onerous contract, assimilated according to the law of the administrative deed, concluded in writing, by which one or more contracting entities entrust the performance of works to one or more economic operators, in which the*

[26] Emil Balan, Introduction to the study of dominance, All Beck Publishing House, Bucharest, 2004, p. 107.
[27] Published in the Official Gazette of Romania, Part I, number 392 of 23 May 2016.

consideration for works is represented either exclusively by the right to exploit the result of the works subject to the contract, or by this right accompanied by a payment;"

Also, the provisions of article 5, paragraph 1, letter h), of the Law number 100/2016 states that the service concession contract designates "*the onerous contract, assimilated according to the law of the administrative deed, concluded in writing, by which one or more contracting entities entrust the provision and management of services, other than the performance of works provided for in letter g), to one or more economic operators, in which the consideration for services is represented either exclusively by the right to operate services that are the object of the contract, or by this right accompanied by a payment."*

The late professor Antonie Iorgovan shows that, by the concession contract, one party, the assignor, transmits to another party, called statutory undertaker, for profitable administration, for a fixed period, in exchange for a royalty, an economic activity, a public service, a productive subunit or a state-owned land.[28]

In the doctrine, concession of services and works is defined as an agreement by which a public person entrusts the provision of a public service to a private company, which ensures the financing of works, their operation and which is remunerated from royalties collected from statutory undertakers.[29]

Another author defines concession of public service as an administrative act by which a public person, called grantor, entrusts to a private person, called statutory undertaker, the management of public service at his / her own risk, recognizing his / her right to collect the royalty from the service beneficiaries.[30]

The service concession contract is the contract that has the same characteristics as the public property concession contract, except that in return for the services provided, the contractor, as statutory undertaker, receives from the contracting authority, as grantor, the right to exploit services for a fixed period or this right accompanied by the payment of an amount of money.

Such a definition was offered even by the legislator by the provisions of article 3, letter h), of the Government Emergency Ordinance number 34/2006, this normative deed being abrogated by the Law number 98/2016.

We deem that, although, unfortunately, such a normative provision is not resumed by the Law number 100/2016 nor by the Government Decision number 867/2016 for the implementation of this normative deed, nevertheless the logical-legal justice of the considerations of the provisions of article 3, letter h), of the Government Emergency Ordinance number 34/2006 cannot be challenged at present, from the definition of the two forms of concession unequivocally resulting the fact that while in the case of the concession of real estate of the state or territorial administrative authorities the object of the contract is objectified in the exploitation of some real estate, in the case of concession works or services, the performance of the statutory undertaker aims at the performance of works or the provision and management of services.

Another important distinction is the one revealed by the provisions of article 3, letter h), of the Government Emergency Ordinance number 34/2006, respectively the fact that, in case of concession of works or services, the royalty has a specific and

[28] Antonie Iorgovan, *op.cit.*, p. 103.
[29] Georges Vedel, Pierre Delvolvé, Administrative Law, Presses Universitaires de France, 1982, p. 847.
[30] Gilles Lebreton, General Administrative Law, the 10th edition, Dalloz, 2019, p. 122.

derogatory nature, being established the principle of liberalism and economic opportunity in the performance of the latter contract, meaning that, in this case, the consideration for services or works it is an alternative, being represented either exclusively by the right to operate the services which are the object of the contract, or by this right accompanied by a payment.

Also, an important legal norm is represented by the former article 3, paragraph (1), of the Government Decision number 71/2007 on the Norms for the application of the Government Emergency Ordinance number 34/2006, which provided that the distinction between the concession contract and the public procurement contract is made according to the distribution of risks, respectively the contract by the intermediary of which the contractor, as statutory undertaker, receives the right to exploit services, thus taking over the largest part of risks related to their operation, is deemed to be a service concession contract, otherwise being considered a public service acquisition contract. To this respect, in determining the legal nature of the contract concluded by the respondents, the manner in which they participate in profit and loss established by the contracting parties plays an important role.

In practice, it was noted that, according to contractual clauses, the participation is 60% for the "shareholder" and 40% for the City Hall.

In relation to the above legal provisions and the considerations retained, the court noted the fact that, although the parties entitled their contract as being a joint venture contract, subject to the provisions regarding civil professionals of the civil Code, in reality it is a service concession contract, the contracting authority having the obligation to apply the provisions of the Government Emergency Ordinance number 34/2006 and the other normative deeds issued in its application.[31]

This practice is confirmed by paragraph number 18 of the recitals of the Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 regarding the award of concession contracts.

It is true that a certain conceptual reminiscence or a certain slippage of language can be identified in paragraph 11 of the recitals of the Directive 2014/23/CE, according to which the object of concession is *"the acquisition of works or services by the intermediary of a concession whose compensation consists in the right to operate works or services or in the right to operate and a payment"*.

However, any confusion between the service concession contract and the procurement contract, which could result from this consideration in the recitals of the said directive, is terminated by the mentions of paragraph 18, quoted above, but also from paragraphs numbers 19 and 20 of the same directive, from which it emerges a clear and obvious distinction of the European legislator regarding the two forms of contract.

In this regard, the Court of Justice of the European Union[32] noted that, within the framework of the concession contractual relations, the statutory undertaker is obliged to undertake the risk of exploitation while operating *under normal conditions*, the amortization of the investments he / she made or the costs he / she incurred with the exploitation of the work or service which is the object of the concession is not certain. The transfer of risk to the statutory undertaker does not have to be complete.

[31] The Court of Appeal of Targu Mures, The Decision number 99/R/2011 from the 27th of January 2011.

[32] See case C-274/09, Privater Rettungsdienst und Krankentransport Stadler against Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau.

However, the transferred risk part must involve a "*real exposure to market hazards"*, according to article 5.1, paragraph (2), of the Directive 2014/23/Ce, and be *significant*, according to the European case law.

Paragraph 29 of the quoted directive also states the fact that "*In the case of mixed contracts, applicable rules should be determined as to the main object of the contract, if the various parts constituting the contract cannot be separated objectively."*

A distinguished French author states that this public works concession contract is a contract whereby the co-contractor of the administration undertakes to carry out a public work in exchange for collecting royalties on the uses of the work which he / she is responsible for operating in return for his / her financial commitment.[33]

The legal regime of concession follows the general rules applicable to administrative contracts and the relations between the grantor and the statutory undertaker are established in a specification, knowing that, at the end of the contract, the works performed shall return free of charge to the patrimony of the awarding public body (assets to be returned to the issuer of concession at the end of the concession agreement). Public works concessions are most often combined with a public service concession, but not necessarily (the case of pipeline construction concessions, for example).

As it results from the express mention in the Law number 100/2006 regarding works concessions and service concessions, this law transposes the provisions of articles 3, 8, 11, 13-19, 22-26, 28, 31, 34-36, 38-40, 43, 44 and 54 of the Directive 2014/23/UE of the European Parliament and of the Council of the 26th of February 2014 regarding the award of concession contracts, [34], and partially the provisions of articles 1, 2, 4-7, 9, 10, 20, 21, 29, 30, 32, 33, 37, 41, 42 and 45 of the Directive 2014/23/UE of the European Parliament and of the Council.

To this regard, it is easy to conclude that the norms of the Law number 100/2006 must be construed in the light of the provisions of the Directive 2014/23/UE.

The Court of Justice of the European Union [35] ruled the fact that "*Public service concession contracts do not fall within the scope of the Council Directive 92/50/CEE from the 18th of June 1992 regarding the coordination of procedures for the award of public service contracts (JO L 209, p. 1, Special edition, 06/vol. 2, p. 50), applicable on the date of the facts in the main proceedings. Although such contracts are excluded from the scope of this directive, public authorities awarding them are obliged to comply with the fundamental rules of the EC Treaty, the principles of non-discrimination on grounds of nationality and equal treatment, and the obligation of transparency which arises from those (see, to that effect, Telaustria and Telefonadress decisions, previously quoted, points 60-62, and the Decision from , Coname, C-231/03, Rec., p. I-7287, points 16-19). Without necessarily implying an obligation to launch a call to tender, this obligation of transparency requires the awarding authority to guarantee, in favor of any potential statutory undertaker, a sufficient level of publicity to ensure a competitive environment in the field of public service concessions, as well as the control of the impartiality of award procedures (see, to that effect, the previously quoted decisions*

[33] Jacqueline Miorand Deveiller and Pierre Bourdon Florian Poelet, Administrative property law, Course, theme of reflection, commentaries on judgments Notes of synthesis, the 15th edition, LGDJ, Paris, 2017, f-197-198.

[34] Published in the Official Gazette of the European Union, series L, number 94 of 28 March 2014.

[35] Case C-324/07, Coditel Brabant SA against Commune d'Uccle, Bruxelles Region – Capital.

Telaustria and Telefonadress, point 62, as well as Coname, point 21).”

Also, according to the provisions of article 1, paragraph 1 and paragraph 5, of the methodological Norms for the application of the provisions regarding the award of works concession and service concession contracts from the Law number 100/2016 regarding works concessions and service concessions of 16.11.2016, in the process of achievement of works concessions and service concessions, hereinafter referred to as concession contracts, in any situation for which there is no express regulation, the principles provided for in article 2, paragraph (2), of the Law number 100/2016 on works concessions and service concessions, hereinafter referred to as Law, apply.

The contracting entity is responsible for the performance modality of works concessions or service concessions, in compliance with all applicable legal provisions.

To this regard, the European court[36] noted the fact that “*the principle of legal security, which has as a corollary that of the protection of legitimate expectations, requires in particular that the rules of law be clear and precise and that their effects be predictable, especially when they may have adverse consequences for natural persons and for enterprises (see, to that effect, the Decision from the 11th of June 2015, Berlington Hungary and others, C-98/14, EU:C:2015:386, point 77, as well as the quoted case-law).*

However, an economic operator cannot rely on the total absence of any legislative amendment, as it can only discuss how to implement such an amendment (see, to that effect, the decision from the 11th of June 2015, Berlington Hungary and Others, C-98/14, EU:C:2015:386, point 78, as well as the quoted case-law).

To that regard, it should be noted that the obligation to provide for a sufficiently long transitional period to allow economic operators to adapt or for a reasonable compensation scheme (see, to that effect, the decision from the 11th of June 2015, Berlington Hungary and others, C 98/14, EU:C:2015:386, point 85, as well as the quoted case-law) is incumbent on the national legislator.”

According to the provisions of article 6 of the Law number 100/2016, the award of a concession of works or services always implies the transfer to the statutory undertaker of a significant part of the operating risk of an economic nature, in connection with the operation of the respective works and / or services. A significant part of the operating risk is deemed to have been transferred when the estimated potential loss incurred by the statutory undertaker is not an insignificant one.

The award procedures provided by the Law number 100/2016 apply to works concessions or service concessions whose value, VAT excluded, is equal to or higher than the value threshold of 25.013.925 Ron, according to the provisions of article 11, paragraph 1, of this normative deed.

Contracts that have as an object both works concession and services concession are awarded in accordance with the provisions of the Law number 100/2016, for the type of concession that characterizes the main purpose of the contract.

In the case of mixed concessions that have as an object both social services or other specific services, provided for in the annex number 3 of the law, as well as other services, the main purpose of the contract is

[36] In the case C 322/16, Global Starnet Ltd against the Ministry of Economy and Finance, Amministrazione Autonoma Monopoli di Stato.

determined according to the highest of the estimated values of the respective services.

In the case of mixed contracts that have as an object both elements for which the provisions of the Law number 100/2016 apply, as well as other elements for which the provisions of other normative acts apply, and the different parts of the contract are objectively separable, the contracting authority / entity has the right to choose between awarding separate contracts to separate parties and awarding a single contract.

In the performance of concession contracts, economic operators are required to comply with the obligations applicable in the fields of environment, social and labor relations, established by the legislation adopted at the European Union level, by the national law, by collective agreements or by international treaties, conventions and agreements in these fields.

Any economic operator shall have the right to participate in the award procedure as a tenderer or a candidate, individually or jointly with other economic operators, including in temporary association forms set up for the purpose of participating in the award procedure, a proposed subcontractor or a supporting third party, according to the provisions of this law.

According to the provisions of article 50 of the Law number 100/2016, the contracting authority / entity awards the concession contract by one of the following award procedures, which constitutes the general rule:

a) open auction;

b) competitive dialogue.

As an exception, the contracting authority / entity may use negotiation without publication of a concession notice as the award procedure.

Open auction is initiated by sending for publication a concession notice, by which the contracting authority / entity requests economic operators to submit tenders.

The open auction procedure is usually carried out in a single stage.

The contracting authority / entity may also establish by the concession notice the award documentation so that the open auction procedure shall be carried out in two stages, as follows:

a) the first stage - submission of tenders prepared in accordance with the information and requirements provided for in the award documentation, accompanied by documents proving the fulfillment of the qualification and selection criteria established by the contracting authority / entity;

b) the second stage - negotiations in order to improve the admissible tenders and the evaluation of improved tenders, by applying the award criteria.

If it chooses to apply the open auction procedure with a negotiation stage, the contracting authority / entity shall establish by the award documentation the elements that may be the subject of the negotiation.

In the contents of the award documentation, the contracting authority / entity defines the object of the works concession or service concession by describing the needs of the contracting authority / entity and the characteristics required for the works or services to be conceded and establishes the award criteria and the distribution method of risks.

The Court of Justice of the European Union [37] established that *"To that regard, it is common ground that the transaction at issue in the present case constitutes a "public works concession" within the meaning of article 1, letter (d), of the*

[37] The case C 423/07, the European Commission against the Kingdom of Spain.

Directive 93/37. According to that provision, "public works concession" is a contract having the same characteristics as those of "public works contracts", with the exception of compensation for carried out works, which consists either exclusively in the right to operate the work or in this right and a payment.

According to article 3, paragraph (1), of the Directive 93/37, in case contracting authorities conclude a contract for the award of works, the rules on publicity laid down, inter alia, in article 11, paragraphs (3) and (6) thereof, are applicable to this contract where its value is equal to or exceeds 5 000 000 ECU."

Following the completion of the first stage, the contracting authority / entity simultaneously sends to all tenderers who have submitted admissible tenders an invitation to participate in the negotiation stage.

The contracting authority / entity negotiates during the negotiation stage with each tenderer who has submitted an admissible tender and has been invited, in order to improve their content.

Within the framework of the negotiation, the contracting authority / entity and the tenderers may discuss any aspects related to the concession, indicated in the award documentation, except for the object of concession, the award criteria and the minimum requirements, which cannot be changed during the negotiation.

The competitive dialogue procedure is initiated by sending for publication a concession notice, by which the contracting authority / entity requests economic operators to submit participation requests.

Within the framework of the competitive dialogue procedure, any economic operator has the right to submit a request to participate, following that only candidates who meet the qualification and selection criteria established by the contracting authority / entity by the concession notice to have the right to participate in the following stages.

The competitive dialogue procedure takes place in three stages, according to the provisions of article 57 of the Law number 100/2016:

a) the first stage - submission of applications for participation and selection of candidates, by applying qualification and selection criteria provided in the award documentation;

b) the second stage - the dialogue with selected candidates, in order to identify the solution / the solutions able to respond to the needs of the contracting authority / entity on the basis of which the final tenders shall be submitted;

c) the third stage - the submission of final tenders by the candidates remaining following the dialogue stage and their assessment, by applying the award criteria.

According to the provisions of article 77 and article 78, paragraph 1, of the methodological norms for the application of the provisions regarding the award of works concession and service concession contracts from the Law number 100/2016 on works concessions and service concessions from 16.11.2016, the tenderer prepares the tender according to the provisions of the award documentation and indicates in its content that information from the technical proposal and / or the financial proposal is confidential, classified or protected by an intellectual property right, on the basis of the applicable legislation. The risks of submitting the tender / request to participate, including force majeure or fortuitous event, are borne by the economic operator submitting the respective tender / request to participate. The tender is made up of a technical proposal and a financial proposal and is accompanied by qualification documents and / or documents proving the fulfillment of the qualification and selection

criteria. The tender is binding, in terms of content, for the entire period of validity established by the contracting entity and undertaken by the bidder.

Following the completion of the first stage, the contracting authority / entity simultaneously sends an invitation to all selected candidates to participate in the second stage. The contracting authority / entity has the obligation to send the invitation to participate accompanied by a copy of the award documentation, which shall also include a descriptive document. The contracting authority / entity has the obligation to invite in the second stage a number of candidates at least equal to the minimum number of candidates indicated in the concession notice.

According to the provisions of article 6 of the Law number 100/2016, the contracting authority / entity carries out the dialogue stage with each selected candidate separately, in order to identify and define the best means to meet its needs. Within the framework of the dialogue, the contracting authority / entity and the selected candidates may discuss all aspects related to concession, indicated in the award documentation, except for the object of concession, the award criteria and the minimum requirements, which cannot be changed throughout the dialogue.

Following the completion of the dialogue stage, the contracting authority / entity simultaneously sends to all remaining candidates in the competition an invitation to submit the final tenders, accompanied by the solution / solutions, following the completion of the dialogue stage.

Final tenders include all the elements requested and necessary to the contracting authority / entity for achieving the object of works concession or services concession and are elaborated on the basis of the solution or solutions presented and negotiated with the respective candidate during the dialogue stage.

The contracting authority / entity has the obligation to prepare the award documentation containing all the necessary information to provide tenderers / candidates with complete, correct and accurate information on the requirements of works concession or services concession, the object of the contract, the distribution of risks and the way of conducting the award procedure.

Technical and functional requirements are established by the award documentation and define the necessary characteristics of works / services that are the object of concession.

Qualification and selection criteria must be related and proportionate to the need to ensure the statutory undertaker's ability to perform the concession contract, taking into account the object of the works or services concession and the purpose of ensuring a real competition.

In the light of the provisions of article 86 of the law, concession contracts are awarded on the basis of the criterion of the most advantageous tender from an economic point of view, established on the basis of some objective criteria that guarantee the assessment of tenders in real competition conditions.

According to the provisions of article 88 of the law, the completion of the award procedure of the award contract can be performed in two ways:

a) signing the concession contract or

b) cancellation of the award procedure.

According to the provisions of article 16 of the law, the duration of concession contracts is limited, in order to avoid distortion of competition. The contracting authority / entity estimates the duration of concession on the basis of works or services requested. For works concessions or service concessions with an estimated duration of more than 5 years, the maximum duration of

concession may not exceed the reasonably estimated time necessary for the statutory undertaker to obtain a minimum income meant to recover costs of investments made, costs in connection with the operation of works or services, as well as a reasonable profit.

Therefore, the term of the concession contract is a determined or determinable one, which shall, however, be inserted in the content of the contract, in order to confer certainty and predictability to the rights and obligations of the parties.

Unlike the concession of public property, the provisions of article 94 of the Law number 100/2016 provide for the possibility of sub-concession in case of works and services concessions, with the mention that the contracting authority / entity has the obligation to request the tenderer to specify in the tender the part / parts of the contract to be subcontracted and identification data of the proposed subcontractors. Proposed subcontractors are bound by the same obligations in the field of environment, social and labor relations, as are the bidders.

Sub-concession does not diminish the statutory undertaker's liability as to how to fulfill the future concession contract.

Pursuant to the provisions of article 110 of the Law number 100/2016, the contracting authority / entity has the right to unilaterally terminate a concession contract, in its validity period, in one of the following situations:

a) the statutory undertaker is, at the moment of awarding the contract, in one of the situations provided for in articles 79-81, which would have determined his / her exclusion from the award procedure;

b) the contract should not have been awarded to the concerned statutory undertaker, in view of a serious breach of obligations resulting from the relevant European legislation and which was established by a decision of the Court of Justice of the European Union.

4. Concession of mining activities

It is a special form of concession, which consists in concluding an agreement called a license, this representing the legal deed by which concession of mining exploration / exploitation activities is granted, as provided by the provisions of article 3, point 17, of the mining Law number 85/2003.[38]

According to the provisions of article 1 of this normative deed, mineral resources located on the territory and in the basement of the country and of the continental plateau in the economic zone of Romania in the Black Sea, delimited according to the principles of international law and regulations of international conventions to which Romania is party, are the exclusive object of public property and belong to the Romanian state.

Concession represents only one of the ways of acquiring the right to use the lands necessary to carry out mining activities from the exploration / exploitation perimeter.

According to the provisions of article 13 of the same law, mineral resources are valued by mining activities that are conceded to Romanian or foreign legal entities or are given in administration to public institutions by the competent authority, according to the present law.

As resulting from the provisions of article 13 of the mining Law number 85/2003, we consider that the reference law referred to in the special legal norm can only be the Law number 100/2016, if the mining exploration / exploitation activities involve the performance of a work or a service, and,

[38] Published in the Official Gazette of Romania, number 197 of 27 March 2003.

otherwise, the closing rules of the concession contract shall be those established by the provisions of article 302 and the following of the administrative Code, these legal norms constituting the common law in the matter of concession.

According to the provisions of article 3, point 8, of the law, mining concession represents the legal operation by which the state, represented by the competent authority, as grantor, transmits for a fixed period to a person, as statutory undertaker, the right and obligation to perform, at risk and own expenses, mining activities having as object mineral resources that fall under the incidence of the present law, in exchange for a mining royalty for exploitation and of a tax on the activity of prospecting, exploration and exploitation of mineral resources.

This legal definition entitles us to conclude that this type of concession represents a special form of works concession, regulated by the Law number 100/2016, so that the special legal and derogatory norms of the Law number 85/2003 shall be completed with those of the Law number 100/2016, for all situations in which the special law does not contain express rules, including on the procedure for preparing, awarding and concluding the concession contact.

According to the provisions of article 24 of the Law number 83/2013, the holder of a license may transfer to another legal person the acquired rights and undertaken obligations only with the prior written approval of the competent authority. Any transfer made without written approval is void as of right. If the holder of the license changes his / her status by reorganization, sale or any other reason, the license, as negotiated, shall be granted by an addendum to the legal successors of the holder, on the basis of the contract between the parties or the court decision, presented to the competent authority.

To this regard, in practice [39] it was noted that *the plaintiff E. E. SRL, by judicial liquidator Individual Insolvency Cabinet I. E., held the concession license for exploitation number 3714/2002 from the perimeter Izvorul Paraul S., but, entering the insolvency procedure, it gave its consent for the transfer of this license to D. J. SRL. The defendant, the National Agency for Mineral Resources, issued the Order number 185/25.08.2004 approving the transfer of the acquired rights and of the undertaken obligations according to the concession license for exploitation number 3714/2002 from the perimeter Izvorul Paraul S. concluded by the National Agency for Mineral Resources and E. E. SRL to D. J. SRL. On the date of issuing this order, the competent authority verified the fulfillment of the conditions provided for by article 24 of the Law number 85/2003. In this case, the current holder of the license, the defendant D. J. SRL did not express its consent to transfer the license it holds on the basis of the Order number 185 from 25.08.2004 issued by the National Agency for Mineral Resources. Therefore, the court found that the refusal of the holder of this license is a well-founded one, so that one of the mandatory legal conditions for approving the transfer of a concession license for exploitation is not fulfilled."*

Mining concession or mining administration ceases:

a) by the expiration of the term for which it was granted;

b) by the waiver by the holder of the license;

c) by revoking the license / the permit by the competent authority;

[39] The Court of Appeal of Bucharest, The Administrative Court Division, the Decision number 100/F/2009 of 17 June 2009.

d) upon the request of the holder, in case of occurrence of events that constitute causes of force majeure and that determine the objective and final impossibility of fulfilling some obligations and / or of achievement of some rights of the holder, provided in the license and which are essential for carrying out the mining activity;

e) by exhausting exploitable reserves, only in the case of concession / contracting out of mining exploitation activities.

5. Concession of forest lands, the public property of the state

According to the provisions of article 5 of the Order number 367/2010 for approving the value of concession, the method of calculation and the method of payment of the royalty obtained from the concession of forest lands, which are the public property of the state, related to assets sold by the National Forests Authority - Romsilva, as well as the concession contract model, *the owner of an asset located on the forest land that is the public property of the state that he / she uses under the concession contract has the obligation to notify the grantor of the intention to alienate the asset, 30 days before the start of legal proceedings regarding the sale.*

The Court of Justice of the European Union [40] ruled that "*It should be added that royalties may relate to goods being valued within the meaning of that article 32, paragraph (1), letter (c), even if those royalties relate only in part to the goods in question (see, to that effect, the decision from the 9th of March 2017, GE Healthcare, C-173/15, EU:C:2017:195, point 53, and the operative part). However, as it results from article 32, paragraph (2), of the customs Code, the additions to the actual price to be paid or payable must be applied only on the basis of objective and quantifiable data.*

As to the questions of the referring national court concerning the interpretation of article 158, paragraph (3), of the Regulation number 2454/93, it must remembered that, under that provision, where royalties or license fees relate in part to imported goods and in part to other elements or components added to the goods after importation or to post-importation provisions or services, the corresponding breakdown is made only on the basis of objective and quantifiable data, according to the interpretative note referred to in annex 23, which relates to article 32, paragraph (2), of the customs Code."

The payment of the royalty is charged from the date on which the asset was purchased.

The area of the forest land that is the object of the concession contract is the area of the landscaping unit in which the objective is located, established according to the forest arrangement in force.[41]

The sale-purchase contract of assets, which is concluded by the National Forests Authority - Romsilva and the buyer, must include the following clauses:

a) the clause regarding the manner of recovering the due and unpaid royalty, including penalties for late payment thereof;

b) the clause by which the buyer is obliged to send to the central public authority responsible for forestry the full documentation, in order to conclude the concession contract for the land related to the sold asset, within 10 working days from the date of concluding the sale-purchase contract of the asset;

[40] The case C-76/19, Direktor na Teritorialna direktsiya Yugozapadna Agentsiya "Mitnitsi", against "Curtis Balkan" EOOD.

[41] VASS Lawyers, Concession of forest lands, the public property of the state, https://www.juridice.ro/106822/concesionarea-terenurilor-forestiere-proprietate-publica-a-statului.html.

c) the clause by which the sale-purchase contract is concluded under suspensive condition, the buyer having the obligation that, within 10 working days from the date of the sale-purchase contract of the asset, to send to the central public authority responsible for forestry the complete documentation, in order to conclude the concession contract for the land related to the sold asset, otherwise it shall cease as of right.

According to the provisions of article 9 of the order, concession contracts for the forest lands related to the assets sold by the National Forests Authority - Romsilva are concluded by the central public authority responsible for forestry, according to the model concession contract provided in addendum number 3, which is an integral part of this order.

6. Concession of forest lands, the public property of the state

According to the provisions of article 29, paragraph 1, of the Law on community services of public utilities number 51/2006[42], republished, delegated management is the mode of management in which deliberative authorities of administrative-territorial units or, as appropriate, inter-community development associations aiming at public utility services, in the name and on behalf of member administrative-territorial units, award to one or more operators all or only a part of their own competences and responsibilities regarding the delivery / provision of public utility services, on the basis of a contract, hereinafter referred to as management delegation contract. Delegated management of public utility services involves making available to operators public utility systems related to delegated services, as well as their right and obligation to administer and operate these systems.

Paragraph 8 of the same article states that the situation of the contract for the delegation of the management of public utility services, which may have the legal nature of:

a) the service concession contract;

b) the public acquisition service contract.

The legal nature of this type of concession contract is that of the species of the service concession contract, an assertion based on the fact that, according to the provisions of article 29, paragraph 9, of this normative deed, in the case of public utility services, the procedure for awarding management delegation contracts is established, as appropriate, on the basis of the provisions of the Law number 98/2016, the Law number 99/2016 and the Law number 100/2016.

Also, according to the provisions of paragraph 13 of article 29, in the case of public utility services provided for in article 1, paragraph (2), the procedure for awarding management delegation contracts shall be established, as appropriate, according to the provisions of the Law number 98/2016 on public procurement, the Law number 99/2016 on sectoral procurement and the Law number 100/2016 on works concessions and service concessions.

The subdelegation by the operator of the management of the service / one or more activities in the area of public utility service

[42] Published in the Official Gazette of Romania, Part I, number 254 of 21 March 2006, published pursuant to article III of the Government Emergency Ordinance number 13/2008 for the amendment and the completion of the Law of community services of public utilities number 51/2006 and of the Law on water supply and sewerage service number 241/2006, published in the Official Gazette of Romania, Part I, number 145 of 26 February 2008, approved, as amended and supplemented by the Law number 204/2012, published in the Official Gazette of Romania, Part I, number 791 of 26 November 2012.

is prohibited. Subcontracting of works or related services, necessary for the delivery / provision of the service / one or more activities in the area of delegated public utilities service, is performed only under the conditions provided by the legislation in the field of public procurement.

By this normative provision, the special law does nothing but give effect to the general rule on the concession of works or services, established by the provisions of article 94 of the Law number 100/2016.

Pursuant to the provisions of article 30, paragraph 1, of the Law number 51/2006, organization and development of procedures for awarding the management delegation contract for public utilities services provided for in article 1, paragraph (2), are made on the basis of an award documentation drafted by the delegator, as appropriate, according to the provisions of the Law number 98/2016, of the Law number 99/2016 and of the Law number 100/2016.

7. Land concession for constructions

According to the provisions of article 13 of the Law number 50/1991 regarding the authorization for the performance of construction works [43], lands belonging to the private domain of the state or of administrative-territorial units, intended for construction, can be sold, conceded or rented by public auction, according to the law, under the conditions of observing the provisions of urbanism and spatial planning documentations, approved by the law, in order to be achieved by the owner of the construction.

Lands belonging to the public domain of the state or of administrative-territorial units may be conceded only in order to achieve constructions or objectives of use and / or public interest, in compliance with urban planning documentations approved according to the law.

Concession is made on the basis of tenders submitted by applicants, in compliance with the legal provisions, aiming at the superior capitalization of the land potential.

This way of valuing lands for constructions represents a special form of concession of the assets which are the public or private property of the state and of administrative-territorial units, so that the normative dispositions derogating of the Law number 50/1991 are to be completed by the provisions of article 302 and the following of the administrative Code.

According to article 14 of the Law number 51/1991, free construction lands under the administration of local councils that are the object of requests for reconstitution of the property right of former owners brought forward within the term provided by the Law number 10/2001 regarding the legal regime of some buildings abusively taken over in the period between the 6th of March 1945 and the 22nd of December 1989, republished, as subsequently amended and supplemented, cannot be the object of concession.

Therefore, the general rule in the case of this concession is that of the award of the contract pursuant to the public auction procedure.

Lands intended for construction can be conceded without a public auction, on the basis of the provisions of article 15 of the Law number 50/1991, by the payment of the royalty fee established according to the law, or they may be put into use for a fixed period, as appropriate, in the following situations:

[43] Published in the Official Gazette of Romania, Part I, number 487 of 31 May 2004, offering texts a new numbering. The Law number 50/1991 was republished in the Official Gazette of Romania, Part I, number 3 of 13 January 1997.

a) for the achievement of objectives of public utility or charity, of a social, non-profit nature, other than those achieved by local authorities on their lands;

b) for the achievement of housing by the National Agency for Housing, according to the law;

c) for the achievement of housing for young people until the age of 35;

d) for the displacement of households affected by disasters, according to the law;

e) for the extension of constructions on adjacent lands, upon the request of the owner or by his / her consent;

f) for works of protection or enhancement of historical monuments defined according to the law, with the approval of the Ministry of Culture and Cults, on the basis of urban planning documentations approved according to the law.

On the basis on the minutes of adjudication of the auction or of the decision of the local council, respectively of the General Council of the municipality of Bucharest, the concession deed shall be concluded, which shall be registered by the statutory undertaker in the Land Registry records, within 10 days from the date of adjudication or the issuance of the decision.

Concession of lands intended for constructions is performed according to the provisions of the law, its duration being established by local councils, county councils, respectively by the General Council of the municipality of Bucharest, depending on the provisions of the urban planning documentations and the construction type.

Prior to concession, lands shall be registered in the land book.

8. Conclusions

As above mentioned, from the point of view of the administrative law, the concession is seen as a way to capitalize on the assets that make up public and private domain, therefore as an effective and useful legal tool for introduction into the economic circuit, in strict compliance with legal rules in this case and of the clauses of the concession contract, of state assets and of territorial administrative units.

However, it is obvious that, viewed with a broader sense, concession is a form of management of public service, and, consequently, of general interest, to which the notion of public service is inextricably related.

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THE EVOLUTION OF CONTRACTS IN ROMAN LAW

Elena ANGHEL[*]

Abstract

One cannot understand an institution today without researching its entire historical thread, how it evolved until it became what it is through the vicissitudes of the past. On this, our law has very deep and distant roots, partly directly in the custom of the land and in the written laws we had, partly through the influence of the laws of the Occident, and especially the French ones, with Roman law. We cannot easily realize how much we live without knowing by tradition based on the past; the scientist's job is to dig up these past influences and bring them to light in order to understand today's institutions".

Following the path shown by Professor Mircea Djuvara, in this study I propose to "dig" in order to highlight the boundless influence of Roman law in the field of contracts. Because it is this influence that explains a unique phenomenon in history, namely the fact that this legal system did not die with the people who created it, but survived for millennia, imposing itself on foreign peoples and vigorously shaping their legal spirit.

Therefore, if we want to understand the physiognomy of today's contract, we must dig for its origins, and they will be found in Roman law, where the contract was originally a convention that produced legal effects only if he wore the heavy coat of formalities required at the moment of its conclusion. The essential element of the contract was therefore not the agreement of will, but the formal elements required for its preparation.

Keywords: *contract, Roman law, formalism, influence, the essential elements of the contract.*

1. Introduction

Roman law is, to a large extent, the classic legal expression of life relationships, of the relationships within a society where private property assumes its enduring form, as none of the following legislations has succeeded in making substantial improvements in this area. The historical interest of Roman law consists in the fact that it shows us the way in which legal institutions are created and how they change in relation to the economic basis and the other forms of social life.

Roman law has created the legal language and Rome has created the alphabet of law. Thanks to this alphabet, we can formulate any legal ideas. Most of the current legal notions have largely appeared in Roman law. When Rome went down in history, the ancient world knew several legislative codes.

This legal system is not only of historical importance, but it represents a great advance in the field of legal technique. The precision and clarity of the definitions, the severe reasoning and consistency of the legal thought, combined with the vitality of the conclusions, highlight the great art of the Roman legal advisers, who played a great role in the development of the law. As Professor Emil Molcuț points out, the legal

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advisers of the Modern era[1] have borrowed many constructions and legal categories from the arsenal of the Roman law, as well as a series of categories and general principles that they have laid the basis for the entire regulation[2].

The subject matter of obligations and contracts has known a great development in Roman law, by taking hold of a particularly important position. This position is imposed by the exceptional vitality of the institutions related to the subject matter of obligations and contracts, which represent the first universal system of rules of a society. The institutions of the obligations exceeded the order that created them and were applied, with certain adjustments, in the social formations that followed.

2. Content

Many of the current legal concepts find their origins in Roman law, which has managed to confer them a precise wording[3]. The Romans achieved such performances, especially in the field of contracts, as they remained, to a large extent, unchanged in terms of the formation of elements and effects.

For a long time, the contract in Rome was just a convention under a certain form. The word "contractus" was used to mean contract, as follows: originally, contract meant reunion. Due to the fact that, in ancient times, the sale was performed by means of two separate documents, a document of purchase and a document of sale, the word appeared later[4]. The word was generalized and also used for other legal operations. Thus, if not any convention is a contract, any contract "contractus" implies a convention, therefore an agreement. In ancient times, this agreement was formal because only the parties were on an equal footing. The owner of the means of production imposes his will on the one who lacks the means of production, who could do nothing but follow the conditions of the owner.

In what concerns the evolution of Roman law, we can start the study in the ancient times, when the contract was a convention the obligation of which resulted from the formalities and solemnities performed on the occasion of its conclusion. The essential element of the contract was not the agreement of will, but the formal elements required on the occasion of its draw up[5].

According to Professor Molcuț, in ancient Roman law, in order for a document to produce effects, it had to be veiled under certain forms; the mere manifestation of will was devoid of legal value[6].

The first forms of contracts that we know were distinguished by a rigorous formalism. *Sponsio*, verbal contract, was concluded by the utterance of certain solemn words, and the so-called literal contract (*litteris*), by certain entries made in the

[1] This is applicable even for modern organisations such as European Union. For a perspective on contractual obligations in EU law: Conea Alina Mihaela, *Politicile Uniunii Europene. Curs universitar*, Editura Universul Juridic, Bucharest, 2019, pp. 130-142.

[2] Emil Molcuț, *Drept roman*, Edit Press Mihaela S.R.L. Publishing House, Bucharest, 2002, page 10.

[3] For a detailed analysis of the juridical concepts, see Nicolae Popa, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, Edition 2, C.H. Beck Publishing House, Bucharest, 2014.

[4] Cornelia Ene-Dinu, *Istoria statului şi dreptului românesc. Curs universitar,* Universul Juridic Publishing House, Bucharest, 2020, page 26.

[5] Vladimir Hanga, Mircea Dan Bocșan, *Curs de drept privat roman*, Universul Juridic Publishing House, Bucharest, 2006, page 241.

[6] Emil Molcuț, *op. cit.*, page 235.

register (codex) of the creditor, under the consent of the debtor.

As production and trade increased, the old forms were abolished by new social needs which were brought to life. However, their removal was gradual, only insofar as contractual forms corresponding to the new social relations were created. Along with the old formal contracts, new informal ones have appeared. This is how we explain the occurrence of the real contracts which are concluded by means of the simple transfer (re) of the object and of the consensual contracts which are concluded by means of the simple consent (*solo consensu*). Their validity is subject to substantive conditions resulting from their economic destination and use. In fact, they are actual pacts, namely agreements which are not veiled under solemn forms, raised to the rank of contracts due to their special economic importance.

Throughout the Imperial Era, the general theory of contracts is progressively developed. The contract (*contractus*), the essential element of which is now the agreement of the parties, is released from the primitive formalism. The contractual system will develop progressively throughout the Roman Imperial Era. The economic and social needs will reveal other conventions generating legal effects that will join the old contractual categories. The pacts, for example, will round the contractual system off, the viability of which consisted in a flexible adjustment to the needs of the social development in continuous transformation.

The subject of obligations has a great importance, both from a practical point of view and from a theoretical point of view. The practical interest results from the multitude and endless variety of legal relations that people create, due to permanent demands of life. In order to satisfy their most basic requirements of life, people conclude various obligation generating contracts every day. Along with the legal relationships created by will, there are others that are born independently of it, such as the obligations involved in the principle of the legal liability. Therefore, the most common act of daily life are resources of legal relations that are the object of obligations.

In a broad sense, obligations mean the legal relations which entail both the active side, which is the right of claim belonging to the creditor, and the correlative of this right, namely the passive side of the relation, which is the encumbrance of the debtor; in the narrow sense, the obligation designates only the passive side, the encumbrance of the debtor.

Therefore, in terms of the active side, the obligation is that legal relation which contains the right of the active subject, called creditor, to ask something to the passive subject, called debtor, whose obligation is to give, to do or not to do something.

If the focus is on the passive side, the active side of the obligation being present by default, the obligation can be defined as the legal relation by virtue of which a person called debtor is hold liable to another person called creditor, either to a positive benefit or to an abstention. The term of obligation sometimes refers to the title itself which establishes the existence of a debt.

If the legal relationship is considered in terms of the creditor, it is called right of claim, and if it is considered in terms of the debtor, it is called obligation.

During the classical antiquity, the obligations take on a particularly large extent due to the development of production and exchange of goods. In this world of business of all kinds, the interest-bearing loan has emerged. Such business operations required new legal instruments.

By being regulated at a higher level, the Roman obligation had a special importance for the economic circuit of Rome. At the same time, the concentration

of private property has enabled the process of crystallization of the institution of obligation, by imposing a detailed regulation of contractual rights and obligations.

The obligation, as an institution of law, appears at the same time with private property and social classes, by firstly representing a means of enslaving those who lack the means of production. According to the primitive Roman conception, the obligation (*ius in personam*) is created after the image and likeness of the property right (*ius in re*), ie of the real rights. The Romans made the same confusion between family rights and real rights. The etymology of the word "obligatio" (ob-ligatio) indicates, in a plastic way, the initial meaning of the term: to bind, to chain.

The development of the production of goods and trade led to the replacement of the formalism of old law, by bringing radical changes in the legal mentality. In this case, the notion of obligation begins to change its primitive structure. The idea of bounding (*ob-ligatio*) ceases to be understood in a strictly material sense. It becomes a purely legal relationship under which the debtor was oblige to perform a service, and in the event of a non-performance, the creditor could pursue the debtor's assets and not his natural person.

It is interesting to study the components of the obligations[7]. If we consider the creditor, he can force the debtor to pay something he owes.

The debtor is always forced to pay something to the creditor.

The scope of the obligation is the payment that the debtor has to make to the creditor. It is important to mention the fact that, by payment, the Romans did not only understand the remittance of amounts of money, but the scope of the obligation could also be established by giving, making, rendering. From the word "prestare", the legal expression prestațiune (provision) was formed in order to designate any scope of the obligation. Therefore, moving from Latin to modern legal terminology, the meaning of this word was amplified.

The conditions of the scope of the obligation meant, in Roman law, the fulfillment of requirements without which it could not be fulfilled. Therefore, the scope must be lawful, be possible, be of interest to the creditor and be determined.

Another essential element of the obligation is the coercion, ie the legal sanction that is applied to debtor in case of non-execution.

The original features of the obligation have never been lost in full, but they have known some deviations over the century. Due to the fact it is a relationship between debtor and creditor, the Romans found it very difficult to accept debt and claim to be passed to another person. The creation of a real right cannot be contemplated by an obligation. The scope and the persons are definitively established and the Romans belatedly admitted that novation could take place, so that the scope of the new obligation was distinct from that of the old obligation.

The sources of the obligation are the legal acts and facts that give rise to it. In the ancient times of Roman law, they consisted of contracts and crimes, the contracts being rare because the production of family members covered all their material needs. The crimes gave rise to the obligation of the defaulter to pay compensation to the victim.

Any obligation has the effect of the voluntary execution of the service the debtor was bound to provide. This is why, the obligation occurs, unlike property, as a transition right, due to the fact it is extinguished by means of its execution. If the debtor fails to perform the service, the

[7] Emil Molcuț, *op. cit.*, page 160.

creditor can sue him, as the creditor's claim is protected by the positive law. There are also obligations not sanctioned by any action, as is the case of the so-called natural obligations.

There are cases when the debtor is exempt from performing the service if the execution became impossible. Natural obligations are imperfect, not protected by actions. Being devoid of action, these obligations are not enforceable, meaning that their execution cannot be required before the courts. The term of natural obligation, unknown in ancient Roman law, is found only in the classical antiquity, being gradually developed in the Post-Classical Era. Natural obligations are a creation of the legal advisers of the Imperial Era, determined by the activity of the slaves.

The slave had no legal personality and could not be bound by his contracts.

Positive law allowed slaves, within certain limits, a certain freedom to contract. Although they are not sanctioned by actions, natural obligations still have a legal existence. Their execution represents a payment identical to that of the civil ones, so that the payment made by the debtor cannot be claimed.

Natural obligations can be changed into civil obligations by means of a novation.

They may be opposed in compensation to other civil obligations and even encumbered with a personal or real guarantee. All these are evidence of the legal nature of these obligations, the execution of which represents a payment, not a donation.

The damages are established before the court, by forcing the debtor to compensate the creditor for the damage caused, the damage being the result of the fact that the debtor fails to fulfill his obligation or fulfills it improperly or with delay. In this case, the court will order the debtor to pay damages, namely an amount of money in order to repair the damage caused. The damages will be assessed by the court before which the debtor was sued. They can also be evaluated, in advance, by the parties.

In order to establish such damages, the ancient Roman law used an objective criterion, the damages representing only the material value of the non-executed services. As production and movement of goods were low, such criterion was sufficient.

During the classical antiquity, once with the development of the production, credit and trade, this criterion proved insufficient, being replaced by a subjective one, which puts the spotlight on the creditor. This criterion seeks to satisfy any interest of the creditor[8].

The cases not chargeable to the creditor are: force majeure and unforeseeable circumstances.

Force majeure (*vis maior*) shall mean the events that the debtor cannot oppose due to the fact they are caused by forces beyond his powers, such as: floods, earthquakes, etc.

Unforeseeable circumstances (fortuitus casus) shall mean those events that could be avoided by exceptional measures. If the debtor fails to fulfill his obligations due to such events, he may be held harmless. Notwithstanding, if he fails to fulfill his obligation, due to his fault, although it would perish later by unforeseeable circumstance or force majeure, the debtor would still be obliged to pay damages. The debtor continues to be liable for the loss even if it occurred by unforeseeable circumstance or force majeure, if he failed to provide the service within the deadline, due to his fault.

The cases of culpable failure are: the notice of default and negligence.

Mora is the culpable delay of the debtor who fails to perform his obligation.

[8] See also Vladimir Hanga and Mircea Dan Bocșa, *op. cit.*, page 286 and the following.

In order to be deemed in default, certain conditions are required, the summon being one of them. The creditor must demand payment from the debtor at the appropriate time and place. The existence of a deadline removes the obligation of a summon.

The claim must be enforceable, the enforceability being possible from the moment the claim arises, except the cases where the parties have not set a deadline.

Another condition is that the debtor's refusal to pay the debt is unfair due to the fact any refusal of the debtor to perform his obligation is culpable, unless the debtor proves that he had doubts on the existence of the claim.

The debtor in default shall bear the risks of the work, in other words, if the work is lost by unforeseeable circumstance or by force majeure, the debtor shall pay damages.

The creditor can also be deemed in default (mora creditoris) if he unreasonably refuses or delays to accept the payment which is due to him. The effects of the default of the creditor are the same, the risks pass on to him, the debtor being liable only for his will. The debtor's notice of default can cease if the debtor or a third party provides the creditor with the due benefit accompanied by the amount of the damages. Furthermore, the creditor's notice of default ceases if he accepts the payment and compensates the debtor for the damages suffered.

Another fact chargeable to the debtor is the negligence, which consists of an inadvertence, an inexcusable mistake in the execution of the obligation. Contrary to dilligence, contractual negligence that occurs in the performance of a contract must be distinguished from the tort[9].

It has been admitted in the classical antiquity that negligence can consist not only of a positive, commissive act, but also of an abstention, omission. Negligence is different from dolus due to the fact it entails an intentional fault, either commissive or omissive, of the debtor who was knowingly outside the rules of law regarding the execution of the contract.

The theory of negligence was gradually shaped in the Roman law, being definitively formulated in the Post-Classical and Byzantine Era. During the Era of Justinian, the negligence was of two kinds: slight negligence (levis) and gross negligence (lata).

In the ancient times, the discharge of obligations was governed by the correspondence principle. According to this principle, the obligation is extinguished by using a solemn act identical to the one that gave rise to it, but used in the opposite direction.

The physiognomy of personal rights is different from that of real rights in terms of capitalization. Therefore, real rights are capitalized by the exercise of certain attributes by the right holder, while personal rights are capitalized by the execution of the obligation by the debtor. Thus, real rights are, in principle, perpetual, while personal rights are temporary. Appeared in the field of patrimonial relationships between two determined persons, the rights of claim are extinguished by capitalizing the interests contemplated by the respective relationships.

There are voluntary and involuntary means of extinguishing obligations. Voluntary means entail a manifestation of will of the creditor and the debtor. In addition to the payment, which was currently used, the Romans also knew other voluntary means of extinguishing obligations: transfer in lieu of payment,

[9] For a detailed analysis of the theory of negligence, see Grigore Dimitrescu, *Drept roman. Volumul II – Obligațiuni și Succesiiuni*, Imprimeria Independența Publishing House, Bucharest, page 259.

remission submission, compensation, novation.

Involuntary means do not entail the will of the parties, which is why there are sometimes designated by the terms: forced means or necessary means. Obligations are involuntarily extinguished by: impossibility, non-execution, confusion, death, capitis de minutio and extinctive prescription.

3. Conclusions

As we have already shown, many of the current legal concept originate in Roman law, which succeeded in giving them a practical formulation. I find it very interesting that the Romans have achieved such performances, especially in the field of contracts. What I mean by saying this is that contracts have remained, for the most part, unchanged in terms of formation, elements and effects. As we have seen, current changes are formal and there are not changes in principle.

Therefore, this study proves the great importance of Roman law for education and life, due to the fact that, as Romanist say, there has been no other system of private law so thorough and capable of reaching the same high level of legal form of technique, throughout the entire history of society.

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THE LEGAL CAPACITY OF THE INDIVIDUAL TO INFLUENCE HUMAN RIGHTS INTERNATIONAL LAW

Natale Serón ARIZMENDI[*]

Abstract

The legal capacity of the individual in international law is of a complex nature. As a subject in the legal field, the natural person has allowed to reframe the prevailing orthodoxy of the international legal order through jurisprudence. Case by case, the individual is contributing to the structural transformation the world is embedded in by standing for their fundamental rights and freedoms before international courts. Drawing on this bottom-up understanding, this article sets out to discuss whether and to what extent are individual's complaints capable of having an impact on human rights legislation through case law. For this question to be answered, this article begins by providing an overview of the evolution that the international capacity of the human person has undergone in the last decades. This is followed by a comprehensive analysis of the individual complaint procedures foreseen by international legal orders, as well as a comparative research aimed at gathering insights on the access to justice granted to natural persons by European, African and American regional human rights protection systems. Next, the paper assesses the dichotomy between monism and dualism in the particular case of Spain, a debate that is gaining ground in the ambit of the direct application of international law in the domestic legislation. Finally, this article casts doubts on the legitimacy and binding power of human rights international treaties: it is hard to perceive these legal texts as mandatory if they are subjected to national authorities' willingness to incorporate international legal dispositions and resolution into internal legislation

Keywords: *Public International Law, Human Rights, Individual's access to justice, Human Rights Treaty Bodies, International Courts.*

1. Introduction

Every human being is vested with inherent fundamental rights that can be asserted before courts and are to be respected by every political organisation including the State.[1] Yet, the acknowledgment of these rights has not been gained without prior struggle. In fact, individual's access to international courts stands out as one of the greatest accomplishments of a collective effort. The relevance of the chosen topic rests on the critical progress that has been made on the development of the 'corpus juris' with the adoption of regional and international mechanisms that grant individuals the capacity to lodge a claim for human rights' violation.[2]

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[1] Antonio Augusto Cançado Trindade, "Chapter X: The Legal Capacity of the individual as Subject of International Law", in *International Law for Humankind towards a New Jus Gentium* (Netherlands: Martinus Nijhoff Publisher, 2010), 243.

[2] Soledad García Muñoz, "La capacidad jurídico-procesal del individuo en la protección internacional de los derechos humanos", *Revista de Relaciones Internacionales* 17 (1999): 15.

Important authors such as Philip Alston[3], Dinah Shelton[4] and Stian Oby Johansen[5] have echoed the proliferation of non-state actors' and their increasing leverage capacity. Even if the bulk of these scholars' literature has been particularly devoted to international organisations, these academics' work has paved the way for other non-traditional actors, including the natural person, to access to justice in the international arena. Soundly align with this diversification of power units and bottom-up approaches, Anne F. Bayesky [6], Sarah Joseph, Katie Mitchell & Linda Gyorki[7], among others, targeted natural person with the aim of empowering individuals with the tools and knowledge required to submit their complaints directly to the international accountability mechanism for a violation of their rights.

Using a doctrinal analysis and a qualitative approach, this contribution aims to build on the previously analysed literature and strives to examine individual's effective capacity to influence international human rights law by rising complaints before international courts and committees. To that end, this paper begins by setting forth an overall assessment of the progress that individual's active legitimation has undergone in the last decades. After the general overview of the historical context, the next section addresses the means that international schemes put at natural person's disposal in order to file a human rights' breach; this is followed by a comparative analysis of individual's legal capacity to stand for their rights under European, African and American regional human rights law. The fifth section focuses attention on Spain and the conflict that revolves around the direct application of international committees' resolutions. Finally, the last section provides a summary of the main findings and conclusions of my research.

2. Historical evolution

In recent decades, important steps had been taken towards individual complaining procedures. In essence, the development of the individual's direct access to justice reaffirms the position of the natural person as a subject of international human rights law, and provides a set of mechanisms that enable an important shift from classical international law to accommodate the new reality. [8] That said, this section will be looking into the ways in which the right to individual complaints has evolved in the international legal scheme.

Since the adoption of the Universal Declaration of Human Rights in 1948, new regional and international mechanisms for human rights' protection have emerged. The European Convention of Human Rights

[3] Philip Alston, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005).

[4] Dinah Shelton, *Committement and compliance: the role of non-binding norms in international legal system* (Oxford: Oxford University Press, 2000).

[5] Stian Oby Johansen, *The Human rights accountability mechanisms of international organizations* (Cambridge: Cambridge University Press, 2020).

[6] Anna F. Bayefsy, *How to complain to the UN human rights treaty system* (New York: Transnational Publisher, 2002).

[7] Sarah Joseph, Katie Mitchell, Linda Gyorki and Carin Benninger-Budel, "A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies", *OMCT Handbook Series* Vol. 4 (November 2006): 29-238.

[8] Ana Gemma López Martin, "La reclamación individual como técnica de control del respeto a los derechos humanos: ¿Comité de Derechos Humanos de Naciones Unidas o Tribunal Europeo de Derechos Humanos?", in *Cursos de Derechos Humanos de Donostia-San Sebastián,* (Bilbao: Universidad del País Vasco, 2005), 227.

(ECHR)[9] was one of those initial attempts to ensure the collective protection of human rights in the European region, still, it must be recalled that the enforcement of the Convention lies in the willingness of the Member states of the Council of Europe to comply. After the entry into force in 1953 of the ECHR, the safeguarding of fundamental rights kept gaining ground in the international agenda and up to 11 protocols to the Convention were adopted with the only propose of envisaging an all-inclusive protection and a wider range of unalienable rights under the Council of Europe and its European Court of Human Rights (ECtHR).[10]

Classical protection mechanisms were grounded on treaty commitments to which states were subjected. This traditional observance to human rights gradually shifted from 'weak' forms of protection, such as state report submissions, to a more comprehensive judicial implementation machinery that foresees the active and direct legitimation of the individual to report a human right violation against a contracting Member state.[11] The development of human rights protection mechanisms was also evidenced by the incorporation of new actors. A decade ago, non-state actors' presence in the legal domain was essentially residual and scholars' interest on the subject low. Nevertheless, this category has become increasingly powerful in a very short time frame, and for the foreseeable future, non-state actors are here to stay.[12]

The irruption of emerging global players in the legal picture urged the international community to work towards non-treaty-based methods including customary law and general principles, to ensure a far-reaching protection of human rights.[13] An example of these non-traditional instruments specifically targeted to unalienable rights was provided by the procedure foreseen in ECOSOC resolution 1503. The complaint system developed under this resolution was aimed at putting a halt to "particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission"[14]. To that end, the 1503 procedure stipulated a complaint mechanism characterised by the following three features: first, every State, including those States who were not parties of the UN, could be subject of a complaint submitted on the basis of a human right violation; second, a far-reaching and, therefore, flexible interpretation of the 'human right' construct was promoted; and, third, individuals alleging to be victims of a human right violation were entitled to file a complaint. [15]

[9] Council of Europe, "European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14", ETS 5 (4 November 1950).

[10] Frederik G. E. Sundberg, "Control of Execution of Decision Under the ECHR – Some Remarks on the Committee of Ministers' Control of the Proper Implementation of Decisions Finding Violations of the Convention", in *International Human Rights monitoring mechanisms: essays in honour of Jakob Th. Möller*, eds. Gudmundur Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan, and Alfred Zayas (The Hague: Kluver, 2001), 561.

[11] August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors", in *Non-State Actors and Human Rights*, ed. Philip Alston (Oxford: Oxford University Press, 2005), 37-89.

[12] Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?", in *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005), 5.

[13] Reinisch, "The Changing International", 37-89.

[14] Economic and Social Council Resolution 1503 (XLVIII), 48 U.N. ESCOR (No. 1A) at 8, U.N. Doc. E/4832/Add.1 (1970).

[15] Maxime E. Tardu, "United Nations Response to Gross Violations of Human Rights: The 1503 Procedure Syposium International Human Rights", *Santa Clara Law Review* 20 no.3 (January 1980): 561.

The 1503 procedure was only the point of departure for individual complaints. Ever since, the procedural capacity to internationally and regionally claim a violation of fundamental rights has only been strengthened. In view hereof, individual complains remain today as a key control mechanism to ensure the effective functioning of the human right protection system, since it provides to those who allege to be victims of a human right breach the entitlement to confront the State party of such violation by submitting a complaint under international law. In essence, individual direct access to justice entails a full-scale legal revolution.[16]

Individual complaints mechanism offers a unique opportunity for natural persons to stand for their rights. Yet, the excess of lawsuits filed to date has limited individual's access to international jurisdictions. The Council of Europe has attempted to address this problem through the adoption of a set of modifications included in Protocol nº 14 of May 13, 2004. Nevertheless, these measures have been subject of criticism as they may hinder individual's access to the ECtHR and therefore compromise the credibility of the European human rights protection system. Therefore, it should be born in mind that despite important advancements have been made in the field of human rights and their protection, there is still a lot to work on.[17]

3. How to file a human rights complaint through current international mechanisms

In spite of significant and positive developments in the safeguarding of fundamental rights, additional mechanisms are called for in order to guarantee a comprehensive framework that foresees the lodging of individual complaints.[18] Since the 1970s, the legal capacity of the individual has wound its way within international law to the point of being a matter of active concern among scholars in the legal field.[19] In the following, this section examines under which circumstances are natural persons entitled to formulate, directly, complaints before international and regional courts and committees.

3.1. Universal protection of human rights

The UN provides to individuals a set of mechanisms to vindicate their human rights under international law. Once national remedies have been exhausted, an individual has the legal capacity to bring a complaint before a UN Treaty Body or the UN Human Rights Council.

To begin with, the UN Human Rights Council has developed a special procedure for individuals who allege patterns of gross human rights violations to submit a complaint against a UN Member state. This procedure adopted by resolution 5/1 of 18 June 2007 is grounded on the previously analysed 1503 mechanism and is characterised by the principles of impartiality, objectivity and efficiency. This

[16] Lopez Martin, "La reclamación individual", 227.

[17] José Manuel Sanchez Padrón, "El Recurso Individual ante el Tribunal Europeo de Derechos Humanos: Evolución y Perspectiva", *Revista Europea de Derechos Fundamentales* 18, (second semester 2011): 169.

[18] García Muñoz, "La capacidad jurídico-procesal", 15.

[19] Oficina del Alto Comisionado de Naciones Unidas, "Procedimientos para presentar denuncias individuales en virtud de tratados de derechos humanos de las Naciones Unidas", *Folleto informativo* 7, no. 2. (2013): 1.

improved and victim-oriented mechanism consists of four stages. After an initial examination of the facts that allegedly constitute a human rights breach, the complaint is handed to the concerned State to respond. This first analysis is followed by a deeper examination carried out by the Working Group on Communications, which analyses if there are substantive grounds to consider a pattern of gross violations of human rights. Building on the information gathered and the recommendations made by the Working Group on Communication, the Working Group on Situations is responsible for presenting a report on the matter that will help the Council to determine how to proceed. Finally, the Council has to decide whether or not to continue considering the complaint and if further evidences or monitoring mechanisms are required. The Council may also recommend to OHCHR to lend technical assistance to the relevant Member state. [20]

A universal alternative mechanism to submit a complaint for human rights violation is the one foreseen in the UN Treaty Bodies. Provided that a country has accepted the competence of these committees to consider individual communications, a national of a State party who alleges to be a victim of a violation by a Member state, is entitled to lodge or formulate a complaint invoking the protection that these Treaty Bodies grant.

- International Covenant on Civil and Political Rights (ICCPR): This Convention foresees, in the first article of its Optional Protocol, the competence of this Treaty Body to receive communications from individuals.[21] According to 2016 data, the Committee counts with the highest number of communications received by the UN Human Rights Treaty Bodies (2,932 cases) since taking effect in 1976.[22]

- International Convention on the Elimination of all Forms of Racial Discrimination (CERD): The Committee on the Elimination of Racial Discrimination recognises in article 14 of the Convention that rules its activity, the CERD, the entitlement of this second body to consider individual communications.[23] Even if this Convention was adopted just a year after the ICCPR, it was not until the ten Member states agreed on the individual complaint procedure that the article 14 of the CERD became operative. [24] Since it went into operation in 1982, and up until 2018, the CERD had only adopted final opinions on the merits on 36 complaints.[25]

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT): In its article 22, the Convention contends that this Committee has the authority to examine complaints submitted by individuals.[26] According to the data published in the 2019 Report of the Committee against Torture, since the CAT entered into force in 1989, the

[20] UN Human Rights Council, "Frequently asked questions", accessed February 2, 2021, https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/FAQ.aspx.

[21] UN General Assembly, "Optional Protocol to the International Covenant on Civil and Political Rights", *United Nations Treaty Series*, vol. 999 (19 December 1966).

[22] Marc Limon, "Part II: Where are we today?" Policy Report: Reform of the UN Human Rights Petitions System, *Universal Rights Group* (January 2018): 20.

[23] UN General Assembly, "International Convention on the Elimination of All Forms of Racial Discrimination", *United Nations Treaty Series* vol. 660, (21 December 1965).

[24] Limon, "Part II", 12.

[25] UN General Assembly, "Report of the Committee on the Elimination of Racial Discrimination", *Seventy-fourth Session* Supplement no. 18 (August 2019), 18 A/74/18.

[26] UN General Assembly, "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", *United Nations Treaty Series* vol. 1465 (10 December 1984).

Committee has registered 1003 complaints, 192 of those complaints are pending and in 158 cases the Committee found a violation of the Convention[27].

- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): The Optional Protocol to this Convention envisages on its article 2 a communication procedure that provides individuals the opportunity to stand for their rights via the formulation of an individual complaint to the Committee.[28] Based on the data published in 2016, with 40 more State parties than committees such as the CAT, only 110 communications have been received by the CEDAW since its entry into force in December 2000.[29]

- Convention on the Rights of Persons with Disabilities (CRPD): The first article of the Optional Protocol to the Convention recognises the competence of the Committee to receive individual communications.[30] Despite being one of the latest Committees becoming operational (2008), it is endorsed by a large number of Member states (92); yet, in its first eight years functioning it only dealt with 40 communications.[31]

- The following three committees are the last procedures brought into operation: The Committee on Enforced Disappearances (CED); the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Rights of the Child (CRC). Three committees may consider communications lodged by natural persons that allege to be victims of a violation. The individual complaint procedure is foreseen in article 31 of the International Convention for the Protection of All Persons from Enforced Disappearance [32]; article 2 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights[33]; and article 5 of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure[34]. Based on the data published in 2016, these three committees received the lowest number of total communications: 20, 29 and 21 respectively. [35]

- Finally, although it has not yet entered into force, it is worth mentioning that complaints can be brought by an individual before the Committee on Migrant Workers (CMW). In this regard, article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides the CMW the competence to consider individual communications. Yet, in order to bring the analysed provision operational, a declaration from ten States parties recognising the individual complaint proceeding is required.[36]

[27] UN General Assembly, "Report of the Committee against Torture", *Seventy-fifth Session* Supplement No. 44. (2020),11 A/75/44.

[28] UN General Assembly, "Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women", *United Nations Treaty Series* vol. 2131 (6 October 1999), 83.

[29] Limon, "Part II", 21.

[30] UN General Assembly, "Optional Protocol to the Convention on the Rights of Persons with Disabilities", *Treaty Series*, vol. 2518 (13 December 2006), A/RES/61/106.

[31] Limon, "Part II", 21.

[32] UN General Assembly, "International Convention for the Protection of All Persons from Enforced Disappearance", Treaty Series, vol. 2716 (20 December 2006), 3, A/RES/61/177.

[33] UN General Assembly, "Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution / adopted by the General Assembly" (5 March 2009), A/RES/63/117.

[34] UN Human Rights Council, "Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: resolution / adopted by the Human Rights Council" (14 July 2011), A/HRC/RES/17/18.

[35] Limon, "Part II", 21.

[36] UN General Assembly, "International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families", (18 December 1990), A/RES/45/158.

Despite the formal process that the UN Human Rights Treaty system made available to individuals, it must be noted that the decisions that emanate from the obligations contained in the UN Treaty Bodies are not legally binding. UN resolutions cannot be enforced in internal courts and there is no international enforcement police that can guarantee the implementation of the decisions. Therefore, the fulfilment of the UN resolutions lies on the willingness of each contracting State to do so.[37]

3.2. European regional protection of human rights

At the emergence of the then called European Communities, now known as the EU, the regional organisation ability to perform was limited and targeted to economic cohesion and growth. The economic driving force behind the creation of the European Communities, as well as the presumption that the belonging of its Member states to the ECHR was enough guarantee of human rights protection, explains the failure to mention any norm related to fundamental rights in the original constitutional treaties of the EU. Yet, the declaration of the principle of direct effect and the prevalence of the Union law over those domestic legislations, where, unlike in the EU legal order, fundamental rights were envisaged, casted doubts on whether this primacy could lead to human rights violations.[38] In this regard, the Court of Justice of the European Union (CJEU) ruled in the landmark case Erich Stauder v City of Ulm – Sozialamt, judgment of the Court of 12th of November 1969, that the fundamental human rights are "enshrined in the general principles of Community law and protected by the Court".[39]

In view hereof, there are two regional binding legal texts in the EU, both competent to intervene in human rights matters: ECtHR, responsible for enforcing the ECHR; and the CJEU, in charge of guaranteeing the implementation of the Charter of Fundamental Rights of the European Union (CFREU).[40]

As previously mentioned, EU Member states are contracting parties of the ECHR; yet, the EU is not a member itself. Nevertheless, the accession of the Union to the Convention of the Council of Europe has been a subject of ongoing debate and visible steps have been taken towards this accession[41]: the Lisbon Treaty included in article 6 of the TEU that "the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms." It is, however, worth drawing attention on the sentence that concludes the referred legal disposition and states that "such accession shall not affect the Union's competences as defined in the Treaties." On account of the subjection to the ECtHR's resolutions that would imply the accession of the EU to the Convention,

[37] Anne F. Bayefsky, "Chapter II. Introduction to Complaints procedures", in How to Complain to the UN Human Rights Treaty System (New York: Transnational Publisher, 2002), 37-38.

[38] Ottavio Marzocchi "The protection of fundamental rights in the EU", European Parliament, accessed January 25, 2021, https://www.europarl.europa.eu/factsheets/en/sheet/146/la-proteccion-de-los-derechos-fundamentales-en-la-union-europea.

[39] Court of Justice of the European Union, "Erich Stauder v City of Ulm - Sozialamt.", (C-29/69), judgment of 12 November, 1969, ECLI:EU:C:1969:57.

[40] CARISMAND: Culture and Risk Management in Man-made and Natural Disasters, "Report on European fundamental rights in disaster situations", Horizon 2020 Programme Secure societies – Protecting freedom and security of Europe and its citizens Collaborative and Support Action (August 2016): 23.

[41] Isiksel Turkuler, "European Exceptionalism and the EU's Accession to the ECHR", European Journal of International Law 27, no. 3, (October 2016): 566.

the relevant authorities deemed right to submit a preliminary ruling to the CJEU. The Court filed against the accession of the EU in its Opinion 2/13, arguing a set of incompabilities between the two legal texts that need to be addressed.[42]

One of the incompatibilities alleged by the CJEU to oppose the accession of the Unión to the ECHR is that contained in articles 33 of the ECHR and 344 of the Treaty on the Functioning of the European Union (TFEU)[43]. The first of the mentioned legal precepts provides that "any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party". In this regard, article 55 of the same legal body adds an "exclusion of other means of dispute settlement" and states that "the High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention."

The CJEU interprets these cited dispositions as a possibility for the ECtHR to disregard the exclusive jurisdiction that according to the article 344 of the TFUE, the CJEU holds when deciding on any dispute between Member states on subjects of EU law that may, occasionally, interfere on ECHR related matters. A possible solution of the analysed incompatibility could be contained in a legal precept directly correlated with the object matter of analysis in this paper: the active legitimation of the individual. Article 35.2.b) of the ECHR stipulates on the admissibility criteria of the individual application, and states that the Court shall not deal with any application submitted under article 34 that "is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information." This last legal precept lays out the subsidiary jurisdiction of the ECtHR, which can only be invoked once national remedies have been exhausted, and provided that the case has not been brought to another legal international proceeding. In accordance with the terms set forth in article 344 of the TFEU and the subsidiarity foreseen in article 35 of the ECHR, the disputes that arise between EU Member states could continue to be solved by the CJEU. [44]

On account of relevant authorities' inability to bring to realisation EU's accession to the ECHR, contemporary mechanisms provide individuals with the capacity to vindicate their rights before the CJEU and the ECtHR. With regard to the CJEU, the so-called Van Gend en Loos case acknowledged "that community law has an authority which can be invoked by their nationals before those courts and tribunals".[45] To do justice to this claim the EU developed a set of protection mechanisms that entitle individuals to file human right complaints, including the action

[42] Court of Justice of the European Union, "Opinion 2/13 pursuant to Article 218(11) TFEU", judgment of 18 December, 2014, ECLI:EU:C:2014:2454.

[43] European Union, "Consolidated version of the Treaty on the Functioning of the European Union" (13 December 2007), 2008/C 115/01.

[44] Alexandros-Ioannis Kargopoulos, "ECHR and the CJEU: Competing, overlapping, or Supplementary Competences?", in *Eucrim the European Criminal Law Associations' Forum*, *3*, (2015): 98.

[45] Court of Justice of the European Union, "Van Gend en Loos v. Nederlandse Administratie der Belastingen", (C-26/62), judgment of 5 February, 1963, ECLI:EU:C:1963:1.

for annulment (article 263 TFEU), the action for failure to act (article 265 TFEU) and the action for damages (article 268 TFEU). Nevertheless, it is important to underline that an individual does not have the capacity to take action neither against another natural or legal person nor a Member state of the Union before the CJEU.[46]

The fourth paragraph of the cited article 263 of the TFEU provides that any natural or legal person may "institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.". In view hereof, the Case European Union Copper Task Force v Commission states that the cited legal precept "must be interpreted in the light of the fundamental right to effective judicial protection" as it is framed within "a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the European Union judicature".[47] It is yet to mention that according to a study published by Takis Tridimas and Gabriel Gari, between 2001 and 2005, from a total of 340 appeals for annulment, only 30 of these actions were filed by natural persons; moreover, of these 30 actions, only 2 were successful. That said, it is worth noting that those two actions that were estimated were filed by a scholar and a former MEP. This evidences that the chance of a proceeding instituted by a natural person with no specific knowledge and previous experience in the EU being successful is very low.[48]

Opposite to article 263 of the TFEU, which demands a direct or individual concern from "non-privileged applicants", article 265 of the TFEU provides a broader locus standi by stipulating that any natural or legal person may "complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion". To conclude with the litigation before the CJEU by private parties, the judgment of the Court of 10th of July, 1985 (CMC Cooperativa muratori e cementisti and others v Commission of the European Communities) ruled that any person who claims to have been injured by acts or conducts of an EU institution must "have the possibility of bringing an action, if he is able to establish liability, that is, the existence of damage caused by an illegal act or by illegal conduct on the part of the community"[49]. Even if this right cannot be deduced from the wording of articles 268 and 340 of the TFEU, it can be derived from the manner these dispositions are foreseen in the Treaty and the CJEU case-law.[50]

As far as the ECtHR is concerned, the ECHR stipulates in its article 34 that "the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in

[46] "Derechos fundamentales", Portal Europeo de e-Justicia, accessed January 18, 2021, https://e-justice.europa.eu/content_fundamental_rights-176-es.do.

[47] Court of Justice of the European Union. "Case European Union Copper Task Force v. Comission" (C-384/16 P), judgment of 13 March, 2018, ECLI:EU:C:2018:176.

[48] Takis Tridimas and Gabriel Gari, "Winners and Losers in Luxembourg: A Statical Analysis of Judicial Review before the European Court of First Instance (2001-2005)", *European Law Review* 2, (April 2010): 159-160.

[49] Court of Justice of the European Union, "Cooperativa muratori e cementisti and others v Commission of the European Communities" (case C-118/83), judgment of 10 July, 1985, ECLI:EU:C:1985:308.

[50] Directorate General for International Policy, "Analysis of locus standi before the CJEU", *Standing up for your right(s) in Europe. Locus Standi. European Parliament* (August 2012), 35.

the Convention or the Protocols thereto." [51] In this regard, the case-law of the ECtHR has established that complaints grounded 'in abstracto' violations of the ECHR are not admissible.[52] Yet, there may be exceptions to the general rule, this was evidenced in the case Klass and Others v. Germany, where the ECtHR accepted "that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him."[53]

Further limitations to individual complaints before the ECtHR are foreseen in article 35 of the Charter which enumerates a set of admissibility criteria: first, the Court requires to the domestic remedies being exhausted before bringing the case to the ECtHR; second, the Court will not deal with any application that is either anonymous or it has been already considered by the ECtHR or other international court; third, the Court must declare inadmissible an individual application if it is in breach with the Convention or the applicant has not suffered prejudice; and, finally, the ECtHR is competent to reject, at any stage of the proceeding, an application that is estimated to be objectionable under this article 35 of the ECHR.

4. Individual complaints before different regional jurisdictions

In the previous section, the evolution of the most effective human rights protection system was analysed: the European system. The effectiveness of this regional scheme is largely due to the ECtHR, a judicial body with compulsory jurisdiction. Although the ECtHR is not the only European Court that issues binding judgements, it is, without a doubt, the regional body that provides the greatest human rights protection mechanisms in the judicial domain.

In accordance with the terms set forth in previous sections, this part provides a comparative analysis of the American and African human right protection systems in relation to the European counterpart, with special attention given to the individual complaint procedure foreseen by each regional system.

4.1. American human rights protection

The American Convention on Human Rights (ACHR) is the pillar that upholds the Inter-American system for the protection of human rights. The first article of the Convention obliges every States subscribing to the Pact of San José (November 1969) to respect the rights and freedoms recognised in the Convention, and to guarantee that every human being subjected to the jurisdiction of State parties holds, without any discrimination, the ability to exercise the rights and freedoms provided therein.[54] The supervisory and surveillance bodies of the Inter-American protection system are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (IACtHR), both bodies share competence with respect to matters relating

[51] López Martin, "La reclamación individual", 249.

[52] European Court of Human Rights, "Practical Guide on Admissibility Criteria", *Council of Europe* (April 2020), 10.

[53] European Court of Human Rights, "Case of Klass and Others v. Germany", (Application no. 5029/71), judgment of 6 September 1978.

[54] Eduardo Ferrer Mac-Gregor Poisot and Carlos María Pelayo Möller, "Capítulo 1: Enumeración de deberes", in *Convención Americana sobre Derechos Humanos*, ed. Christian Steiner and Marie Christine Fuchs (Berlin: Konrad Adenauer Stiftung, 2019), 54-55.

to the fulfilment of the commitments made by the contracting parties of the Convention.[55]

Framed within these control mechanisms, individual complaints lie at the heart of the scheme. Article 44 of the Convention provides that any person "may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."[56] Unlike the ECHR, the ACHR does not require to certify the status of victim in order to submit a communication; hence, this legal provision offers the opportunity to any individual to file a complaint against a contracting State party.[57] Although it provides a broader entitlement than the Convention of the Council of Europe, communications submitted under the ACHR are still subjected to the admissibility requirements of the American Convention's article 46, criterions that are very similar to the ones established in the previously anlaysed article 35 of the ECHR.

Once an individual complaint has been lodged and a decision in this regard is ruled by the IACtHR, the judgment is binding not only among the parties involved in the dispute but also 'erga omnes partes', with national authorities, ex officio, being subjected to it. The binding character of the jurisprudence responds to the role that the Court plays as the preeminent interpreter of the ACHR and guarantor of the effective protection of human rights in the American region.[58] In this regard, the IACtHR states that those judgments that have the force of res judicata "should necessarily be complied with since it entails a final decision, thus giving rise to certainty as to the right or dispute under discussion in the particular case, its binding force being one of the effects thereof."[59]

4.2. African human rights protection

The Charter of the Organization for African Unity (OAU) does not assign a primary role to the promotion and protection of human rights. Thus, on June 27, 1981, the African Charter on Human and Peoples' Rights (ACHPR) was adopted in Banjul, with the aim of guaranteeing a human rights protection framework in the African region. Almost two decades later, the OAU aimed to enhance the African Charter establishing a judicial body capable of adopting binding decisions: the African Court of Human and Peoples' Rights (ACtHPR).[60] With 31 State parties having ratified the protocol that established the ACtHPR, this judicial organ was brought into operation in 2004.[61]

As with the previously analysed two regional human rights safeguarding systems, ACPHR envisages in its article 55 an

[55] Felipe Gonzalez Morales, "La Comisión Interamericana de Derechos Humanos: antecedentes, funciones y otros aspectos", *Anuario de Derechos Humanos* (2009): 35.

[56] Organization of American States (OAS), "American Convention on Human Rights, Pact of San Jose", (22 November 1969).

[57] Michelo Hansungule, "Protection of Human Rights Under the Inter-American System", in *International Human Rights monitoring mechanisms: essays in honour of Jakob Th. Möller*, eds. Gudmundur Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan, and Alfred Zayas (The Hague: Kluver, 2001), 700.

[58] Sergio García Ramírez, "The Relationship between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions", *Notre Dame Journal of International & Comparative Law, 5*: Iss. 1, Article 5. (2015): 136.

[59] Inter-American Court of Human Rights, "Case of Acevedo-Jaramillo et al. v. Peru", judgment of February 7, 2006.

[60] Lopez Martin, "La reclamación individual", 253.

[61] "The African Court in Brief", African Court on Human and People's Rights, accessed January 25, 2021, https://www.african-court.org/wpafc/basic-information/#establishment.

individual complaint proceeding by which members of the Commission may consider "communications other that those of States Party".[62] Nevertheless, the consideration of these communications is subjected to what is established in article 56 of the Charter: the communication cannot be anonymous or be written in "disparaging or insulting language"; it must be consistent with the Charter of the Organisation; it cannot be "based exclusively on news disseminated through mass media" or deal with "cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter"; and, finally it has to be submitted once local remedies are exhausted and within the period of time set by the Commission. In this regard, articles 6 and 34.6 of the Court's Protocol add further admissibility criteria and establish the requirement of States making a declaration agreeing on the competence of the ACtHPR to cases brought by an individual before the Court be considered. As of 2011, only 11 African countries accepted the competence of the Court to examine natural persons' complaints.[63]

To conclude with this section, it is key to analyse the compliance of the analysed regional mechanisms in order to evaluate the effective impact of individual complaints. Data evidences disparities between the three examined regions: ECtHR's decisions enjoy the highest rates of implementation, 56%; second is the IACtHR with 20% of its decisions being implemented, and, finally, in third place, is the African region, with a mere 14 %. Yet, this data cannot be fully interpretated without taking into account the flexibility that each court provides in the field of remedies. The ECtHR, for example, dispenses a wide scope of action for internal systems to redress the violation; opposite, the IACtHR lays out specific remedies that hinder the full implementation of the solution.[64]

5. Case Study: Spain - monism and dualism

Since international law broadens its scope of application, it should not come as a surprise an increase of tensions between national and international legislations.[65] As a means to address these problems, the academia has developed two major theoretical perspectives to approach the incorporation of international law into domestic legal order: monism and dualism. On the one hand, monism is grounded on the principles of unity and subordination. This first category postulates that both legal systems belong to a single body of law where legal norms are subordinated in a hierarchical order and the international law prevails. On the other hand, dualism is based on the premise that international law and domestic law are two equal, independent and separate systems. Unlike in the monist approach, there is no relationship of dependence or subordination, hence, in order to an international norm being applied

[62] Organization of African Unity (OAU), "African Charter on Human and Peoples' Rights (Banjul Charter)", 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

[63] "About us", African Commission on Human and Peoples' Rights, accessed January 25, 2021, https://www.achpr.org/afchpr/.

[64] Vera Shikhelman, Implementing Decisions of International Human Rights Institutions – Evidence from the United nations Human Rights Committee. *The European Journal of International Law*, 30, 3 (2019): 758.

[65] Mattias Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", *The European Journal of International Law* 15, no.5, (2004): 915.

in the domestic field, a prior incorporation is required.[66]

The Spanish Constitution foresees in the first paragraph of its article 96, that international treaties shall form part of the internal legal order on the condition that they are validly concluded and officially published.[67] Given the fact that publication of an international treaty is an essential requirement for international treaties to be directly applicable in Spain, it has been long discussed whether the system of national implementation is either monist or dualist. Professor Araceli Mangas Martin stands for a middle ground between these two models of integration and advocates a moderate monism. This approach is based upon the position that international treaties bind Spain from their entry into force in the international order and do not require transposition to be part of domestic law, only their publication.[68]

There is a constant caselaw of the Spanish courts which argues in favour of the automatic reception of international treaties.[69] A different, albeit related, matter is the internalisation of resolutions and opinions that emanate from international committees such as the Human Rights Committee. The relevance of these Committees rests on the role they play in treaty interpretation. When it comes to addressing the nature and scope of the dispositions foreseen in the treaties these Committees are grounded on, the contribution of these bodies is key. It is, thus, difficult to understand Spanish legal authorities' reluctance to frame these Committees' opinion and resolutions under article 10.2 of the Spanish Constitution.[70]

Article 10.2 of the Spanish Fundamental Norm complements the integrating role provided in article 96 of the same legal body. The tenth article of the Constitution establishes that "the principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain." This disposition involves an obligation as to the result to be achieved: the meaning and extent attributed to constitutional rights and freedoms by the Spanish Public Powers must align or correspond to the ones attributed by international treaties. In this line, Cesareo Gutiérrez, Professor of International Law and International Relations in the University of Murcia, lays down the dichotomy of the obligation of result: Gutiérrez argues that this imperative relates to a negative strand or prohibition, as it bans any restricting interpretation of constitutional rights and freedoms that is not compatible with what has been stated in the international human right treaties ratified by Spain; yet, the obligation introduced by article 10 also demands public authorities to agree on the most favourable interpretation, the one that

[66]Yezic Carrillo De La Rosa and Oscar Manuel Ariza, "Teorias aplicables al derecho internacional e interamericano de derechos humanos", *Revista Jurídica* 11, no. 21 (April 2018), 116-119.

[67]Spain. Cortes Generales. "The Spanish Constitution". *BOE*, 311, 1978.

[68]Araceli Mangas Martin, "La Recepción del Derecho Internacional por los ordenamientos internos", in *Instituciones de Derecho Internacional Público*, ed. Manuel Diez de Velasco (Madrid: Tecnos, 2013), 251.

[69]Mangas Martin, "La Recepción del Derecho Internacional", 256.

[70]Maria Eugenia Torres Costas, "Nacimiento de artículo 12 de la Convención de Naciones Unidas sobre Derechos de las personas con dicapacidad: El cambio de paradigma", in *La capacidad jurídica a la luz del artículo 12 de la Convención de Naciones Unidas sobre los Derechos de las personas con Discapacidad* (Madrid: Agencia Estatal Boletín Oficial del Estado, 2020), 109.

guarantees the greatest effectiveness of international regulations.[71]

The reticence of Spanish legal authorities to assimilate under the analised article 10.2 the decisions and opinions of important international committees is evidenced in verdicts such as the Resolution number 141/2015, of February 11, of the Spanish Supreme Court, ruling that states that the UN Human Rights Committee "does not have a jurisdictional nature, so that its resolutions or opinions lack the ability to create a doctrine or precedent that could bind this Criminal Chamber of the Supreme Court". A similar line of interpretation was adopted by the Constitutional Court in its resolution number 70/2002 of the 7th of April, and by the Spanish Supreme Court among which the following judgements are noteworthy: the resolution of the 9th of March of 2011 (cassation appeal number 3862/2009), the resolution of the 25th of July of 2002 (revision appeal number 69/2001) and the resolution of the 9th of November of 2001 (cassation appeal number 28/2001). [72]

However, the 17th of July of 2018, the Supreme Court adopted the resolution number 1263/2018 and broke with the previous trend of jurisprudence by agreeing on the application of an opinion dictated by a committee of which Spain is a contracting party. The Supreme Court ruling argues that "the decisions of the international bodies that are related to the execution of the decisions of the international control bodies, whose competence Spain has accepted, once they are received in the terms of article 96 of the Fundamental Norm, form part of our internal legislation and enjoy the hierarchy that this article -supralegal rank- and article 95-infra-constitutional rank- confer on them"[73].

The Spanish court built this last resolution on the argument that the refusal to comply with the committee's opinion would entail a violation of the applicant's human rights, and added that "although neither the Convention nor the Protocol regulate the executive nature of the Opinions of the CEDAW committee, it cannot be doubted that they will be binding / mandatory for the State party that recognized the Convention and the Protocol, since Article 24 of the Convention provides that 'States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.' " The Supreme Court also invoked articles 1[74] and 7.4[75] of the Optional Protocol to reinforce the competence of the committee recognised by Spain.

The arbitrariness of the Spanish Supreme court regarding the assimilation of

[71]Cesáreo Gutiérrez Espada, "La Aplicación en España de los Dictámenes de Comités Internacionales: La STS 1263/2018, un Importante Punto de Inflexión", *Cuadernos de Derecho Transnacional* 10, no. 2 (September 2018): 847.

[72] Torres Costas, "Nacimiento de artículo 12", 110.

[73] Original text: "las decisiones de los órganos internacionales relativas a la ejecución de las decisiones de los órganos internacionales de control cuya competencia ha aceptado España forman parte de nuestro ordenamiento interno, una vez recibidas en los términos del artículo 96 de la Norma Fundamental, y gozan de la jerarquía que tanto este artículo -rango supralegal- como el artículo 95 -rango infraconstitucional- les confieren".

[74] Article 1 of the Optional Protocol "A State Party to the present Protocol ("State Party") recognizes the competence of the Committee on the Elimination of Discrimination against Women ("the Committee") to receive and consider communications submitted in accordance with article 2".

[75] Article 7.4 of the Optional Protocol "The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.".

these committees' decisions and opinions jeopardises the right to a fair trial, and hinders the confidence of the public in the judicial system. In this regard, the ECtHR argued in the case Beian v. Romania (No. 1) that this lack of consistency "is in itself contrary to the principle of legal certainty, a principle which is implicit in all the articles of the Convention and constitutes one of the basic elements of the rule of law".[76] Further, the same court added in the case Nejdet Şahin and Perihan Şahin v. Turkey that "if justice is not to degenerate into a lottery, the scope of litigants' rights should not depend simply on which court hears their case." [77] Therefore, a clear set of guidelines is fundamental in order to guarantee a coherent approach and avoid any disassociation between State's internal and external activity. [78]

For the sake of human rights protection, these action guidelines should align with the examined last ruling of the Supreme Court, the resolution of the 17th of July of 2018. It is important to bear in mind that as analysed in a previous section (third section), most of the mechanisms provided by the UN are grounded on a group of international committees that are responsible for monitoring compliance with human rights treaties. Therefore, it can be concluded that if the Spanish legal authorities do not agree on a line of interpretation that favours first, the internalisation of Treaty Body decisions within domestic legislation, and, second, their capacity to set precedent, the individual complaint procedures lose its raison d'être.

6. Conclusions

Upon closer analysis, this paper concludes that the capacity of the individual to influence human rights international law is rather limited. Despite positive advancements in the field of human rights, the complexity that entails reporting a breach of fundamental rights and the incongruencies that arise in the assimilation of these decisions within domestic law, call for further developments in the guarantee of those inherent rights of which every human being is holder.

Building on the Universal Declaration of Human Rights (1948), the world has gradually evolved to accommodate a new era characterised by a growing awareness of the human rights field, and a greater presence of the natural person as a subject of international law. Classical schemes are progressively shifting towards comprehensive mechanisms that are better at delivering protection by envisaging the participation of the natural person in the law-making process.

That said, the UN as well as the European, American and African conventions offer to every human-being means to vindicate their rights through individual complaints, yet, all these mechanisms are subjected to the initial willingness of the State to commit to these conventions, as well as the prior exhaustion of domestic remedies. That said, it is important to bear in mind that the lack of an international enforcement body and the reluctancy of national courts to assimilate international committees' opinions weakens the strength of many international resolutions, leaving, once again, to the

[76] European Court of Human Rights, "Case of Beian v. Romania (No. 1)" (Application no. 30658/05), judgment of 6 December 2007.

[77] European Court of Human Rights, "Case Nejdet Şahin and Perihan Şahin v. Turkey" (Application no. 13279/05), judgment of 20 October 2011.

[78] Mangas Martin, "La Recepción del Derecho Internacional", 250.

discretion of nation-states the observation of the obligations that emanate from these international decisions. Thus, although significant steps have been made in favour of the natural person, much needs to be done, at both regional and global level, to improve the access to justice of every individual in line with the principle of equity of arms.

Central to meet this need of improvement is the development of a common consistent approach in the national reception of international resolutions and decisions. Spanish authorities' lack of consensus leads to inconsistencies on law-making and may lead to a breach of the right of a fair trial. Hence, the findings of this research evidence the relevance of setting a clear and stable criterion that favours the direct assimilation of international committees' opinions. This agreed line of interpretation would grant greater congruency and therefore, further protection.

The legal capacity of the individual is a matter of an active concern, therefore future research is needed to address the many questions that arise as the debate moves forwards. Will, in the future, individuals themselves be able to claim their legal capacity by vindicating their role before international courts? Or will they always be constrained by an international structure that favours the State? Given the progress that the natural person has made in the global legal scheme, will individuals be granted access to the International Court of Justice? And in a regional level, will the adhesion of the EU to the ECHR limit the discretion in the enforcement of the ECtHR's resolutions by assimilating this court's judgments within EU law, and, thus, reinforcing their binding character? If this adhesion does not occur, will the individual be entitled to bring a case against a Member state before the CJEU? All these questions that emerge from the challenging nature of the subject are issues for future research to explore.

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CJEU'S JURISDICTION AFTER BREXIT

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Abstract

The study explores the main provisions included in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community regarding the Court of Justice of the European Union's Jurisdiction after Brexit, with emphasis on the preliminary ruling procedure. The scope of the analysis is to determine the nature and the limits of CJEU's jurisdiction to decide matters of EU law involving the United Kingdom and the effects of such decisions, pronounced after the end of the transition period.

Keywords: *Court of Justice of the European Union; jurisdiction; preliminary ruling procedure; withdrawal from the European Union; Brexit.*

1. Brexit

The United Kingdom of Great Britain and Northern Ireland (UK) is the first and only Member State of the European Union (EU) to exercise its right to withdraw from this international integration organisation, a choice commonly known as Brexit.

Following a referendum held on 23 June 2016, UK notified its intention to leave the EU to the European Council on 29 March 2017[1], as required by Article 50 of the Treaty on European Union[2]. This marked the beginning of negotiations for the conclusion of an agreement setting out the arrangements for UK's withdrawal. The treaty was necessary in order to facilitate UK's transition to the non-Member State status in an orderly manner, to safeguard the important interests of the other Members States, to protect the rights of the EU citizens residing and working in the UK and of the UK citizens residing and working in the EU[3].

The negotiations lasted approximately one and a half years. The process was sometimes very complicated, a no-deal withdrawal remaining always as an alternative. It was doubled by the need to establish a framework for UK's future relationship with the EU, a political engagement for further negotiations on subject matters not covered by the agreement.

Despite the difficulties, on 17 October 2019, the parties succeeded in concluding the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union

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[1] For the possibility to revoke this notification unilaterally, by a notice addressed to the European Council in writing, see judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraphs 73-75.

[2] The Treaty on European Union (TEU) was signed at Maastricht on 7 February 1992 and entered into force on 1 November 1993. Article 50 was introduced in TEU by the Treaty of Lisbon, signed on 13 December 2007, in force since 1 December 2009. For the development of the withdrawal process in the UK, see Horspool, Humphreys, Wells-Greco, 2018, p. 10-11 and Foster, 2019, p. 11-13.

[3] See Fuerea, *Brexit – Limitele negocierilor*…, 2016, p. 106-112 şi *Brexit – trecut, prezent* …, 2016, editorial.

and the European Atomic Energy Community (Withdrawal Agreement), a detailed treaty on the legal, economic and social consequences of Brexit.

The Withdrawal Agreement included a transition period that started on the date of its entry into force, 1 February 2020, and ended on 31 December 2020[4]. The scope was to provide more time for the states' administrations and nationals to prepare and adapt.

During the transition period EU law continued to apply in and to the UK, but without UK's participation in EU institutions and governance structures[5].

Once the transition period ended, EU law ceased to apply in its entirety to the UK and the Withdrawal Agreement came into full effect, governing the legal relationship between UK and the EU.

The study shall analyse the main provisions of the Withdrawal Agreement that recognize a residual jurisdiction for the Court of Justice of the European Union (CJEU)[6] in matters involving the UK or its nationals after Brexit and that institute the means to enforce the CJEU's rulings.

Applying these new legal rules in good faith is important for both the UK and the EU, if the efforts to build a new and a better relationship are to be fruitful. Also, since these new rules impact both the public and the private sectors of the states involved, EU and UK nationals, state authorities and legal practitioners need to be aware of their content and of their legal effects, especially in cross-border litigation.

This synthetic analysis aims to facilitate the dissemination of information on the subject matter of CJEU's jurisdiction, to put in the spotlight recent developments, research of established authors and relevant case law, in order to contribute to doctrinal debate.

Effective withdrawal of a Member State from the EU is an unprecedented legal event and what happens in practice after the transition period represents a subject of great interest for EU legal literature.

2. The jurisdiction of the CJEU with respect to the UK after the entry into force of the Withdrawal Agreement

2.1 The CJEU's jurisdiction during the transition period

With the few exceptions provided in the Withdrawal Agreement, during the transition period the UK continued to be bound by EU law as any other of the Member States[7]. The EU's institutions, bodies, offices and agencies exercised the same powers with respect to the UK as before 1 February 2020. In particular, CJEU had full jurisdiction over UK, including with regard to the interpretation and application of the Withdrawal Agreement.

However, the effects of such competence reach beyond the end of the transition period, especially in what ongoing judicial cooperation in civil and commercial matters and pending cases before CJEU are concerned.

For example, the UK continues to apply Regulation Rome I[8] to contracts concluded before the end of the transition

[4] Art. 126 of the Withdrawal Agreement.

[5] Art. 127 of the Withdrawal Agreement.

[6] CJEU is composed at the present moment of the Court of Justice and the General Court. For further details, see Coutron, 2019, p. 130-138.

[7] Art. 127 paragraphs 1 and 3 of the Withdrawal Agreement.

[8] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ L 177, 4.7.2008, p. 6).

period and Regulation Rome II[9] to events giving rise to damage, if the events occurred before the end of the transition period.[10]

The provisions of several EU Regulations and Directives regarding jurisdiction of national courts, recognition and enforcement of judicial decisions, service of judicial and extrajudicial documents, taking of evidence, legal aid and mediation continue to apply after Brexit in respect of legal proceedings instituted and documents received before the end of the transition period.[11]

CJEU continues to have jurisdiction to rule on pending direct actions, including appeals, and preliminary references, a solution we envisaged and advocated for in a previous study.[12] Our main arguments supporting this view were that the UK was a EU Member State at the time the proceedings were registered, the facts of the cases occurred prior UK's effective withdrawal from the EU and the solution would be in agreement with the principle of legal certainty and with the principle of the protection of legitimate expectations, since the parties have little or no influence on the length of the procedure before the CJEU.

The case is considered to be pending if the proceedings were brought by or against the UK and if the requests from UK courts were made before the end of the transition period. The date of reference is the moment at which the document initiating the proceedings has been registered by the registry of the Court of Justice or of the General Court, as the case may be.[13]

Thus, if the document was sent to the CJEU before 31 December 2020, but it arrives at the Court and it is registered after this date, the case cannot be considered pending. It shall fall under the category of new cases and it may be deemed inadmissible under the provisions of the Withdrawal Agreement on new cases brought before the CJEU.

The Court of Justice affirmed its jurisdiction in pending cases in a judgment pronounced during the transition period. The Court stated: "it follows from Article 86 of the Withdrawal Agreement, which came into force on 1 February 2020, that the Court of Justice is to continue to have jurisdiction in any proceedings brought against the United Kingdom before the end of the transition period, such as the present action for failure to fulfil obligations."[14]

The Court's position is based on the new treaty, but it is in alignment with its case law from the period between the official notification of UK's intention to leave the EU and the date of entry into force of the Withdrawal Agreement, a period in which the UK was, in principle, under the complete jurisdiction of the CJEU, in all its aspects and it had to give full effect to all of CJEU's rulings, just like any other EU Member State.[15] The Court decided that the UK's mere intention to leave the EU, communicated in accordance with Article 50 TEU, does not have the effect of suspending the application of EU law in UK until the

[9] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (OJ L 199, 31.7.2007, p. 40).

[10] Art. 66 of the Withdrawal Agreement.

[11] Art. 67-69 of the Withdrawal Agreement.

[12] Larion, 2017, *A Brief Analysis…*, p. 85-94.

[13] Art. 86 of the Withdrawal Agreement.

[14] Judgment of 14 May 2020, *Commission v United Kingdom*, C-276/19, EU:C:2020:368, paragraph 28. The case concerned the common system of value added tax and the regime applicable to terminal markets.

[15] See Larion, 2016, *Brexit's Impact…*, p. 76-84.

time of actual withdrawal[16] and cannot justify, in itself, the refusal or postponement of the execution of a European arrest warrant issued by the UK[17].

In conclusion, CJEU's jurisdiction in pending judicial proceedings shall extend after the end of the transition period, with no time limit stipulated in the Withdrawal Agreement. It is reasonable to presume, based on CJEU's existent case law with respect to the withdrawal process, that the Court shall continue to assess consistently all of the legal grounds for its judicial powers in order to ensure that EU law is observed in and by the UK, for as far as the UK is, in one way or another, still bound by EU law.

2.2 The CJEU's jurisdiction after the end of the transition period

The new cases CJEU may rule upon after Brexit are mainly infringement actions and preliminary references.[18]

Within four years after the end of the transition period, the European Commission or a Member State may bring an infringement action[19] against the UK. This may be the case if the UK has failed to fulfil an obligation under the EU treaties or under the Withdrawal Agreement before the end of the transition period and if the UK does not comply with decisions adopted by institutions, bodies, offices and agencies of the EU before the end of the transition period or in procedures initiated during the transition period, addressed to the UK or to natural and legal persons residing or established in the UK. The UK retains the right to bring infringement procedures against a Member State for the same period. The CJEU has jurisdiction over all such cases.[20]

For actions concerning UK and EU citizens rights[21] commenced at first instance before a court in the UK within eight years from the end of the transition period, the CJEU has jurisdiction to give a preliminary ruling, where the UK court considers that a decision on the question is necessary to enable it to give judgment in that case.

In what UK's participation to the EU's budget for the years 2019 and 2020 and UK's participation to EU's programmes, activities and previous financial perspectives are concerned, the CJEU retains jurisdiction to decide infringement actions and preliminary references in respect to the applicable EU law referring to this subject matter in the Withdrawal Agreement.[22]

Of course, the CJEU has jurisdiction to interpret the Withdrawal Agreement, where a court of a Member State refers for a preliminary ruling to the Court of Justice.[23]

The Withdrawal Agreement institutes a procedure of dispute settlement between the EU and the UK on its interpretation and application. If the parties cannot settle a dispute informally and in good faith, any party may require the establishment of an

[16] Judgment of 29 November 2018, *Alcohol Countermeasure Systems (International) v EUIPO*, C-370/17 P, EU:C:2018:965, paragraphs 115-118. The Court of Justice decided an appeal against the General Court's decision in an action for annulment pronounced in the matter of an EU trade mark. See also judgment of 23 January 2019, *M.A. and Others*, C-661/17, EU:C:2019:53, paragraph 54.

[17] Judgment of 19 September 2018, *RO*, C-327/18 PPU, EU:C:2018:733, paragraph 62.

[18] CJEU's jurisdiction to rule on the basis of art. 263 of the Treaty on the Functioning of the European Union (TFEU) is provided in art. 95 paragraph 3 of the Withdrawal Agreement.

[19] Art. 258-261 TFEU. For a synthesis of the main actions before the CJUE, see Fuerea, 2016, *Dreptul Uniunii Europene…*, p. 65-123. For further details, see Craig and De Búrca, 2017, p. 481-677.

[20] Art. 87 and art. 95 paragraph 1 of the Withdrawal Agreement.

[21] Part Two of the Withdrawal Agreement.

[22] Art. 160, art. 136 and art. 138 paragraphs 1 and 2 of the Withdrawal Agreement.

[23] Art. 161 of the Withdrawal Agreement.

arbitration panel.[24] Where a dispute submitted to arbitration raises a question of interpretation of a concept of EU law or of a provision of EU law referred to in the Withdrawal Agreement or a question of whether the UK has complied with its obligation to respect the binding effects of CJEU's decisions, the arbitration panel must request the CJEU to give a ruling on that question. The CJEU has jurisdiction to give such a ruling, which shall be binding on the arbitration panel.[25]

The separate Protocol on Ireland/Northern Ireland, annexed to the Withdrawal Agreement, provides for CJEU's jurisdiction over its interpretation and application.[26]

The procedural rules to be followed in pending cases and in new cases are the ones governing the procedure before CJEU.[27]

The UK has the right to intervene, to participate and to be represented in all proceedings and requests for preliminary rulings which concern it until the last judgment or order rendered by CJEU has become final.[28]

It must be emphasized that the UK accepted CJEU's jurisdiction post Brexit for the specific matters indicated above for a nonspecific time-limit. Only the beginning of some proceedings is to take place within a certain period of time, but these proceedings may continue until the last decision becomes final.

2.3 Enforcement of the CJEU's decisions post Brexit

The UK is no longer a member of the EU and, unless otherwise provided by the Withdrawal Agreement, the CJEU lacks competence, ratione personae, to receive, hear and solve cases involving the UK and the UK in no longer under the obligation to observe the Court's rulings.

However, judgments and orders of the CJEU handed down before the end of the transition period, as well as those pronounced in proceedings referred to in the Withdrawal Agreement, shall have binding force in their entirety on and in the UK, that is the UK is obliged to take the necessary measures to comply with that decision, which is enforceable under the UK's civil procedural rules.[29]

Article 158 paragraph 2 of the Withdrawal Agreement also stipulates that the legal effects in the UK of preliminary rulings on citizens' rights shall be the same as the legal effects given pursuant to Article 267 TFEU in the EU and its Member States.

The rule is that UK still has to respect CJEU's decisions that produce erga omnes effects and those concerning the UK or one of its nationals given before the end of the transition period and all the decisions pronounced after the end of the transition period as a result of CJEU's jurisdiction enshrined in the Withdrawal Agreement.

The main legal means of enforcement of CJEU's decisions given on the basis of the residual competence conferred upon it after Brexit include: infringement actions[30],

[24] For a presentation of the dispute settlement procedure, see Chalmers, Davies and Monti, 2019, p. 417-419 and Larik, 2020, p. 7-16.

[25] Art. 174 paragraph 1 of the Withdrawal Agreement.

[26] Art. 12 paragraph 4 of the Protocol.

[27] Art. 88 and art. 161 of the Withdrawal Agreement.

[28] Art. 90, art. 91, art. 161 paragraph 3 and art. 174 paragraph 7 of the Withdrawal Agreement.

[29] Art. 89 of the Withdrawal Agreement corroborated with art. 280 and art. 299 TFEU.

[30] Art. 87 and art. 160 of the Withdrawal Agreement. For example, the European Commission has started an infringement procedure against the UK on15 March 2021. The Commission sent a letter of formal notice to the UK

preliminary ruling procedure[31], the use or arbitration[32] and the supervision of the UK by an independent Authority[33].

We consider that, because of its role as an instrument of dialogue between the Court of Justice and judicial bodies from EU Member States, the preliminary ruling procedure[34] might prove to be the most effective means of proper interpretation and application of the Withdrawal Agreement by its parties. Unlike the infringement procedure, which implies the idea of a sanction, preliminary rulings are meant to facilitate fulfilment of obligations and to prevent improper application of the law.

The EU, its Member States and the UK may decide to extend CJEU's jurisdiction further, by concluding a contract and empowering the CJEU to rule on direct actions based on contractual liability[35]. Another possibility would be for the UK to become a party to existing international treaties, such as the Agreement on the European Economic Area (EFTA), which authorizes courts of the EFTA Member States to refer questions to the Court of Justice on the interpretation of an Agreement rule[36].

At last, a new international treaty could be concluded to further develop UK's relationship with the EU[37], which could extend CJEU's jurisdiction over the UK to actions inspired by the CJEU's current powers or to innovative, outstanding competence. Such a new treaty could offer answers for the need to find better means of enforcement of the CJEU's decisions if the ones provided already prove to be insufficient.

Even if it appears unrealistic at this moment, the UK could even rejoin the EU on the basis of Article 50 paragraph 5 TEU, by starting over the process of accession[38].

3. Conclusions

The rather long and sinuous journey of the United Kingdom of Great Britain and Northern Ireland from declaring its intention to leave the European Union until the date of effective withdrawal has ended. Following the effort of all the parties involved, this unprecedented process has led to the conclusion and full entry into force of a Withdrawal Agreement.

Although it is no longer a part of the EU, the UK has chosen an orderly Brexit and it continues to be under the jurisdiction of the Court of Justice of the European Union in pending cases, as well as in a number of new cases that may be lodged with the Court after the end of the transition period, on 31 December 2020.

for breaching the substantive provisions of the Protocol on Ireland and Northern Ireland, as well as the good faith obligation under the Withdrawal Agreement, according to: https://ec.europa.eu/commission/presscorner/detail /en/IP_21_1132 (last accessed on 20 March 2021).

[31] Art. 158 and art. 160 of the Withdrawal Agreement.

[32] Part Six Title III art. 167 and the following of the Withdrawal Agreement.

[33] Art. 158 paragraph 1 of the Withdrawal Agreement.

[34] Article 267 of TFEU.

[35] Article 272 of the TFEU.

[36] Article 107 of the Agreement on the European Economic Area and Protocol 34 annexed to it. For other options in defining the EU – UK relationship after Brexit, see Berry, Homewood, Bogusz, 2019, p. 308 and Schütze, 2018, p. 871-884.

[37] For example, the EU and UK concluded a Trade and Cooperation Agreement, provisionally applicable since 1 January 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2020:444:TOC (last accessed on 20 March 2021).

[38] Art. 50 paragraph 5 TEU: "If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49."

It is difficult to foresee all of the complex legal and practical issues which may arise out of the interpretation and application of the Withdrawal Agreement with respect to the CJEU's powers over the UK. The study has focused on the analysis of the main provisions regarding CJEU's jurisdiction after, as well as during the transition period, since the Court has kept, in principle, full jurisdiction in and to the UK until the end of the transition period, with the result that, depending on the length of the proceedings, pending cases may extend well beyond the loss of EU Member State status by the UK.

Also, the study has approached the issue of the means to enforce the CJEU's decisions stipulated in the Withdrawal Agreement, amongst which the preliminary ruling procedure continues to be an important instrument.

The research aims to contribute to the existing doctrinal works on this latest development of EU law, to be a synthetic source of information about CJEU's jurisdiction post Brexit, of use to legal practitioners, and to inspire further studies on this subject matter.

Further research works could be conducted on the specific rights of EU citizens living and working in the UK after the transition period and of UK citizens residing in the EU, on the detailed jurisdiction of the CJEU with respect to citizens' rights and on the future relationship between the EU and the UK in the areas not covered by the Withdrawal Agreement.

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THE RESPONSE OF THE SPANISH CRIMINAL LAW TO FORCED LABOUR PRACTICES IN TRANSNATIONAL CORPORATIONS

Demelsa BENITO-SÁNCHEZ[*]

Abstract

This paper aims at studying the criminal liability according to the Spanish law of transnational companies for imposing forced labour on citizens in other countries. The objective is to elucidate whether, under the Spanish law, it is possible to penalise Spanish companies that carry out these practices abroad, practices that are clearly harmful to fundamental rights. For criminal prosecution in Spain to be possible, certain requirements must be met. First, it is necessary that the Spanish Criminal Code acknowledges that legal persons can be held liable. This is a reality since year 2010, although there are a number of problems in attributing responsibility to the parent company for the conducts carried out abroad by the subsidiary. Second, it is required that the Spanish Criminal Code expressly provides that legal persons may be responsible for this type of offences (offences against workers" rights). This is not currently foreseen by the Spanish Criminal Code. Third, it is needed that the Spanish courts are able to prosecute extraterritoriality these criminal offences. This is not possible at the moment according to the current Spanish legislation. Given the situation described, this paper proposes the necessary legal reforms to make it possible to penalise Spanish companies that impose forced labour practices abroad since these practices entail violations of fundamental rights.

Keywords: *criminal responsibility, forced labour, slavery, Spanish Criminal Code, transnational corporations.*

1. Introduction

The aim of this paper is to study the criminal liability of transnational companies under Spanish law for the imposition of forced labour on citizens in other parts of the world[1]. It seeks to answer the question of whether, under Spanish law, criminal penalties can be imposed on Spanish companies that engage in these practices outside of the national borders. Three requirements must be met to make this possible. Firstly, the legal system must recognise that legal persons can be criminally liable. Unlike common law systems, the legal systems in continental Europe have not traditionally recognised this. However, several European and Latin American states have recently included this possibility in their legislation. In the case of Spain, the criminal liability of legal persons was incorporated into the Criminal Code through a reform carried out in 2010. Secondly, under Spanish law, the Criminal Code must expressly state which offences can be attributed to a legal person, as it is governed by a closed list (*numerus clausus*) principle. A major problem arises here, as the Spanish Criminal Code does not currently include violations of workers" rights in this list of offences. Thirdly, Spanish law

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[1] This paper is one of the results of the research project "Hacia un modelo de justicia social: alternativas político-político criminales" ("Towards a model of social justice: criminal policy alternatives"), granted by the Ministry of Science, Innovation and Universities of the Government of Spain, refence RTI2018-095155-A-C22.

would need to allow the extraterritorial prosecution of violations of workers" rights committed abroad by Spanish companies. While the current legislation does not allow for this, it makes it possible to prosecute human trafficking for exploitation (including labour exploitation). In other words, Spanish law is not totally foreign to the actual problem that exists at present, but it only provides a criminal law solution to a specific facet of this problem.

In light of the situation described above, this paper aims to offer a proposal *de lege ferenda*, for improving the law in the future, to make it possible to criminally sanction violations of workers" rights by Spanish companies in other countries under Spanish law. This is a response to a practice that is unfortunately common around the world today, as shown by the data that will be provided in the following section. With this proposal *de lege ferenda*, Spain would comply with the supranational mandates that have been developed in this area, such as, for example, the Guiding Principles on Business and Human Rights, adopted by the United Nations in 2011.

It is essential to ensure that national legal systems can address human rights violations such as forced labour and similar practices, as transnational corporations are not subject to international jurisdiction (e.g., the International Criminal Court). Therefore, it is for states to provide an effective response to this problem within their domestic laws[2]. In particular, the focus is on the home states of transnational corporations since, as experts have pointed out, there may be corruption problems in the host state that allow multinationals to circumvent the rules and emerge unscathed from criminal proceedings if there is a prosecution[3].

2. Conceptual framework. Some figures on forced labour worldwide

The term "modern slavery" has gained prominence in recent times. It has been used in numerous scientific studies[4], as well as in some national laws and regulations[5]. The International Labour Organisation (ILO) includes forced labour and forced marriage within this term. The term "forced labour" encompasses acts perpetrated either by the state or by the private sector, as well as the sexual exploitation of adults and children, whether in prostitution or pornography[6].

Forced labour was defined as early as 1930, in the ILO Forced Labour Convention (Convention No. 29). Article 2 defines this term as "all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily". The Convention obliged ratifying States[7] to

[2] Ambos, K. "The Foundations of Companies' Criminal Responsibility under International Law". Criminal Law Forum, 29 (2018): 564; García Mosquera, M. "La personalidad jurídica de empresas transnacionales como requisito de la responsabilidad penal del art. 31 bis CP. Consideraciones en el contexto de la unión europea". *Estudios penales y criminológicos*, vol. XXXIII, (2013): 325-326; Pérez Cepeda, A.I. Acuerdos de libre comercio y el sistema internacional de Derechos Humanos en el marco del Derecho penal internacional. In *Liber amicorum. Estudios jurídicos en homenaje al Prof. Dr. Dr. H.c. Juan Mª Terradillos Basoco* (617-636). Valencia: Tirant lo Blanch, 2018; Pérez Cepeda, A.I. "Hacia el fin de la impunidad de las empresas transnacionales por violación de los Derechos Humanos". *Revista Penal*, 44, (2019): 141.

[3] Muñoz de Morales Romero, M. "Vías para la responsabilidad de las multinacionales por violaciones graves de Derechos humanos". *Política Criminal*, vol. 15, n. 30 (2020): 948.

[4] See, among others, Scarpa, S. *Trafficking in Human Beings. Modern Slavery*. New York: Oxford University Press, 2008.

[5] United Kingdom, *Modern Slavery Act*, 2015. Australia, *Modern Slavery Act*, 2018.

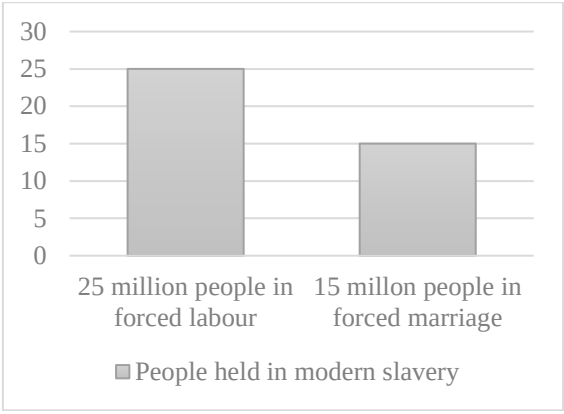
[6] International Labour Office, Walk Free Foundation & International Organization for Migration. *Global Estimates of Modern Slavery*. Geneva (2017), 17.

[7] Spain ratified the Convention on the 29th August 1932. Romania ratified it on the 28th May 1957.

abolish all forms of forced labour (Article 1), a mandate that was repeated in the Abolition of Forced Labour Convention, adopted by the same organisation in 1957 (Convention No. 105)[8] and, more recently, in the Protocol to the Forced Labour Convention, 1930, adopted in 2014[9]. Slavery, however, has further implications. The 1926 Slavery Convention (as amended in 1953) defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised" (Art. 1) and requires its abolition (Art. 2).

Despite the supranational mandate for the abolition of forced labour practices and slavery, which began almost a century ago, the figures are still devastating today, even though they may not reflect the "unrecorded figures" on this type of crime because many of these practices, by definition, remain hidden from society. At present, the ILO estimates that just over 40 million people in the world (that is, more than twice the population of Romania), are held in conditions of modern slavery (see Graphic 1). This means that 5.4 people in every 1000 are victims of this type of practice. One in four enslaved persons are under the age of 18. Available data also show that slavery has a significant gender bias (see Graphic 2): 71% of victims are either women or girls. They account for 99% of victims in the sex industry sector, and 58% in all other sectors[10].

Graphic 1. People held in modern slavery around the world



Source: International Labour Office, Walk Free Foundation and International Organization for Migration (2017). *Global Estimates of Modern Slavery*. Ginebra

The phenomenon of modern slavery could be considered to be eradicated in Spain, a country with a well-established democracy and rule of law. In fact, the Spanish Constitution, approved in 1978, did not declare slavery abolished or prohibited, probably because at that time it was believed that slavery no longer existed. However, the Global Slavery Index estimates that 105,000 people in Spain are subjected to modern slavery, which means that just over 2 people out of every 1000 experience slavery conditions in Spain[11].

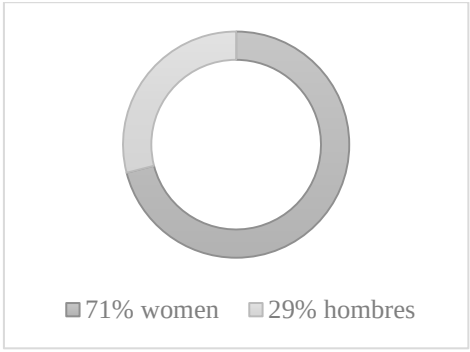
[8] Spain ratified the Convention on the 6th November 1967. Romania ratified it on the 3rd August 1998.

[9] Spain ratified the Convention on the 20th September 2017. Romania has not ratified it yet (last check 21.3.2021).

[10] International Labour Office, Walk Free Foundation & International Organization for Migration, *op. cit.*, 9-10.

[11] Walk Free Foundation. Global Slavery Index. 2018.

Graphic 2. Distribution of forced labour between men and women



Source: International Labour Office, Walk Free Foundation and International Organization for Migration (2017). *Global Estimates of Modern Slavery*. Ginebra

The above data show that slavery practices exist all over the world and that policies are needed to eliminate them. These policies include those that can be adopted in criminal law, although criminal law is certainly not the only way to combat these practices, and sometimes it is not even the most effective way. In fact, as early as 1930, the Forced Labour Convention set out that "the illegal exaction of forced or compulsory labour should be punishable as a penal offence" and penalties should be imposed by states accordingly (Article 25). The treatment of forced labour in Spanish criminal law is explained below.

3. Forced labour as a criminal offence in the Spanish Criminal Code

Title XV (Articles 311-318) of the Spanish Criminal Code regulates violations of workers" rights. It criminalises a wide range of behaviours such as imposing illegal conditions on a worker, simultaneously employing people without a work permit or without registering them with the Social Security authorities, certain behaviours related to labour discrimination, the infringement of health and safety rules that poses serious risk to workers" life or health, etc. (see Table 1). When these behaviours are less serious, they are sanctioned by administrative law[12], a less harming and stigmatising branch of law. Specifically, these sanctions are provided for in the *Law on Labour Offences and Sanctions*[13] outside of criminal law in Spain. However, recent decades have seen an expansion of punitive measures in various forms, both in Spain and elsewhere[14]. In particular, in the area of so-called criminal labour law, this expansion has been characterised by including in the punitive provisions some behaviours that are already sanctioned in non-criminal regulations. This poses a serious problem, because they have largely been incorporated without providing for any additional levels of harm, which would make it possible to distinguish an administrative infringement from a criminal offence.

Despite the fact that criminal labour law has undergone a notable expansion, there are certain truly serious conducts that are not expressly criminalised in the Spanish Criminal Code. These are slavery and forced labour practices. Admittedly, these practices would fall under Art. 311.1º of the Criminal Code, which reads as follows:

"Prison sentences of between 6 months and 6 years and a fine of between 6 and 12 months will be imposed on:

[12] Fuentes Osorio, J. L. "¿El legislador penal conoce la normativa sancionadora laboral? Superposición del ilícito penal y el administrativo-laboral. El ejemplo del tráfico ilegal de mano de obra". Estudios Penales y Criminológicos, vol. XXVI (2016): 553-603, passim.

[13] Passed on the 4th August 2000.

[14] Silva Sánchez, J.M. La expansión del Derecho penal. Aspectos de Política criminal en las sociedades postindustriales. Montevideo – Buenos Aires: BdeF, 2006, passim.

1. Those who, by means of deceit or abuse of a situation of need, impose working or Social Security conditions on the workers in their service that are detrimental to suppress or restrict the rights that are granted to them by law, collective bargaining agreements or individual contracts".

Even though these behaviours are covered by Article 311.1º above, the fact is that this provision includes wide-ranging practices in terms of their degree of harm to workers" rights. This is why the penalties are so broad (the prison sentence ranges from 6 months to 6 years). The inclusion of disparate violations in the same article means that the full extent of slavery and forced labour is little recognised, and legal provisions are not consistent with the situation of our time, as shown by the data in section 2 above. There is such lack of knowledge of the actual situation by the Spanish legislator that the concepts of slavery and forced labour are not even mentioned in these articles of the Criminal Code. Professor Terradillos has noted that there is an important paradox here, as the Criminal Code requires slavery and forced labour practices to be encompassed within more "minor" criminal offences such as the imposition of unlawful working conditions in Article 311.1º, and charged cumulatively with other offences such as offences against moral integrity, illegal detentions, and human trafficking for exploitation, among others. This allows for relatively long prison sentences being given, "but causes the boundaries of very serious crimes, namely, imposing slavery and forced labour, to be blurred"[15].

[15] Terradillos Basoco, J.M. Aporofobia y plutofilia. La deriva jánica de la política criminal contemporánea. Barcelona: J.M. Bosch Editor, 2020, 140.

Table 1. Violations of workers" rights in the Spanish Criminal Code

Art. 311.1º	Imposing unlawful conditions
Art. 311.2º	Simultaneously employing a number of workers without registering them with the social security system or without a work permit
Art. 311.1º	Maintaining unlawful conditions
Art. 311.4º	Engaging in the above behaviours resorting to violence or intimidation
Art. 311bis	Repeated hiring of foreign nationals without work permits/Hiring of minors without work permits
Art. 312.1	Workers" trafficking (transfer, placement)
Art. 312.2 (I)	Recruiting or luring people out of employment by offering misleading or false employment or working conditions
Art. 312.2. (II)	Employing foreign nationals without a work permit under conditions that impair, suppress, or restrict rights
Art. 313	Promoting migration by simulating a contract or placement or similar deception
Art. 314	Engaging in serious discrimination and failing to restore equality under the law following a formal notice or administrative sanction
Art. 315	Preventing or limiting the rights to organise a union and take industrial action/Coercing to go on strike
Art. 316 – 318	(Intentional and reckless) violations of health and safety regulations

Source: Spanish Criminal Code

In addition to this situation, which makes it impossible to have an adequate appreciation of slavery or forced labour practices, there is another inconsistency in the Spanish Criminal Code. In 2010, human trafficking was incorporated into Spanish legislation as a separate criminal offence, pursuant to the applicable supranational regulations[16]. The new offence was inserted into Art. 177bis of the Criminal Code. It defines the human trafficking in the same way as supranational regulations do, including the well-known three elements:

[16] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (15 November 2000); Council of Europe Convention on Action against Trafficking in Human Beings (16 May 2005); Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (Official Journal L 101, 15 March 2011). See Pérez Cepeda, A. I. & Benito Sánchez, D. *Trafficking in Human Beings. A Comparative Study of the International Legal Documents.* Groningen/Amsterdam: Europa Law Publishing, 2014.

- the conducts (inducing, transporting, etc.),
- the means (violence, intimidation, deception, etc.)
- and the purposes (exploitation of various kinds).

These purposes literally include "imposing forced labour or services, slavery or practices similar to slavery, servitude or begging" (Art. 177bis.1.a). This reference is incongruous insofar as these practices do not appear as such in any other provision of the Criminal Code. They could be included in the scope of Art. 311.1, but as mentioned above, it also includes other types of less severe conduct.

The crime against humanity was incorporated into the Spanish Criminal Code in 2003, as required by the Rome Statute of the International Criminal Court. It also punishes subjecting a person to slavery or keeping them in slavery, provided that the acts are perpetrated "as part of a widespread or systematic attack against the civilian population or a part thereof" (Art. 607bis of the Criminal Code). The same provision also sets out a definition of slavery as "the situation of a person over whom another person exercises, albeit de facto, all or some of the attributes of the right of ownership, such as buying, selling, lending, or exchanging such person". The same inconsistency is found here, since slavery as such is not criminalised elsewhere in the Spanish Criminal Code.

In view of the above, there is a certain lack of coherence on these matters in the provisions of the Spanish Criminal Code. It is therefore necessary to incorporate the offences of subjection to slavery and forced labour separately into the Criminal Code. This would be the starting point for holding Spanish companies accountable for such practices.

4. Corporate criminal liability for forced labour practices under Spanish law: unfinished business

Organic Law 5/2010 of 22 June 2010 introduced the criminal liability of legal persons into Spanish criminal law, in line with other legal systems and supranational requirements, especially those of the Organisation for Economic Co-operation and Development. Since the entry into force of the Organic Law, companies can be held liable for certain criminal offences if the requirements in Art. 31bis of the Criminal Code are met. Specifically, Art. 31bis encompasses two events:

1. A legal person can be criminally liable when the offence is committed by its legal representative or a person who individually or collectively has decision-making, organisational or controlling authority.
2. A legal person can be liable when the offence is committed by a person under the authority of the aforementioned.

In both cases, the offence must be committed in the name or on behalf of the entity, in other words, within the scope of duties of the subject in question, and it must be carried out for the direct or indirect benefit of the company. In the second case, a further requirement is that the offence must be enabled by a serious breach of the duties of supervision, monitoring and control by the persons referred to in point (1), considering the circumstances of the case. If the legal person is found guilty of a criminal offence, the applicable penalties are those mentioned in Table 2.

Table 2. Penalties applicable to legal persons under Spanish law

Art. 33.7 Spanish Criminal Code	a) Fine by quotas or proportional
	b) Dissolution of the legal person. The dissolution shall cause definitive loss of its legal personality, as well as of its capacity or act in any way in legal transactions, or to carry out any kind of activity, even if lawful.
	c) Suspension of its activities for a term that may not exceed five years.
	d) Closure of its premises and establishments for a term that may not exceed for five years.
	e) Prohibition to carry out the activities through which it has committed, favoured or concealed the felony in the future. Such prohibition may be temporary or definitive. If temporary, the term may not exceed fifteen years.
	f) Barring from obtaining public subsidies and aid, to enter into contracts with the public sector and to enjoy tax or Social Security benefits and incentives, for a term that may not exceed fifteen years
	g) Judicial intervention to safeguard the rights of workers or creditors for the time deemed necessary, which may not exceed five years.

Source: Spanish Criminal Code

Having explained the cases of attribution of liability to legal persons, it should also be borne in mind that legal persons cannot be liable for *any* of the offences provided for in the Spanish Criminal Code, but only for a closed list of offences (*numerus clausus*), which is shown in Table 3. It is therefore necessary to ensure that the Criminal Code expressly states that the legal person can be liable for the offence in question. This list of offences is essentially composed of so-called white-collar crimes, with one remarkable exception: violations of workers" rights, which do not appear in this list. This has been criticised by the doctrine[17] because the context in which workers" rights can be violated is typically within a corporation. Moreover, violating these rights undoubtedly benefits the company, which is a requirement for the attribution of criminal liability to a legal person under the Spanish system, as mentioned above.

In summary, under Spanish law, companies cannot be held liable for criminal violations of workers" rights. There is an urgent need to reform the Criminal Code to ensure that criminal liability can be attributed to legal persons for this type of offences. It would be sufficient to insert a final paragraph to Art. 318 specifying this.

In addition to the above, further reform of the Criminal Code would be needed whereby it would expressly recognise that the parent company is responsible for what the subsidiary company does in terms of violations of workers" rights in the territory

[17] See, among others, Agustina Sanllehí, J.R. Delitos contra los derechos de los trabajadores. In *Lecciones de Derecho penal económico y de la empresa. Parte general y especial*, directed by J.M. Silva Sánchez.Barcelona:

where it operates[18]. Under the current regulations, Spanish criminal law could not be applied to a subsidiary company whose registered office is in a different state and which has a different legal personality, as none of the principles for the application of Spanish criminal law on a territorial basis would be met, as will be discussed in the following section. To solve this, some authors[19] have proposed considering both parent and subsidiary as a single economic unit, as is already the case for the purposes of competition law penalties in the European Union. Ever since the Judgment of the Court of Justice of the European Union of 10 September 2009 was rendered (case C-97/08 for, Akzo Nobel and another v. Commission), where the subsidiary was wholly owned by its parent company, it has been possible to attribute liability to parent companies for infringements of antitrust rules committed by their subsidiaries. In other words, priority has been given to the financial situation rather than to the legal avenue to solve the problem.

Table 3. Offences attributable to a legal person under the Spanish Criminal Code

Art. 156 bis (trafficking in human organs),
Art. 177.7 bis (trafficking in human beings),
Art. 189 bis (child pornography),
Art. 197 quinquies (discovery and revelation of secrets),
Art. 251 bis (swindling),
Art. 258 ter (foiled executive proceeding),
Art. 261 bis (punishable insolvency),
Art. 264 quater (damages on informatics data and programs),
Art. 288 (offences against intellectual and industrial property, the market and consumers),
Art. 302.2 (money laundering),
Art. 304 bis (illegal funding of political parties),
Art. 310 bis (fraud),
Art. 318 bis.5 (offences against the rights of foreign citizens),
Art. 319.4 (offences against the organisation of the territory),
Art. 328 (environmental crime),
Art. 343.3 (offences related to nuclear energy and ionising radiations),
Art. 348.3 (offences of risk caused by explosives),
Art. 366 (offences against public health),
Art. 369 bis (drug trafficking),
Art. 386.5 (forgery of currency),
Art. 399 bis.1 (forgery of credit cards, debit cards and travellers" cheques),

Atelier, 2020, 415; Gil Nobajas, S. Protección penal del trabajador y responsabilidad penal de personas jurídicas. In *Direitos Humanos e Mediaçao*. Carviçais. Lema d'Origem, 2019, 83; Hortal Ibarra, J.C. Delitos contra los derechos de los trabajadores. In *Manual de Derecho penal económico y de la empresa. Parte general y especial*, directed by M. Corcoy Bidasolo y V. Gómez Martín (511-553). Valencia: Tirant lo Blanch, 2016.

[18] Pérez Cepeda, A.I. "Hacia el fin de la impunidad…", *op. cit.*, 142. The criminal liability of parent companies for failure to prevent crimes committed by their subsidiaries is a topic gaining attention at the international level with respect to other areas such as anti-bribery policies. See Dell, G. *Exporting Corruption 2020: Assessing Enforcement of the OECD Anti-Bribery Convention*. Transparency International, 2020, 25-26.

[19] Nieto Martín, A. Derecho penal de la empresa y económico europeo e internacional. In *Derecho penal económico y de la empresa*, coauthors De la Mata Barranco, Dopico Gómez-Aller, Lascuraín Sánchez, Nieto Martín. Madrid: Dykinson, 2018, 82-83; Pérez Cepeda, A.I. "Hacia el fin de la impunidad…", *op. cit.*, 142, footnote 81.

Art. 427 bis (bribery), Art. 430 (trafficking in influence), Art. 435.5 (embezzlement), Art. 510 bis (hate incitement), Art. 580 bis (terrorisim)

Source: Spanish Criminal Code

5. The application of Spanish criminal law to offences committed by Spanish legal persons operating in other countries

The classic principle of application of a state"s criminal law is the principle of territoriality, which means that the courts of that state have jurisdiction to prosecute offences committed within its territory. Even when this principle was originally applied in modern liberal states it had some exceptions, such as, for example, crimes committed by a state"s national in another state (active personality principle). Additional principles were developed over time to address new situations such as transnational crimes (e.g., piracy) and crimes against the international community (e.g., genocide), in particular, the principle of universal jurisdiction.

In Spanish law, these matters are governed by Article 23 of the *Organic Law of the Judiciary* (hereinafter LOPJ)[20]. Under current regulations, even if violations of workers" rights were included in the list of offences for which a legal person can be held liable, it would not be possible to prosecute that legal person if the offence had been perpetrated in a different state, as is the case discussed in this paper regarding the imposition of forced labour on workers in a state other than Spain by Spanish companies. This is so because the principle of universal jurisdiction contained in Article 23.4 of the LOPJ is only applicable to a closed list of offences, which does not include violations of workers" rights.

In view of the above, in order for Spanish courts to be able to prosecute and eventually convict a Spanish company for violations of workers" rights perpetrated in a foreign territory, it would be necessary to extend the jurisdiction of Spanish courts[21]. Specifically, the legislative should amend Article 23.4 of the LOPJ that would incorporate the violations of workers" rights into this list of offences. Similarly to the provisions in paragraph m) of Article 23.4 of the LOPJ with respect to human trafficking, it should be noted that Spanish courts have jurisdiction to hear criminal cases related to offences committed by both Spaniards and non-Spaniards outside the national territory that could be classified as violations of workers" rights provided that "the proceedings are directed against a legal person, company, organisation, group or any other type of entity or group of persons whose headquarters or registered office are in Spain".

6. Conclusions

It can be concluded from the above that current Spanish legislation does not allow for criminal sanctions to be imposed on Spanish companies that engage in violations of workers" rights in other states. This

[20] Passed on the 1st July 1985.
[21] Pérez Cepeda, A.I. "Hacia el fin de la impunidad…", *op. cit.*, 142.

means that these corporations go unscathed after committing serious human rights violations, such as the imposition of forced labour. This situation contradicts the supranational mandates that have been developed in recent years.

The lack of a supranational jurisdiction that could be responsible for addressing these serious human rights violations perpetrated by transnational corporations makes it necessary for states to take action in their domestic law. In the case of Spain, a number of legislative reforms would be necessary.

- Firstly, slavery and forced labour practices should be given an independent treatment in the Criminal Code, so as to enable the imposition of penalties that are proportional to the gravity of the offenders" crimes.

- Secondly, this type of offence should be expressly included in the list of offences that can be attributed to a legal person, since under Spanish criminal law, legal persons cannot be held liable for all the offences contained in the Criminal Code, but only for those expressly indicated.

- Thirdly, it would be necessary to consider that the Spanish parent company and its subsidiary form a single economic unit and therefore, the acts committed by the subsidiary abroad are attributable to the parent company, having fulfilled the rest of the requirements of Article 31bis of the Criminal Code.

- Finally, it would be necessary to extend the jurisdiction of the Spanish courts, regulated in the *Organic Law of the Judiciary*, to allow for violations of workers" rights committed by Spanish legal persons abroad to be prosecuted and criminal penalties imposed, as is the case for human trafficking crimes.

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BUSINESS EMAIL COMPROMISE FROM THE CRIMINAL LAW PERSPECTIVE

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Abstract

With nearly 85% of worldwide organizations being hit at least once, the Phishing attack has become one of the most significant cybercrime vectors that affect the business environment annually, with great loss in terms of money, assets, financial and personal data, confidential information and intellectual property rights. Hackers evolved both in sophistication and persistence of the methods they use in performing these attacks, while 97% of the users are still unable to roughly or properly recognize a simple phishing email. Amongst different types of Phishing, the Business Email Compromise variant represents one of the most employed tool by attackers for hacking human minds, and manipulate victims into performing various actions that eventually cause them loss. Most of the national legislations already have legal provisions to cope with this kind of menace, but the trend is to treat such scam as cyber-related offence or crime, based on the simple reason that it is performed by information technology means. While the judicial practice in this scenario is often ripped off by different interpretations of the existing legal provisions available, this material tries to come up with the most suitable criminal indictment solutions for this fraud, highlighting both technical and legal aspects that may help judges, prosecutors, lawyers, law enforcement agents and other legal practitioners in properly solving their cases.

Keywords: *business email compromise, fraud, scam, phishing, social engineering, criminal law, cybercrime, IT law, CEO fraud.*

1. The concept of Phishing

Phishing has risen as a unique threat in the cyber environment, a menace that succeeds to bind together technology, psychology, sociology and communication skills, in exploiting the weakest link of the human defense and personal security: the mind.

Acting as a Social Engineering (SE) attack, Phishing is far more dangerous when directed to target a specific destination (individual, business, organization) – thus known as Spear Phishing.

Phishing itself is not intended to harm a computer system or data, as it hasn"t a malicious payload. Instead, it lures the victim to access its dangerous hyper-connections (known as "links") inserted in "to-good-to-be-true" email messages. Technically, the links are crafted to drive the user"s browsers to certain web pages (usually fake or in control of the offender). The human exploit is then realized as soon as the user is deceived and agrees to perform the offender"s will.

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The COVID-19 pandemic offered a good opportunity to different bad actors (scammers, fraudsters, hackers) to target individuals and businesses alike, especially in the "work-from-home" scenarios.

Statistics of 2020[1] show that nearly 85% of the businesses have been hit by Phishing, while 97% of the Internet users do not have the capacity to recognize such an attack. On a regular basis, 30% of Phishing emails are opened by the users, and 12% of them further click on the links provided in the messages. Every month, 1.5 million new Phishing websites are created and used by fraudsters.

One particular thing is of a special attention: 96% of all targeted attacks are intended for intelligence-gathering[2]. Intelligence that is further used by the offenders in a reconnaissance activity with the intent to target a particular individual or business with the final aim to cause them loss of money or property. Such derived attack often comes as a scam, a swindle or a fraud, and it is known as Business Email Compromise (BEC).

According to government agencies[3], Business Email Compromise or Email Account Compromise (EAC) poses as a sophisticated scam targeting both large/medium/small businesses and sometimes individuals, frequently carried-out by an intruder breaking-in and taking-over an email account or just by spoofing an email address in order to determine an individual target to undertake financial transactions or transfers to bogus bank account or wire recipients.

While back in 2013, BEC scam was performed by simply creating a "just-like-the-original" fake email address (account) or by spoofing a genuine email address mostly belonging to a high rank official with a financial organization, a company or an organization (ex. CEO, CFO etc.), with the request of wire money transfer to be made to fraudulent locations, this kind of fraud evolved in the years after, both in technicity and sophistication, posing a far greater danger to businesses that regularly conduct electronic (wire) banking transactions, money transfer and payments.

In its 2020 IC3 Report[4], the FBI warns about a new trend in BEC/EAC scams, where has been observed an increase of using Identity Theft at a larger scale and (illegally obtained) funds being converted into cryptocurrencies.

Holding the 9th position in the 2020 top US Cyber Crime by Type, BEC/EAC has reached the Number 1 position in terms of financial loss, with a figure of nearly 1.9 billion USD (with 1.7 billion USD in 2019), a strong indicator of the criminal potential these scams reached to.

The industry alike, especially financial companies see BEC and EAC as a damaging form of cybercrime, capable of producing loss worth billions of USD a year, especially during the COVID-19 pandemic, when two factors contributed the most in escalation of the scams: new work-from-home business model and the increasing number of new foreign clients/suppliers/partners etc.

The experts warn that no industry is risk-free against BEC/EAC. In 2020, 93% of these attacks hit energy and infrastructure sector, while the overall rise reached 75% of the tracked business[5].

[1] https://securityboulevard.com/2020/12/staggering-phishing-statistics-in-2020/.

[2] Ibidem.

[3] https://www.fbi.gov/contact-us/field-offices/anchorage/news/press-releases/fbi-releases-2020-internet-crime-report.

[4] Issued on April 9, 2021.

[5] https://securityboulevard.com/2021/02/business-email-compromise-is-on-the-rise-again/.

Banking sector has its own big concern about BEC/EAC, as recent statistics[6] show that 86% of the bank employees and representatives think that business email compromise and account takeover fraud are the greatest risks to their business. In response to that menace, 37% of the bank respondents intend to invest significantly in check fraud technology in the next 12 months.

At this level of industry, BEC/EAC are often perceived as "cyberattacks designed to gain access to critical business information or to extract money through email-based frauds", where the emails are just an attempt to convince an employee to reveal "critical business or financial information or process a payment request" that would never be done otherwise[7].

For all that, the companies admit that BEC/EAC may be something more complex than a simple email spoofing, especially when they are confronted with sophisticated "account takeover" attacks – with the attacker using intrusion tactics, techniques and procedures (TTP), such as (Spear) Phishing and Reconnaissance. While inside an email account, the attacker may find very useful information, like personal data of the victim"s contacts (vectors for new BEC/EAC attacks), calendar events, as well as the content of the electronic correspondence which is of a great importance when the attacker need to study the victim"s profile (as an employee or a boss), especially the payment habits or financial recurrences (both business and personal).

The success of an BEC/EAC attack rely on both technical aspects and human (victim) behavior.

According to cyber-security specialists at CSO Online[8] the technical flaws in confronting BEC/EAC may include:

- Desktop email client and web interface (e.g. Gmail, Yahoo) not synchronized and run the same version;
- Not establishing multi-factor authentication (MFA) for business email accounts;
- Not forbidding "automatic forwarding" of emails to external addresses;
- Not properly monitoring email Exchange servers for changes;
- Not often reviewing the use of legacy email protocols (IMAP, POP3);
- Not logging the changes to mailbox login and settings for at least 90 days;
- Not enabling security features to block malicious emails.

While the human (mis)behavior consists of:

- Not being attentive (aware) of "last-minute" change of email address of domain name of the contacts the employee often exchanges messages with;
- Not checking the misspelling in email address (often, the attackers switch the letters like "O" or "I" with figures like "0" and "1", or just eliminate certain letters of figures);
- Not adding banners in inbox to messages received outside the organization;
- Not reporting suspicious payment requests;
- Not setting-up alerts for suspicious behavior in exchanging messages with other contacts.

Despite the use of (even highly) sophisticated tactics, techniques and procedures, BEC/EAC scams, usually known as CEO Frauds or Man-in-the Email scams, ultimately target individuals in a way that succeed to manipulate them and

[6] https://bankingjournal.aba.com/2021/02/survey-banks-see-business-email-compromise-as-biggest-threat/.
[7] https://news.microsoft.com/on-the-issues/2020/07/23/business-email-compromise-cybercrime-phishing/.
[8] https://www.csoonline.com/article/3600793/14-tips-to-prevent-business-email-compromise.html.

determine (or persuade) to perform different actions that otherwise they probably would have not done.

So, they appear to be more like social engineering (SE) type "confidence tricks", than real computer fraud, while in both scenarios the aim is the money, as more and more specialists tent to admit[9].

In such way, dealing mostly with human (brain) hacking, and not computer hacking, the legal system has fallen apart in identifying the most appropriate way to bring down to justice and press charges against the perpetrators.

But, what is really there, from the criminal law perspective?

2. Doctrine views on scam/fraud

When it comes to law enforcement, it is of a great importance to define the terms, and rely on the most appropriate meaning in order to get the best from a variety of possible criminal charges.

Either is about Advance Fee Schemes or BEC/EAC, Business Fraud, Charity and Disaster Fraud, Credit Card Fraud, Elder Fraud, Identity Theft, Internet Fraud, Investment Fraud, Nigerian Letter (or "419 Scam") Fraud, Letter of Credit Fraud, Money Mules, Non-delivery of Merchandise, Ponzi Schemes, Pyramid Schemes, Romance Schemes or Sextortion, they all have one thing in common: human hacking (brain hacking) or human manipulation.

National criminal legislations usually drive on slippery slopes when about to differentiate among the above-mentioned illegal activities, and thus don"t make strong and clear difference between scam and fraud.

In the English-speaking countries" law, the term "fraud" is rather a concept, although not a crime in itself, it exists at the core of a variety of criminal statutes[10]. According to author Ellen S. Podgor, "one finds generic statutes, such as mail fraud or conspiracy to defraud being applied to an ever-increasing spectrum of fraudulent conduct", while "in contrast, other fraud statutes, such as computer fraud and bank fraud present limited applications that permit their use only with specific conduct".

Other English Law based authors[11] defined fraud as "an intentional or deliberate misrepresentation of the truth for the purpose of inducing another, in reliance on it, to part with a thing of value or to surrender a legal right". Fraud, then, appears to be "a deceit which, whether perpetrated by words, conduct or silence, is designed to cause another to act upon it to his or her legal injury".

"Fraud", as well as "fraudulent" are terms united by a common sense: deceit[12], and both has the meaning of a conduct with a purpose to deceive in order to get hold of something. That is why in some legislation (ex. UK) "fraud" is the short name for the crime of "fraud by false representation".

"Scam", however, has the meaning of a fraudulent business scheme, a stratagem for a gain or a swindle[13]. But in any case it involves human manipulation through deceiving.

Although there seems to be little or no difference between "fraud" and "scam", the general perception is that "scam" always

[9] https://eyfinancialservicesthoughtgallery.ie/ceo-fraud-an-ancient-attack-with-a-new-dimension/.

[10] Podgor Ellen S., *Criminal Fraud*, American University Law Review 48, no. 4 April 1999: 729-768.

[11] Edward J. Dewitt Et Al., *Federal Jury Practice and Instructions*, 16.8, 4th edition, 1992.

[12] „The act of misleading another through intentionally false statements or fraudulent actions" (according to https://legal-dictionary.thefreedictionary.com/deception).

[13] scam. (n.d.) *American Heritage® Dictionary of the English Language, Fifth Edition*. (2011). Retrieved April 10 2021 from https://www.thefreedictionary.com/scam.

involves money, whereas "fraud" may incur more other losses (apart from money).

Fraud is a term also used in the rest of the world criminal legislation, depicting various instances of criminal activity where deceit is often used to manipulate a person or to evade (bypass) state regulations for a personal gain.

More or less, the crimes having fraud as a drive, are usually gathered under the same title (or section) within the nations" criminal codes, such as "crimes against property".

3. Doctrine views on computer-fraud

Based on the legal provisions of the Council of Europe "Budapest" Cybercrime Convention of 2001[14], most of the European countries created, modified, or updated their own criminal laws including different crimes against confidentiality and integrity of data and computer systems, as well as the so-called "computer-related crimes" (computer-related forgery and computer-related fraud).

Article 8 of the CoE Convention on Cybercrime provides Member States with a model for criminalization of a behavior against the trust and the property by the means of computer data and computer systems, as follows:

"Computer-related fraud – Each member state shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the causing of a loss of property to another person by:

- any input, alteration, deletion, or suppression of computer data,
- any interference with the functioning of a computer system,

with fraudulent or dishonest intent of procuring, without right, an economic benefit for oneself or another person".

Currently, the CoE Convention on Cybercrime has been ratified by 47 members of the Council of Europe and adopted by another 31 non-European countries, with most of its legal provisions being implemented into national criminal legislation on cybercrime.

And thus, having a rising trend in technology and with a new (or reshaped) criminal provision in place, a new form of fraud offence emerged – the computer-related fraud, usually with slightly harsh punishment with imprisonment (comparing to different other types of fraud or scams).

Analyzing the legal provision promoted in Article 8 by the CoE Convention on Cybercrime, one can notice that there is no mention of the "deceiving a person", "misleading" or "turning a person of doing something".

It is all about interfering with (or acting upon) computer data and computer systems, with "fraudulent or dishonest intent" of (just) the perpetrator on its way to procuring an economic benefit, while causing a loss of a property (that includes other values, such as money) to a person (the victim).

In some criminal legislations (in Romania, for example), the computer-related fraud was long time considered as a special provision, thus being preferred by the law enforcement, prosecutors and judges to be used in pressing criminal charges against individuals suspected for the commission of various scams especially on the online markets, like eBay, Amazon and so.

Even the cases of BEC/EAC are usually being "solved" by referring to

[14] Available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680081561.

computer-related fraud as the best option for a criminal charge, merely due to an increased penalty and the scope for a better prevention against this kind of misconduct.

4. Business Email Compromise at the crossroads between traditional fraud and computer-fraud

As we have showed, BEC/EAC is a type of scam or fraud that implies different tactics, techniques and procedures, with the use of computer data and systems or other means of electronic communications.

But, apart from using computer systems and data (mostly email messages), BEC/EAC is more about the perpetrator taking advantage of multiple bad habits of the victims in using electronic means of communication, and the manipulation of their behavior in order to give up sensitive information (personal, confidential etc.) and, more important, to perform certain acts that eventually result in loss of money or property (for the benefit of the fraudster/scammer)[15].

Although it may look like the same, fraud and computer-related fraud are two individual offences with different approach from the national criminal legislations.

The common things that seem to bind them are:

- they both target property (in general) and money (in particular) of another (individual or organization)
- they both produce or intend to produce loss
- they both use tactics, techniques and procedures from the cyberspace (email, short messages, instant chat, computers, smartphones etc.)

The differences are somehow essential.

The first difference consists of who/what the perpetrator (fraudster) is acting upon:

a) in the case of a simple fraud (scam/swindle – for example BEC/EAC), the criminal actor uses deceit as his principal weapon against the victim. Deceit is successful if the offender and the victim don"t actually meet in person, but communicate via email (or other means). Deceit works especially when the factual data (the misrepresentation) presented by the offender contains enough "truth" that determine the consciousness of the victim to lay down the psychological barriers, to enter in a "comfort status" in the relationship with the ideas provided by offender and finally to get into the "trust status" thus accepting the offender data input as "worth to be followed". And, this is the moment when fraudster takes advantage of the victim"s "trust status" and further conduct manipulation against her.

b) in the case of a computer-related fraud, the offender creates, modifies, deletes or suppresses computer data, and even interferes with the functioning of a computer system in order to cause loss (of property or money), thus no relying on the victim"s behavior and not trying to manipulate her at all. The victim simply does not have any role in being defrauded or losing her property or money.

In the BEC/EAC scams, the funds are consciously authorized or handed-over to the offender by the victim herself, while in the computer-related fraud scenarios, the victim is not participating at all, and just finds out, discovers or is noticed about the result of the fraud/scam: loss of her property.

[15] See also Andrew Marshall Hardy, head of fraud risk for CCIB in article *The high cost of business email compromise fraud*, available at https://www.sc.com/en/feature/the-high-cost-of-business-email-compromise-bec-fraud/.

Such conclusions are also shared by other authors. In one opinion[16], computer data and computer systems are the target of the offender in the case of computer-related fraud, whereas in the case of simple fraud (scam/swindle), they are just means by which the offender is deceiving the victim.

In the simple fraud (scam, swindle), if the offender relies on false computer data (through input, alteration, deletion or suppression of data – resulting in non-authentic data with the aim to be considered to legal purposes) in order to create a misrepresentation of the truth and manipulate the victim, along with the crime of fraud, a computer-related forgery crime should also be considered as a valid criminal indictment.

Another perspective[17] that we embrace is that, in the legal relationship between the traditional fraud (scam, swindle) and the computer-related fraud, there is no possibility of a legal concurrence of offences. This is merely a conflict of legal provisions, that usually requests the legal practitioners to choose the one that is the most applicable for a given scenario.

5. Conclusions

For all that we have said and demonstrated in this paper, we came to the conclusion that in the case of traditional fraud, performed by the means of electronic communications or computer data (e.g. BEC/EAC scam, swindle), the following offences shall be considered (given the tactics, techniques and procedures, as well as the technology used):

- illegal access to a computer system (with regard to the email account of the victim, that the offender breaks-in)
- unauthorized transfer of computer data (if the offender gets data – personal, financial, confidential – out of the email account)
- computer-related forgery (if the offender interferes with computer data thus resulting unauthentic information to be used in deceiving the victim prior to manipulate her to surrender the property or money)
- traditional fraud (scam, swindle) by the means of electronic communications or computer data

all together in a legal concurrence of offences.

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[16] George Zlati, *Treatise on Cybercrime*, vol. I, Solomon Publishing, 2020, p. 454.
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FIGHTING CRIME IN THE KNOWLEDGE SOCIETY: REFLEXION ABOUT TURKISH CRIMINAL CODE

Pinar MEMIŞ KARTAL*

Abstract

The state has the negative and positive obligation to not violate basic rights of human rights. But the state also must fighting crime. As in legal systems of many countries, evidence and substantiation of cybercrime under Turkish law constitutes an issue of major importance. Inadequacy of legislation, discrepancies between national law and initiatives in international judicial cooperation, lack of specialized authorities, shortage of personnel and experts with knowledge and expertise in cybercrime, and absence of specialized prosecutors and courts on cybercrime are factors which contribute to difficulties in fighting cybercrime.

Keywords: *knowledge, society, penal law, penal prosecution, proof, evidence, forensic cybernetics.*

1. Introduction

The state has the negative obligation to not violate basic rights of individuals through its interactions. The state also has a positive obligation to protect human beings from basic rights' violations.[1]

The most important discoveries of modern times, information technology and the internet have become indispensable in enhancing our lives, but it has also become a tool for illegal activities in parallel with developing technology and human nature, thus making it one of the more important topics of penal law. It stands out as a topic which creates unique challenges for penal law due to its cross border structure, intangible medium and the fact that perpetrators cannot be identified easily, even if the illegal act itself is. This is a challenge not only for lawyers but for everyone involved in information technology. Although there are various legislative and regulatory acts in Turkish law on the subject, these tend to remain inadequate due to its tight link to technological developments and its complexity[2].

Cybercrime can be broadly categorized into two main subtopics which are crimes against information systems and crimes committed through the internet.[3]

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[1] *Yenisey Feridun*, (2020) "Crimes Against Pollution Caused by Illegal Construction in Turkey," Journal of Comparative Urban Law and Policy: Vol. 4 : Iss. 1 , Article 21, (311-323), 311.

[2] *Kunter Nurullah*/ *Yenisey Feridun* / *Nuhoğlu Ayşe*, Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku, Beta, Ekim 2010, p.1093; *Centel Nur/Zafer Hamide*, Ceza Muhakemesi Hukuku, Beta, Ekim 2011, p.400; *Bıçak Vahit,* Suç Muhakemesi Hukuku, Seçkin, Ankara 2010, 581.

[3] *Gedik Doğan*, "Bilişim Suçlarında IP Tespiti İle Ekran Görüntüleri Çıktılarının İspat Değeri", in: Bilişim Hukuku Dergisi, 2019, (51-84), 53.

When legal values protected by these crimes are taken into account, it is readily apparent that they are closely connected to fundamental rights and freedoms. In particular, personal security, right to privacy and freedom of expression are fundamental rights and freedoms protected by multinational conventions (ECHR) and constitutions (Art. 17, 19 and 20 of the Turkish Constitution), which can become manifest in or through information technology. The fight against cybercrime also has an international dimension. The "Convention on Cybercrime" which was opened to accession on November 23rd, 2001 has been ratified by many countries. Turkey has finally acceded to this convention on November 10th, 2010. However the treaty has yet to be ratified by the Turkish Parliament in order to become enforceable nationally. The treaty prescribes new investigative methods in the fight against cybercrime. Kunter/Yenisey/Nuhoğlu agreeably contend that the treaty should be ratified and that under Article 13 of the Constitution of the Turkish Republic, such methods have to be prescribed by parliamentary acts, since they encroach upon rights and freedoms of individuals, in particular the right to privacy[4].

Criminal offences such as unauthorized access to, interference with or damaging or destroying information systems can also be used to commit offences such as insulting, violation of the confidentiality of communications, violation of privacy, recording and assembly of personal data for illegal use, praising criminal offences and discrimination, through the internet. Such acts are offences in and of themselves, whereas commission of such crimes through the internet will constitute an aggravating factor for some of them.

With the above framework in mind, in this article I will try to provide some general advice on current legislation concerning matters of evidence and proof, the general approach of penal procedure to the subject, and methods which can be employed to attain substantive truth in cybercrime. Although this framework also involves forensic cybernetics as a sub-discipline of forensic science, I will not delve into technical details as it is beyond the scope of my area of expertise[5].

2. Fighting Crime with the Turkish Criminal Legislation

The intangible and virtual nature of information technology makes the search for truth a very difficult task, and renders the proof of cybercrime problematic. The problem of proof in cybercrime thus constitutes a major topic in penal law and procedure in view of the aforementioned nature of information technology.

2.1. Crimes against knowledge society: Examples in the Turkish Criminal Code

It is readily apparent that there are loopholes in Turkish penal legislation on cybercrime which is broadly categorized into two main areas\ which are offences against information systems, and offences committed through the internet.

The criminal offences of "unauthorized access to an information system" (TCC Art. 243), "blocking an

[4] K*unter/Yenisey/Nuhoğlu*, (Fn 2), 1094.

[5] For more information about this famework also involves forensic cybernetics as a sub-discipline of forensic science., *Henkoğlu*; Adli Bilişim-Dijital Delillerin Elde Edilmesi ve Analizi, Pusula, Eylül 2011; *Karagülmez*, Bilişim Suçları ve Soruşturma-Kovuşturma Evreleri, Seçkin, Ankara 2011; K*unter/Yenisey/Nuhoğlu*, (Fn 2) 1106-1108.

information system" (TCC Art. 244) and, "abuse of bank and credit cards" (TCC Art. 245), the latter being somewhat disputed as to whether it is cybercrime although there is obviously a connection, have been regulated in the subsection 10 titled "Crimes in Cybernetics" under section 3 titled "Crimes Against Society" in the second main section of the Turkish Penal Code which defines specific crimes. It is not the purpose of this article to examine these crimes therefore suffice it to say that these are "cybercrimes" in which the lawful interest to be protected is the data contained within information systems[6].

Another piece of legislation on cybercrime is the Law No. 5651 on "Regulation of Publishing on the Internet and Prevention of Crime Committed Through These Publications"[7]. The law regulates responsibilities of service, content and access providers, situations where access can be prohibited judicially (such as incenting to suicide, sexual abuse of minors, facilitating use of narcotics, obscenity, prostitution etc.), right to respond, but no new cybercrimes have been defined. This Law No. 5651 consists of 14 articles and is clearly inadequate. Within the Turkish Criminal Code (Law. 5237), libel, violation of privacy, obscenity, sexual abuse of minors and various other crimes mentioned here above have been defined as criminal acts. Commission of these crimes on or through the internet do not constitute a separate offence, but in most cases it is an aggravating factor.[8] It may not be imperative to define new types of offences separately within legislation on prevention of crime on the internet, but there is a need for separate appropriate regulation of internet crimes. By appropriate regulation, what is meant is special methods and procedures for investigation and prosecution under the main subject of cybercrime. Creating a new definition of crimes besides the already existing provisions of the Turkish Criminal Code can lead to confusion and conflicts between provisions, making an already difficult situation even worse. The preferred approach will be to revise and update, and to develop investigation and prosecution methods appropriate to the offences defined, and to promulgate legislation which will enable discovery of evidence without violating essential fundamental rights and freedoms.

2.2. Fighting crime with the Turkish Code of Penal Procedure

Investigation and prosecution of cybercrime is undertaken according to the generally applicable rules of criminal procedure. This means that there are no provisions regarding collection and interpretation of evidence and proof which are specific to cybercrime.

Investigation and prosecution of cybercrime, or more specifically crimes against information systems and crimes committed through the internet, is quite distinct and different as compared to other crimes. The importance of the issue with regard to criminal procedure, the objective of which is to seek and uncover the substantive truth, is self evident in view of the nature and speed of information systems which require special techniques and expertise. Aside from problems likely to be encountered in investigating, identifying , collating and preserving evidence,

[6] *Tezcan Durmuş/Erdem Mustafa Ruhan/ Önok Murat,* Teorik ve Pratik Ceza Özel Hukuku, Seçkin, Ankara 2019, 1145-1148.

[7] The Law No. 5651 on "Regulation of Publishing on the Internet and Prevention of Crime Committed Through These Publications" entry in to force on 23.05.2007 at Official Gazette no:26530.

[8] *Dülger Murat Volkan*, Bilişim Suçları ve İnternet İletişim Hukuku, 2. Baskı, Seçkin, Ankara, 665 ets.

admissibility of the evidence can become an issue as such activities are inevitably linked to privacy rights, personal data and integrity of communication. Dealing with evidence closely related to fundamental rights and freedoms is a prominent feature of investigation of cybercrime.[9] Investigation of cybercrime where there is a high likelihood of breach of fundamental rights and freedoms require and deserve to be regulated separately and in specific detail.

Currently, collection of evidence in cybercrime is conducted in accordance with the provisions of the general legislative instrument in this area, which is the Code of Penal Procedure, Law no. 5271[10]. The problem which needs to be addressed in this regard is not only collection of evidence, but also the manner and duration of its preservation.

2.2.1. Investigation Phase

In investigating cybercrime, public prosecutors and the police use Art. 134 of the Code of Penal Procedure. This article regulates "Search, Copying and Confiscation of Computers, Computer Programmes and Registers". Although the title of this article suggests a provision specific to cybercrime, this is actually not the case as it is applicable to the investigation of any crime. Unver/Hakeri rightfully contend that lack of regulation on "*search on internet registers with or without data transfer*" is a shortcoming[11].

Kunter/Yenisey/Nuhoğlu argue that a distinction must be made in the admission of data found on the internet or an information system, as evidence in penal procedure[12]. The most recent date of recording must be taken as the basis for data stored on an information system. Another principle concerns data transferred to other locations. This requires scrutiny of such data by public authorities based on residual data transfer signals (CPP Art. 135) which requires a mandate different from that stipulated in CPP Art. 134. Writers on matters of evidence in information systems correctly point out that a court needs to issue two separate injunctions on these two separate issues. One of these is search on computer registers regulated in CPP Art. 134 and the other is monitoring of communications as regulated by CPP Art. 135[13]. Elimination of this ambiguity and facilitating timely and lawful access to evidence requires a new type of precautionary injunction appropriate to the nature of cybercrime.[14] Kunter/Yenisey/Nuhoğlu[15]. have pointed out that a new type of warrant should be created for access to encrypted data, with reference to the Treaty of the European Council dated 23.11.2011 and as set out by the norms of the European Parliament (2001/2070 COS, OJ C72E.21.03.2002,pp.323-329).

There also exists a "Regulation on Judicial and Preventive Searches", promulgated under the Code of Penal Procedure. Art. 17 of this regulation is a provision similar to that in the Code itself, in more intricate detail.

Both of these legislative texts are important to our subject matter, although it must be emphasized that they are not tailored or specific to cybercrime.

[9] *Gedik*, Bilişim Suçlarında IP Tespiti, 54.
[10] *Ünver Yener/Hakeri Hakan*, Ceza Muhakemesi Hukuku, 4. Bası, Adalet, Mart 2011, 424-427.
[11] *Ünver/Hakeri*, (Fn.6), 426.
[12] K*unter/Yenisey/Nuhoğlu*, (Fn 2), 1097.
[13] K*unter/Yenisey/Nuhoğlu*, (Fn 2), 1097-1098.
[14] *Kara İlker,* Dijital Kanıtlarının İncelemeleri ve Hukuki Boyutu, Yüzüncü Yıl Üniversitesi Fen Bilimleri Enstitüsü, C.24, S.3, 2019, 184.
[15] K*unter/Yenisey/Nuhoğlu*, (Fn 2), 1098.

2.2.2. Prosecution Phase

Prosecution means the phase where an indictment by the prosecutor is accepted by the criminal court thereby commencing the criminal trial. The activity of collecting evidence is continued in this phase, subject again to the Code of Penal Procedure. However Art. 134 regulating the investigation phase will not be applicable in the prosecution phase. This Article explicitly provides that the rule is applicable only in the investigation phase.

Within this framework, inadequacies already inherent in the investigation phase are exacerbated in the prosecution phase. CPP Art. 116 which regulates search and confiscation in the pursuit for substantive truth is readily applicable in this phase. The Cybercrime Department of the Security Administration is charged with obtaining and evaluating evidence in the investigation of cybercrime. Technical proficiency and competence of department staff alone is far from being sufficient in itself in the struggle against cybercrime. Another department evaluating evidence obtained is the Physics Specialty department of the Institute of Forensic Sciences. Cybercrime is investigated also by this department, with mixed and disputed verdicts on the accuracy and authenticity of their findings[16].

3. Conclusion

Just like in many other countries, the problem of proof and evidence in cybercrime presents a major challenge in Turkish Law. Inadequacy of legislation, incompetence of national legislation with international cooperation, lack of specialized investigative authorities, shortage of staff proficient in cybernetics, lack of specialized prosecutors and courts are all important impediments in the endeavour for preventing cybercrime. Integrity and originality of data obtained from computers and the internet should be verified beyond doubt in order to be admitted as evidence, since such data can be manipulated and fabricated with impunity and very easily. [17].

As a first step, Turkish penal legislation needs to be reviewed from the point of view of cybercrime and methods and tools of collecting and evaluating evidence in this area should be regulated. More qualified security staff is needed in the struggle against cybercrime. Coordination and cooperation with international organizations in this area needs to be strengthened, and current developments need to be followed closely.

A separate independent Forensic Cybernetics Institute needs to be established, although this can also be within the structure of the existing Institute of Forensic Sciences, in order to properly preserve and evaluate evidence collected in the course of investigation and prosecution of cybercrime. It is not possible to expect prosecutors and judges to possess intricate technical knowledge on cybercrime. There are expert witnesses to cover this gap and an Institute of Forensic Cybernetics will be an important tool in evaluating evidence in cybercrime.

Judges and prosecutors as well need to gain a basic level of understanding in technical matters concerning cybercrime against information systems and crimes committed through the internet, although of course they cannot and should not be expected to have the level of knowledge that an expert on the subject can possess. It can be observed that in some European countries, some experts in cybercrime can

[16] *Öztürk Cemal*; İz İncelemede Adli Tıp Fizik İhtisas Dairesinin Yetki Sorunu, in, CHD-Ceza Hukuku Dergisi, Nisan 2001, Yıl:2, Sayı:1, Seçkin, 164-165.

[17] K*unter/Yenisey/Nuhoğlu*, (Fn 2), 1108.

possess degrees both in computer science and the law. Although it does not seem to be possible in Turkey at this time, this should be a very effective in preventing cybercrime.

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THE RESTORATIVE JUSTICE PROCESS IN THE WAKE OF THE GLOBAL PANDEMIC

Nagore PÉREZ HIERRO[*]

Abstract

The COVID-19 pandemic has completely changed the way we relate, both personally and socially, and at work. Isolation, confinement, restrictions or fear of contagion have led to the need to adapt to a virtual reality. And so, although many sectors have been paralyzed, many others are experiencing an express maturation thanks to the phenomenon of the Internet.

In the field of justice, it has also been proposed to implement the judicial processes in a telematic way. However, the Spanish system is not yet ready to face virtual reality. Spain is suffering a significant collapse in the courts, due to the unprecedented health crisis. It is therefore necessary to promote alternative processes of conflict resolution, embodied in restorative justice, as an expeditious and effective way out of this saturation of the judicial system. To this end, it is vital to have sufficient regulatory support to regulate such reparation processes, such as criminal mediation, which lacks systematic regulation in our legal system, as well as to enable online sessions in order for us to embrace the new virtual reality defined after the pandemic.

Keywords: *Restorative Justice, repair, pandemic, mediation, virtual reality.*

1. Introduction

This research work is about criminal mediation, an institution of great importance incardinated in Restorative Justice, which is opposed to Retributive Justice, and whose objective is the satisfaction of all parties to the process, that is, from the point of view of the victim of the crime as well as from the point of view of the rehabilitation of the perpetrator.

The interest that it arouses is none other than the lack of an express regulation in Spain that recognizes this institution in the field of criminal law, unlike other countries of the European Union that do regulate in a satisfactory way the criminal mediation.

It must be said that, for the study of research, it is at least necessary to refer to European legislation in order to determine how Restorative Justice is inserted into the different legal systems of the Member States, and analyze how it could be done in Spain.

It is true that many authors have delved into the application of alternative conflict resolution processes and, especially, on mediation. However, in the field of criminal law, it does not take off.

2. Content

It is a reality that in recent years the Spanish judicial system has been especially collpased. The high litigation present in Spanish society is a well-documented fact. The General Council of the Judiciary (CGPJ) has already highlighted on

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numerous occasions the existing congestion in the courts and tribunals of the country. That defendants wait many years to receive a judgment or for it to be carried out is the harsh realiy of the Spanish judicial system. And unfortunately it seems that the Spanish are going to continue condemned to have a slow and absolutely saturated judicial system.

Improving the functioning of the Administration of Justice is the key in a State of Law, as the UN assures, and although it should have already been dealt with urgently by the authorities, the need increases even more in this current context of global health crisis produced by COVID-19 in which we find ourselves.

The justice has been and continues to be the great forgotten by the State and, after the pandemic, it has been retested. The Administration of Justice is suffering a significant slowdown due to this unprecedente health crisis. The collapse of the courts, the delay in the issuance of judicial decisions, the lack of confidence of citizens in a system where they see neither the right to an effective judicial protection nor the right to obtain a judicial response without unacceptable delay; together with the increase in litigation after the confinement, leads us to think about the need to promote alternatives conflict resolution systems.

It is at least a priority to encourage other procedures that manage to resolve conflicts between the parties from a higher quality of Justice. An agile way out of this saturation of the traditional judicial system is, without a doubt, mediation.

The resource of mediation, along with other figures such an arbitration or conciliation, were erected as substitute instruments for the ordinary process, whose main objective was none other than to lighten the weight borne by the courts.

It is true that these strategies have been reaching greater diffusion over the years. An example of this is the approval of the report on the draft law to promote mediation. However, this practice has not yet taken off.

Perhaps the lack of knowledge, the lack of mediators or the lack of confidence in the effectiveness of these methods are the causes that impede their growth process and that can explain the limited success of mediation in Spain.

In the criminal sphere, the lack of security of the crime victim that the mediation procedure does not entail a danger to her security or a risk of suffering further material or moral damage has to be added.

However, and bringing up the data provided by the Judicial Statistics Section of the General Council of the Judiciary on mediations, the resolution rate, which relates the volumen of income wih the resolution capacity, is encouraging. For this reason, it is considered vital a modernization of the Administration of Justice, which bets more on these alternative dispute resolution mechanisms.

In this line, and supporting the idea of promoting these procedures, three possible proposals are worth highlighting: favoring criminal mediation and betting on an express regulation; firstly; including mediation in the content of the Free Legal Assistance, secondly; and, finally, promoting the sessions electronically.

Regarding the first proposal, the legislator has dedicated and focused his attention on developing mediation especially in civil and commercial sphere. And it seems that he has forgotten about criminal mediation.

We found an isolated sentence such as the one issued by the provincial Court of Madrid, Section 17, 621/2015, of September 16 (Appeal 6037/2013), which transversely contemplated the criminal mediation procedure. Nevertheless, the reality is that,

despite a theoretical basis is placed, there is a lack of a true legal regulation of the institution in Spain.

The reform of the Penal Code has already allowed the legislative entry of mediation, but there is still a long way to go before the judicial authorities consider it a legitimate, adequate and effective figure.

We are witnessing how European legislation (the Framework Decision of the Council of the European Union of March 15 /2001/220/JAI, regarding the status of the victim in criminal proceedings; and then Directive 2012/29/EU of the European Parliament and the European Council of October 25, 2012, which stablishes minimum standards on the rights, support and protection of crime victims, which has set a serie of guidelines for the implementation of Justice Restorative in the members countries of the European Union) has already endowed mediations with a specific regulation (Italy, Germany or Netherlands, among others), and it is undoubtedly that it's a key instrument for society and the fabric of the judicial system.

Not only does it manage to minimize the criminal response, but it also contributes to the task of Restorative Justice: it facilitates the rehabilitation of the culprit and the compensation of the victim.

Therefore, it can be considered necessary to give greater visibility to this practice and face an express regulation of criminal mediation, which ensures the safety of the crime victim and promotes the principles that allow to achieve the guarantees of Modern Criminal Law.

Regarding the second proposal, it is vital that mediation is going to be included within the content of Free Legal Assistance (AJG), which is already regulated in Law 1/1996, of January 10, on Free Legal Assistance.

As well is established in its Statement of Motives, the objective of this law in none other that to regulate a free justice system that allows citizens who prove insufficient resources to litigate, to provide themsleves with the necessary professionals in order to access to the effective judicial protection and see their rights and legitimate interests adequately defended.

Article 119 of the constitutional text provides that Justice will be free when the law so provides and, in any case, with respect to those who prove insufficient resources to litigate. Our Supreme Norm designs a regulatory framework for the right to judicial and effective protection in which integrates a service activity aimed at providing the necessary means to make this right real for all the citizens.

Within the content of this right, article 6 of mentioned law refers to the advice and guidance prior to the initiation of the process, the defense and representation by a lawyer, expert assistance, the substantial reduction of the cost for obtaining deeds, notarial documents, custom duties and those who emanating from the Public Registries, which may be accurate for the parties in the process.

However, if we star from dispensering the same treatment of the judicial process to alternative dispute resolution systems, making these and equally valid option, it will soon be necesssary to expand the material content of the AJG. Since the defendants who opt for the mediation ressource will also have to face those amounts that this system inevitably entails, such as the mediators" fees, management or administration expenses, among others, despite the fact that the cost of the process is cheaper than the judicial procedure.

The Court of Justice of the European Union in the judgement of June 14, 2007 (case C-75/16, Livio Menini and Maria Antonia Rampanelli / Banco Popolare Società Cooperativa), established that for the mediation to be compatible with the

principle of effective judicial protection, among other conditions, should not cause expenses or, in any case, they must be scarcely significant.

Nevertheless, however small they are, they can be an obstacle to the parties with insufficient resources from exercising the right to the protection of their legitimate interests. For this reason, the insertion of mediation in the content of the law is more than justified.

Finally, and in relation to conflict resolution systems, it can be proposed the promotion of these tools in their online mode.

The COVID-19 pandemic has completely changed the way we interact with each other, both personally and socially, as well as in the work field. Isolation, confinement, restrictions or fear of contagion have led to the need for us to adapt to the virtual reality.

And for this reason, although many sectors have been paralysed, many others are experiencing an express maduartion thanks to the Internet phenomenon. In the field of Justice, it has been also proposed to carry out judicial processes electronically. However, the Spanish system is not yet ready to face virtual reality.

The fact is that, if we do not have the means to ensure a trial with all the guarantees, not only would the defense rights of the defendants be violated, but the online practice would turn out to be counterproductive. That is why it is essential to modernize the Spanish judicial system to new information technologies, as well as the alternative dispute resolution systems, emphasizing the rights of all the parts of the process.

3. Conclusions

For all the exposed, it should be noted that mediation stands as an economic and agile resource, which requires an active participation of the interested parties themselves, and generates a high dose of satisfaction in those who they come to it. Therefore, it is worth highlighting the need for the Spanish legal system to opt for a systematic and complete regulation of the institution of mediation, extending to the criminal field, given the undeniable benefits that its exercise entails, both for the State with respect to relief the workload for judges and courts, as for the parts, who save time and money.

In addition, it can be emphasized the possible insertion of mediation in the free justice content, given the equality of the judicial procedure wih respect to the disbursements that may derive from its application, in order to avoid this flagrant discrimination among those defendants who choose the judicial process and those who decide to submit to mediation.

Finally, it can be said that it is important for society to adapt to new social reality defined after the pandemic, and, along the same lines, it is vital that the Administration of Justice itself do so, so as to achieve a proliferation of alternative systems for solving problems by a telematic way. Telecommunication networks have become more relevant than ever, and they are vital in this era of digitalization. Therefore, the need to bet on true digital justice is more than evident, as well as the promotion of the telematic use of alternative systems, that ultimately suppose an absolute support for the judicial process.

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TAX EVASION. A CRIME THAT REQUIRES A MATERIAL RESULT OR ONLY A STATE OF DANGER?

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Abstract

Although tax evasion has been incriminated as a crime in Romania for almost 100 years, in the doctrine and judicial practice there are still presented contradictory points of view regarding the requirement result as constituent element of crime. The present study aims to carry out an in-depth analysis that provides an answer to the question of whether the crime of tax evasion require a material result or only a state of danger.

The study is divided into three sections, starts with an overview of the concept of tax evasion, of the line between lawful and illegal evasion and the history of legislation regarding tax evasion.

The next section presents various concepts and theories about the material result or the state of danger as constituent elements of crime, presented in national and international doctrine. The section continues with a presentation of the consequences of the classification of offenses, by reference to the result they produce.

In the last part of the study is presented an analysis of all variants of tax evasion, based on the theories and concepts set out in previous sections, which concludes that the tax fraud, apparently a crime that require a material result, is in fact a crime that require only a state of danger.

Keywords: *tax evasion, tax fraud, white-collar crimes, crime result, history of legislation regarding tax evasion, theories regarding the result of crime, concept of tax evasion, types of tax evasion crime.*

1. General considerations on tax evasion

1.1. The concept of tax evasion

In Romania, one of the main causes for economic problems is the size of the underground economy, representing a significant percentage of the gross domestic product.

The large size of the underground economy can be explained by the weak reaction of the authorities, and the evasion of taxes is caused by the pressure of taxation and by the fluctuation of law in the field of taxation.

The word "evasion" comes from the Latin "evasio, -onis" and from the French word "évasion", referring to the act of avoidance or evasion.

In a broad sense, the concept of tax evasion involves evading the fulfilment of one"s tax obligations, and it has either legal or illegal forms.

According to the literature[1], "both forms represent components of tax evasion, the evasion punishable by law, the fraudulent evasion is the illicit tax evasion;

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[1] Olteanu Doina-Simona, Pascu Loredana-Mihaela, *Evaziunea fiscală şi corupţia – fenomene complexe ale societăţii româneşti*, WorkingPapers *ABC-ul lumii financiare*, nr. 5/2017 available at *http://www.fin.ase.ro/ABC/fisiere/ABC5_2017/18.pdf.*

the legal tax avoidance is only a way of exploiting some "loopholes" in the law. Theoretically, the delimitation of the two seems simple; in practice there is a thin line between the two, an area so-called "avoision" (avoidance + evasion), which means the ability of an individual to manage his business in the sense of minimising their taxes, but doing it in an unclear way, a way in which it is difficult to distinguish between tax evasion and tax avoidance".

The modality in which authorities understood to combat this phenomenon varied from fiscal amnesties to administrative penalties/sanctions, the repressive measures culminating in criminal penalties/sanctions with high punishment terms and the adoption of a strategy to combat tax evasion, a matter of national security, by C.S.A.T. Decision from 69/2010.[2]

1.2. History of tax evasion incriminations

The crime of tax fraud was incriminated for the first time in the form of a closed form crime[3] in Romania by Law no. 661/1923 for the unification of direct contributions and for the establishment of the global income tax, being defined as any evasion from the payment of the tax, and was punished with a fine and a corrective punishment from 6 months to one year. Subsequently, in the content of Law no. 88/1933 for the unification of direct contributions and for the establishment of the global income tax, the term tax evasion was used for the first time, and in chapter VI were regulated measures against tax evasion and sanctions, which were divided into simple and aggravated administrative offences.

During the communist era, by Decree no. 202/1953 for the amendment of the Criminal Code of the Romanian People"s Republic, the non-payment of taxes or fees by those who have the possibility of payment, or evading such payment by concealing the excisable or taxable object or source, or destroying mandatory records were incriminated as tax offenses and punishable by correctional imprisonment for up to one year.

After the fall of the communist regime, the first regulation of tax evasion in the criminal area was made by Law no. 87/1994, when different forms of the crime were incriminated, respectively evading the payment of taxes, fees and contributions due to the state by not registering activities, by not declaring the taxable income, by concealing the taxable object or source, and by not registering the revenues in the accounting documents, or by registering expenses not based on taxable operations.

At present, Law no. 241/2005 is the seat in the field of combating and sanctioning tax evasion. The crime of tax evasion is regulated as a crime with alternative content, so that committing several different forms provided in the criminalisation norm does not generate concurrent offences and does not affect the unity of the crime.[4]

[2] By CSAT Decision no. 69/2010 on preventing and combating tax evasion, *not published in the Official Gazette*, the Interinstitutional Working Group for preventing and combating tax evasion was set up at a strategic level.

[3] Acording to F. Streteanu, D. Nițu, *Drept penal. Partea generală*, vol. I, Universul Juridic Publishing House, Bucharest, 2014, p. 282, in the case of closed form crimes, the legislator establishes a certain form, out of the possible actions likely to infringe the protected value, that the typical action must take, and in the case of free form crimes it is sufficient that the action be "causal" in relation to the expected result.

[4] In this regard, see Decision no. 25/2017 by which the Supreme Court resolved in principle the legal issue "if the actions listed in art. 9 (b) and (c) of Law no. 241/2005 are distinct normative modalities for committing the crime of tax evasion or alternative variants of the material element of the single crime of tax evasion ".

In order to carry out a scientific analysis of the immediate result in the case of the crime of tax evasion, it is necessary to first make an analysis of the immediate result of the crime requiring a material result and the crime requiring a state of danger / the crime of danger and the result crime.

2. Concepts and theories on the immediate result of crimes

2.1. Establishing the immediate result of the crime as a constitutive element

In the Italian criminal doctrine of the early 1970s there were two traditional views based on which the result/ prosecution of the crime was established. "According to the naturalistic view, the result/consequence is a natural effect of human behaviour, criminally relevant and linked to it through causation. Thus, the result/consequence is characterised by two elements: it is a modification of the external world and it is provided by the criminal law as a constitutive or aggravating element of the crime.

It follows that for a consequence of an action or inaction to be the immediate result, it must meet two conditions: it should change the external reality and it should be provided by the criminal law. The immediate result/consequence is a concept delimited by the action or inaction as an element of the crime, by delineating from the same temporally and spatially.

According to this view, the result/consequence does not exist in the case of any crime, but only in the case of those acts provided by the criminal law which have the ability to change the external reality, the change being susceptible to being perceived and evaluated. Starting from this assumption, the crimes can be classified as result crimes, in which case there is a result in the naturalistic sense, and pure conduct crimes in which case this result is missing.

The legal concept defines the result as an infringement of the interest protected by the criminal norm, materialised in the damage or endangerment of the protected social value. As the crime necessarily presupposes an infringement of the legal object, this distinction does not justify the distinction between conduct crimes and result crimes, because the result exists in the case of both categories of crimes"[5].

This same views have been maintained by the modern Italian criminal doctrine[6], but slightly nuanced. In the naturalistic view, the immediate result is the result or consequence of the action or inaction provided by the criminal norm. The change of the external world is: a) related to the action or inaction and to causation, but it is an entity different from the two from a logical and chronological point of view b) provided by the criminal law as a constitutive or aggravating element of the crime. The naturalistic view distinguishes between: 1) crimes of pure conduct, for which law requires the simple fulfilment of the action or inaction 2) material crimes, for the existence of which law requires that the action produce a determined change of the world. The first category includes most of the administrative penalties and offences/misdemeanours provided in the Italian Criminal Code, *tax evasion*, clandestine entry into military compounds, and the second category the most serious crimes, murder, bodily harm, blackmail, fraud.

According to the legal view, the immediate result is the harmful effect of the conduct, represents the damage of the

[5] F. Antolisei, *Manuale di diritto penale*, Mvlta Pavcis Publishing House, Milan, 1969, p. 229.
[6] F. Mantovani, *Diritto Penale*, CEDAM Publishing House, Florence, 2015, p. 178.

interest protected by the criminal norm, and is logically linked to causation. The connection is a logical one and is not related to the temporal succession, if in the case of certain crimes the immediate result occurs at a certain time interval from the commission of the action or inaction, in the case of other crimes the damage of interests occurs simultaneously with the criminal action or inaction.

In the Romanian criminal doctrine, among the first authors who defined the generic content of the crime as being composed of an objective element, the consequences of the activity, the causation, was Mr. Vintilă Dongoroz in 1939. The established author was the first to have a complex vision on the generic content of the crime and managed to structure it in three parts, introducing in the Romanian criminal doctrine *the concept of activity consequences.*

In the opinion of the established author[7], any crime involves *an evil*, and one of the constitutive elements of the crime is the consequence of the criminal activity. The result may consist of a state, which is the natural consequence of the dynamic process, i.e. the transfer of physical energy from one position to another, thus of the existence of physical activity itself, or of a result which is a substantial achievement of the dynamic process, ie a material transformation brought to the object on which the physical activity befell. The crimes where it is sufficient for the consequence to consist in a state are called formal crimes or crimes of attitude, while the offenses in which the consequence must consist in a result are called material crimes or result crimes. In order to differentiate, the author pursued aspects related to the way in which the criminal act was incriminated, respectively if the consequence consists in a state, it is not necessary to provide it in the content of the incrimination, and when the consequence consists in a result, the legislator must always indicate such a result, in an explicit or implicit manner.

The current Romanian criminal doctrine[8] has embraced the theory according to which the result of an act under the criminal law may consist of a material result, which is a perceptible change in reality or a state of danger for the value protected by the rule of incrimination, without a material consequence being caused. Based on this theory, the crimes were classified, according to the consequence produced, in result crimes and crimes of danger.

In the Romanian doctrine[9], the notions of material crime are usually used for result crimes, and formal crime for crime of danger. The use of these notions of material crime, formal crime respectively, is made in relation to the existence or non-existence of a material object as a constitutive element of the crime. If these terms were accepted, the theory according to which the result crime has always a material object would be accepted, and the crime of danger, having a formal character, has in no case a material object.

In reality, crimes of danger involving the existence of a material object have been identified, for example destruction and false signalling provided by Art. 332 (1) C.C.. and the disturbance of public order and tranquillity provided by Art.370 C.C. are crimes of danger - the immediate result consists in a state of danger for the safety of the railway traffic, the public order respectively, but they, however, have a material object. At the same time, there are

[7] V. Dongoroz, *Drept penal (reeditarea ediției din 1939)*, Asociația Română de Științe Penale Publishing House, Bucharest, 2000, p. 178.

[8] F. Streteanu, D. Nițu, *op. cit*., p. 294.

[9] M. Udroiu, *Sinteze de drept penal – Partea generală*, C.H. Beck Publishing House, Bucharest 2020, p. 133.

result crimes which create a definite change in the outside world, but have no material object, as is the case of forgery[10].

Crimes of danger have been divided into crimes of abstract danger, when the state of danger for the protected value is presumed by the legislator, it being sufficient that the action or inaction provided by the criminalisation norm be committed, and crimes of concrete danger, when it is necessary that the state of danger provided by the incrimination norm effectively occur.

2.2. Consequences of classifying crimes as crimes of danger and result crimes

First of all, it is important that an offense fall into one of the two categories in order to determine when the offense is committed. In the case of result crimes, the crime is committed at the time of the actual change of reality, in the case of crimes of abstract danger, at the time of the action or inaction provided in the incrimination norm, and in the case of crimes of concrete danger, at the time of occurrence of the actual danger provided by the norm of incrimination.

Determining whether a crime is in the form of a committed crime or attempted crime is of particular significance, as there are consequences related to the sanctioning regime.

The moment of committing the crime is also relevant in order to determine the more favourable criminal law, the beginning of the prescription of criminal liability, the application of the criminal liability regime to the minor.

The inclusion of a crime in the category of crimes of danger or result crimes is also relevant with regard to the establishment of injured parties, passive subjects and with regard to the exercise of civil action.

In the opinion of some authors[11], the civil action cannot be exercised in the criminal procedure when the object of the case is a crime of danger.

We do not agree with this opinion, contradicted even by legal practice and we are of the opinion that civil action can be exercised in case of crimes of danger, for example threat, home invasion, blackmail, etc. In order for civil action to be exercised in criminal proceedings, it is not necessary for the crime brought before the court to produce a material result, but it is necessary for the damage to have been caused by committing the act provided by criminal law, even if the immediate result is a state of danger. Consequently, the state of danger produced by committing the action or inaction provided by the criminal law can cause moral damage, and even material damage in some cases.

In order to answer the question whether the crime of tax evasion is a crime of danger or a result crime, we shall proceed to analyse the immediate result by reference to each alternative variant.

3. Analysis of the forms of tax evasion crime in relation to the immediate result

3.1. The crime of tax evasion provided by Art. 9 (a) of Law no. 241/2005

The material element of the crime is represented by *the act of concealing the asset or the excisable or taxable source*. The action of concealment implies a concealment in the legal sense, which can take different forms, respectively the failure to register in accounting documents,

[10] Please also see: F. Streteanu, D. Nițu, *op. cit.*, p. 294.

[11] A.Weisman, *Despre oportunitatea exercitării acţiunii civile în cadrul procesului penal*, *https://www.juridice.ro/119482/despre-oportunitatea-exercitarii-actiunii-civile-in-cadrul-procesului-penal.html.*

drawing up false documents regarding the origin, ownership, or circulation of the asset. The essential requirement attached to the material element is that the action be carried out in order to evade the fulfilment of the tax obligations, but it is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place.

In legal practice[12] an example of hiding the goods is represented by the act of ordering the company"s accountant to record in the accounting records as deductible expense the value of unstamped cigarettes that had to be destroyed upon the imposition of the obligation to stamp such goods.

The immediate result of the act is the creation of a state of danger regarding the collection of tax obligations to the state budget. Considering the naturalistic view, it can be concluded that the development of the action provided by the incrimination norm does not produce a determined material change of the external world, a state of danger regarding the full collection of tax obligations to the state budget being created instead. It is not relevant for the constitutive elements of the crime if, by concealing the asset or the taxable source, a damage to the state budget is caused. Given that the rule of criminalisation provides that actions must be taken in order to evade the fulfilment of tax obligations and it is not necessary for the evasion to actually occur, the immediate result is not influenced by causing material damage consisting of legally due and unpaid tax obligations to the state budget.

However, even if it is a crime of danger, the state will be able to become a civil party with the tax obligations it has to recover, because for the exercise of civil action, the requirement is that material or moral damage be caused by committing the crime, which damage shall be recovered as a result of incurring legal liability based on tort.

As a consequence, the crime of tax evasion provided by Art. 9 (a) of Law no. 241/2005 is a crime of abstract danger, the state of danger being presumed by the legislator, and is consumed/effective at the time of committing the act provided by the incrimination norm, but can produce a material result as, by the concealment of the excisable or taxable asset or source, material damages to the state may be caused, consisting in the tax obligations legally due and not collected.

However, the material damage is not a constituent element of the crime, the latter is consumed regardless of whether or not the damage is caused.

3.2. The crime of tax evasion provided by Art. 9 (b) of Law no. 241/2005

The material element of the crime is represented by an inaction, respectively by the non-registration, in whole or in part, in the accounting documents or in other documents of the commercial operations performed, or of the revenues. The essential requirement attached to the material element is that the inaction be carried out in order to evade the fulfilment of tax obligations, but it is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place. The non-registration may consist in the non-preparation of supporting documents for the revenues or the non-registration of supporting documents in the accounting registers or in other supporting documents. In legal practice[13], a defendant was convicted for tax evasion because she did not record in the company"s registers the invoices with which she had bought certain products, and subsequently she did not

[12] Romanian Soupreme Court of Justice, criminal section, decision no. 253/2003, unpublished.
[13] Ploiesti Appeal Court, criminal section, decision no. 610/2002, unpublished.

record the revenues obtained from the sale of such products.

The immediate result of the act is represented by the state of danger regarding the collection of tax obligations to the state budget. Considering the naturalistic view, it can be concluded that the occurrence of the inaction provided by the incrimination norm does not produce a determined material change of the external world, a state of danger being created regarding the full collection to the state budget.

As a consequence, the crime of tax evasion provided by Art. 9 (b) of Law no. 241/2005 is a crime of abstract danger, the state of danger being presumed by the legislator, and the crime is consumed at the time of committing the inaction provided by the incrimination norm. It is not relevant for the constitutive elements of the crime if the failure to register in the accounting documents of the financial operations causes a damage to the state budget. Given that criminalisation rule provides that the inaction must be undertaken in order to evade the fulfilment of tax obligations and it is not necessary for the evasion to actually take place, the immediate result is not influenced by causing material damage consisting of legally due and unpaid tax obligations to the state budget.

However, even if it is a crime of danger, the state shall be entitled to become a civil party with the tax obligations it has to recover, because in order to exercise the civil action the requirement is that, by committing the crime, a material or moral damage is caused, which should be recovered by incurring legal liability based on tort, but the resulting outcome is not a constitutive element of the crime.

3.3. The crime of tax evasion provided by Art. 9 (c) of Law no. 241/2005

The material element of the crime is represented by the *act of recording in the accounting documents or in other legal documents some expenses that are not based on real operations, or of recording fictitious operations*. The registration of expenses that are not based on real operations means the preparation of false supporting documents for expenses not made, or recording fictitious operations in order to reduce tax obligations. The essential requirement attached to the material element is that the action be carried out in order to evade the fulfilment of tax obligations, but it is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place.

A well-known modus operandi is recording fictitious invoices in the accounting records, or simulating commercial transactions by interposing shadow companies, with huge debts to the general consolidated budget and which include/involve formal Managing Directors and homeless persons as members, having a precarious material situation, recruited by those who actually control the companies. The Supreme Court pointed out that "recording expenses that are not based on real operations means the preparation of false supporting documents for supporting expenses, and based on such false supporting documents unreal expenses are also operated in other accounting documents, with the consequence of decreasing income and implicitly, the tax obligation to the state" [14].

With regard to retaining as concurrent offences the crime of tax evasion prov. by Art. 9 (c) of Law 241/2005 with the crime provided by Art. 43 of Law no. 82/1991, the

[14] Romanian High Court of Cassation and Justice, criminal section, criminal decision no. 1113/2005, available online at https://legeaz.net/spete-penal-iccj 2005/decizia-1114-2005.

relevant decision is Decision no. 4 of January 21, 2008, by which the appeal in the interest of the law declared by the General Prosecutor of Romania was admitted; it has been established that the act of omission, in whole or in part, or the recording in the accounting documents or other legal documents of commercial operations performed or of revenues, or the recording in the accounting documents or in other legal documents of the expenses not based on real operations, or the recording of other fictitious operations constitutes the complex crime of tax evasion, provided by in Art. 9 (1) (b) and (c) of Law no. 241/2005. The High Court of Cassation and Justice retained that the examination of the content of the legal texts by which the two crimes are currently criminalised thus shows that the social values protected by them are at least complementary and have a common final purpose, as long as by the provisions of Art. 9 (1) (b) and (c) of Law no. 241/2005 aims to ensure the establishment of real tax situations, which should ensure a correct collection of taxes, fees, contributions and other tax obligations incumbent on taxpayers, and by Art.43 of Law no. 82/1991 aims at preventing any acts likely to prevent the correct reflection in the accounting records of the data regarding the incomes, expenses, financial results, as well as of the elements that refer to the assets and liabilities in the balance sheet. The comparative analysis of the component elements of the tax evasion crimes, provided by Art. 9 (1) (b) and (c) of Law no. 241/2003 and intentionally false statement, provided by Art. 43 of Law no. 82/1991, imposes, therefore, the conclusion that all these elements overlap, in the sense that the acts referred to in the last text of the law are found in the two ways of circumventing the tax obligations incriminated in the first crime, of tax evasion. As a result, the omission, in whole or in part, of recording in the accounting documents or other legal documents of the commercial operations performed or of the revenues, or recording in the accounting documents or in other legal documents of expenses not based on real operations, or recording other fictitious operations constitutes the complex crime of tax evasion, provided by Art. 9 (1) (b) and (c) of Law no. 241/2005 [former Art. 13 and, then, Art. 11 (c) of Law no. 87/1994], the provisions of Art.43 (former Art.40 and then Art. 37) of the Accounting Law no. 82/1991, in conjunction with Art. 289 C.C. (1969), such activities being included in the constitutive content of the objective side of the tax evasion crime.

The immediate result in the case of this crime is the state of danger for the collection of tax obligations to the state budget. Considering the naturalistic view, it is observed that by the action provided by the incrimination norm, there is not a determined modification of the external world, but a state of abstract danger presumed by the legislator. Although following the recording of the expenses that are not based on real operations in the accounting documents or other legal documents, or the recording of other fictitious operations, a material damage to the state budget is caused by not collecting tax obligations, this result not being a constitutive element of the crime. Consequently, the crime may exist regardless of whether or not it causes damage to the state budget.

3.4. The crime of tax evasion provided by Art. 9 (d) of Law no. 241/2005

The material element is alternate and may consist of three alternative actions of *alteration*, *destruction or concealment.* Destruction of accounting documents, memories/records of electronic tax registers or cash registers or other means of data storage means their abolition in order to

evade tax obligations. Alteration means degradation so that the data contained in the accounting documents, memories/records of electronic tax registers or cash registers can no longer be read. Concealment involves physical or legal shelter so that it cannot be found or identified by the competent authorities. The essential requirement attached to the material element is that the acts provided by the incrimination norm be carried out in order to evade the fulfilment of the tax obligations, but it is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place.

This crime is a special variant of some destruction crimes provided by the Criminal Code and will not be retained as concurrent with them, being retained only the variant provided by tax evasion provided by special law, according to *lex specialis derogat legi generali*.

There are several opinions in the doctrine regarding the immediate prosecution of this crime. Some voices[15] consider that the immediate result consists in altering, destroying or concealing the accounting documents, memories/records of electronic tax registers or cash registers or other means of data storage, and from this point of view the crime is classified as a result crime. Other authors[16] consider that the immediate result is represented by the state of danger determined by the failure to ensure the full collection of tax obligations from taxpayers.

In this case, by carrying out the action provided by the norm of incrimination, the alteration destruction or concealment of the accounting documents or the means of data storage, two immediate results occur, a main and a secondary one.

The main result consists in the state of danger for the collection of tax obligations to the state budget. The result is categorised as the main one, as the purpose of the norm is to prevent and combat tax evasion. The main "evil" produced by the commission of the crime is represented by the state of danger for the collection of tax obligations to the state budget and not by the destruction or alteration of the accounting documents or storage means.

On the other hand, in addition to the state of danger, there is a result, a change in external reality, if the material element consists in the act of alteration or destruction.

As a consequence, the crime of tax evasion provided by Art. 9 (1) (d) of Law no. 241/2005 is a crime of danger, by reference to the main immediate result.

Even if, as a result of the alteration, destruction or concealment of the accounting documents or the means of storage, a material damage to the state budget is caused by not collecting the tax obligations, this result is not a constitutive element of the crime. Consequently, the crime may exist regardless of whether or not it causes damage to the state budget.

3.5 The crime of tax evasion provided by Art. 9 (e) of Law no. 241/2005

The material element of the crime is represented by the action of execution of double accounting records, an official one which is presented to the control bodies, and the other an occult accounting which represents the real accounting. The organization of double accounting records

[15] Al. Boroi, M. Gorunescu, I.A. Barbu, B. Vîrjan, *Dreptul penal al afacerilor*, C.H. Beck Publishing House, Bucharest, 2016, p. 177.

[16] E.Crişan, R.V. Nemeş, N. Nolden, *Ghid de bune practici în domeniul combaterii infracţiunilor de evaziune fiscală*, Patru Ace, Bucharest, 2015, available online at: *http://www.inm-lex.ro/fisiere/d_1443/Ghidul%20combatere%20infractiuni%20de%20evaziune%20fiscala.pdf*.

means the preparation and execution of such records in parallel with the official ones. The essential requirement attached to the material element is that the action of execution of double accounting records be performed in order to evade the fulfilment of tax obligations, but is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place.

The immediate result in the case of this crime is the state of danger for the collection of tax obligations to the state budget. Considering the naturalistic view, it is observed that the action provided by the incrimination norm does not produce a determined modification of the external world, but a state of abstract danger presumed by the legislator. Even if, following the execution of double accounting records, a material damage to the state budget is caused by not collecting the legally due tax obligations, this result is not a constitutive element of the crime. Consequently, the crime may exist regardless of whether or not it causes damage to the state budget.

The crime of tax evasion provided by Art. 9 (e) of Law no. 241/2005 is a crime of danger, by reference to the immediate result produced.

3.6. The crime of tax evasion provided by Art. 9 (f) of Law no. 241/2005

The material element of the crime may consist either in a *fictitious or inaccurate declaration action regarding the main or secondary registered offices, or in an inaction of non-declaration*. The essential requirement attached to the material element is that the action be carried out in order to evade the fulfilment of the tax obligations, but it is not relevant for the fulfilment of the constitutive elements, if the evasion actually took place.

The relationship between this crime and that of false statements is a relationship from genus to species and cannot be retained as concurrent when committed in the same circumstance.

With regard to the immediate result of the crime, some authors[17] consider that the consequence of the illicit action is of a material nature, consisting in the perpetrator evading from the financial, tax or customs verifications.

We do not embrace this opinion, as a result is material in nature when it produces a change in external reality, while the act of evading financial, fiscal or customs checks does not have a material existence.

The immediate result in the case of this crime is the state of danger for the collection of tax obligations to the state budget. Considering the naturalistic view, it is observed that by the action or inaction provided by the incrimination norm, no determined modification of the external world is produced, but a state of abstract danger presumed by the legislator.

It is not relevant for the constitutive elements of the crime, if by the action of evading the fiscal, financial or customs verifications in the modalities provided by the incrimination norm, a prejudice to the state budget occurs.

In order to fulfil the constitutive elements of the crime from the point of view of the subjective and objective side, it is necessary that the evasion from financial, fiscal or customs verifications take place, and the actions or the inaction provided by the criminalisation norm must be undertaken in order to evade the fulfilment of tax obligations, and it is not necessary that the evasion actually took place, the immediate result is not influenced by causing a material damage consisting in the tax obligations legally due and unpaid to the state budget.

[17] Al. Boroi, M. Gorunescu, I.A. Barbu, B. Vîrjan, *op. cit.*, p. 178.

3.7. The crime of tax evasion provided by Art. 9 (g) of Law no. 241/2005

The material element of the crime is alternative and may consist in *the action of substitution, degradation or alienation of the seized goods in accordance with the provisions of the Fiscal Procedure Code and the Criminal Procedure Code*. Substitution means the replacement of the legally seized good with one that has similar characteristics. Degradation involves affecting the good so that it loses some of its characteristics. Alienation means the transfer of the ownership or possession over the good to another person. The essential requirement attached to the material element is that the action be carried out in order to evade the fulfilment of tax obligations, but it is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place.

In the present case, by carrying out the action provided by the norm of incrimination for degradation or alienation of the seized goods, two immediate results occur, one main and one secondary.

The main result consists in the state of danger for the collection of tax obligations to the state budget. The result is categorised as the main one, as the purpose of the norm is to prevent and combat tax evasion. The main "evil" produced by committing the crime is represented by the state of danger for the collection of tax obligations to the state budget and not by the destruction of the seized goods. On the other hand, when the material element consists in the action of destroying the seized goods in addition to the state of danger, there is also a result, a change of the external reality, and this is a secondary result.

As a consequence, the crime of tax evasion provided by Art. 9 (1) (g) of Law no. 241/2005 is a crime of danger, by reference to the main immediate result.

3.8. The aggravating variants provided by Art. 9 (2) and (3) of Law no. 241/2005

The legislator provides two aggravating variants of the crime of tax evasion, respectively in case by the acts provided in paragraph (1) there was a damage higher than Eur 100,000, the punishment terms are increased by 5 years, and if there was a damage exceeding Eur 500,000, the punishment terms are increased by 7 years.

In this case, there is no transformation of a crime of danger into a result crime.

The occurrence of a result can be both a constitutive element of and an aggravating element a crime. In the case of aggravated tax evasion, causing the damage is not the essence of the typicality of the crime, in case the damage is not caused, the crime is still typical, but the aggravated form is no longer retained.

Professor Antolisei stated that the result is characterised by two elements: it is a change in the outside world and is provided by criminal law as a constitutive or aggravating element of the crime.[18] In the aggravated tax evasion, causing a damage higher than the amount of Eur 100,000 or Eur 500,000 is a consequence of the crime which constitutes an aggravating element of the crime.

Causing a damage higher than the amount of Eur 100,000 or Eur 500,000 does not influence the typicality of the act, the immediate result as a constitutive element of the aggravating crime representing the state of danger for the collection of tax obligations to the state budget.

We consider that causing a damage exceeding the amount of Eur 100,000 or Eur

[18] F. Antolisei, *op. cit.*, p. 229.

500,000 represents an aggravating element of the crime of tax evasion, not a constitutive element of the aggravated variant, since it does not have an autonomous form.

In order to establish whether causing the damage is a constitutive element of the aggravated autonomous crime or a circumstantial element of the aggravating form, it is necessary to establish in advance whether Art. 9 (2) or (3) of Law no. 241/2005 regulates two autonomous crimes or an aggravated form of the basic variant regulated by Art. 9 (1) of Law no. 241/2005.

In the process of criminalising certain acts of conduct, the legislator regulates the content of the crime objectively and subjectively and provides the applicable punishments. A crime can have a standard, basic variant and mitigating and aggravated variants, which do not represent autonomous crimes, depending on the basic variant.

The norm provided in Art. 9 (1) of Law no. 241/2005, which incriminates the crime of tax evasion in its basic form is a complete norm, being composed of disposition as well as sanction and includes all the objective and subjective conditions that must be met cumulatively for the act to constitute a crime.

Unlike the provisions of Art. 9 (1), the text of Art. 9 (2) and (3) of Law no. 241/2005 does not provide typical conditions and does not draw a line of conduct, but only provides an aggravating circumstantial element, namely causing damage in excess of the amount of Eur 100,000 or Eur 500,000.

By the regulation modality, the provisions of Art. 9 (2) and (3) do not define a standard, independent crime, since the structure of the norm does not describe a distinct act, with its own configuration, but refers to the provisions and punishments contained in Art. 9 (1) of Law no. 241/2005, which regulates the crime of tax evasion in its basic version.

In addition, other arguments supporting the thesis that Art. 9 (2) and (3) of Law no. 241/2005 does not regulate autonomous crimes would be that the texts of law do not provide an alternative material element to the basic variant, do not protect different values, and Art. 9 (2) and (3) is in conjunction with Art. 9 (1) of Law no. 241/2005, not the other way around.

As a consequence, the norms contained in Art. 9 (2) and (3) do not regulate autonomous crimes, the mentioned articles of law do not incriminate any reprehensible act, and the references in paragraphs (2) and (3) to the provisions criminalising tax evasion in standard form make them dependent on it.

Also, the variants provided in Art. 9 (2) and (3) cannot be considered causes for the increase of the punishment, as they also provide for an aggravating circumstantial element, respectively causing a damage superior to the amount of Eur 100,000, Eur 500,000 respectively.

Consequently, considering that Art. 9 (2) and (3) of Law no. 241/2005 regulates aggravating variants of the crime of tax evasion, causing damage is not a constitutive element of the crime, but an aggravating circumstantial element.

4. Causes of reduction of punishments and impunity regulated by Law no. 55/2021 on the amendment and completion of Law no. 241/2005 for preventing and combating tax evasion

On April 1, 2021, Law no. 55/2021 on the amendment and completion of Law no. 241/2005 for the prevention and combating of tax evasion was published in the Official Gazette, which regulates two special causes of reduction of punishments and a cause of impunity.

The main legislative amendments concerned chapter III of Law 241/2005

"*Causes of reduction of punishment, prohibitions and revocations*", the other amendments having an accessory character and being necessary for the correlation of the legal provisions. A mandatory cause of reduction of punishment, an optional cause of reduction of punishment, and a cause of impunity were regulated.

The compulsory cause of reduction of the punishment regulated by the legislator in paragraph (1) the final thesis of Art. 10 of Law no. 241/2005, implies the application by the court of the penalty consisting of a fine, when by committing the crime of tax evasion a damage of up to Eur 50,000 was caused, which was covered before the court ruled a decision of conviction.

The legislator regulated three conditions that must be met cumulatively for the mandatory application of the penalty of fine, respectively it is necessary that the damage caused by committing the crime be up to Eur 50,000, the damage be fully recovered before the final conviction, and the perpetrator should not have committed a tax evasion offense for which he has benefited from this special cause of reduction within 5 years from the commission of the act. The process of judicial individualisation will consist only in the court establishing the number of fine-days and the amount corresponding to a fine-day.

The second cause for reduction of sentences, optional, assumes that the court has the option to apply either the fine or imprisonment.

The legislator regulated three conditions that must be met cumulatively for the court to be able to apply the penalty of the fine, respectively it is necessary that by committing the crime there was a damage of up to Eur 100,000, the damage must be fully recovered before ruling the final conviction decision, and the perpetrator has not committed an offense incriminated by Law no. 241/2005 for which you have benefited from this special cause of reduction within 5 years from the commission of the act.

In order to establish the damage caused, only the tax obligations will be taken into account, and not the interests or penalties.

In paragraph (1) of Art. 10 of Law no. 241/2005 which regulates the special causes for reduction of punishments, the legislator used the phrase "*damage caused*", resulting without a doubt the intention to refer only to the actual damage caused by non-payment of tax obligations, without taking into account interest and penalties. On the contrary, in paragraph (11) of Art.10 of Law no. 241/2005, the seat of the case of impunity, the legislator expressly mentioned that the damage caused by committing the act must be recovered, increased by 20% of the calculation basis, to which interests and penalties are added.

Consequently, from the theological and grammatical interpretation of the text of the law, it results that for the application of the fine punishment it is necessary to recover the damage actually caused by committing the crime, without taking into account the interests and penalties.

When the cause of the special optional reduction is present, the individualisation process takes place in two stages. In a first stage, the court determines the type of the main punishment, either the prison sentence or the fine, and in the second stage it establishes the duration / amount of the punishment.

Regarding the application of the more favourable criminal law, the causes of reduction and impunity are applied retroactively only for crimes under trial, but do not apply in criminal proceedings in which a final conviction decision was pronounced prior to the entry into force of Law no. 55/2021.

However, the special case of reduction of sentence shall also take effect after the final judgment of the case, when the offense of tax evasion for which a conviction has already been ruled and a prison sentence has been applied, has caused damage to up to Eur 50,000, fully covered during the criminal investigation or trial.

In this sense, pursuant to Art. 6 (3) of the Criminal Code, regulating the application of the more favourable criminal law after the final judgment of the case, the applied prison sentence shall be replaced by a fine, which shall not exceed the maximum provided in the new law. In view of the term executed from the prison sentence, the execution of the fine will be eliminated in whole or in part.

The amendments to Law 241/2005 regulated also a special cause of impunity, which operates regardless of the amount of damage caused by committing the crime. In order to benefit from the cause of impunity, it is necessary to fully recover the damage caused by committing the act, increased by 20% of the calculation base to which the interests and penalties are added. If only one of the participants covered the damage, the cause of impunity will benefit all participants, even if they did not contribute to the damage coverage.

The legislator regulated only one condition to operate the special case of impunity, respectively the damage caused by committing the act should be fully covered before the final conviction, increased by 20% of the calculation basis, plus interest and penalties.

It is irrelevant if the perpetrator previously benefited from this special cause of impunity, as the legislator stipulates that only the special causes of reduction of the punishment regulated by paragraph (1) of Art.10 of Law 241/2005 do not apply if the perpetrator has committed another crime of tax evasion for which he benefited from the cause of reduction. This condition is not valid for the cause of impunity, as provided in paragraph (11) of Art.10.

Through this cause of impunity, the legislator regulated a form of civil sanction[19], so that the one who affected the integrity of the public budget will have to pay the damage actually suffered by the state budget, increased by 20%, to which interest and penalties shall be paid. This increase is a form of civil punishment which punishes deviation from the rules of law. Thus, given the nature of the violated social relations, namely those involved in fiscal finance, the legislator has a wide margin of appreciation in identifying the most appropriate solutions both in combating the evasion phenomenon and in recovering the damages suffered.

Even if, following the constitutionality examination, the constitutional court rejected the criticisms of intrinsic and extrinsic constitutionality invoked regarding the provisions of Law 55/2021, we cannot refrain from noting that the regulation of special cases of reduction of punishments and impunity can give rise to discriminatory situations. By way of example, an offender who has committed the crime of tax evasion by causing damage of EUR 100,001 and who does not objectively have the material means to cover the damage caused, shall be punished by imprisonment from 7 years to 13 years. However, another perpetrator who committed a tax evasion offense causing damage of EUR 10,000,000 and covering the damage caused by committing the act, increased by 20% of the calculation basis, to which the interest and penalties are added, will not be punished.

Given that the two crimes infringe on the same social values, creditworthiness and financial possibilities of the perpetrators,

[19] Romanian Constitutional Court, decision no. 101/2021 (published in the Official Gazzette no. 295 of 24 March 2021), paragraph 107.

there are no objective justifications for applying such a different penalty treatment.

5. Conclusions

Following the analysis carried out in the previous sections, we can conclude that the crime of tax evasion, apparently a result crime, in all alternative forms is a crime of danger, a conclusion reached also by the Italian doctrinaires who categorize the crime of „*evazione fiscale*" as one of danger.

In order to meet the elements of typicality in terms of the subjective and objective side in the case of all alternative variants, it is necessary that the actions or inactions provided by the criminalisation rule be committed in order to evade the fulfilment of tax obligations. It is not the essence of typicality if the evasion is actually carried out, but it is necessary that the actions be committed for the purpose of evasion.

In certain forms of alternative variants, the development of the action provided by the incrimination norm may have two immediate results, a main one consisting in the state of danger for the collection of tax obligations to the state budget and a secondary one consisting in the destruction or alteration of accounting documents or storage means, or the degradation of seized assets.

By committing the crime of tax evasion, a material damage can be caused, consisting in the non-payment of the legal tax obligations due to the state budget, but the crime is consumed independently of the causing of damage.

The causing of damage can be a criterion of judicial or legal individualization of the punishment, and in some cases, if higher than the amount of Eur 100,000 or Eur 500,000, it is an aggravating circumstantial element.

Given the way in which the legislator described the verbum regens of the crime of tax evasion, not specifying in the content of the crime that it is necessary to cause material damage, we can conclude that the crime of tax evasion is a crime of danger, unlike the tax crime regulated by Decree no. 202/1953 for the modification of the Criminal Code of the Romanian People"s Republic whose material element consisted in the non-payment of taxes or fees by those who had the possibility of payment, and which automatically presupposed causing a patrimonial damage.

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